

two sureties in the sum of Rs. 5,000 each is sufficient to require from Babu Surjya Kanta Roy Chowdhry, and we direct that the order be amended accordingly.

Subject to this modification the order will otherwise stand and the Rule be discharged.

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Rule discharged.

G. M. F.

APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Mitra.

MONMOHINI GUHA

v.

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 June 29.

Probate—Will, proof of—Compromise—Agent—Caveat—Probate and Administration Act (V of 1881), ss. 50, 76, 83—Evidence Act (I of 1872) s. 41—Civil Procedure Code (Act XIV of 1882), ss. 177, 375.

Unless a will is proved in some form, no grant of probate can be made merely on the consent of parties. Hence an agreement or compromise as regards the genuineness and due execution of a will, if its effect is to exclude evidence in proof of the will, is not lawful within the meaning of section 875 of the Code of Civil Procedure.

Evans v. Saunders(1) distinguished.

Norman v. Strains(2), *Rajji Ranchod Naik v. Vishnu Ranchod Naik*(3) and *Ghellaikai v. Nandubai*(4) followed. *Roadnight v. Carter*(5) referred to.

Any party to a suit has the right to repudiate the action of an agent compromising it without his knowledge and consent, before an order is passed accepting the compromise as the final determination of the suit.

Brajoduribh Sinha v. Ramanath Ghose(6) referred to.

APPEAL by the defendant, Monmohini Guha.

*Appeal from Original Decree, No. 22 of 1902, against the decree of E. H. Ransom, District Judge of Chittagong, dated Dec. 7, 1901.

(1) (1861) 30 L. J. P. D. A. 184.

(4) (1896) I. L. R. 21 Bom. 335.

(2) (1880) L. R. 6 P. D. 219.

(5) (1863) 3 Sw. & Tr. 421.

(3) (1884) I. L. R. 9 Bom. 241.

(6) (1897) I. L. R. 24 Calc. 903.

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This appeal arose out of an application for grant of probate made by the plaintiff, Banga Chandra Das. It was alleged that one Srimanta Ram Das died on the 27th January 1900, leaving a daughter Monmohini, the defendant, a minor grand-son Hara Kumar Guha by the said daughter, and another minor grandson, Khettra Mohan Das, by a predeceased daughter, the widow of the plaintiff. Probate of a will dated the 28th June 1889, left by the said Srimanta Ram Das, was applied for on the allegation that the testator had appointed the plaintiff petitioner, and the defendant opposite party as executor and executrix respectively to his estate, and as the latter was unwilling to take probate jointly with him the former prayed for grant of probate to him alone. The will provided that the two minor grandsons of the testator above named were to get the estate in equal shares on their attaining majority, but that they were to maintain the testator's last wife, Swarnalata. The application for probate was made on the 30th January, 1901.

On the 8th March 1901, Monmohini filed a caveat alleging that the will propounded was false, that the woman Swarnalata was not the lawfully wedded wife of the deceased Srimanta Ram, and imputing fraud to the plaintiff. On the 3rd December 1901, one Rupasi Mohan Guha, purporting to act on behalf of Monmohini as her am-mukhtear, filed a petition alleging that the dispute between the parties had been amicably settled in accordance with the terms of a *solenamah*, and stating that the petitioner Monmohini was willing to take probate of the will jointly with the plaintiff. It appears that the caveat also was filed by the same person, Rupasi Mohan Guha, acting as am-mukhtear of Monmohini. The *solenamah*, or the petition of compromise, was also filed on the 3rd December 1901, signed by Banga Chandra and Monmohini, the latter by the pen of the said Rupasi Mohan Guha. The *solenamah* set out the terms of the compromise, whereby the properties left by the testator were partitioned and allotted in equal shares to the two grandsons. On the 7th December 1901, the District Judge passed an order that probate be granted to the parties in terms of the compromise filed. Before this order was passed, Monmohini had put in a petition on the 6th December stating that she did not give her consent to the filing

of the *solenamah* and that she did not instruct her am-mukhtear, Rupasi Mohan Guha, to file it or agree to it, and praying that in the circumstances the *solenamah* be declared inadmissible and that the case might be tried upon evidence taken. This objection was, however, overruled by the District Judge by an order in these terms :—

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"This application is made by a pleader different from the pleader who filed the compromise. The latter pleader appears and produces a power of attorney granted by the opposite party (Monmohini) to the agent, who instructed the pleader in question to file the compromise. This power of attorney is in order, and conveys the requisite authority to the agent and must therefore be held to cover all his proceedings taken under it. It must be held therefore that the compromise was filed with the full authority, knowledge and consent of the opposite party herself, and therefore that it is valid as far as it goes."

Moulvi Abdul Jowad, for the appellant, contended that the lower Court was in error in refusing to examine the appellant and her witnesses with reference to her allegation that the compromise was signed and filed by one of her am-mukhtears in collusion with the opposite party and without her knowledge and consent. The lower Court ought not to have based its decision on such a petition of compromise without full inquiry. The mere filing of such a petition did not make the probate proceeding non-contentious, nor did it absolve the opposite party from proving the genuineness of the will: see sec. 73, Explanation, and sec. 83 of the Probate and Administration Act.

Babu Pramatha Nath Sen, for the respondent, contended that the compromise having been filed by an authorized agent was good in law, but asked that the case might be remanded to the lower Court for an inquiry as to whether such a compromise was really made under circumstances so as to make it binding on the appellant.

BRETT AND MITRA JJ. This is an appeal by a caveatrix in a proceeding for the probate of a will propounded by the respondent, Banga Chandra Das, as the last will of one Sremanta Ram Das. Sremanta Ram died on the 27th January 1900, leaving him surviving a daughter, the caveatrix Monmohini, her minor

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son Hara Kumar Guha, Khettra Mohan Das, another grandson by a deceased daughter, and a widow Pourani, *alias* Swarnalata, the legality of whose marriage with the deceased is, however, disputed. Banga Chandra, the propounder of the will, is the husband of the deceased daughter of Srimanta Ram and father of Khettra Mohan.

The will is dated the 28th June 1889, and bears the attestation of a number of witnesses of whom Annada Charan Dutta verified the petition, which was presented on the 30th January 1901. Monmohini put in her caveat on the 8th March 1901 alleging that the will propounded was false.

The will purported to devise in equal shares the testator's estate to his two grandsons, Khettra Mohan and Hara Kumar, after they should attain majority, and directed that Banga Chandra and Monmohini should be *maliks* or managers and executor and executrix, until the grandsons were of age. Provision is also made for the maintenance of the widow Pourani, *alias* Swarnalata, but both she and the daughter, Monmohini, were practically excluded from the inheritance.

On the presentation of the caveat on the 8th March 1901, the case was numbered as an original suit and from that date to the 3rd December 1901, various proceedings were taken for the attendance of witnesses and the examination of witnesses on commission, and an application was also made on one occasion for time for an amicable settlement. On the 3rd December 1901 two petitions of compromise were presented, one signed by Banga Chandra and one Rupasi Mohan Guha as general mukhtear of Monmohini, and the other by Rupasi Mohan Guha alone as general agent of Monmohini; and by these petitions it was prayed that probate of the will of Sremanta Ram deceased, might be granted to both parties in terms of the arrangement contained in the first named petition, by which the properties of the deceased were partitioned between his grandsons.

These petitions were taken up by the District Judge on the 5th December 1901, when a petition dated the same day (the 5th) and verified by herself was presented on behalf of Monmohini, in which she repudiated the action of her general agent, Rupasi Mohan Guha, in presenting the petitions of the 3rd December,

and stated that they had been filed without her knowledge and consent and fraudulently in collusion with Banga Chandra. She asked that the petitions of compromise might be rejected and the case disposed of after a regular trial. The District Judge ordered that the matter should be heard on the following day. On that day an affidavit of one Chandra Shekhar Dutt, another general agent of Monmohini, was put in on her behalf in support of her petition of the previous day, and the general power she had given to Rupasi Mohan as well as Chandra Sekhar on the 4th March 1901, was put in on behalf of Banga Chandra. The case was put off to the 7th December 1901, and on that day Monmohini put in a petition stating that she was present in Court and asking the learned Judge to take down her deposition. The learned Judge, however, without taking any evidence, and merely on the authority of the am-mukhtearnama of the 4th March 1901, held that Monmohini was bound by the act of her general agent, Rupasi Mohan, and could not be permitted to resile from the compromise, and he directed that probate should be granted to her and Banga Chandra in accordance with the terms of the compromise. In the formal decree which was drawn up in accordance with the judgment it was ordered and decreed that probate be granted to the parties in terms of the compromise, which were recited in it.

The present appeal is against the judgment and decree of the 7th December 1901, and we feel no hesitation in saying that they should be set aside. Even in an ordinary suit, any party has the right to repudiate the action of an agent compromising it without his knowledge and consent before any order of the Court is passed accepting the compromise as the final determination of the suit. The Court may, as held in *Brajodurlabh Sinha v. Ramanath Ghose* (1), make an enquiry as to the fact of the compromise, and, if it holds that the suit was adjusted by a lawful agreement or compromise, it may pass a decree in accordance therewith. In the present case no enquiry was made notwithstanding that the repudiation was by a *purdanashin* lady, and it was supported by her verified petition and the affidavit of another

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am-mukhtear of hers and the offer of her being herself examined in Court. We are of opinion that the mere fact that her agent, Rupasi Mohan, pretending to act on her behalf signed and presented the petitions is not sufficient to enable the Court to pass a decree in accordance with them. Besides the compromise covered matters clearly beyond the subject-matter of the suit, and dealt with the partition of property in which the beneficial interest according to the will belonged to persons who were not before the Court and one of whom was a minor. The order made by the learned Judge is clearly beyond the scope of a proceeding for the probate of a will under the Probate and Administration Act. His procedure is also highly irregular as he excluded all evidence except the am-mukhtearnama.

We have been asked by the learned vakil for the respondent to remand the case for receiving evidence and for determination of the question whether Monmohini had consented to the compromise, but we think we ought not to accede to his request as we are of opinion that the compromise, if any, was not lawful and ought not to be recorded.

In a proceeding for the probate of a will, the will must be duly proved either in common form or *per testes*; if the proceeding is contentious, as it is in the present case, it must be proved in solemn form. The consent of parties that probate should be granted cannot give validity to a grant of probate, as no grant can be valid, unless the will be proved in some form and the Judge be in a position to pronounce that it is *proved* and registered before him, as indicated by the form of the grant given in section 76 of Act V of 1881. A final judgment or order of a competent Court in the exercise of probate jurisdiction as conferring the status of executor to the grantee of a probate is conclusive proof of the existence of such status and the fact that the will is genuine. It operates as a judgment *in rem* (Evidence Act, section 41), and its effects cannot be nullified except by a proceeding for revocation of the probate under section 50 of the Probate and Administration Act. We, therefore, think that no grant of probate can be made merely on the consent of parties. The only issue in a probate proceeding relates to the genuineness and due execution of the will, and it is exclusively the province of

the Judge to come to a decision on this issue on the evidence produced before him. The Court must itself be satisfied by admissible evidence that a will propounded is the will of the testator. The parties in a contentious proceeding cannot arrogate to themselves the function of deciding the issue by agreement or compromise, especially when the next-of-kin and the persons beneficially interested are not parties to the agreement. We think that though a contentious proceeding for a probate takes under section 83 of the Act, as nearly as may be, the form of a suit, an agreement or compromise as regards this issue, if its effect is to exclude evidence in proof of the will, is not lawful within the meaning of section 375 of the Code of Civil Procedure, when the Court has not an opportunity of judging for itself whether the will is the will of the deceased person and to what extent the rights of the parties will be affected, if the agreement be allowed to be made a rule of Court.

It is true that there is nothing unusual in a compromise being entered into in the course of probate proceedings, but it appears from most of the reported cases, which we have looked at, that the effect of the compromise was to make a contentious proceeding non-contentious, opposition being abandoned: *Road-night v. Carter*(1). *Evans v. Saunders*(2) would seem to indicate that an agreement in a probate proceeding might be made a rule of Court. But the report of the case is so meagre that it cannot be taken as an authority for the broad proposition submitted for our consideration. In *Norman v. Strains*(3), Sir James Hannen being asked to confirm an arrangement which had been entered into between the parties in a proceeding for the will of one Strains observed—"My duty is to determine whether or not a particular will is the will of the deceased person," and he declined to confirm the arrangement at the stage the case had then arrived.

In *Ravji Ranchod Naik v. Vishnu Ranchod Naik*(4), Sargent, C.J., held, that in a contentious proceeding for a probate, the mere refusal of a caveator to answer a question will not, notwithstanding section 177 of the Code of Civil Procedure, justify the Court

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(1) (1863) 3 Sw. & Tr. 421.

(3) (1880) L. R. 6 P. D. 219.

(2) (1861) 30 L. J. P. D. A. 184.

(4) (1884) I. L. R. 9 Bom. 241.

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in dispensing with the proof of the will. In *Ghellsabhai v. Nandubai*(1), a question arose as to whether an executor against whose application for probate a caveat was entered, could submit to arbitration the matter in dispute, *i.e.*, the genuineness and due execution of the will. Farran C.J., was strongly of opinion that he could not.

We think the same principle applies to a compromise, though there can be no doubt that a caveator may withdraw upon terms his opposition to the will, leaving the Court to decide as to the *factum* of the will.

For these reasons, we think, the case must go back to the District Judge for his decision, irrespective of the petitions put in on the 3rd December 1901. He must decide it on the evidence already on the record and such other evidence that may be produced before him. The respondent must pay to the appellant the costs incurred by the latter in this appeal.

M. N. R.

Appeal allowed. Case remanded.

(1) (1896) I. L. R. 21 Bom. 335.