BOMBAY HIGH COURT

Narbheram Jivram Purohit

Vs

Jevallabh Harjivan

(B.J. Wadia, J.)

23.09.1932

JUDGMENT

B.J. Wadia, J.

1. One Hirabai widow of Madhavji Makanji died at Bombay on or about January 1, 1932, leaving a will dated December 20, 1931, of which the defendant is the executor. Defendant applied to this Court for probate on July 12, 1932, and probate was granted to him on August 5, 1932. The plaintiffs say that they are the sons of a cousin of the deceased and claim to be her heirs. On August 20, they filed this suit praying for a declaration that they are the heirs of the deceased Hirabai, that the will is not her valid and lawful will, that the grant of probate may be revoked, and that it may be declared that the plaintiffs as heirs of the deceased are entitled to the estate left by her and that the same may be handed over to them, and for other reliefs. On August 22, 1932, the plaintiffs took out a notice of motion for an order revoking the grant of probate and for appointment of a receiver and for injunction. In the argument a preliminary point was raised on behalf of the defendant, namely, whether the High Court in the exercise of its ordinary original civil jurisdiction had jurisdiction to try the suit, as it contained a prayer for revocation of probate which was granted by this Court in the exercise of its testamentary and intestate jurisdiction. The defendant contended that the suit and the notice of motion should be dismissed. The suit was accordingly set down on board for argument on this preliminary point.

2. It was contended on behalf of the defendant that if the grant of probate was to be contested, it must be contested before the Court sitting as a Court of Probate, that is, sitting on the testamentary side in the exercise of its testamentary and intestate jurisdiction, and not in the exercise of its ordinary civil jurisdiction. The provisions of the Indian law regarding the grant of probate and letters of administration to the estate of a deceased person are to be found in the Indian Succession Act, 1925. Chapter I of Part IX deals with the grant of probate and letters of administration. Chapter III deals with the alteration and revocation of grants, and Chapter IV, with the practice in granting and revoking probate and letters of administration. An application

for probate of a will is to be made by petition to the High Court, or under Section 264 of the Act to the District Judge in all cases falling within his district. The application to the High Court for probate must be made by petition in form No. 83, and an application for letters of administration must also be made by petition in form No. 88 of the High Court Rules and Forms, Such petition is intituled :-in the high court of judicature at bombay testamentary and intestate jurisdiction. If the application is unopposed, the grant from the Registry follows as a matter of course, and is drawn up by the Prothonotary and Senior-Master of the Court. If it is opposed, a caveat is filed, and on an affidavit in support of the caveat being filed the proceedings are turned into a suit, and the suit is numbered. There are separate numbers for suits filed on the Testamentary Side of the High Court. The grant of probate or letters of administration or the refusal thereof depends upon the result of the suit.

3. It is clear, therefore, that the grant issues from the High Court in the exercise of its testamentary and intestate jurisdiction, and when an application is made to revoke the grant, the question arises whether such an application can be made only by way of proceedings instituted in the Court out of which the grant issued, or whether it can also be made to the Court exercising its original civil jurisdiction. Counsel for the plaintiffs, by way of analogy only, as I take it, referred in the first place to the jurisdiction of the High Court of Judicature in England. In England, before the Judicature Act was passed in 1873, it was held that when the Court having jurisdiction, that is, the spiritual or Ecclesiastical Court, granted probate or letters of administration, the probate or letters, so long as they were unrepealed, could not be impeached in the temporal Courts: see *Allen v. Dundas*[1] and The *Attorney General v. Partingfam*[2] By the Judicature Act of 1873 the several Courts exercising different functions were consolidated together into one Supreme Court of Judicature of England, divided into Her Majesty's High Court of Justice and Her Majesty's Court of Appeal, and under Section 16 of that Act the jurisdiction vested in or capable of being exercised by such Courts, which included the Court of Probate, was transferred to or vested in the High Court of Judicature. Other Judicature Acts were passed after 1873, and now under the Supreme Court of Judicature (Consolidated) Act of 1925, which consolidated the Judicature Acts from 1873 to 1910 and other enactments relating to the Supreme Court and the administration of justice thereunder, there is also one Supreme Court of Judicature in England, similarly divided into the High Court and the Court of Appeal. Under Section 4(1) of the Act of 1925, as amended in 1928, the High Court is to have three divisions "for the more convenient despatch of busipess," namely, the Chancery Division, the King's Bench Division, and the Probate, Divorce and Admiralty Division. Section 4(4) provides that without prejudice to the provisions of the Act relating to the distribution of business of the High Court, all jurisdiction vested in the High Court under the Act belongs to all the divisions alike. Sections 55 and 56 regulate the distribution of business and the assignment of business to the

three divisions. The result, therefore, is that a Judge belonging to any division has jurisdiction to hear any action within the jurisdiction of the High Court. He may retain and deal with an action wrongly assigned to his division, or he may refuse to exercise his jurisdiction over it, and under Section 58 transfer it to the proper division where it can be more conveniently and appropriately dealt with. In Russian Commercial and *Industrial Batik v. British Sank for Foreign Trade, ld*[3]. Lord Dunedin pointed out that the Chancery Division was not in the strictest sense of the word a separate Court from the High Court of Justice, and at p. 460 Lord Wrenbury stated that the High Court of Justice was after all one Court although divided into divisions and with certain business assigned to one division to the exclusion of another. In *Pinney v. Hunt*[4] Jessell M.R. held that a Judge of the Chancery Division had under the Judicature Act jurisdiction to grant probate, but that it would not be using a sound discretion in exercising it, apart from the inconvenience caused by allowing the peculiar business of the Probate Division to be distributed over all the other divisions. In In re *Ivory, Hanlcin v. Turner*[5] letters of administration were granted to the brother of the deceased. Plaintiff then commenced an action in the Chancery Division for the administration of the estate of the deceased, alleging that he was the next of kin. It was held by Lush J. that letters of administration were conclusive that defendant was one of the next of kin, and the proper course for the plaintiff was to apply to the Probate Court to have the letters of administration recalled. These decisions were followed in *Bradford v. Young*[6] in which it was held that though the Chancery Division might have jurisdiction to recall the probate of a will, it ought not as a general rule to exercise it. There is also an observation of the Lord Chancellor in *Stead v. Smith*[7] that "it will always be borne in mind that all legal proceedings ought to be so far as practicable localized for the convenience of those concerned either in litigation or in any other legal business which may come before any officers of the Court."

4. In India the jurisdiction of the High Courts and of the Judges comprising the Courts is determined (1) by the High Courts Act of 1861, also known as the Charter Act (24 &> 25 Vic. c. 104), which was an Act for establishing High Courts of Judicature in India, (2) by the Letters Patent issued thereunder, and (3) by the Rules framed by each High Court under the authority conferred upon it by the Act. Section 9 of the Act provides that the Court "shall have and exercise" all such jurisdiction as Her Majesty may by Letters Patent grant and direct, the Court being comprised of the Chief Justice and the Judges appointed by Her Majesty. Section 13 empowers the Court to make Rules providing "for the exercise by one or more Judges or by Division Courts constituted by two or more Judges of the said High Court of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice". The High Court of Bombay was established under the Letters Patent, and when established it was to have and to exercise all such Civil, Criminal, Admiralty, and Vice-Admiralty, Testamentary, Intestate, and Matrimonial Jurisdiction,

original and appellate, and all such powers and authority for, and in relation to, the administration of justice in the Presidency as Her Majesty might by the Letters Patent grant and direct. Clause 34 of the Letters Patent provides for the testamentary and intestate jurisdiction of the High Court of Bombay. Under Section 106 of the Government of India Act, 1915, the High Courts are to have such jurisdictions, original and appellate, as are vested in them by Letters Patent, and Section 108 similarly empowers the High Court to make its own rules for the exercise by one or more Judges or by Division Courts of the original and appellate jurisdiction vested in it. In the exercise of the power contained in Section 13, which I have referred to above, the High Court of Bombay has made Rules for the exercise of jurisdiction by the Judges both on the original and the appellate side, but the jurisdiction itself, apart from its exercise, is conferred by the Crown by Letters Patent. I may here also mention that under Section 129 of the Civil Procedure Code the High Court is empowered to make rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction. The rules framed by the High Court are collected together and are headed "Rules and Forms of the High Court of Judicature at Bombay on the Original Side in its Several Jurisdictions". Rule 58 provides that "any Judge of the High Court may, subject to any rules of Court, exercise in Court or in Chambers all or any part of the jurisdiction vested in the High Court on its Original Side". Rule 60 empowers the Chief Justice to assign the different suits, matters and proceedings referred to therein to such Judges as he may from time to time appoint. Reading the two rules together the effect is that any Judge can exercise all or any part of the original jurisdiction of the Court, that is, the jurisdiction vested in the High Court on its original side, but for the sake of convenience "in the due administration of justice" different suits, proceedings and matters on that side are assigned to different Judges. Amongst these are testamentary and intestate matters, and Rules 583 to 649 of the High Court Rules regulate the procedure of the Court in dealing with those matters, It was argued on behalf of the defendant that the words "for the more convenient despatch of business" occurring in Section 4 of the Judicature Act of 1925 are not found in either of these two rules, but under Section 13 of the Indian High Courts Act, to which I have referred above, the rules are to be made for the exercise of jurisdiction by single Judges or Division Courts in such manner as may appear to the Court "to be convenient for the due administration of justice". The "several jurisdictions" on the original side for which rules have been made have been separated because of this convenience in the due administration of justice, but they are not exclusive of one another. They are each of them parts of the jurisdiction vested in the High Court on its original side. In my opinion, therefore, every Judge of the High Court by virtue of his appointment is competent to discharge all the functions connected with the High Court on its Original Side, that is, he has full powers to exercise all or any part of the jurisdiction vested in the High Court on its original side. The hearing and determination of testamentary and intestate matters form a part of that jurisdiction, and therefore any Judge may exercise it, subject only to

the assignment of business under Rule 60 for the sake of convenience in the due administration of justice. I may state here that Mirza J. in *Tilak v. Nene*[8] decided by Mirza J., on February 2, 1932(Unrep.) has also expressed a similar opinion. Counsel for the defendant, however, relied on the full bench decision in *Narayan Vithal Samant v. Jankbai*[9] in which the majority of the Judges constituting the full bench held that it was not competent for a single Judge of the High Court in the exercise of its ordinary original civil jurisdiction to stay the hearing of a suit pending for trial in a Subordinate Judge's Court in the mofussil, unless authorised so to do by rules. Batchelor J., delivering the judgment of the majority of the Judges, observed as follows (p. 620):-The intent and effect of these provisions seam to me to be that the jurisdiction conferred is conferred on the Court as a body : it is the Court which is to 'have and exercise' the jurisdiction granted : but, inasmuch as it would not be ' convenient for the due administration of justice' that the entire Court should have to sit for the valid determination of every suit and appeal and application, power is given to the Court to make Rules for the exercise of the Court's jurisdiction by one or more Judges within the limits and subject to the conditions prescribed by the Rules. The powers so delegated would thus fix the limit within which such Judge or Judges would be competent to exorcises the Court's jurisdiction, and any order made by a Judge or Judges in excess of this authority would be void as being beyond the jurisdiction which the Judge or Judges were legally authorised to exercise.

5. It was contended that when certain powers were delegated to a Judge, sitting, for instance, on the original side, those powers fixed the limits within which he was competent to exercise that jurisdiction, and an order made by him in excess of the authority would be void as being beyond the jurisdiction he was legally authorised to exercise. Accordingly it was argued that an order made by a Judge sitting on the original side for revocation of probate of a will granted by the Court in the exercise of its testamentary and intestate jurisdiction would be void. In my opinion, however, this inference does not follow. What the Court was there considering was whether a Judge sitting alone was entitled to exercise the function of the High Court in its appellate jurisdiction. Such a delegation to a single Judge could only be effected by a rule or rules of the High Court, and there was no such rule, so that the order made was in the exercise of a jurisdiction which the Judge. could not lawfully exercise. The local jurisdiction of the Judge on the original side being confined to the limits of the Town and Island of Bombay, an order for stay of a suit in a subordinate Court in the mofussil appertains to the appellate side of the High Court, and the jurisdiction on the appellate side is, according to the rules, unless otherwise provided or ordered, to be exercised by a Division Court consisting of two Judges. The exorcise of the jurisdiction of the Court in testamentary and intestate matters is assigned to a Judge for convenience in the due administration of justice, but there is no rule which lays down that the functions of such a Judge can be exercised by that Judge alone, and no other. In fact, as I have

already pointed out, Rule 58 vests the whole or part of the jurisdiction vested in the original side of the Court in every Judge, subject to the division of work mentioned in Rule 60.

6. It was next argued that an order made by a competent Court in the exercise of its probate jurisdiction, or the testamentary and intestate jurisdiction, is a judgment in rem under Section 41 of the Indian Evidence Act and is filial, until it is set aside. Section 273 of the Indian Succession Act lays down that probate shall be conclusive as to the representative title against all debtors of the deceased, and probate granted by a High Court shall have the effect mentioned in the section throughout the whole of British India, unless otherwise directed by the grant. When probate is granted, it operates upon the whole estate and establishes the will from the death of the testator. Probate is conclusive evidence not only of the factum but also of the validity of the will. Plaintiffs now seek to revoke the probate in a suit filed on the original side. There are no doubt other reliefs also in this suit which the Court on its original side can grant; but they depend upon the revocation of the probate. Unless probate is revoked for "just cause" under Section 263 of the Indian Succession Act, the Court cannot give a declaration that the will is null and void, that the plaintiffs are the heirs of the deceased, and that the estate should be handed over to them. So long as the probate is unrevoked, this Court cannot declare the plaintiffs to be the heirs of the deceased. They can only be heirs as on an intestacy, and probate being granted, the will is established, and there is no intestacy. It is, therefore, in my opinion, incumbent on the plaintiffs before proceeding further to have the grant revoked. The question is whether the plaintiffs can have the grant revoked by this Court, that is, the Court sitting on the original side. It was held in *Komollochun Dutt v. Nilruttun Mundle*[10] that where it was alleged that a probate had been wrongly granted, the proper course to pursue was to apply to the Court which granted the probate to revoke it. The grant must be contested before the Court sitting as a Court of Probate and not in the exercise of its ordinary civil jurisdiction. It was pointed out by Mr. Justice Markby at p. 363 that "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." It must also be remembered that under Section 296 of the Indian Succession Act when the grant is revoked, the person to whom the grant was made has to return it to the Court which made the grant. Counsel for the defendant relied on *Kishorbhai Revadas v. Ranchodia Dhulia*[11] but there it was held that the District Court was competent to decide questions of fraud or collusion vitiating the grant of probate and alone had jurisdiction to revoke the probate, and the subordinate Court had no jurisdiction in probate matters. *Similarly in Sheoparsan Singh v. Ramnandan Singh*[12] it was held that the will having been affirmed in a Court exercising appropriate jurisdiction, the propriety of that decision could not be impugned by a Court exercising any other jurisdiction. Probate was there granted by the

District Judge of Mozufferpur, and the suit was filed in the Court of the Subordinate Judge for a declaration that the plaintiffs were the nearest reversionary heirs of the deceased in order that that declaration may enable them to apply for revocation of the letters of administration. The suit was for a declaration under Section 42 of the Specific Relief Act, and it was held that it was misconceived because so long as the probate stood, the plaintiffs were not entitled to any legal character or any right to property as required by Section 42 of the Specific Relief Act. The Court was, therefore, incompetent to proceed with the hearing and determination of the suit, and it was dismissed. In *Annada Charan Mondal v. Atul Chandra Malik*[13] it was held that a civil Court had no jurisdiction to declare the grant of letters of administration null and void. The only "proper Court" to set aside the grant was the probate Court. Even, therefore, if this Court sitting on the original side has jurisdiction to deal with the question of revocation of probate, the Court will not exercise it, as it is not the "proper Court". In the same judgment of the Privy Council there is a remark by Sir Lawrence Jenkins at p. 97 that "it is not suggested that in this litigation the testamentary jurisdiction is, or can be, invoked, and yet there can be no doubt that this suit is an attempt to evade or annul the adjudication in the testamentary suit, and nothing more". In the present suit there is also an attempt to annul the grant of probate, and therefore the proper course for the plaintiffs was to have applied to the "proper Court", that is, the Court which deals with testamentary and intestate matters in the High Court. In England if a suit was filed in a wrong division, the suit was not liable to be dismissed, but if it could be transferred, the proper course was to transfer it to the appropriate division. The English law and English procedure are of course only a guide to our Courts in India. It has been held by the Privy Council in *Ramanandi Kuer v. Kalawati Kuer*[14] that testamentary cases must be decided in India with reference to the relevant provisions of the Indian legislature uninfluenced by considerations derived from the English law on the subject, but Rule 639 of the High Court Rules provides that when necessary the practice and procedure of the Probate Division of the High Court of Justice in England shall be followed. In my opinion this suit cannot be transferred to the Court dealing with testamentary and intestate matters, nor can the one relief appropriate to that division be so transferred. It was argued by counsel for the plaintiffs that such a course would lead to multiplicity of proceedings, and the estate was small; but, in my opinion, the plaintiffs are themselves to blame for having come to the wrong side of the High Court for relief in respect of the revocation of probate. Legal proceedings have to be localized in the proper Courts, and to be taken on the proper side. Moreover, the procedure for revocation of probate is not by suit, but by petition. However small the estate may be, there can be no question of denial of justice, because the plaintiffs can file a petition on the testamentary and intestate jurisdiction and establish the very facts on which they rely in the suit for revocation of probate.

7. The conclusion to which I have arrived is that the plaintiffs should, take the necessary

proceedings, if so advised, to have the probate revoked by the Court in the exercise of its testamentary and intestate jurisdiction by filing a separate petition; the petition to be filed within a week. This suit will be stayed and the notice of motion adjourned. liberty to the parties to apply to have the suit set down for hearing and final disposal and to bring on the notice of motion in default of proceedings being taken as aforesaid; in the event of proceedings being taken to have the suit so set down within a week after the Court sitting on the testamentary and intestate jurisdiction has pronounced judgment on the petition for revocation.

8. I have heard counsel on the question of costs of this hearing on the preliminary point. On the one hand the plaintiffs have adopted proceedings in the wrong Court by praying for revocation of probate amongst the reliefs sought in a suit filed on the original side. On the ether hand I am of opinion that the suit is not liable on that ground to be dismissed as was contended by counsel for the defendant. The fairest order for costs that I can make is that the plaintiffs do bear their own costs of this hearing. The costs of the defendant will be costs in the cause.

Cases Referred.

1(1789) 3 T.R. 125, 130
2(1864) 3 H. & C. 193, 204
3[1921] 2 A.C. 438, 447
4(1877) 6 Ch. D. 98
5(1878) 10 Ch. D. 372
6(1884) 26 Ch. D. 656
7[1911] A.C. 688, 692
8(1932) O.C.J. Suit No. 2490 of 1923
9(1915) I.L.R. 39 Bom. 604, s.c. 17 Bom. L.R. 655, F.B
10(1878) I.L.R. 4 Cal. 360
11(1914) I.L.R. 38 Bom. 427, s.c. 16 Bom. L.R. 459
12(1916) L.R. 43 I.A. 91, s.c. 18 Bom. L.R. 397
13(1919) 23 C.W.N. 1045
14(1927) L.R. 55 I.A. 18, s.c. 30 Bom. L.R. 227