APPELLATE CIVIL.

Before Justice Sir Shah Muhammad Sulaiman and Mr. Justice Niamat-ullah.

GOPI RAI (OBJECTOR) *v.* BAIJ NATH RAI AND OTHERS (APPLICANTS).* 1930 July, 1.

Probate—Arbitration—Application for probate opposed by caveators—Question of genuineness of will referred to arbitration—Jurisdiction—Estoppel—Civil Procedure Code schedule II, paragraph 1—Public policy.

A court dealing with an application for the grant of a probate has no jurisdiction to allow a dispute relating to the genuineness of the will to be referred to arbitration. The order granting probate is a judgment *in rem*, and before such an order is passed the court must be satisfied in its own mind that the will is a genuine document. It is against public policy that the probate court should delegate its proper functions to a private individual and decide the point vicariously. The grant of a probate upon the basis of an award which was the result of a reference to arbitration without even the consent of many of the beneficiaries under the will, is altogether invalid.

A caveator, who had himself agreed to the reference and did not object to the award on the ground of illegality of the reference, was not estopped from raising this point, which was one of jurisdiction, in appeal.

Messrs. *U. S. Bajpai* and *G. S. Pathak*, for the appellant.

Messrs. *Iqbal Ahmad* and *K. Verma*, for the respondents.

SULAIMAN and NIAMAT-ULLAH, JJ. :—This is an appeal by Gopi Rai, one of the objectors to an application for the grant of a probate. Baij Nath Rai, who claimed to be the executor under a will dated the 29th of January, 1928, executed by Nakched Rai, who admittedly died on the 15th of April, 1928, applied for the grant of probate to him. Notices were issued to a large number of persons, many of whom were beneficiaries under the

*First Appeal No. 102 of 1929, from an order of Kameshwar Nath, District Judge of Ghazipur, dated the 22nd of February, 1929.

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alleged will. Three of these persons only entered the caveat, but the beneficiaries did not put in an appearance.

An application was made on behalf of Baij Nath the applicant and six other persons to refer the dispute relating to the genuineness of this document to an arbitrator. The learned Judge allowed this application and referred the matter to arbitration, although the other beneficiaries had not joined in the application. The agreement of reference to arbitration permitted the arbitrator to import his own personal knowledge and decide the dispute on its basis. The arbitrator delivered his award, basing his conclusion on his personal knowledge also, and holding that the will had been proved to be a genuine document. Objections were filed to this award by some of the objectors, including Gopi Rai, but no objection was taken that the reference itself was illegal. The learned Judge after considering the objections on their merits overruled them and passed an order in terms of the award.

Gopi Rai now appeals from the order granting the probate, and on his behalf it is urged that the reference was wholly irregular and illegal.

It seems to us that the learned Judge had no jurisdiction to allow the dispute relating to the genuineness of a will in a probate proceeding pending before him to be referred to the arbitration of an arbitrator. The order granting probate is a judgment *in rem* and, so long as it is not revoked, is operative against the whole world. Before such an order is passed the court has got to be satisfied in its own mind that the will is a genuine document and that probate ought to be granted. It cannot delegate its proper functions to a private individual and decide the point through him. If such a course were permitted, a door for fraud and collusion would be opened, which it is against public policy to permit.

The point is not *res integra* but is covered by authority. We may refer to the case of *Ghellabhai*

Atmaram v. *Nandubai* (1) in which FARRAN, C. J., at page 342 remarked that the court had no authority to refer the *factum* of the will to arbitration and that clearly it would not refer such a matter in which there were beneficiaries interested whose consent had not been obtained; that the probate court could not grant probate on the vicarious finding of an arbitrator but must itself be satisfied by admissible evidence that the will was the will of the testator, and that the relevant provisions of the Code of Civil Procedure were not applicable to probate proceedings and, on the other hand, the provisions of the Probate Act preclude the possibility of a Judge referring the question of the execution of a will to arbitration, particularly if all the beneficiaries had not appeared before him and consented to that course, even which was doubtful. We agree with these observations and hold that the District Judge could not act upon the award which was the result of a reference to arbitration, without even the consent of many of the beneficiaries.

The same principle has been applied to compromises regarding the genuineness of the will in probate proceedings; vide *Monmohini Guha* v. *Banga Chandra* (2), and *Sarada Kanta Das* v. *Gobinda Mohan Das* (3). We have, therefore, both on principle and on authority, no doubt whatsoever in our minds that the order of the Judge was quite illegal.

The only point seriously urged on behalf of the respondents is that inasmuch as Gopi Rai had himself agreed to the reference and never objected to the award on the ground of illegality, he is estopped from raising this point in appeal. We cannot hold that there is any estoppel against Gopi Rai on this question of jurisdiction. That is a matter which we can take into account only when ordering costs.

We accordingly allow this appeal and, setting aside the order of the court below granting the probate, send

(1) (1896) I.L.R., 21 Bom., 335. (2) (1903) I.L.R., 31 Cal. 357.
(3) (1910) 6 Indian Cases, 912.

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the case back to that court with directions to restore it to its original number on the file and dispose of it according to law. In view of the fact that this objection has been taken for the first time in appeal before us, we direct that the parties should bear the costs of the proceedings incurred so far.

Before Justice Sir Shah Muhammad Sulaiman and Mr. Justice Kendall.

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July, 2.

BINDRABAN (PLAINTIFF) *v.* RAJPAT SINGH AND OTHERS (DEFENDANTS).*

Agra Pre-emption Act (Local Act XI of 1922), section 4(10) —"Sale"—Transfer of property for a price but effected under a compromise decree without registered sale deed—Not pre-emptible.

By section 4(10) of the Agra Pre-emption Act a sale which is pre-emptible must be strictly a sale as defined in the Transfer of Property Act. A transfer of property in exchange for a price, but effected by means of a compromise decree and not by a registered instrument of sale as required by section 54 of the Transfer of Property Act, cannot be treated as a sale as defined in that Act and is, therefore, not pre-emptible.

Mr. *N. Upadhiya*, for the appellant.

Messrs. *A. P. Pandey* and *M. L. Chaturvedi*, for the respondents.

SULAIMAN and KENDALL, JJ. :—This is a plaintiff's appeal arising out of a suit for pre-emption. The vendors first sold the property on the 28th of August, 1923, but before the suit for pre-emption was filed the vendees retransferred the property to the vendors on the 24th of July, 1924. The suit for pre-emption was, however, filed, but was dismissed on the 10th of November, 1924, on the ground that the property had been resold. Subsequently a brother of the vendees, who had resold the

*Second Appeal No. 2059 of 1927, from a decree of Syed Iftikhar Husain, District Judge of Azamgarh, dated the 26th of August, 1927, reversing a decree of Mathura Prasad, Munsif of Haveli, dated the 7th of June, 1927.