APPEAL FROM ORIGINAL CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Woodroffe.

OFFICIAL TRUSTEE OF BENGAL

v.

KUMUDINI DASI.*

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Jan 24.

Probate—Testamentary and Intestate Jurisdiction—Revocation—Probate and Administration Act (VI of 1881) s. 50—Official Trustee of Bengal—Official Trustee's Act (XVII of 1864).

Where a Judge exercising the original testamentary and intestate jurisdiction of the High Court granted probate to the Official Trustee of Bengal, the probate being expressed to be granted to the Official Trustee of Bengal for the time being, assuming the order to have been erroneous, it cannot be said that the Judge acted without jurisdiction so as to bring the matter within the scope of section 50 of the Probate and Administration Act.

APPEAL by the Official Trustee of Bengal from an order of Fletcher J.

On the 12th September 1907, Manick Lal Seal, a Hindu governed by the Bengal school of Hindu Law, died, leaving him surviving his sole widow, Sreemati Kumudini Dasi, and an infant son, Monohur Lal Seal, aged four years, and possessed of considerable properties, moveable and immoveable, situate both within and without the jurisdiction of the High Court.

On the 7th June 1907, Manick Lal Seal had made and published his last will giving various directions for the benefit of his wife, his son who was to be the residuary legatee, and others, and establishing various trusts, charitable and otherwise. The material portions of his will, so far as the present matter is concerned, were as follows: "I desire that the Court of Wards should take charge of my estate, and it is my respectful prayer to Government that the Court of Wards may be empowered to take charge of my estate . . . . . I desire that the funds for all the charities above named remain with the Official Trustee . . . I desire, as I have already

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stated, that the Court of Wards should take charge of my estate and carry out the provisions of my will. If it does not, and only if it does not, then I desire that the Official Trustee of Bengal shall do so. And I appoint the said Official Trustee executor of this my will, or failing him the Administrator General of Bengal."

On the death of the testator the Court of Wards was requested by the widow to assume charge of the estate, but it was doubtful whether the Court of Wards would consent to do so.

On the 1st October 1907 Mr. C. E. Grey, who was at the time officiating as Official Trustee of Bengal, and had been so officiating for some time previous to the death of the testator, expressed his intention of renouncing probate. Thereupon, the Administrator General of Bengal applied to the High Court in its Testamentary and Intestate Jurisdiction for grant of probate. The widow, Kumudini Dasi, entered a caveat.

The application of the Administrator General of Bengal came on for hearing before Chitty J. on the 4th October 1907, when Mr. C. E. Grey, officiating Official Trustee of Bengal, withdrew his renunciation. The matter was adjourned till the 28th October, on which date an application was made by the Official Trustee of Bengal for grant of probate, the petition being verified by Mr. Grey.

The matter was again adjourned till the 18th November 1907, when it came on for hearing before Chitty J. The Official Trustee's application was consented to by the Court of Wards, and by the widow, the latter expressing her willingness to withdraw her caveat, if grant of probate were made to the Official Trustee. The application was resisted by the Administrator General of Bengal, who claimed that the grant should be made to him. On the 18th November 1907, Chitty J. made an order directing that the petition of the Administrator General, dated the 4th October 1907, praying for grant of probate be withdrawn, and that probate of the will of Manick Lal Seal be granted to the Official Trustee of Bengal (1).

(1) (1907) I. L. R. 35 Calc. 156.

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Probate was accordingly issued on the 6th December 1907 to the Official Trustee of Bengal by the name of his office : it was expressed to be granted to the Official Trustee of Bengal for the time being. Between the date of Chitty J.'s order of the 18th November 1907 and the actual issue of probate on the 6th December, Mr. A. B. Miller, the permanent incumbent of the office of Official Trustee of Bengal returned to duty and resumed charge of the office.

By virtue of the grant of probate, the Official Trustee took possession of and administered the estate of the testator as executor under the will. In the month of March 1909, Mr. Miller again proceeded on leave, returning to duty early in December of the same year. During his absence Mr. Grey again officiated for him as Official Trustee, and as such took possession of and administered the estate of the testator.

On the 27th July 1909, Kumudini Dasi presented her petition praying for the revocation or annulment of the grant of probate to the Official Trustee of Bengal, and for the issue of letters of administration with copy of the will annexed to herself during the minority of her infant son. She contended that the appointment of the Official Trustee of Bengal as executor under the will of the testator was not warranted by law, that the Official Trustee of Bengal was not authorised by law to accept probate, and that the grant of probate to the Official Trustee of Bengal was entirely without jurisdiction.

In an affidavit filed on the 12th August 1909, and made by Mr. Grey, it was alleged that the Official Trustee had long since realised the outstandings of the testator and paid all his debts so far as they had been ascertained. It was admitted, however, that there were two suits still pending : one, an administration suit by the widow, Kumudini Dasi, against the Official Trustee, instituted on the 8th December 1908, and the other a suit by the Official Trustee against Kumudini Dasi for the recovery of the sum of Rs. 1,00,000 which she was alleged to have appropriated from the estate and which she claimed as a gift made by her husband before his death.

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The widow's application for revocation or annulment of the grant of probate was directed to stand over till the return of Mr. Miller.

The application was heard on the 17th December 1909 by Fletcher J., who directed that the grant of probate of the will of Manick Lal Seal to the Official Trustee be revoked, and that the grant of probate issued to the Official Trustee of Bengal for the time being be brought into the Registry of the High Court. The judgment of his Lordship was as follows :—

FLETCHER J. This is an application by a lady of the name of Kumudini Dasi, widow of one Manick Lal Seal, calling upon the Official Trustee of Bengal to show cause why grant of probate of the will of Manick Lal Seal should not be revoked or cancelled, and why letters of administration should not be granted to her.

The facts stated shortly are as follows:

Manick Lal Seal died on the 12th September 1907. By his will, dated the 7th June 1907, he desired in the first place that the Court of Wards should take charge of his estate and carry out the provisions of his will, and if it did not do so, and only in that case, he desired that the Official Trustee of Bengal should do so, and he appointed the Official Trustee of Bengal executor of his will, failing him the Administrator General of Bengal.

An application was made to the Court after the death of Manick Lal Seal, which occurred, as I have already said, on the 12th September 1907 for grant of probate of the will to the Official Trustee of Bengal. The petition to the Court was presented by Mr. Grey, the petitioner being stated to be the Official Trustee of Bengal. The verification of the petition shows that the application was presented by Mr. Grey, who was then officiating as Official Trustee whilst Mr. Miller was on leave.

The matter came on before Mr. Justice Chitty in Chambers on the 18th November 1907. Mr. Justice Chitty directed that probate should issue to the Official Trustee of Bengal for the time being as prayed in the petition.

The probate of the will was accordingly issued to the Official Trustee for the time being. The probate annexed to the certified copy of the will shows in fact that a grant was so made.

The present application is by the widow to have the probate revoked on the ground that the Court had no jurisdiction to make that grant. Under the Official Trustee's Act (Act XVII of 1864) which regulates, if it does not constitute, the office of the Official Trustee, the duties of the Official Trustee are limited and defined. I cannot on reading the sections of the Act have any doubt as to what the duties conferred by the statute are.

Section 8 provides that the Official Trustee may be appointed as an original Trustee of any deed to which he had been so appointed with his consent in the words of that section. Section 10 provides that where the property is already subject to a trust (not where the property is about to be made the subject of a trust), and where there is no trustee willing to act or capable of acting in the

trust thereof, the Official Trustee may be appointed in the room of such trustees or trustee. Those words are familiar to any one who has had to do with the appointment of new trustees, and they occur in every English Trustee Act from 1850.

It is obvious to my mind that section 10 applies to a case where there is a desire to appoint the Official Trustee in the place of an original trustee. It matters not whether the trust arises by deed or will.

These, in my opinion, are the only trusts which the Official Trustee is entitled to accept *qua* Official Trustee. An attempt was made to rely upon the subsequent sections of the Act relating to the investment of trust funds, and retransfer of trust funds to the original or subsequently appointed trustee. Mr. Hill has argued that these sections show that the Official Trustee had power to act as original trustee of a will, and that being so, he has power to accept an executorship. To neither of these propositions of Mr. Hill's am I able to assent. In my opinion there is nothing in the Act to authorise the Official Trustee to be appointed an original trustee of a will and with regard to executorships, not only is there nothing to authorise the Official Trustee to accept such offices, but the legislature has thought fit to constitute a special officer to accept such duties.

Mr. Justice Chitty considered that as there was no provision in the Official Trustee's Act prohibiting him from accepting an executorship he was at liberty to do so. With the greatest respect for the learned Judge, I am wholly unable to agree with his decision on this point.

The decision of the learned Judge on this point is contrary to a whole string of decisions commencing with *Ashbury Railway Carriage and Iron Company* v. *Riche* (1), which expressly laid down that where a body is created by statute, that body has only the powers given to it by statute and cannot exercise any other power, although not expressly prohibited from doing so. Under the Official Trustee's Act the Official Trustee has power only to accept the trusteeships authorized by sections 8 and 10 of the Act only. These two sections do not authorise the Official Trustee to accept an executorship.

The only point that has been at all seriously argued before me is whether this matter having been dealt with by Mr. Justice Chitty, the probate is capable of being revoked under section 50 of the Probate and Administration Act.

The decision of the learned Judge in granting the probate being a judgment in *rem* is binding and can only be revoked for what is defined as "just cause" in section 50 of the Probate and Administration Act. Unless it can be shown that there is "just cause," the grant is binding, however much one may disagree with the reasons upon which the learned Judge founded his decision.

"Just cause" is defined in section 50 as including the case where the proceedings to obtain the grant of probate are defective in substance, and the first illustration to the section shows that, where the Court has no jurisdiction, probate can be revoked. It was argued by Mr. Mitter on behalf of the Official Trustee that this applies only to the case where the Court has either no local or territorial jurisdiction. In my opinion the section cannot be limited in that way. In going through the Probate and Administration Act, it will be noticed that the Act places certain limits on the powers of the Court.

(1) (1875) L. R. 7 H. L. 653.

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The first of such limits is in section 6, which provides that probate can be granted only to an executor named in the will. That clearly implies that the Court has no jurisdiction to grant probate to a person other than an executor named in the will. An executor is defined in section 3 as a person to whom the execution of the last will is committed by the testator.

The Court must also pay attention to statutory provisions contained in other Acts, and if the Official Trustee *qua* Official Trustee accept an executorship, the Court cannot give itself jurisdiction to appoint the Official Trustee *qua* Official Trustee executor.

I think, therefore, the learned Judge had no jurisdiction to grant the probate now sought to be revoked on two grounds: *First*, that the Official Trustee is not capable of being appointed executor; and, *second*, that the learned Judge had no jurisdiction in so far as he directed the grant to issue to the Official Trustee for the time being. The will having appointed the Official Trustee to be the executor, I know of no authority for making a grant in the terms in which the present grant was made, and the grant is clearly not to the person named in the will as executor.

On both these grounds I am of opinion that the Court had no jurisdiction to make the grant to the Official Trustee for the time being. Then it has been argued that the widow is bound by acquiescence on her part, but no consent on her part could give the Court jurisdiction to make a grant of probate which the Court had no jurisdiction to make. I am, therefore, of opinion that she is not estopped from applying that the probate granted should be revoked. There only remains the question of costs to be dealt with. I have no jurisdiction sitting here as a Judge of a Probate Court to order the costs to come out of the estate. I, therefore, make no order as to costs.

On the second part of the application, asking that the widow may have granted to her letters of administration with a copy of the will annexed, I make no order.

From this order the Official Trustee of Bengal appealed.

Mr. B. C. Mitter (with him *Mr. Pugh*), for the appellant. Assuming that Fletcher J. was right in his contention that the Official Trustee of Bengal was not capable of being appointed executor, and, secondly, that grant of probate cannot be issued to the Official Trustee for the time being, still Fletcher J. was not competent to set aside as a nullity an order granting probate passed by Chitty J., a judge exercising co-ordinate jurisdiction. Fletcher J. relied on section 50, illustration (*a*), of the Probate and Administration Act, and came to the conclusion that Chitty J. had no jurisdiction to make the grant. Now an illustration cannot be relied on to militate against the words of a section. The 5th clause shows what is the meaning

of section 50. In *Craster* v. *Thomas* (1), Neville J. pointed out that it was clear from the 5th clause that the grant was valid until recalled. My main contention is that no question of jurisdiction arises. Chitty J. decided on an issue raised, that the Official Trustee was a "person" within the meaning of the Probate and Administration Act. It was not a question of want of jurisdiction: if anything, the order was erroneous: *Sardarmal* v. *Aranvayal Sabhapathy* (2). The order was valid and binding on all Courts of co-ordinate jurisdiction.

[JENKINS C.J. You rely on the proposition that every Court has jurisdiction to decide a case erroneously.] Yes.

[WOODROFFE J. The question is, whether the Court had jurisdiction over the subject matter of the application.] Yes. Chitty J. presiding over an original Court of testamentary and intestate jurisdiction clearly had such jurisdiction.

[JENKINS C.J. What would you say of a grant of probate to a lunatic or a minor ?]

If the Court adjudicated on the point and made a grant, the order would be valid.

[JENKINS C.J. The authorities lay down that an erroneous assumption of jurisdiction does not give a Court jurisdiction; but I do not see how the present matter involves a question of jurisdiction at all.]

On the second point, the grant of probate was made to the Official Trustee; the order, as drawn up, was in favour of the Official Trustee for the time being.

[JENKINS C.J. A grant of probate to a corporation sole enures only for the benefit of the person to whom the grant was made. Moreover, how can the Official Trustee be presumed to be a corporation sole ?]

If the Official Trustee is entitled to apply, and did so apply, the Court will not consider who was the particular officer who applied or to whom grant was made: *In the goods of William Haynes*, (3). The executor will be the Official Trustee for the time being.

(1) [1909] 2 Ch. 348. (2) (1896) I. L. R. 21 Bom. 205, 211.
(3) (1842) 3 Curt. 75.

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Mr. Pugh (following). It was decided in *In the goods of William Haynes* (1) that probate may be granted to a corporation sole. Now, in his judgment Chitty J. held that the Official Trustee was in the position of a corporation sole as under the old Common Law. The proper remedy of the widow lay by way of appeal. The revocation of the grant to the Official Trustee would cause great inconvenience to the estate; for a space of three years the estate had been administered by the Official Trustee.

Mr. Sircar (with him *Mr. C. C. Ghose*), for the respondent. The Official Trustee is not a "person" within the meaning of the Probate and Administration Act. He cannot be appointed executor or obtain grant of probate. If the Official Trustee is a corporation sole at all, he is such a corporation regulated by, and his powers are limited by, the Official Trustee's Act: *Baroness Wenlock* v. *River Dee Company* (2), *The Conservators of the River Tone* v. *Ash* (3). The Official Trustee's Act does not empower the Official Trustee to act as executor; if he does, he does so outside the Act, and then he ceases to be a corporation.

[JENKINS C.J. The Official Trustee's Act seems to constitute an *office* rather than a *corporation*.]

It is submitted that inasmuch as the Official Trustee is not entitled in law to obtain grant of probate, Chitty J. had no jurisdiction to make the grant. A Court can pass judgment only upon a matter which it has authority to decide: *Sukh Lal Sheikh* v. *Tara Chand Ta* (4), *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan* (5). The way to invoke the jurisdiction of the Court to obtain a grant of probate was on the application of a "person."

The test, whether a proceeding is an irregularity or a nullity, is to see whether the party can waive the objection: *Ashutosh Sikdar* v. *Behari Lal Kirtania* (6). Here the proceedings were *in rem* and the widow could not waive the objection. They

(1) (1842) 3 Curt. 75.
(2) (1887) L. R. 36 Ch. D. 674, 685n
(3) (1829) 10 B. & C. 349, 383.
(4) (1905) I. L. R. 33 Calc. 68, 71.
(5) (1855) 6 Moo. I. A. 134, 155.
(6) (1907) I. L. R. 35 Calc. 61, 73.

were a nullity: *Allan* v. *Dundas* (1) and *Prosser* v. *Wagner* (2) were also referred to.

Mr. B. C. Mitter, in reply, cited *Malkarjun* v. *Narhari* ( ).

JENKINS C.J. This is an appeal from the Original Side of this Court in the Testamentary and Intestate Jurisdiction, the judgment complained of being one passed by Mr. Justice Fletcher, who directed that the grant of probate of the will of one Manick Lal Seal, deceased, to the Official Trustee be revoked, and that the grant of probate issued to the Official Trustee of Bengal for the time being be brought into the Registry of this Court. There is no dispute as to the facts, and the only question is whether this is a case where the Court, under section 50 of the Probate and Administration Act, ought to revoke the probate that has been granted. This probate was granted by Mr. Justice Chitty on the 18th of November 1907, his order being that probate of the will be granted to the Official Trustee of Bengal: the probate actually granted was expressed to the Official Trustee of Bengal for the time being. At the time when the application was made Mr. Grey was Official Trustee, but he was merely officiating temporarily in the place of Mr. Miller the permanent incumbent. The ground on which Mr. Justice Fletcher has revoked this grant of probate was that Mr. Justice Chitty had no jurisdiction to grant the probate now sought to be revoked: *first*, because the Official Trustee is not capable of being appointed executor; and, *secondly*, because the learned Judge had no jurisdiction, in so far as he directed the grant to issue to the Official Trustee for the time being.

It has not been contended before us that Mr. Justice Fletcher's view of the law is not correct, and, speaking for myself, I am glad that he has raised this point. I think, however, the appeal must succeed on the ground that, although Mr. Justice Chitty's order may have been erroneous on the ground stated, it cannot be said that he had no jurisdiction to make

(1) (1789) 3 T. R. 125.
(2) (1856) 1 C. B. N. S. 289.
(3) (1900) I. L. R. 25 Bom. 337; L. R. 27 I. A. 216.

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the order. It has become a commonplace that it is within the jurisdiction and competency of the Court to decide wrongly as well as to decide rightly, so that, even if it be assumed for the purpose of this case that Mr. Justice Chitty took an erroneous view of the position of the Official Trustee under the Official Trustee's Act, it cannot, in my opinion, be said that he made an order as to which he had no jurisdiction. Reading the judgment of Mr. Justice Chitty, I have little doubt that he regarded the Official Trustee as a *corporation sole*, represented by the incumbent for the time being. He therefore regarded the Official Trustee as a person who could be appointed as executor within the meaning of the Probate and Administration Act. Further than that, he obviously was of opinion that there was nothing in the Official Trustee's Act which precluded his becoming an executor of a will. However erroneous that decision may have been—and it is assumed for the present purpose that it is erroneous—still it was a decision to which the learned Judge was entitled to come. He was the Judge at that time exercising the testamentary jurisdiction of the Court in its Original Side, and the subject matter then before him was clearly one with which he was in every way competent to deal. There was, therefore, no defect in respect of subject matter, or parties, or the nature of the proceeding, so that I am of opinion that the case does not fall within section 50 of the Probate and Administration Act. Further, I think this is not a case where it would be convenient to exercise the power of revocation and annulment given by section 50 of the Probate and Administration Act to the Court. The estate is one of very considerable value: probate was granted as far back as November 1907, and we are told, and it is not disputed, that during the three years that have elapsed since the grant of probate many transactions have taken place, so that serious questions might possibly arise, notwithstanding the saving provision of section 84 of the Act, were the grant now to be cancelled.

The result then is that, even assuming the order of Mr. Justice Chitty to have been erroneous, I still think that the order for revocation should be set aside.

I notice that Mr. Justice Chitty, in the course of his judgment in *In the Goods of Manick Lal Seal* (1), points out that if the Official Trustee takes up the executorship, he will receive no remuneration for that portion of the duties, but only under the Official Trustee's Act, for his management as trustee: and it has been stated before us that no remuneration is claimed, or will be claimed, in respect of the executorship. I must point out that it was not competent for the learned Judge to express any opinion as to the right of the Official Trustee to remuneration—as trustee—for that was obviously not a matter before him. My reason for alluding to that remark is to safeguard myself against being supposed to have assented to the view that this Court in its testamentary jurisdiction can come to any decision as to the right of the Official Trustee to remuneration as a trustee, or even as to his capacity to take up the trusteeship.

The appeal must therefore succeed. The order of Mr. Justice Fletcher must be set aside. The respondent must pay the appellant's costs both in this Court and in the Court of first instance without prejudice to the right of the latter to have the costs to be paid out of the estate. We direct that probate be re-issued.

WOODROFFE J. I agree that the order of the learned Judge should be set aside. In this case the Official Trustee applied for probate as being a person appointed by the will of the testator, and the application was made to a Court having probate jurisdiction. It is admitted that the Court had jurisdiction over the subject-matter, that is the grant of probate. The question then to be decided was whether the Official Trustee was a person entitled to apply for such probate. This was not a question of jurisdiction, but was one of the questions which a Court possessing probate jurisdiction had to determine during the course of its exercise. If Mr. Justice Chitty had not jurisdiction to decide this point, what Court had? There was no defect, therefore, in the proceedings within the meaning of

(1) (1907) I. L. R. 35 Calc. 156.

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section 50 of the Probate and Administration Act. Whether the decision on the question as to the right of the Official Trustee to obtain probate was a right or a wrong decision does not concern us, but having been given, it was binding on a court of co-ordinate jurisdiction. Further, the Court has discretion under section 50 of the Probate and Administration Act to revoke or annul the grant of probate. No doubt there are cases where a Court which is given a discretion by the statute is bound under the circumstances of the case to exercise that discretion in the applicant's favour ; but this is not the case here. This is a case where revocation was likely to cause the greatest inconvenience, for we are informed that the administration having gone on for several years has nearly come to an end. It would, therefore, be disastrous at such a stage to reopen all that had been meanwhile done under an order to which the present respondent was a consenting party. Such consent may not give jurisdiction : but it is a circumstance which may be, and should be, considered on the question whether the Court should exercise its discretion at the instance of such party and declare that there had been no jurisdiction.

Appeal allowed.

J. C.

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