

APPEAL FROM ORIGINAL CIVIL.

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

GREY *v.* CHARUSILA DASI.*

1910

July 26.

*Official Trustee—Probate—Official Trustee's Act (XVII of 1864)
ss. 8, 10, 32.*

The Official Trustee as constituted by Act XVII of 1864 is not entitled by virtue of his office and in his character as Official Trustee and in the name of Official Trustee to obtain a grant of probate.

Ashbury Railway Carriage and Iron Co. v. Riche (1) referred to.

APPEAL by C. E. Grey from an order of Fletcher J.

Akshoy Kumar Ghose died on the 23rd November, 1909, leaving a large estate and leaving him surviving his widow Sreemati Charusila Dasi and his nephew Bireswar Chandra Basu Mullick. On the 11th May, 1907, Akshoy Kumar Ghose had made and published his last will whereby he made the following provision for the appointment of his executor:—"I appoint the Court of Wards to be the executors and trustees of this my will. But should the said Court of Wards refuse to accept the said office or should the High Court refuse to grant probate to the said Courts of Wards, then I appoint the Official Trustee of Bengal to be the executor and trustee of this my will." The Official Trustee of Bengal was appointed trustee of the residuary estate, which was to be applied to certain charitable purposes.

The Court of Wards refused to accept the executorship. On the 3rd December, 1909, Mr. C. E. Grey, who was at the time officiating as Official Trustee of Bengal, in the absence on leave of Mr. A. B. Miller, and had been so officiating both at the date of the execution of the will and the death of the testator, applied for probate of the will. On the 7th December, 1909, the widow Sreemati Charusila Dasi applied for

*Appeal from Original Civil, No. 39, of 1910.

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letters of administration with a copy of the will annexed. Citations were duly served on the Official Trustee of Bengal, the permanent incumbent Mr. A. B. Miller having in the meanwhile returned.

On the 17th December 1909, in *In the goods of Manik Lal Seal* (1) and order was passed by Fletcher J. for the revocation of the grant of probate, which had been made to the Official Trustee of Bengal in that matter on the ground that the Official Trustee was not competent to obtain such grant.

Thereupon certain correspondence ensued between the solicitors of Sreemati Charusila Dasi and Mr. A. B. Miller, in which the latter expressed his intention of not proceeding with Mr. Grey's application for a grant of probate of the will of Akshoy Kumar Ghose, and on the 22nd December the Official Trustee of Bengal through Counsel formally withdrew his petition for grant of probate.

On the 4th April, 1910, letters of administration with a copy of the will annexed were issued to the widow. Thereupon Bireswar Basu Mullick applied for the revocation of this grant and for an order that the will be proved in solemn form. On the 12th April the matter was directed to be set down as a contentious cause and the letters of administration was ordered to be brought into Court. On the 16th April the widow returned the letters of administration to the Registrar.

It appears that on the 24th January, 1910, the order of Fletcher J. in *In the goods of Manik Lal Seal* (1) was reversed by the Court of Appeal in *Official Trustee of Bengal v. Kumudini Dasi* (2), but the Appellate Court refrained from expressing an opinion whether a grant of probate could be made to the Official Trustee of Bengal.

On the 6th April, 1910, Mr. C. E. Grey again took over charge of the office of the Official Trustee of Bengal, and hearing of the order of the 12th April, and of the recall of the letters of administration, he applied on the 18th April, 1910, to be added as a party defendant in the contentious cause and for a three weeks' adjournment of the hearing. This applica-

(1) Unreported.

(2) (1910) I. L. R. 37. Calc. 387.

tion was refused. The will was duly proved in solemn form by the widow, and the letters of administration were directed to be re-issued to her. On the same date an *ex-parte* application had been made on behalf of Mr. Grey for leave to apply for probate, and he had been directed to serve notice on the widow. Thereupon Mr. Grey, through his solicitors, Messrs. Pugh & Co., filed a *caveat* with the Registrar.

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On the 20th April, the widow's solicitors were informed by the Registrar that so long as the *caveat* filed on behalf of Mr. Grey was not discharged or taken off the file, the grant could not be re-issued to her.

Thereupon a summons was taken out on behalf of the widow asking that "the *caveat* filed by Mr. Grey, the Official Trustee of Bengal for the time being, be taken off the file as not having been properly filed, or in the alternative that the same may be discharged."

On the 25th April, 1910, Fletcher J. ordered the *caveat* to be discharged. After setting out the facts His Lordship continued:—

"The first point is in what capacity has the appointment of the Official Trustee of Bengal to be executor and trustee been made. Did the testator intend to appoint Mr. C. E. Grey, who by the way was not and is not the Official Trustee but was and is officiating as the Official Trustee of Bengal during the absence on leave of the Official Trustee or did he intend to appoint the Official Trustee of Bengal by virtue of his office as executor of his will. I have not the slightest doubt that the testator did not care anything about Mr. Grey whom it is quite possible he had never heard of but intended to appoint the Official Trustee of Bengal by virtue of his office to be executor of his will. That being so, I have to see whether the Official Trustee is authorised by virtue of the Act constituting his office to accept the office of executors. In my opinion he has not. Section 8 of his Act applies only to cases of deeds where the Official Trustee is named the trustee and is thereby appointed trustee. The second class of cases is where the Official Trustee is not appointed trustee but where no trustee has been appointed by deed or will or where the trustee appointed is unwilling or incapable of acting and the Official Trustee may be appointed the trustee by an order of the Court. The Act does not contain anything which suggests that the Official Trustee can be appointed an executor of a will. But it is said that the Official Trustee is a person and as a grant of probate or of letters of administration may be made to a person, there is, therefore, no reason why the Official Trustee fulfilling the description of a person should not be permitted to take out

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a grant and that there is nothing under his act to prevent him applying for probate. Such a construction of a statute would work a revolution. The principle that the Judges have laid down to be applied, since the case of *Ashbury Railway Carriage and Iron Co. v. Riche* (1) is that when dealing with a statute defining the powers of a corporation or of a person with statutory duties or powers one has to look at the statute to see what the duties are and only those duties which are conferred by the statute or are necessarily incident to the performance of the statutory duties are conferred on such corporation or person. That being so, the fact that the Official Trustee is a person is obviously not sufficient in itself to entitle him to perform the duties of executor. Under the description of person there are many classes, such as infants and lunatics, to whom a grant cannot be made. Similarly there are other persons whom the law does not desire should act as executors. Thus the Official Trustee is an officer with limited powers under his Act having only such powers as are necessary for the purpose of performing the duties of trustee but not of carrying out those of an executorship under a will. That being so, I am of opinion there is nothing in the Official Trustee's Act to authorise him to accept an executorship and unless I am shown words which expressly or by necessary implication authorise him to accept executorship, I am of opinion he is not entitled to have a grant of probate.

The only other point raised on the present application is whether Mr. Miller by his act has renounced the executorship. That point having regard to my decision on the first point need not be considered here. The present application is, therefore, successful and the *caveat* of Mr. C. E. Grey must be discharged and he must pay the cost of this application with the *caveat* certificate for Counsel."

From this order Mr. Grey appealed.

Mr. C. R. Das (with him *Mr. S. R. Das*), for the appellant.

Mr. Jackson (with him *Mr. B. C. Mitter*), for the respondent.

JENKINS C.J. Appeal No. 39 of 1910 relates to the estate of one Akshoy Kumar Ghose who died on the 23rd of November, 1909, having made a will of the 11th of May, 1909. The genuineness of this will has not been called in question, and the whole of this litigation is concerned with the question whether or not the Official Trustee is entitled to probate and whether the widow of the testator, who in the circumstances is his nearest heir, is entitled to letters of administration with the will annexed. Mr. Justice Fletcher has decided that the

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Official Trustee is not entitled to probate, and he has granted letters of administration to the widow: and it is from his decision that this appeal is preferred.

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I am clear that the Official Trustee has no right to probate. To begin with, I read the letters contained in the affidavit and the action of the Official Trustee as a clear renunciation on his part. To read the letters otherwise and to give a different interpretation to his conduct would be, I think, little short of imputing bad faith to him. That I do not propose to do. The matter might be allowed to rest there because that would dispose of the Official Trustee, but I think, in the circumstances, it is desirable to proceed to the further question as to whether or not the Official Trustee is entitled by virtue of his office and in his character as Official Trustee and in the name of Official Trustee to have a grant of probate. I put the proposition in that form, because it cannot be seriously contended—and indeed was not seriously contended that there was any desire on the part of the testator to single out the individual incumbent of the office to be his executor. I feel no doubt that the testator's idea was to appoint the Official Trustee as such, and by that I mean the Official Trustee by virtue of his office, and by the name of his office and in no other sense. Now, was it open to the testator to appoint the Official Trustee as constituted by Act XVII of 1864 as executor of his will? In my opinion, it was not. The Act itself appears to afford the clearest answer on this point. It is described as an Act to constitute an office of Official Trustee, and it opens with a preamble in which it is said "It is expedient to amend the law relating to Official Trustee and to constitute an office of Official Trustee." The office is created for specific and definite purposes: it is the creature of the Act, and the incumbent of the office as such can only have such powers as are expressly or impliedly vested in him by the Act to which he owes his existence. Section 8 and section 10 indicate the conditions under which in ordinary circumstances the Official Trustee may become trustee

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of property. It is manifest that an application for probate does not come within either of those provisions. Then we have a supplemental provision in section 32 which indicates how in the particular events there set forth, an executor or administrator may pay to the Official Trustee the legacy or share of an infant or a lunatic, but that can only be done subject to certain conditions which clearly show that it is the scheme of the Act that the Official Trustee as such should not have the wide and unlimited powers that the argument addressed to us on his behalf would suggest. Then again, if the Act be examined, it will be seen that without exception the whole of its expressions are limited to the Official Trustee as a trustee and the property, over which he is to have control is regarded as trust property in the ordinary, proper and accepted sense of that term. There is in the Act as I read it no suggestion of the possibility of the Official Trustee as such being entitled to probate or letters of administration. Without going in detail through all the provisions of the Act, it is enough to say that it contains careful and elaborate provisions with a view to ensuring that the Official Trustee in the performance of his duties should be under vigilant and proper control. He has to furnish accounts which have to be examined; he has to keep books of accounts, he has to submit his account to creditors. But it is conceded that if the Official Trustee is entitled to probate and administration none of these precautions would be applicable to him in his character of executor or administrator under the terms of the Act; the very terms of the Act would be inapplicable to the position and the dealings of the Official Trustee as executor or administrator. Therefore it seems to me that not only is there no express provision in favour of the power to grant probate or letters of administration to the Official Trustee, but the whole scheme of the Act is opposed to the view that they can properly be granted to him.

It is unnecessary to refer to the cases or to deal seriously with the argument that the case of *Ashbury Railway Carriage and Iron Co. v. Riche* (1), does not decide that

which the House of Lords itself has held that it decided. The conclusion then to which I come is that the Official Trustee holds a public office created, regulated and defined by the Act, and that in his official capacity his powers are limited to those expressly or impliedly vested in him by the Act. I need not deal with the other difficulties that would arise in the particular circumstances of this case having regard to the position of Mr. Grey at the time when the will was made. It is sufficient for me, in answer to the broad question whether or not the Official Trustee is entitled to be executor administrator, to hold that he is not so entitled, and in this view the decree of Mr. Justice Fletcher should be confirmed and this appeal dismissed with costs.

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It has been suggested to us that Mr. Justice Fletcher's order as to costs was harsh. I will say no more than that I see no reason for differing from him as to the order he has made with regard to the costs before him.

WOODROFFE J. I agree.

Appeal dismissed.

Attorneys for the appellant: *Pugh & Co.*

Attorneys for the respondent: *B. N. Basu & Co.*

J. C.