APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

1878
Aug. 24
and Sept. 12.

KOMOLLOCHUN DUTT AND OTHERS (DEFENDANTS) *v.* NILRUTTUN MUNDLE (PLAINTIFF).*

Probate—Proceedings for Impeaching Probate—Succession Act (*X of* 1865), *ss.* 188, 242.

The grant of probate is the decree of a Court, which no other Court can set aside, except for fraud or want of jurisdiction.

Where it has been alleged that probate has been wrongly granted, the proper course to be pursued is, to apply to the Court which granted the probate to revoke the same.

Procedure upon such application discussed.

Semble.—A person interested by assignment in the estate of the deceased may, where a will has been set up and proved at variance to his interests, apply for the revocation of probate of the will so set up.

The case of *Baijnath Shahai* v. *Desputty Singh* (1) explained and distinguished.

THIS was a suit brought by one Nilrutton Mundle to recover certain properties to which he laid claim under the following circumstances :—

It appeared that Komollochun Dutt and Joynarain Dutt, two brothers, originally held possession of certain joint properties in which they each had an eight-anna share. On the 25th Pous 1278 (8th January 1872) Joynarain Dutt died childless, leaving a widow Bogolamoye Dassee, who would, therefore, under the Hindu law, succeed to his estate. It did not, however, appear that Bogolamoye ever got into possession of her husband's property, and on the 13th November 1875 Komollochun Dutt, the elder brother of the deceased, obtained probate from the District Court of the 24-Parganas of a will executed by the deceased shortly before his death.

* Special Appeal, No. 1560 of 1877, against the decree of J. OKinealy, Esq., Additional Judge of the 24-Pargannas, dated the 11th July 1877, reversing a decree of Baboo Brojendro Coomar Seal, Second Subordinate Judge of that District, dated the 13th February 1877.

(1) I. L. R., 2 Calc., 208; S. C., 25 W. R., 489.

Prior to the grant of probate,—namely in June 1875,—the widow had sold her interest in her husband's estate to the plaintiff in this suit.

The plaintiff then brought this suit to recover the widow's share of the property upon the strength of his purchase, alleging the will to be a forgery. Komollochun, who was in possession, defended the suit upon the ground that the will was genuine, and that by the will the property was bequeathed to himself for certain purposes therein specified. He also alleged the sale by the widow to be fictitious. A person named Kadombinee was also made a defendant, and she denied the title, both of the plaintiff and of the defendant Komollochun.

The Subordinate Judge found that the plaintiff was entitled to recover if the will did not bar him. He considered that the grant of probate was conclusive as to the genuineness of the will; that, on the true construction of the will, the defendant Komollochun was entitled to hold possession of the property: and that the plaintiff's suit for possession ought to be dismissed.

Upon appeal to the District Judge, the Subordinate Judge was ordered to try the genuineness of the will upon the ground that the grant of probate might be impugned in a regular suit.

The Subordinate Judge, on the trial of this issue, found the will to be a forgery: and upon this finding being returned to the District Judge, the District Judge gave the plaintiff a decree for the share of the property which had belonged to the deceased.

Both Kadombinee and Komollochun appealed to the High Court.

Baboo *Opender Chunder Bose* and Baboo *Bhowany Churn Dutt* for the appellants.—The will, of which probate had been granted by the District Judge, cannot be impeached in a regular suit in a Civil Court. Section 19 of Act VI of 1871 clearly is against such a proceeding; but even admitting a suit would lie to contest the grant of probate, the District Judge is the only person competent to try such suit. We have no decision in the lower Appellate Court whether or no the plaintiff's purchase is binding against the reversioners after the death of his vendor

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Bogolamoye, and the issue as to the claim of Kadombinee to a portion of the property has not been tried; the case should be remanded on these points.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Nilmadhub Bose* for the respondent.

The judgment of the High Court was delivered by

MARKBY, J. (who, after stating the facts above set out, continued).—We think that the District Judge was wrong in holding that the grant of probate could be impugned in this suit. The grant of probate is the decree of a Court which no other Court can set aside except for fraud or want of jurisdiction, and no such ground is alleged here.

What, however, the District Judge really meant (as appears from his second judgment) was, that the grant of probate was not conclusive as to the genuineness of the will; and that, notwithstanding the probate, the will might be questioned in a civil suit in which the will was relied on.

In this view also we are unable to agree. Section 242 of the Succession Act declares, that "probate or letters of administration shall have effect over all the property and estate, moveable or immoveable, of the deceased, throughout the province in which the same is granted, and shall be conclusive as to the representative title against all debtors of the deceased and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration have been granted."

The language of this section is clear upon the point before us. When the probate is granted it operates upon the whole estate, and (by s. 188) it establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such. The property vests in the executor by virtue of the will, not of the probate. The will gives the property to the executor; the grant of probate is the method which the law specially provides for establishing the will. So long as the probate exists it is effectual for that purpose.

It would lead to the greatest confusion if the validity of the will could be questioned in a civil suit after the grant of probate. There might be any number of conflicting decisions as to the validity of the will. The executor would be exposed to endless litigation, and he would never be safe in dealing with the property of the deceased.

This view is in accordance with the decision of the Allahabad Court in *Mayho* v. *Williams* (1). There Turner, Offg. C. J., says: "The Judge seems to have considered that a grant of probate is in the nature of a summary proceeding to be contested by a regular suit in the Civil Court. This view is wholly erroneous. The grant must be contested by a suit in the Court out of which the grant issued, and it must be contested before the Court sitting as a Court of Probate, and not in the exercise of its ordinary civil jurisdiction."

The proper course, if it is suggested that the probate has been wrongly granted, is to apply to the District Judge to revoke the probate, for which a special procedure is provided by the Act; and in that case, the executor and other persons who have acted upon the faith of the probate are protected by s. 262.

In consequence of what has occurred in this and other cases, we think it may be desirable to point out what we consider to be the nature of the procedure for obtaining a revocation of probate.

The probate can be revoked upon any of the grounds mentioned in s. 234. The duty of the Judge upon an application being made under this section somewhat depends upon what has passed on the previous grant of probate. Clearly, however, the first thing for him to do is to direct notice to be given to the executor and all persons interested under the will or claiming to have any interest in the estate of the deceased. It is also clear from s. 261 that the executor will be the plaintiff in the regular suit which the Judge will then have to try: and the object of this is clear. It is in order to enable the Judge, if he thinks proper, to call upon the executor to prove the will again in the presence of the objector, notwithstanding the prior probate, just

(1) 2 N. W. P. H. C. Rep., 268, see p. 274.

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as in England he may be called upon to prove the will in solemn form. But a discretion is left to the Judge. Where there had been already full enquiry as to the genuineness of the will, the Judge would probably take, as he would have a right to take, the previous grant of probate as *primâ facie* evidence of the will, and so shift the onus on to the objector. But if there had been no previous contention, and the will had only been proved summarily, or in what is called common form in England, that is, without any opposition, and merely *ex parte*, to the satisfaction of the Judge, who can know nothing of the circumstances or the state of the family, then he ought in all ordinary cases to have the will regularly proved afresh, so as to give the objector an opportunity of testing the evidence in support of the will before being called upon to produce his own evidence to impeach it. For example, when, as has actually happened in this case, the widow applied to have the probate revoked, the District Judge rejected her application without giving any notice to any one, because she did not make a *primâ facie* case against the will, we think that was wrong. The District Judge should have summoned the executor and the other parties interested under the will and in the estate of the deceased, and should, in such a case as the present, have required the executor to prove the will in the presence of the widow.

So also when the applicant for probate is about to prove a will in common form, and a *caveat* is put in, unless the parties signify their desire at once to proceed to trial, it is preferable that a postponement should be granted so that there may be a formal trial of the matter on all the evidence that either side may be able to adduce.

If this procedure be followed, we do not see what are the disastrous consequences of holding probate to be conclusive, to which the District Judge alludes. It was said that the plaintiff in this case would be remediless, because, according to the decision in *Baijnath Shahai* v. *Desputty Singh* (1) he could not apply to revoke the probate. The point is not directly before us, but as at present advised, we think that the plaintiff could apply to revoke

(1) I. L. R., 2 Calc., 208; S. C., 25 W. R., 489.

the probate. He is interested by assignment in the estate of the deceased, and if there be no will, he has a good title, at any rate, as against Komollochun, so far as the will is concerned. Whether the sale by the widow Bogolamoye would be good as against the reversioners, does not appear to have been raised and tried. We do not, therefore, see why he should not apply to revoke the probate. The ground of the decision in *Baijnath Shahai* v. *Desputty Singh* (1) was, that the party there, a creditor of one of the next of kin, had no interest in the estate of the deceased. A purchaser from the next of kin is in a very different position from a creditor. If we thought that that decision went as far as to hold that a purchaser or an attaching creditor could not apply for revocation of a probate, we should, as at present advised, refer the point to be settled by a Full Bench, because we should disagree from such a ruling.

We think the proper course in this case is to postpone the final decision of the suit until the plaintiff has had an opportunity of applying to the District Judge to revoke the will. If that application be successful, and probate be revoked, the decree of the Court below will stand, and this appeal will be dismissed with costs. If that application be unsuccessful, the decree of the Court below will be reversed, and the present suit will be dismissed with costs in all the Courts. The application to revoke must be made within a month, and if not made, the defendants may apply to have the suit dismissed with costs.

We do not understand why the issue raised by Kadombinee has not been tried. The evidence being complete, there is no reason why it should not be so. The case is wholly independent of the validity of the will.

On a subsequent day the following order was passed:—

MARKBY, J.—As it appears now that it is necessary to try the issue raised by Kadombinee, we direct that the case be sent back to the lower Appellate Court to try whether the claim of Kadombinee to a portion of the property in dispute can be supported.

Case remanded.

(1) I. L. R., 2 Calc., 208; S. C., 25 W. R., 489.