

CALCUTTA HIGH COURT

Monmohini Guha

Vs

Banga Chandra Das

(Brett and Mitra , JJ.)

29.06.1903

JUDGMENT

Brett and Mitra, JJ.

1. 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 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 propounded of the will, is the husband of the deceased. daughter of Srimanta Ram and father, of Khettra Mohan.

2. 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.

3. 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 Manmohini should be maliks or managers and exicutor 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.

4. 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 alone 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.

5. 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-mukhtearnamma 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.

6. 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 *Brojodurlabh 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 as made notwithstanding that the repudiation was by a Purdanashin lady, and it was supported by her verified petition and the affidavit of another 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,

7. 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.

8. 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 Y 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 60 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 875 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.

9. 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*² *Evans v. Saunders*³ would seem to indicate that an agreement in 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*⁶ 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.

10. 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 in dispensing with the proof of the will. In *Ghellabai v. Nandubai*⁵ 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

11. 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.

12. 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.

Cases Referred.

1(1897) I.L.R. 24 Calc. 908

2(1863) 3 Sw. & Tr. 421

3(1861) 30 L.J.P.D.A. 184

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

5(1896) I.L.R. 21 Bom. 335

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