APPELLATE CIVIL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Mosely.

YENKANA *v.* LETCHANA.*

1939

Feb. 2.

Revocation of letters of administration—"Just cause" not put forward, or already agitated and decided before grant—Subsequent application by party to revoke—Burma Succession Act, s. 263—Application for review—Compliance with provisions of the Code—Copy of decree to accompany application—Civil Procedure Code, O. 41, r. 1; O. 47, rr. 1 and 3.

Where the party had an opportunity to put forward a particular just cause and had not chosen to put it forward, he cannot be heard to agitate the same cause later. No Court would allow a "just cause" already agitated and decided upon before the grant of probate to be again made the subject of an application under s. 263 of the Succession Act to revoke that grant.

Chinnaya v. *Ramanna*, I.L.R. 38 Mad. 203; *Rallabandy* v. *Satyavati*, 46 M.L.J. 383, referred to.

The only way in which the grant can be attacked by a party who contested the order at the time it was made and who relies on fresh evidence merely is by bringing his application within the limits of an application for review. By O. 47, r. 3 of the Civil Procedure Code such an application must comply with the provisions as to the form of preferring appeals, *mutatis mutandis*, one of them being that a copy of the decree must accompany the application.

Tun Tin for the appellant.

P. B. Sen for the respondent.

ROBERTS, C.J.—This is an appeal from an order passed by the District Judge, Myaungmya, dismissing the application of the appellant for revocation of letters of administration granted to the respondent in the estate of Kesanakoorthi Yenkat Reddy.

Chapter IV of the Succession Act deals with the practice in granting and revoking probates and letters of administration, and section 299 of the Act makes this order appealable.

Both the appellant and respondent applied for letters of administration: the appellant said he was the son of

* Civil Misc. Appeal No. 49 of 1938 from the order of the District Court of Myaungmya in Civil Regular No. 1 of 1937.

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a sister of the deceased, and the respondent said that he himself was the grandson of the deceased's brother. Letters were granted in December 1937 to the respondent as the *sapinda*, both parties being Hindus subject to the Mitakshara Law.

The appellant then petitioned the District Court on February 28, 1938 : he said that he had no prior knowledge of the respondent and prayed for time to make further enquiries. On March 12th he lodged a further petition stating that the respondent based his claim on being the grandson of one Pampathy whom he alleged to be deceased's brother. But, said the appellant, Pampathy in registered deed of mortgage No. 105 of 1911 in the office of the Sub-registrar of Bassein described his own father as one Nagana ; whilst the deceased Yenkat Reddy in registered deed of mortgage No. 1532 of 1923 in the office of the Sub-registrar of Myaungmya described his own father as Sattaya ; consequently Pampathy and Yenkat Reddy could not be brothers. These two men were both working as dhobis in Bassein together and were thought to be somehow related, but they were friends merely ; and thus, said the appellant, the respondent's claim has been discovered to be false.

The learned District Judge held : (1) that as the appellant was respondent in the letters of administration suit he could not file an application for revocation of probate under section 263 of the Succession Act ; (2) his application could only be considered if it fell within Order 47, rule 1, and was an application for review : in that respect it was defective, not being accompanied by a copy of the decree appealed from, for by Order 47, rule 3, such an application must comply with the provisions as to the form of preferring appeals, *mutatis mutandis*. Order 41, rule 1, therefore, applies, and this has not been complied with.

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It is clear that the appellant is seeking to adduce fresh evidence which could convince the Court that the respondent's claim for letters of administration was unwarrantable. Such new evidence even if admitted would not necessarily show that the respondent's claim was fraudulent, though it might show that it was ill-founded.

By section 268 of the Succession Act the proceedings in the Court of the District Judge in this matter shall, so far as circumstances permit, be regulated by the Code of Civil Procedure. Order 47, rule 1, lays down the procedure and in my opinion the learned District Judge was right in dismissing the application.

If the appellant's contentions were right his application to revoke for just cause the letters of administration could be made with complete disregard of the formalities enjoined by the rule and he would even be exempt from proof of having exercised due diligence in presenting his case before the Court which granted the letters. He could watch the proceedings to which he was a party with indifference and could subsequently make an application for the revocation of the grant as though he had never been cognizant of them at all. In *Chinnaya* v. *Ramanna* (1) it was said :

" But where two parties fight at arm's length it is the duty of each to question the allegations made by the other and to adduce all available evidence regarding the truth or falsehood of it. Neither of them can neglect this duty and afterwards claim to show that the allegation of his opponent was false."

This is an application of the broad principle of *res judicata.*

In *Rallabandy Venkataratnam* v. *Yanamandra Satyavati* (2) Wallace J. said :

" It is an elementary principle that, where the party had an opportunity to put forward a particular just cause and had not

(1) (1913) I.L.R. 38 Mad. 203, 208. (2) 46 M.L.J. 383, 388.

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chosen to put it forward, he cannot be heard to agitate the same cause later. No Court would, in my opinion, allow a 'just cause' already agitated and decided upon before the grant of probate to be again made the subject of an application to revoke that grant, and I see no difference in principle between disallowing such an application on the ground of *res judicata* and disallowing it on the ground that the party already had a full opportunity of putting forward his just cause and omitted to do so. So that the question before us, as I view it, is whether the 1st appellant had an opportunity before the grant was made of urging the very grounds he now puts forward, or whether he urges any new grounds that have arisen since he had that opportunity which he refused to utilise."

In my opinion the phrase "new grounds" does not mean additional evidence on old ground ; it might apply for instance to a case in which the person to whom letters of administration were granted had subsequently become of unsound mind. It is meant to cover contingencies quite different in character from the mere discovery of evidence which, if it had been available before, might have induced the Court to take a different view.

In the present case the learned District Judge by implication at least held that the appellant had not exercised due diligence. Whether by doing so he could have found out about these registered mortgage deeds or not, I think we need not trouble to inquire. It is enough to say that the appellant was bound to comply with the provisions of Order 47, Rule 1 and in other respects, at all events, he failed to do so.

An application for the revocation of a grant by a party who contested the order at the time at which it was made is on an entirely different footing from such an application made by a party who was a stranger to the proceedings which led to the making of the order and had no notice of them. In the former case the matter is *prima facie res judicata* as between the parties.

Where there is an allegation of fraud as a ground for vacating a judgment or order, the fraud proved must be extraneous to every thing which has already been adjudicated upon by the Court. Subject to what I have already said in relation to "new grounds" the only other way in which the grant can be attacked by a party who contested the order at the time it was made and who relies on fresh evidence merely is by bringing his application within the comparatively narrow limits of an application for review.

Accordingly, in my opinion, this appeal fails and must be dismissed with costs, five gold mohurs.

MOSELY, J.—I agree.