Calcutta High Court
Dwijendra Nath Purkayastha vs Golok Nath Sarma Purkayastha on 30 July, 1914
Equivalent citations: 28 Ind Cas 574
Bench: A Mookerjee, Beachcroft
JUDGMENT

1. This appeal is directed against the grant of probate of a Will alleged to have been executed by one Janakinath Sarma on the 9th September 1901, the day previous to that of his death. Janaki, who was one of a family of four brothers, left a widow Sushila, who was at the time 14 years of age, and a boy, Dwijendra Nath, only two months old. By the Will, his brothers Golok Nath, Baikuntba Nath and Mathura Nath were appointed successive executors. On the 10th February 1901, Goloknath applied for probate of the Will. Citations were issued upon Baikuutha and Mathura Nath as also upon Sushila and Dwijendra Nath. There was no opposition and probate was granted on the 13th March 1902. On the 22nd December 1911, Dwijendra Nath, still an infant, made the present application through his mother, Sushila, for revocation of the probate on the allegation that the alleged Will had not been executed by his father. The District Judge was satisfied upon the evidence that notices had not been properly served upon Sushila and Dwijendra Nath, and held that the matter should be re-opened; but without formally revoking the probate, as he should have done, he called upon the executor to prove the Will in the presence of the objector. Witnesses were then examined, and the District Judge came to the conclusion that the original grant should not be revoked. The present appeal is directed against that order.

2. Before we deal with the case on the merits, we must examine a special ground assigned by the respondent in support of the order of the Court below, namely, that the application for revocation should not have been entertained inasmuch as citations wore issued upon Sushila and Dwijendra Nath, and notwithstanding the service of such notice, there was at the time no opposition on their part to the grant of the probate. In support of this argument, reliance has been placed upon the cases of Brinda Chowdhrain v. Radhica Chowdhrain 11 C. 492 and Durgagati Debi v. Saurabini Debi 33 C. 1001 : 10 C.W.N 955. It need net be disputed that if a party is cognizant of the proceedings for Probate or Letters of Administration and chooses to stand by and allow the proceedings to be concluded in his absence, he will not be allowed to come in afterwards and have the grant revoked or the proceedings re-opened. This principle has been repeatedly recognised in this Court: Komollochan Dutt v. Nil ruttun Mundle 4 C. 360 : 4 C.L.R. 175 : 2 Shome L.R. 126; Brinda Chawdhrain v. Radhica Chowdhrain 11 C. 492; Nistarini Dabya v. Brahmomoyi Dabya 18 C. 45. In the goods of Bhugobutty Dasi 27 C. 927 : 4 C.W.N. 757 and Durgugati Debi v. Saurabini Debi 33 C. 1001 : 10 C.W.N 955. This is in the accord with the rule followed in England: Newell v. Weeks (1814) 2 Phillim. 224; Ratcliffe v. Barnes (1862) 2 P. & Sw. & Tr. 486 : 31 L.J.P. 61 : 8 Jur (N.S.) 313 : 6 L.T. 658; Wytcherley v. Andrews (1871) 2 P. & D. 327 : 40 L.J.P. 57 : 25 L.T. 134 : 19 W.R. 1015; Bell v. Armstrong (1882) 1 Add. 372. But in In the goods of Bhuggobutty Dasi 27 C. 927 : 4 C.W.N. 757, Ameer Ali, J., pointed out that even in cases where a party has upon notice failed to appear and contest the proceedings, the Court may for sufficient reason allow the proceedings to be reopened; Young v. Holloway (1895) P.D. 87 : 64 L.J.P. 65 : 11R. 596 : 72 L.T. 118 : 43 W.R. 429; Peters v. Tilly (1886) 11 P.D. 145 : 55 L.J.P. 75 : 35 W.R. 183; Ritchie v. Malcolm (1902) 2 I.R. 403 : 36 I.L.T.R. 56 : 6 Irish Law Reports 783. The principle, however, that a party who is cognizant of the proceeding's

and might have intervened, is bound by their result and cannot be allowed to re-open them, has manifestly no application to the circumstances of the case before us. Here the person affected by the Will was the infant son of the testator, lie was, at the time of the issue of the citation, a child a few months old; his mother also was a minor, incompetent in law to act as his guardian. Service of notice upon them was wholly useless for the protection of the interest of the infant.

3. The object of the issue of a citation is that all persons whose interests are or may be adversely affected by the decree of the Probate Court should have notice of the proceedings, and an opportunity, should they choose to avail themselves of it, of intervening for the protection of their interests. This purpose is clearly not achieved merely by issue of citations to infants. From this point of view, the opinion was expressed in Walter Rebells v. Maria Rebells 2 C.W.N. 100 and Shoroshibala v. Anandamoyee 12 C.W.N. 6 that in these circumstances the proper course for the propounder of the Will to follow is to have a guardian ad litem appointed for the infant concerned. [Mortimer on Probate, p. 535.] It is plain, however, that there may be eases where such a course may be impracticable, or, if adopted, may not afford sufficient protection to the infant. This is well illustrated by the case before us. The son of the testator was an infant; his mother was a minor: neither could, in law, take steps in Court for his or her protection. The three uncles of the infant were named as successive executors in the Will and their interest was clearly adverse to that of the infant. Whether the appointment of an officer of the Court as guardian of the infant son would have really afforded him any protection, is more than doubtful: a stranger to the family, not cognizant of the surrounding circumstances, could hardly make an adequate defence. The propounder of the Will, who obtains probate in these circumstances, takes the obvious risk of an a implication for revocation by the infant when he comes of age, or, possibly earlier, as here, through his guardian. In our opinion, the District Judge has correctly held that the Will must be proved by the executor in the presence of the appellant. The only defect in his order is one of form and not of substance, namely, that he did not revoke the grant and then call upon the executor to prove the Will: Brindaban v. Sureshwar 3 Ind. Cas. 171 : 10 C.L.J. 263; Durgagati v. Surabini 33 C. 1001 : 10 C.W.N 955. This defect, however, has not prejudiced, either party, as the executor and the objector have both produced evidence in support of their respective cases.

4. As regards merits, we are of opinion, after an anxious consideration of the circumstances of the case, that the order of the District Judge cannot be supported. The real controversy between the parties is, whether the testator had testamentary capacity at the time when he is alleged to have executed the Will. It is proved that he had been ill of fever for at least two weeks before his death, and complications had supervened. Of the many witnesses to the Will, only two (inclusive of the scribe) have been examined; no explanation has been offered why the others have not been called. There is also the significant fact that the Kabiraj who attended on the deceased during his last illness has not been called. The onus was upon the executor to establish that the deceased had sound and disposing mind at the time when he is said to have executed the Will: Waring v. Waring (1848) 6 Moore P.C. 341 : 12 Jur. 947 : 13 E.R. 715 : 79 R.R. 73. On this question, the evidence of the medical attendant would naturally have been of great value, and it is a matter for legitimate comment that he has not been cited. We have, on the other hand, evidence on the side of the objector that for two or three days before his death, Janakinath was unconscious, and although he now and then responded to questions put to him, his mental faculties had been greatly impaired. This fact alone will induce

the Court to scrutinize with care and caution the evidence of execution of the Will. But we have here the additional fact that the Will contains a somewhat singular provision, namely, that the executor would not be responsible to the beneficiary for the accounts of the estate. The testator also assumes sole responsibility for debts which stood in the names of his brothers and would, in ordinary course, be payable by them as they had separated from him. It is further clear that one of the brothers, Baikuntha, took a leading part in the preparation and execution of the Will. Circumstances like these, as the Judicial Committee observed in Dufaur v. Croft (1840) 3 Moore P.C. 136 : 13 E.R. 59 and Harwood v. Baker (1840) 3 Moore P.C. 232 : 13 E.R. 117 : 50 R.R. 37 will rouse the vigilance of the Court, and the Court, before pronouncing for the Will, must be satisfied beyond all reasonable doubt that the testator was fully cognizant of its contents, and in a condition to exercise, and did exercise, thought, judgment and reflection respecting the act he was doing. On the evidence taken as a whole, we are unable to say in the present case that this has been established. But we may add that though the main point in controversy between the parties was the mental condition of the testator at the time of the execution of the Will, the genuineness of the signature in the Will is not admitted by the objector. In view of the opinion we have already expressed upon the question of testamentary capacity, it is needless, however, to consider whether the Will was actually executed by the deceased.

5. The result is that the appeal is allowed, the decree of the District Judge discharged and the application of the 10th February 1002 for probate of the alleged Will of Janakinath Sarma dismissed. Each party will bear his own costs both here and in the Court below.