ORISSA HIGH COURT

Shanti Devi Agarwalla

Vs

Kusum Kumari Sarkar

Civil Revn. No. 373 of 1970

(R.N. Mishra, J.)

16.09.1971

JUDGMENT

R.N. Misra, J.

1. In a pending probate proceeding (O.S. No.25 of 1966) before the learned District Judge of Cuttack an application was made by the petitioner purporting to be under Order 1, Rule 10, Civil Procedure Code read with Section 268 of the Indian Succession Act, 1925 to be added as a party and enter caveat. The learned District Judge has refused leave to the petitioner. Hence this revision.

2. The historical background of the case may now be furnished in order to appreciate the point required to be decided. One Adhar Chandra Sarkar owned properties located in the town of Cuttack and at Sundargarh. He died on 5-6-62, Kusum Kumari Dasi, opposite party No.1, admittedly was the wife of Adhar. Sakuntala, opposite party No.2, claims to be, the second wife. Her status as wife has, however, not been admitted by Kusum Kumari. Adhar is said to have left behind two wills - one executed on 5-4-62 which is registered document and the other is dated 23-5-62 and it is not registered. Sakuntala applied for probate of the registered will. Her application was registered as O.S. No.16 of 1965. Kusum Kumari similarly applied for probate of the unregistered will and her application was registered as O.S. No.25 of 1966. The registered will has been marked as Ext.2 and the unregistered will as Ext.C. The material difference between the two wills both of which were executed within a period of about two months before the death of the testator and with a gap of about seven weeks between the two inter se may now be noticed. Ext.2 provides that all the immovable and movable properties at Cuttack as also the property at Sundargarh acquired by Adhar in the name of the minor son through Sakuntala would go to her and her son, and the rest of the immovable properties as also movables at Sundargarh would so to Kusum Kumari. Ext.C makes provision that the residential house at Jagannath Ballav in the town of Cuttack along with movables as also the homestead described in schedule Ka would go to Sakuntala and her son. They would be given maintenance at the rate of Rs.15/- per month out of the income of the other properties of the testator. All the remaining properties of Adhar are to go to Kusum Kumari. There is some difference in the description of Sakuntala in the two documents. In the registered will she has been described as the wife while in Ext.C she seems to have been referred to as the keep. On 27-10-64, Sakuntala sold the house at Cuttack to

the petitioner for a sum of Rs.20.000/-. Ext.C was disputed to be forged and it was sent out to an expert for examination. The expert sent his report, but when he was to be examined he demanded a heavy fee. Ultimately by consent of the parties on 10-7-68 a fresh expert was required to examine the document. On 10-9-68, Sakuntala applied for withdrawal of her probate application. The learned Trial Judge refused leave for withdrawal. That matter and a connected matter were subjected to revisions before this Court in C.R. Nos.140 and 141 of 1969. By decision dated 18-2-70, I vacated the order of the learned District Judge and granted leave to Sakuntala to withdraw her petition. My judgment is reported in AIR 1971 Orissa 103. Soon after Sakuntala made an application for withdrawal of her probate petition the petitioner made an application on 16-9-68 to the court for leave to be added as a party and for permission to enter caveat. That application has now been rejected and the order rejecting the application is impugned in this revision.

3. Mr. N. Mohanty for the petitioner contends that the petitioner has a substantial stake in the property and she must be found entitled to resist grant of probate of the will (Ext.C). If Ext.C is accepted as a genuine will of Adhar and probate is granted to that document, her vendor's title to the property would stand negatived and her title to the property under the registered sale deed dated 27-10-64 would stand in jeopardy. Thus she is entitled, according to Mr. R. Mohanty, to enter caveat and contest probate of Ext.C. Answering the objection regarding delay he has contended that there is sumptuous evidence on record to show that Sakuntala, opposite party No.2, was contesting the proceeding with the consideration money of the sale deed and as the vendor was litigating to support her own title thereby supporting the title of the vendee there had been no justification for the petitioner to directly appear in the case. It was only when the petitioner found that the opposite party No.2 was won over and was no more pressing her own title that she wanted to be brought on the record. Even if that is at a belated stage, in the circumstances she cannot be kept out of the proceeding on the basis of delay.

4. Mr. D. Mohanty for the opposite party No.1 contends that the petitioner is not a person in respect of whom under provisions of the Indian Succession Act general or special citation could have been made and. therefore, she must not be found to be competent to enter caveat. The ambit of enquiry in a probate proceeding is limited and the question of title of a third person cannot be allowed to be raised in a probate proceeding thereby enlarging the litigation. He next contends that the evidence in the case is already over and to allow the petitioner to get into the litigation at such a stage would virtually amount to reopening of the dispute and thereby prejudicing the opposite party No.1.

5. In view of these contentions two questions really arise for determination:-

(1) Is the petitioner entitled to enter caveat? And
(2) Should caveat be permitted to be entered at the present stage of the proceeding?

Whether a creditor or heirs at law can enter caveat during probate proceedings in response to general citation came to be dealt with by my Lord the Chief Justice in *(Rao and Sons v. Chandramoni Dei*[1]). His Lordship quoted the dictum of the Privy Council in *(Sarala Sundari v. Dinabandhu Roy*[2]) where it had been said.

"It is suggested that it is only those persons who could be cited before the grant of probate

> who are the persons who could apply to revoke the probate. In their Lordships' view that is putting it on much too narrow a footing. One of the grounds for revoking probate is that the grant was obtained fraudulently by making a false suggestion which obviously covers the case of putting forward a forged will just as (C) would cover the case of a person putting forward a forged will even if when he or she propounded it, he or she did not know it was a forged will. In dealing with the first point that the grant was obtained fraudulently, it appears to their Lordships to follow as a matter of course that if a person is complaining that he has in fact been defrauded, he is one of the persons who is injured by the fraud alleged and that person is entitled to have his redress by applying to revoke the probate and thereby cause the fraud to become inoperative. If he had not such a right as that, it is very difficult to know what right a creditor in those circumstances or a person injured by the fraud could have. Otherwise, the probate would stand and he would be affected by the probate which had been obtained ex hypothesis fraudulently. That is the view which was taken by their Lordships in *Raja Nilmon Singh Deo v. Umanath Mookherjee*[3]. It has been followed since in Calcutta and their Lordships feel satisfied that in this case the applicants for revocation had every ground for applying and had a proper locus standi to come into Court and ask that the probate should be revoked."

On the basis laid in the decision of the Judicial Committee my Lord the Chief Justice, proceeded to state.

> "The aforesaid Privy Council decision is, therefore, a final authority in support of the proposition that the creditors of the heirs at law can ask for revocation of the probate on the ground that the will was forged. In principle, it makes no difference whether they ask or revocation or they lodge caveat in response to a general citation."

That was a case of a creditor. The case in hand is one of a purchaser of a part of the property covered by the will of the testator. As far as facts are concerned, there is no dispute that if Ext.C is probated the title of the petitioner by virtue of the sale obtained from the opposite party No.2 would be in jeopardy. Under Ext.2 the other registered will the opposite party No.2 had right to the house. Probate of that will has no more been pressed and. therefore, the title of the opposite party No.2 by virtue of that will is not being considered. It has been alleged even by the present petitioner in her application before the probate Court that Ext.C is a forged will. Section 263 of the Indian Succession Act provides the five grounds upon which revocation of probate can be asked for. As indicated in the decision of the Judicial Committee the third ground is in relation to a forged will. The third illustration is also to the following
effect:-

> "The will of which probate was obtained was forged or revoked-"

The only point for examination is as to whether a person like the petitioner can have locus standi to enter caveat. Mr. R. Mohanty has referred to a number of decisions to support his contention that the petitioner must be taken to have sufficient interest in contesting probate of Ext.C. In

(Nobeen Chunder Sil v. Bhobosoonduri Dabee[4]) a Bench of that court was dealing with maintainability of the caveat by a decree-holder against the son of the testator who had obtained attachment of some property which was the subject matter of the will. There were also two others who were seeking to enter caveat because under a mortgage executed by two sons of the testator they had the interest of the mortgagees of a part of the immovable properties left by the testator. Dealing with the maintainability of caveat by such persons it was said:

> "In the search which I have been able to make in the English reports and text-books, I can find no cases, and therefore no decision, in which persons standing to the deceased's estate in the relation in which the appellants respectively stand have entered caveat or applied to revoke grants. Probate and administrations in England only affect personal property, and no title to such property can be made without the act of the executor or administrator. It is plain that mortgages by the next-of-kin of their shares in the deceased's personal estate, before distribution of the assets by the executor or administrator if they ever occur there, must be of extreme rarity. It is almost beyond the bounds of probability that a party would before probate take from the next-of-kin an assignment of their interest in the estate as upon an intestacy or that, if he did, he would not fortify his title by making the next-of-kin execute a power-of-attorney authorising him to oppose probate in their name. In this country, however, probate has effect over all the property of the deceased, both moveable and immoveable, and everything that is capable of assignment is, according to the habits and practice of the people of this country, constantly being assigned, quite irrespective of whether the title is inchoate or imperfect, doubtful or bad. It cannot be disputed that the appellants have a direct interest in disputing the will. They allege that the will is a forgery and has been concocted for the purpose of overriding their mortgage and attachment."

In *(Komollochun Dutt v. Nilruttun Mundle[5])* a Bench of that Court was dealing with the case of a purchaser from the next-of-kin of the testator as in the present case. It was held:

> "The point is not directly before us, but as at present advised, we think that the plaintiff could apply to revoke the probate. He is interested by assignment in the estate of the deceased, and if there be no will, he has a good title, at any rate, as against Komollochun, as far as the will is concerned. Whether the sale
> by the widow Bogolamove would be good as against the reversioners, does not
> appear to have been raised and tried. We do not therefore see why he should not apply to revoke the probate. The ground of the decision in *Baijnath Shahai V. Desputty Singh* [6]was, that the party there, a creditor of one of the next-of-kin, had no interest in the estate of the deceased, (now not accepted in this Court as already indicated). A purchaser from the next of kin is in a very different position from a creditor. If we thought that that decision went as far as to hold that a purchaser or an attaching creditor could not apply for revocation of a probate, we should, as at present advised, refer the point to be settled by a Full Bench, because we should disagree from such a ruling."

On the aforesaid authority it would follow that a purchaser like the petitioner has an interest. In *(Rahamatullah Sahib v. Rama Raul*[7] it was held that proof of a former will of the testator in which the defendant is interested is a sufficient interest to contest the will set up. Although the opposite party No.2 has not pressed Ext.2 for probate, for the purposes of resisting the claim under Ext.C. Ext.2 can now be relied upon by the petitioner at least for sustaining her title following the will. In *(Lalit Mohan Bhattacharjee v. Navadip Chandra Kaparia*[8]*,* Maclean C.J. and Banerjee, J. were dealing with a case of this type. A testator left behind two sons as his heirs and from the date of the father's death upto the time the letters of administration were granted the two sons had dealt with the property as his heirs and at no time they had disclosed the will. They had mortgaged and sold the property and dealt with it entirely as their own. One of the purchasers asked for revocation of the letters of administration. The locus standi to apply for revocation was in issue, Maclean, C.J. stated:

> "Under these circumstances, the only question submitted for our decision is. whether the applicant had any locus standi to apply for revocation of these Letters of Administration. I think he had. He stood virtually in the shoes of the two sons, who claimed to be the heirs, and who had dealt with the property, as the sole owners of it. The applicant was the purchaser from the heirs and. if the heirs could have applied for revocation of the Letters of Administration, I do not see why the purchaser could not do so, he being in the same position as they were. He was not in the position of an ordinary creditor, but was the purchaser from the heirs. I think, therefore, that if the heirs were entitled to sue for revocation of the Letters of Administration, the purchaser from them had a locus standi to make a similar application."

In the present case the petitioner must be treated to have stepped into the shoes of the opposite party No.2 and if the opposite party No.2 was entitled to enter caveat certainly the petitioner would. She has in fact stepped into the shoes of the opposite party No.2. In this case because the purchaser, has been given a higher right than the creditor and as the creditor is now being entitled to enter caveat, the purchaser would necessarily have that right.

6. Sir Ashtosh Mookerjee, J. and Vincent, J. in *(Brindaban Chandra Sana v. Sureswar Saha Paramanik*[9]*)* have stated that any interest, however
slight and even, it seems, the bare possibility of an interest, is sufficient to entitle a
party to oppose a testamentary paper or instrument. Another Bench of the Calcutta High Court in *(Nabin Chandra Guha v. Nibaran Chandra Biswas*[10]) after resorting to a number of cases stated the legal position thus:-

> "It is difficult to say that the Appellant (a purchaser) does not fulfil this requirement. The purchase that he had made stands the chance of being affected if the terms of the Will were effective at the date of the suit: for then in certain events and circumstances that he purchased might be held to be only the right, title and interest of the judgment-debtor and not the holding itself. A purchaser from an heir after the death of the testator has a locus standi and to have it, it is not necessary for the objector to show that he had an interest in

the estate at the time of the testator's death. So also it has been held that an assignee from an heir of the testator after the latter's death has locus standi to apply for revocation of a probate already granted."

In view of this state of authorities on the point in question I have no doubt in my mind that the petitioner is a person entitled to enter caveat. The learned District Judge went wrong in holding that she was not so entitled.

7. The next question for consideration is as to whether her application should fail because she came at a belated stage. Mr. R. Mohanty has contended, as I have already indicated, that the petitioner's interest was being properly looked after and guarded by the opposite party No.2. It was only when she intimated to the court of not pressing her probate petition that the petitioner thought it necessary to come on the record to protect her own interest. This really affords the true explanation as to why the petitioner had not come on the record at any earlier point of time.

8. In view of what I have already said about locus standi of the petitioner, even if the probate is now granted by keeping out the petitioner from contest she would be competent to ask for revocation of the probate. It would unnecessarily give rise to a fresh litigation. I think in the interests of justice and also advantage to the parties, and to avoid that future litigation it would be better to have the entire matter litigated in the present probate proceeding. Introduction of the petitioner into the arena of contest at this stage might mean prolongation of the proceeding at the trial stage. But it would certainly be less cumbersome than allowing an entirely fresh proceeding on the basis of the praver for revocation of the will. The petitioner's stake is large and she would certainly not remain content after probate of Ext.C is granted. I remember Mr. R. Mohanty to have reiterated at the Bar during hearing of this application that even if she is kept out now it would only mean a fresh proceeding for revocation. In the circumstances I think it appropriate to allow the petitioner to enter caveat by being brought on record on the basis of her application under Order 1, Rule 10 Civil Procedure Code This, however, will have to be made on terms of costs and the learned District Judge, in case costs paid, must permit the parties to lead such further evidence as they seek to lead and in his opinion are relevant. I would allow this application, set aside the order of the learned District Judge and permit the petitioner to enter caveat on condition that she would pay a consolidated sum of Rs.300/- to the
opposite party No.1 within six weeks from today. If the payment is made in this Court and is duly certified, the record shall go back to the learned District Judge for giving effect to the directions in the revision petition. On the other hand if there is default in payment of the costs now ordered, this revision application shall be deemed to have been dismissed and no further action would be necessary. The Deputy Registrar is called upon to take note of these directions.
Petition allowed.

Cases Referred.

[1]AIR 1971 Oris 95
[2]2AIR 1944 PC 11
[3](1882) 10 Ind App 80 (PC)
[4](1881) ILR 6 Cal 460
[5](1879) ILR 4 Cal 360
[6]((1876) ILR 2 Cal 208)

[7](1894) ILR 17 Mad 373
[8](1901) ILR 28 Cal 587
[9](1909) 10 Cal LJ 263
[10]36 Cal WN 635