

1931

PUEN
NABAIN
v.
RAM
CHARAN.

their own costs in both the courts in India. The plaintiffs must pay the appellant defendant his costs of this appeal. Any costs which may have been paid in accordance with the orders of the courts in India must be returned.

For the above reasons, their Lordships have humbly advised His Majesty accordingly.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitors for respondents: *Barrow, Rogers & Nevill.*

APPELLATE CIVIL.

*Before Sir Shah Muhammad Sulaiman, Acting Chief Justice,
and Mr. Justice King.*

1931
May, 13.

BISHUNATH RAI (PLAINTIFF) v. SARJU RAI AND OTHERS
(DEFENDANTS).*

Probate proceedings—Compromise between the parties admitting valding of will and dividing the property among themselves—Whether terms of compromise can be incorporated in probate or annexed to it—Registration Act (XVI of 1908), section 17(2)(vi)—Public policy.

An application for probate was at first contested, but subsequently the parties entered into a compromise admitting the genuineness of the will and the existence of a sound disposing mind of the testator. The compromise further proceeded to divide up the estate among themselves, with directions regarding possession and mutation of names. The Judge being satisfied on the evidence that the will was validly executed, granted the probate in the common form, and did not direct the compromise to be incorporated in the probate or to be annexed to it in the form of a schedule.

Held that the main issue before the Probate court being the question of the valid execution of the will, and all other matters being outside that inquiry, and the court having to be satisfied as to this issue by independent inquiry apart from any consent or agreement of the parties, the compromise and its terms were wholly immaterial and were rightly refused to be incorporated in or annexed to the probate.

*First Appeal No. 173 of 1930, from an order of P. L. Rastogi, District Judge of Ghazipur, dated the 26th of April, 1930.

Section 17(2)(vi) of the Registration Act as now amended makes it clear that consent decrees and orders, comprising immovable property other than that which is the subject-matter of the suit, are no longer exempt from registration. Therefore, any agreement affecting immovable property which is not the subject-matter of the suit cannot be incorporated in an order of the court, because it would require registration.

It would be contrary to public policy to introduce into the probate that is granted to the executor terms of a private compromise that might have been arrived at between him and any objector. So long as it is not revoked the probate is conclusive against the whole world, and private arrangements between the parties in a proceeding would be quite out of place in it.

Mr. *Haribans Sahai*, for the appellants.

Mr. *A. P. Pandey*, for the respondents.

SULAIMAN, A. C. J., and KING, J. :—This is an objector's appeal from an order granting probate but not annexing to the probate a copy of a compromise entered into between the parties. At first the proceeding was a contested one, but the parties filed a compromise under which they admitted the genuineness of the will and the existence of a sound disposing mind of the testator. The compromise proceeded to divide up the estate into two portions and to put the parties into separate possession of them with power to get mutation of names effected through the revenue court. The request was that the court should decide the case in terms of the compromise and should embody the compromise in its decree.

The learned Judge came to the conclusion that inasmuch as the genuineness of the will and the power of the testator to execute it were admitted and inasmuch as he was satisfied on the evidence produced by the applicants that the will had been validly executed, he ordered that a probate with a copy of the will annexed be granted to the applicant. He did not direct that the compromise should either be incorporated in the probate or be annexed to it in the form of a schedule.

1981

 BISHUNATH
 RAI
 v.
 SARJU RAI.

1931

DISHUNATH
 RAT
 o.
 SARIJ RAL.

The objector comes up in appeal, and it is contended on his behalf that the court below should have disposed of the dispute between the parties in strict accordance with the terms of the compromise.

In the first place, it is quite clear that as a proceeding in a contested case will result in a judgment *in rem* the court cannot act merely upon the consent of the parties before it so as to shut out an inquiry into the genuineness and due execution of the will itself. The main issue before the court is the question of the proof of the valid execution of the will, and all other matters are outside that inquiry. The court has to be satisfied as to this issue before it grants probate, and it is wholly immaterial whether the parties desire to compromise their dispute or not.

Of course, if the defendant at any stage withdraws his objection, whether under a compromise or otherwise, the proceeding may become a non-contentious one, in which case the probate will be granted in the common form. The learned advocate for the objector relies on the case of *Hemanta Kumari Debi v. Midnapore Zamindari Co.* (1) which has been followed in *Bai Monghibai v. Bai Rambhalaxmi* (2) and *Kamal Kumari Devi v. Narendra Nath Mukherji* (3) and contends that the proper course was to introduce the agreement in a schedule attached to the probate. The case before their Lordships of the Privy Council was one relating to a regular suit in which the private rights of the parties to it were in dispute. Furthermore, that was a case before the amendment of the Registration Act, when in view of the opinion previously expressed by their Lordships of the Privy Council a decree of the court could embody the terms of the compromise relating to properties which were other than the subject-matter in suit. On the other hand, there are the cases of *Kunja Lal Chowdhury v. Kailash*

(1) (1919) I.L.R., 47 Cal., 485. (2) (1920) 59 Indian Cases, 344.

(3) (1907) 9 C.L.J., 19.

Chandra Chowdhury (1) and *Janakbati Thakurain v. Gajanand Thakur* (2), where it was remarked that the court cannot embody the terms of the compromise.

1931
BISHUNATH
RAT
o.
SARIC RAL

The Registration Act has now been amended and section 17(2), sub-head (vi), now makes it clear that consent decrees and orders, comprising immovable property other than that which is the subject-matter of the suit, are no longer exempt from registration. It is, therefore, quite obvious that any agreement affecting immovable property which is not the subject-matter of the suit cannot be incorporated in an order of the court because it would require registration.

It also appears that it will be contrary to public policy to introduce into the probate that is granted to the executor terms of a private compromise that might have been arrived at between him and any objector. So long as it is not revoked the probate is conclusive against the whole world, and private arrangements between the parties in a proceeding would be quite out of place in it.

The form of probate which is prescribed in schedule VI attached to the Indian Succession Act does not admit of the incorporation of private terms like the division of the estate of the testator and the putting of each party into separate possession of it.

We think that the learned Judge was right in not allowing the private compromise to be embodied in the probate or in the order of the court. The appeal is accordingly dismissed with costs.

(1) (1910) 14 C.W.N., 1063.

(2) (1916) 1 Pat. L.J., 377.