Supreme Court of India
Mrs. Hem Nolini Judah (Since ... vs Mrs. Isolyne Sarojbashini ... on 16 February, 1962
Equivalent citations: 1962 AIR 1471, 1962 SCR Supl. (3) 294
Author: K Wanchoo
Bench: Wanchoo, K.N.

PETITIONER:
MRS. HEM NOLINI JUDAH (SINCE DECEASED) AND AFTER HER LEGAL

Vs.

RESPONDENT:
MRS. ISOLYNE SAROJBASHINI BOSEAND OTHERS

DATE OF JUDGMENT:
16/02/1962

BENCH:
WANCHOO, K.N.
BENCH:
WANCHOO, K.N.
GAJENDRAGADKAR, P.B.
SARKAR, A.K.

CITATION:
1962 AIR 1471 1962 SCR Supl. (3) 294

ACT:
Will-Probate-Letters of Administration-Establishment of right-Legatee-Other persons claiming under legatee -Bar of claims-Probate proceedings-Title-Not determined-Res-judi-cata-Estoppel-Indian Succession Act, 1925(39 of 1925), ; 213 (1)-Code of Civil Procedure, 1908 (Act, 5 of 1908) 8. 11-Indian Evidence Act, 1872 (1 of 1872), s. 115.

HEADNOTE:
One Dr. Miss Mitter who owned a house died leaving her mother and three sisters. The plaintiff respondent filed -a suit for a declaration that she was the owner of the house. Her case was that the deceased gave the house to Mrs. Momin another sister) by a will and Mrs. Momin in turn gifted the (house to the plaintiff. The case of Mrs. Judah, the defendant appellant was that Dr. Miss Mitter had bequeathed the house by a will in favour of her mother who in turn bequeathed the house to her by a will. Admittedly no probate of either of the wills alleged to have been made by Dr. Miss Mitter was taken out. The another died and it was alleged
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that she had executed three wills one in favour of each of

three daughters. Applications were filed by each of the daughters for letters of administration each claiming that the will in her favour was the last will of Mrs. Mitter. Each of the alleged wills include the house in question among the properties of the deceased. The application of the was granted while the other two application were Appeals were filed by the two sisters whose application were rejected. The appellate court while rejecting their claims for granting letters of administration in favour of the present appellant. The, appellant thereupon appealed to the Privy Council and; the Privy Council allowed her appeal. The respondent then filed the suit out of which the present appeal has arisen claiming a declaration that she was the owner of the house in whole or to the extent of two-thirds. The trial court found the defendant-appellant became the owner of the house under the will of Mrs. Mitter and the suit of the plaintiff-respondent was barred by res-judicata and estoppel. The plaintiff-respondent took the matter -in appeal to the High Court. The High Court held that as the will of Dr. Miss Mitter in favour of her mother was not probated the latter did not acquire the house under the will and therefore the mother alongwith her three daughters took equal share in the house. Since the appellant got the mother's share under her will and she had got one fourth share of the house in her own right she was entitled to one half share of the house in all. The appellant has come upto this Court on a a certificate granted by the High Court. Apart from the pleas of res-judicata and estoppel the appellant contended that it was not necessary to obtain probate of the will of Dr. Miss Mitter in favour of her mother in order to success. fully claim the house under the will of her mother in her favour.

Held, that s. 218 of the Indian Succession Act is a have to the establishment of any right under a will by an execution or legatee unless probate or letters of administration have been obtained. This bar operates irrespective of the fact that the right is claimed by a plaintiff or a defendant in suit. The bar, is not restricted only to cases in which the claim is made by a person directly claiming as a legatee of executor but it applies also to any person who might find in necessary in order to establish the right of some legatee of executor from whom he might have derived title.

Questions of title are not decided in proceedings for the grant of probate or letters of administration and therefore the decision given ill such proceedings cannot operate a

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res-judicata in subsequent proceedings relating to the dispute title.

Estoppel can arise as is clear from s. 115 Evidence Act when one person has by his declaration, act, or omission intentionally caused or permitted another person to believe a thing to be true and to act on such belief. No estoppel arose in the present case on the facts.

Ghanshamdoss v. Gulab Bi Bai, (1927) I. L. R. 50 Med. 927, approved.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 273 of 1959. Appeal from the judgment and decree dated January 17th 1957, of the Allahabad High Court it (Lucknow Bench) at Lucknow in first Civil Appeal No. 16 of 1950.

Sarjoo Prasad, E. Udayarathnam and S. S. Shukla, for the appellant.

C.B. Agarwala and D. N. Mukherjee, for respondent No. 1. 1962. February 16. The Judgment of the Court was delivered by WANCHOO, J.-This appeal on a certificate granted by the Allahabad High Court arises out of a suit filed by Mrs. Bose (plaintiff-respondent) by which she claimed a declaration that she was the owner of house No. IO') Ghasiari mandi Road, Lucknow, or in the alternative a declaration that she was the owner of two-thirds of the house. The previous history of litigation with respect to this house is relevant and may be set down. The house originally belonged to Dr. Miss - Mitter, who died in July 1925. At the time, of her death she left three sisters, namely, the appellant Mrs. Judah, the plaintiff-respondent Mrs. Bose and the defendant- respondent Mr. Momin, and her mother Mrs. Mitter. The plaintiff's case was that Dr. Miss Mitter had made a will in favour of Mrs. Momin in April 1921 by which she gave. the whole house to her. Mrs. Momia in turn made a gift of the house to the plaintiff who thus became the Owner of the house. The defence of the appellant on the other hand'was that Dr. Miss Mitter had executed a will in June 1925 bequeathing the house to her mother Mrs. Mitter. Subsequently the mother made a will in favour of the appellant in April 1930. It appears that no probates of the two alleged wills by Dr. Miss Mitter of April 1921, and June 1925 were taken out. It appear,,; further that Mrs. Mitter was living in this house when she died in 1934. On her death three wills alleged to have been made by her -were propounded one in favour of each of her three daughters, namely, Mrs. Bose, Mrs. Judah and Mrs. Momin Applications for letters of administration were made by the three sisters each claiming that the will in her favour was the last will of Mrs. Mitter, and among the property left by Mrs. Mitter by the three wills was included the house in dispute. Farther the house in question was also shown in the' applications Made by the three sisters for letters of administration of the alleged wills in their favour. Letters of administration were granted to the appellant while the applications of Airs. Bose and Mrs. Momin were dismissed. This was followed by appeals to the then Chief Court of Oadh. The said Court rejected the appeals of Mrs. Bose and Mrs. Momin and thus their applications for letters of administration on the basis of

-the wills propounded by them stood finally dismissed. The Chief Court however allowed them against the grant of letters of administration the appellant and dismissed -her application also. The matter was then taken before their Lordships of the Privy Council by the appellant and in 1945 the appeal of the appellant was allowed and the decree of the Chief Court was set aside and that of the trial judge granting letters of administration to the appellant was restored.

In the meantime, however, certain other events had transpired. In 1942, Mrs. Bose filed a suit for partition. This suit was still pending when the Judicial Committee of the Privy Council allowed the appeal of the appellant in March 1945. So in December 1945 Mrs. Boge made an application to withdraw the partition suit with permission to bring a fresh suit, and she was allowed to do so on the condition that she would pay the costs of the appellant before filing the fresh suit. In July 1946 Mrs. Momin made a gift of her interest in the house in dispute in favour of Mrs. Bose. Thereafter in the same year viz., 1946, Mrs. Bose filed an application for grant of letters of administration of the will alleged to have been executed by Dr. Miss Mitter in Mrs. Momin's favour. This was objected to by the appellant and certain preliminary issues were framed in 1947; but eventually Mrs. Bose did not pursue this application for letters of administration and it was dismissed in 1948.

In the meantime, Mrs. Bose bad filed an application for the revocation of the letters of administration granted to the appellant but this was also dismissed. About the same time in September 1916, the present suit was filed by Mrs. praying for reliefs already set out. Eventually this suit was the only proceeding which was pursued to the end by Mrs. Bose.

In the trial court the case based on the will of Dr. Miss Mitter was given up and the plaintiff respondent only pressed her alternative prayer for a declaration that she was entitled to two-thirds of the house. The trial court however found that there was a will by Dr. Miss Mitter in favour of her mother, though no probate or letters of administration were taken out in that behalf The trial court also found that Mrs. Mitter made a will in favour of the appellant and that letters of administration, as already indicated, were granted to the appellant with respect to Mrs. Mitter's will by the judgment of the Privy Council in 1945. The trial judge therefore held that the appellant was entitled to the house by virtue of the letters of administration granted to her of Mrs. Mitter's will. It repelled the contention of the plaintiff-respondent that as no letters of administration were taken out of the will of Dr. Miss Mitter in favour of Mrs. Mitter, no right to the house could be established by the appellant 'on the basis of the, letters of administration granted to her. The trial court also held that the suit was barred by the principles of res judicata and estoppel. It therefore dismissed the suit. The plaintiff-respondent then went in appeal to the High Court, and the main contention raised on behalf of the respondent before the High Court was that in view of s. 213 of the Indian Succession Act, No. 39 of 1925, (hereinafter referred to as the Act), the appellant could not claim any right to the house in dispute as the will of Dr. Miss Mitter in favour of 'her mother was neither probated nor letters of administration were obtained with respect thereto. The High Court accepted this contention of the plaintiff-respondent. The High Court also negatived the other contentions raised on behalf of the appellant and allowed the appeal in part. The High Court pointer out that on the death of Dr. Miss Mitter her three sisters and mother were alive and they were entitled equally to the property left by her. But as the share of Mrs. Mitter must be deemed to have been willed" away to the appellant and as the share of Mrs. Momin must be deemed to have been gifted to the plaintiff-respondent, the plaintiff- respondent was entitled to half the house. The High Court therefore gave her a declaration that she was entitled to a half share in the house in dispute.' As the decree was one of reversal the appellant applied for and obtained a certificate to appeal to this Court; and that is how the matter has come before us.

Learned counsel for the appellant has urged only three contentions before us, namely, (i) that the High Court was not right in holding that if was necessary to obtain probate or letters of administration of the will executed by Dr. Miss Mitter in favour of Mrs. Mitter and that as neither probate nor letters of administration of that will were obtained it, was not open to the appellant is view of s. 213 of the Act to take advantage of that will; (ii) that the suit was barred by res judicata and (iii) that the plaintiff-respondent'was estopped from contesting the title of Mrs. Mitter to the, property in dispute. Re. (i).

We have already pointed out that though it was said that Dr. Miss Mitter had executed a will in favour of her mother Mrs. Mitter in June 1925 bequeathing the house in dispute to her, no probate or letters of administration were ever obtained by Mrs. Mitter. It is true that Mrs. Mitter in her turn made a will in favour of the appellant and she obtained letters of administration of that will. In that will the house in dispute was mentioned as the property of Mrs. Mitter and was bequeathed to the appellant and in the letters of administration granted to her this property was mentioned as one of the proper ties coming to her by the will of her mother. The question therefore that arises is whether it was necessary before the appellant could take advantage of the bequest in favour of Mrs. Mitter that letters of administration of the will of Dr. Miss Mitter should have been obtained by Mrs. Mitter Section 213 (1) which governs this matter is in these terms :-

> " (1) No right as executor or legatee can be established in any Court, of Justice, unless a Court of competent jurisdiction in India has granted probate of the will under which the right is claimed, or has granted letter') of administration with the will or with a copy of an authenticated copy of the will annexed."

This section clearly creates a bar to the establishment of any right under a will by an executor or a legatee unless probate or letters of administration of the will have been obtained. It is now well-settted that it is immaterial whether the right under the will is claimed as a plaintiff or a defendant ; In either case s. 213 will be a bar to any right being claimed by a person under a will whether as a plaintiff or as a defendant unless probate or letters of administration of the will have been obtained: (see Gansham- doss v. Gulab Bi Bai) (1). But it is urged on behalf of the appellant that this section Will not bar her because she obtained letters of administration of the will of her mother Mrs. Mitter under which she is claiming and that it was not necessary for Mrs. Mitter to have obtained probate of the will of Dr. Miss Mitter in her favour. Now it is not in dispute that, the grant of probate or letters of administration does not establish that the person making the

-'Will was the owner of the property which he may have given away by the, will, and any person interested in the property included in the will can always file a suit to establish his right to the property to the exclusion of the testator in spite of the grant of probate or letters of administration to the legatee or the executor, the reason being that proceedings for probate or letters of administration are not concerned with titles to property but, are only concerned with the due execution of the will. Therefore, when the plaintiff respondent contended in effect that the appellant could not establish her right to the full ownership of this property on the basis of the will of Mrs. Mitter because Mrs. Mitter had not obtained probate or letters of administration of the will of Dr. Miss Mitter, she was really contending that Mrs. Mitter was not the full owner of this property so

that (1) (1927) I.L.R. 50 Mad. 927.

she could dispose it of as she willed. The plaintiff- respondent was thus disputing the title of Mrs. Mitter to dispose of the entire disputed house by her will on the ground that Mrs. Mitter was not the sole owner of this house after the death of Dr. Miss Mitter. In order therefore that the appellant should succeed on the basis of the letters of administration of the will of Mrs. Mitter which had been granted to her with respect to this house, she had to show that Mrs. Mitter was the full owner of this house at the time she made the-will in her favour. Now the appellant could show this by other evidence; but if the appellant wanted to rely on any will of Dr. Miss Mitter in favour of Mrs. Mitter, in proof of full ownership of Mrs. Mitter of this house, it would amount to this that the appellant was saying that Mrs. Mitter was the owner of the house as the legatee under the will made by Dr. Miss Mitter. The appellant would thus be asserting the ownership of Mrs. Mitter of the whole house as a legatee, and this is what sub-s. (1) of s. 213 clearly forbids, for it says that no right as - a legatee can be established in, a Court of Justice, unless the probate or letters of administration have been obtained of the will under which the right as a legatee is claimed. It is true that so far -is the will of Mrs. Mitter in favour of the appellant is concerned, she has obtained letters of administration of that and she can maintain her right as -a legatee under that will ; but that will in her favour only gives her those properties which really and truly belonged to Mrs. Mitter, that will however does not create title in the appellant in properties which did not really and truly belong to Mrs. Mitter but which Mrs. Mitter might have thought it fit to include in the will. Therefore, as soon as the appellant, in order succeed on the basis of the will in her favour of which she obtained letters of administration, alleges that Mrs' Mitter was full owner -of the property able to will it away to her, she had to prove the title of Mrs. Mitter to the property. Now it that title rests on Mrs. Mitter's being legatee of Dr. Miss Mitter the appellant will have to prove that Mrs. Mitter bad the right as a legatee under the will of Dr. Miss Mitter. As soon as the appellant wants to prove that, s. 213 will immediately stand in her way for no right as an executor or a legatee can be proved unless probate or letters of administration of the will under which such right is claimed have been obtained. The words of s. 213 are not restricted only to those cases where the claim is made by a person directly claiming as legatee. The section does not say that no person can claim as a legatee or as an executor unless he obtains prabate or letters of administration of the will under which be claims. What it says is that no right as an executor or legateee can be established in any Court of Justice, unless probate or letters of administration have been obtained of the will under which the right is claimed, and therefore it is immaterial who wishes to establish the right as a legatee or an executor. Whosoever wishes to establish that right, whether it be a legatee or an executor himself or somebody else who might find it necessary in order to establish his right to establish the right of some legatee or executor from whom he might derived title, he cannot do so unless the -will under which the right as a legatee or executor is claimed has resulted in the grant of a probate or letters of administration. Therefore, as soon as the appellant wanted to establish that Mrs. Mitter was the legatee of Dr. Miss Mitter and was therefore entitled to the whole house she could only do so if the will of Dr. Miss Mitter in favour of Mrs. Mitter had resulted in the grant of probate or letters -of administration. 'Admittedly that did not happen and therefore s. 213(1) would be a bar to the appellant showing that her mother was the full owner of the property by virtue of the will made in her favour by Dr. Miss Mitter. The difference between a right claimed as a legatee under a will and a right which might arise otherwise is clear in this very case. The right under the will which was claimed was that Mrs.

Mitter became the owner of the entire house. Of course without the will Mrs. Mitter was an equal heir with her daughters of the property left by Dr. Mitter, as the latter would be taken to have died intestate, and would thus be entitled to onefourth. It will be seen from the judgment of the High Court that it has held that the appellant is entitled to the one-fourth share to which Mrs. Mitter was entitled as an heir, to Dr. Miss Mitter and granted the plaintiff-respondent a declaration with respect to only half the house. Therefore, the High Court was right in holding that s. 213 would bar the appellant from establishing the right of her mother as a legatee from Dr. Miss Mitter as no probate or letters of administration had been obtained of the alleged will of Dr. Miss Mitter in favour of Mrs. Mitter. The contention of the appellant on this head must therefore fail. Re. (ii).

Turning now to the question of res judicata, learned counsel for the appellant has been unable to point out any judgment inter parties in which the question of title to this house has been decided and which would bar the plaintiff- respondent from raising the question of title which she has raised in the present suit. As we have already said ques- tions of title are not decided in proceedings for the grant of probate or letters of administration. Whatever therefore might have happened in those proceedings would not establish the title to the house either of the appellant or of Mrs. Mitter. In particular, learned counsel for the appellant relied on the order of the High Court dated December 17, 1948, by which the application of the plaintiff-respondent for letters of administration of the will of Dr. Miss Mitter was dismissed. In that ease certain preliminary issues were framed one of which related to estoppel with respect to Mrs. Mitter's right to this property. What happened in that case was that Mrs. Bose who had made the application did not appear and thereupon her application was dismissed for that reason obviously under 0. XVII r. 2, of the Code of Civil Procedure. In these circumstances there can be no question of res judicata as -to the title to the property in dispute. The contention on this head must therefore be rejected.

Re.(iii).

As to estoppel, reliance is mainly placed on the applications of Mrs. Bose herself for the grant of letters of administration of a will alleged to have been made in her favour by Mrs. Mitter. In that application Mrs. Bose had shown the house as if it belonged to Mrs. Mitter. Her application was as we have already noted dismissed. It may be that Mrs. Bose in her application for letters of administration showed this house as the property of her mother Mrs. Mitter; but as we have already said, proceedings leading to the grant of probate or letters of administration have nothing to do with titles. Further estoppel can only arise as is clear from s. 115 of the Indian Evidence Act, when one person has by his declaration, act or ommission intentionally caused or permitted another person to believe a thing to be true and to act upon-such belief. Therefore before Mrs. Bose can be estopped from pleading that Mrs. Mitter was not the owner of the entire property it must be shown that by her showing the house as the property of Mrs. Mitter in her application for letters of administration she intentionally caused or permitted the appellant to believe that thing to be true and to act on that belief It is obvious that the "appellant cannot be said to have acted in her turn with respect to this house simply because Mrs. Bose said in her application for letters of administration that the house belonged to Mrs. Mitter. It appears that after the death of Mrs. Mitter the three sisters put forward three separate. wills each in her favour and there was no question of one sister acting on any representation made by another. We are therefore of opinion that no question of estoppel arises in

this case. The appeal therefore fails and is hereby dismissed: No order as to costs.

Appeal dismissed.