(1935) 11 CAL CK 0001

Calcutta High Court

Case No: None

Siva Mohan Kundu Choudhury and Others		APPELLANT
	Vs	
Sm. Bechumoyee Dasi-Plaintiff and Others		RESPONDENT

Date of Decision: Nov. 21, 1935

Citation: AIR 1936 Cal 585

Hon'ble Judges: Panckridge, J; Costello, J

Bench: Full Bench

Judgement

Costello, J.

These appeals are from a judgment dated 17th August 1934, whereby the learned Judge in the Court below made a decree in favour of the plaintiff Srimati Bechumoyee Dasi declaring that she is entitled to a one-twelfth share in certain properties and in the business referred to in Schs. B and C annexed to her plaint and to a one-fourth share in properties and in the business mentioned in Schs. D and E. The decree made by the learned Judge also included an order for partition and all other necessary reliefs in that connexion. The suit was instituted by the plaintiff on 19th August 1931 and by the plaint it was averred that one Kissori Mohan Kundu Choudhury, who was during his life time and at the time of his death governed by the Bengali School of Hindu Law, died intestate on 12th March 1880 without any male issue but leaving his widow Srimati Manorama Dassi and the plaintiff who is the only daughter of Kissori Mohan and his wife Manorama.

2. The plaintiff Bechumoyee Dassi claimed that on the death of her mother on 23rd January 1931 she as the sole daughter of Kissori Mohan Kundu Choudhury became entitled to the whole of his estate. The plaintiff set forth the list of properties which are comprehended in the schedules to which I have already referred. It is to be observed that by the plaint in the suit the plaintiff founded her claim solely upon the basis that her father had died intestate and that after the death of her mother, who

inherited a Hindu widow''s right in the property of her husband, the plaintiff became entitled to the whole of her father''s estate. The statements in the plaint were verified by Ratnamay Srimany who is described as the constituted attorney of the plaintiff. We are informed that he is in fact the son of the plaintiff. The facts as stated in the plaint did not represent the real state of affairs for it was not the fact that Kissori Mohan Kundu Choudhury had died intestate; on the contrary he had not only made a will but probate of that will had been granted by this Court as long ago as the month of April in the year 1880. By that will broadly speaking, Kissori Mohan gave the bulk of his property to two of his brothers, and made certain provisions for the maintenance of his widow and the maintenance of his daughter, the plaintiff. There were also certain provisions in the will requiring the principal beneficiaries to make provision for certain Debutter dispositions.

3. In the year 1912 the widow of the testator Manorama Dasi instituted a suit in which she averred that the maintenance provided for her by the terms of her husband''s will are insufficient, and she claimed that she was entitled to receive at the hands of her brothers in-law, as executors and beneficiaries under the will, a larger sum for her maintenance. As an outcome of the proceedings she received, at any rate she was declared to be entitled to a sum of Rs. 235 monthly for her maintenance. The importance of that suit is this: that so far from any question arising as to whether or not Kissori Mohan had left a will, in that suit the will was actually referred to if not in fact relied upon. What we are concerned with however is another suit, a suit which came before the Court at Hooghly. We are concerned with that suit for this reason: In reply to the plaint filed by the plaintiff in the present suit, the defendants put in a written statement in which they stated in para. 3 that:

With reference to para. 1 of the plaint they deny that Kishori Mohan Kundu Choudhury (hereinafter referred to as the testator) died intestate. Prior to his death and on 28th Falgoon 1286 B.S. corresponding with 10th March 1880 the testator made and published his last will in the Bengalee language and character whereby he gave and bequeathed his entire estate absolutely unto his uterine brothers Hiramohan Kundu Choudhury and Nagendra Mohan Kundu Choudhury subject to certain legacies and annuities therein mentioned. The widow of the testator is named in the said will as Ramani Dassi.

4. Paragraph 4 of the written statement is as follows:

The said will was duly proved and on 7th April 1880 probate thereof was granted to the said Hiramohan Kundu Choudhury and Nagendra Mohan Kundu Choudhury, both since deceased as the executors thereof, by this Hon''ble Court in its testamentary and intestate jurisdiction.

5. In para. 9 the defendants said:

Until the death of the said Sm. Manorama Dasi, as mentioned in the plaint, the plaintiff all along lived with her in the family dwelling house of the testator at

Mohiary in the district of Howrah and she has all along been aware of the existence of the said will and of the provisions made thereunder for her and her heirs and also of the said suit No. 273 of 1912 as well as of the various proceedings had and decrees and orders made therein.

6. There is therefore a definite allegation that the plaintiff was aware-indeed she must have been aware-of the existence of the will made by her father and the fact that probate of that will had been granted by this Court. It would be superfluous for us to make much comment upon the conduct of the plaintiff and her advisers, in putting on the file of this Court a plaint which obviously must have been drafted with the definite design of suppressing from the knowledge of the Court the fact that Kissori Mohan Kundu Choudhury had made a will and that that will had been duly admitted to probate. On the facts, as they now appear and so far as the present case is concerned, one need only express astonishment that any one should have been found or procured to verify statements which are manifestly untrue. It is a little difficult to understand how the plaintiff or her advisers could have imagined that upon the plaint as it was originally drafted the plaintiff could possibly succeed in her suit, because the fact that there had been a will and that will had been duly proved was bound to be urged against her either before or at the trial of the suit.

7. Actually, as I have pointed out, the existence of the will and the fact of the probate was brought to the attention of the Court in the written statement put in by the defendants. Thereafter the plaintiff was permitted to file a pleading that was described as a "written statement on behalf of the plaintiff." That document was verified on 4th May 1934. It is the contents of that pleading which have given rise to such difficulty, as there is in the way of a proper determination of the suit and this appeal. In my opinion what was intended was that the plaintiff should merely have an opportunity of making answer to the defendants'' contention in the matter of probate of the will, and though that pleading was called "written statement on behalf of the plaintiff" it was to all intents and purposes what under English procedure would be a "reply" to the defence put in by the defendants. In my view it was never intended by the plaintiff that this pleading should constitute something in the nature of a further statement of claim, or as an amendment of the original claim. In this "written statement" the plaintiff stated that Kissori Mohan Kundu Choudhury never executed a will. That might have been by way of traversing the defendants'' pleading. Then the plaintiff states:

The will set up is a forgery. With full knowledge of the fact that the will was a forgery, probate was obtained from this Hon''ble Court by means of fraud. Probate was never granted to Nagendra Mohan Kundu Choudhury.

8. It appears that the whole of para. 1 of the written statement was intended to plead in effect that if there was a will it was not genuine and probate of it ought never to have been granted. In para. 2 the plaintiff said:

The plaintiff submits that if necessary the grant of probate may be revoked on the grounds: (a) The will was a forgery; (b) the grant of probate was obtained by suppressing the fact that it was a forgery and by falsely representing to the Court that it was a genuine document; (c) the grant has become useless and inoperative by reason of the decree made in suit No. 61 of 1884 as hereinafter mentioned; (d) the proceedings to obtain probate were defective in substance.

9. If that paragraph was really intended to be a claim for the revocation of the grant of the probate of the will of Kissori Mohan Kundu Choudhury, then it seems quite obvious, that it was not a claim which could properly be made in a suit such as the present suit. It is a claim which could only be made in properly constituted testamentary proceedings. But the paragraph which has mainly given rise to the discussions that have taken place not only in the Court below but before this Court is para. 3. In that paragraph the plaintiff said this:

The plaintiff will contend that the proceedings and decree in suit No. 61 of 1884 (in the Court of the second Subordinate Judge at Hooghly, which was a suit for partition of the joint family properties between the co-sharers and in which among others the plaintiff''s mother and the defendants or their predecessors-in-interest were parties) declared and/or created the right of Sm. Ramani Dasi alias Sm. Manorama Dasi, as widow of Kishori Mohan Kundu Choudhury as a co-sharer in the estate of Chaitanya Charan Kundu Choudhury and she will contend that by reason thereof the defendants are estopped from setting up the alleged dispositions in the alleged will or denying the title of the plaintiff as the heiress of Kishori Mohan Kundu Choudhury in the joint family properties. In particular she will rely on inter alia the following in support of her contention.

10. Then she sets out a number of documents which came into existence in connexion with the proceedings in the Court at Hooghly. The appellants say that that paragraph comes to no more than this: that the plaintiff was in effect alleging that the defendants ought not to have been allowed to set up the will of Kissori Mohan Kundu Choudhury as a defence to the plaintiff''s case and that something had occurred in the Court at Hooghly which operated either as an estoppel in the way of the defendants or in the nature of res judicata. The learned Judge devoted the greater part of his somewhat lengthy judgment to a discussion of the effect of that para. 3 of the written statement on behalf of the plaintiff. Mr. S.M. Bose, on behalf of the plaintiff-respondent, has argued before us that the effect of the proceedings before the Court of the second Subordinate Judge, Hooghly, was that there was a declaration not only contained in the admission on the part of the defendant but declaration in the decree which was made by the Court at Hooghly, and to all intents and purposes affirmed on appeal by this Court, that the plaintiff was numbered amongst the co-sharers in the estate of Cbaitanya Charan Kundu Choudhury or rather her mother was so numbered together with the brothers of Kissori Mohan Kundu Choudhury in such a way as to bring it about that in effect the

brothers of Kissori Mohan were renouncing or abandoning their position as beneficiaries under the will, and were restoring the family properties to the position they would have taken had there been no will at all. Mr. Bose referred first of all to a written statement which was filed in the Hooghly suit on behalf of Gurudas Kundu Choudhury one of the defendants. In that written statement he said:

The plaintiff has actually no cause of action for this suit against this defendant, nor has he disclosed in the plaint any sufficient cause thereof. The plaintiff and the defendant cannot be reckoned as members of an undivided Hindu family. The 6 anna co-sharers, namely the plaintiff and his brother Kedar Nath and his deceased (step) brother Annada Prasad''s sons are members of a Hindu family separate from that to which the 10 anna co-sharers, namely these defendants and defendants 4, 5, 6, 8 and 9 belong. The co-sharers of the 10 annas and 6 annas estate have some joint moveable and Immovable properties and Karbar but the plaintiff has not mentioned anything in his plaint which goes to show that these defendants have done anything affecting the plaintiff''s interest therein, nor is there any reason for their so doing; and the plaintiff has not in his plaint stated anything against these defendants except an unfounded allegation of their collusion with his brother Kedar Nath.

11. It should be explained at this point that the suit in the Hooghly Court was brought by a representative of one of the branches of the family which descended from Ram Kanta Kundu Choudhury. He was the descendant of a man named Gour Mohun Kundu Choudhury who was a brother of Chaitanya Charan Kundu Choudhury. He claimed that his branch was entitled to a six anna-share in the joint family property while the representatives of Chaitanya Charan were entitled to a ten anna share. The importance of the written statement which I have just read is (according to Mr. Bose) that it includes in the group of ten anna sharers "defendant 5" in the Hooghly suit and she was the mother of the present plaintiff. Mr. Bose, therefore, says that there was an admission by that written statement that the plaintiff''s mother was entitled as a co-sharer to claim with the brothers of her husband Kissori Mohan Kundu, to the extent of such interest as she would get as a Hindu widow. Mr. Bose then referred us to the decree which was ultimately made in the Hooghly suit. That decree is dated 12th February 1889 and contained this statement:

The defendants 2 to 9 who are co-sharers to the extent of 10 annas obtained possession of the said (property) and of Kheraj and Lakharaj properties mentioned in Schedule Ga,below which on division have been allotted to them by the Commissioners.

12. The Hooghly suit as already stated, ultimately came on appeal to this Court and the decree of this Court was dated 25th April 1892. It must be borne in mind, however, that the widow Ramani Dasi herself also put in a written statement in the Hooghly proceedings and in that written statement she said:

I, Srimati Ramani Dasi, state that at the time of his death my husband made a will whereby he appointed his brother Hira Mohun Kundu Choudhury defendant 3 as the executor and the said defendant having as such taken probate of the will has been managing and looking after all the properties left by my husband. Under such circumstances it is unjust to make me a defendant in this suit. Whatever written statement is necessary to be filed in this suit has been filed by the said defendant 3 and I admit that written statement to be true and the said written statement may be treated as if filed on my behalf.

13. It seems clear, therefore, that so far as Ramani Dasi was concerned, she, in the Hooghly suit, was repudiating the suggestion (so far as any such suggestion had been made) that she was entitled to any part of the estate of Chaitanya Charan Kundu, other than such interest as she acquired by reason of her husband''s will which had been duly proved by one of her co-defendants in the suit. In my opinion the admission (if it can properly be called an admission) which appears in the written statement, which I have read, of one of the defendants in the Hooghly suit, and the statement in the decree of the Hooghly Court regarding the ten anna co-sharers ought to be taken for our present purpose, as indicating nothing more than that on the one side of the family there was an aggregation of persons who constituted ten anna co-sharers and on the other side there was an aggregation of persons who constituted six anna co-sharers and defendant 5 the mother of the present plaintiff was numbered in the group which constituted the ten anna co-sharers. Therefore, in my opinion it is impossible successfully to contend that the effect of the decree in the Hooghly suit was to obliterate the will and the probate of the year 1880.

14. But there is another aspect of the case which puts the matter beyond all question in my judgment and it is this that in the proceedings in the Hooghly Court the executors under the will of Kishori Mohan Kundu Choudhury were not parties, and they were not brought into the suit at all. It is true that one individual who was in fact an executor under the will was there, but he was so far as the plaintiff in that suit was concerned, not there qua executor under the will but solely in his personal capacity as one of the group of ten anna co-sharers. The fact that when he put in his written statement he referred to himself as an executor, makes no difference whatever, in my opinion because he was not in fact sued as an executor. Therefore the question of the validity and the operative effect of the will of Kishori Mohan Kundu was never under discussion or at issue, in any sense whatever in the Hooghly Court. In the circumstances it is impossible for us to hold that the effect of the proceedings and the decree in suit No. 61 of 1884 in the Court of the 2nd Subordinate Judge at Hooghly was to confer upon the plaintiff any rights in respect of her father''s property other than those she already possessed by virtue of her father''s will. The learned Judge seems to have taken the view that because Ramani Dasi (otherwise called Manorama Dasi) the mother of the plaintiff, was a party to the Hooghly proceedings therefore what transpired as the outcome of those proceedings, has precluded the defendants from relying upon the will as a defence

to the plaintiff''s claim in the present suit. In my opinion it is by no means certain that it can rightfully be argued that anything which Ramani Dasi did or did not do in those proceedings could be effective in favour of the present plaintiff as against the present defendants and I doubt very much whether this case can really be said to be a case where these proceedings in the law can be taken to be proceedings as between the same parties as those in the present proceedings. In that view of the matter it would be of course impossible to hold that any case of res judicata can arise. It is, however, sufficient for the purpose of disposing of this appeal to say, as I have already said, that the executors of the will were not represented in those proceedings, and therefore nothing was done which could interfere with the full legal effect of the provisions contained in the will of Kissori Mohan Kundu Choudhury.

15. Once we have arrived at the position that the proceedings in the Hooghly Court have no effect upon the validity and operative force of the will of Kissori Mohan Kundu Choudhury it automatically follows that the plaintiff cannot possibly succeed in this suit. If by the written statement on behalf of the plaintiff the plaintiff intended to set up a substantive case, that the will of her father made and proved some fifty or more years ago, was a forgery, or that the probate which was granted ought to be revoked, the short answer is that she can only do this in proceedings properly constituted and brought under the testamentary jurisdiction of this Court. The learned Judge seems to have fully recognised that that is the position in law and he set it out in his judgment. At the bottom of p. 42 of the paper book we find that the learned Judge said:

Various issues were raised, but only two points were argued, namely whether in this suit the plaintiff could challenge the will as a forgery, and what was the effect of the decision in suit No. 61. of 1884.

16. Then he says:

On the first point the decision in Sheoparson Singh v Ramnandan Singh 1916 P C 78 at p. 97 in my opinion concludes the matter. It may be argued for the plaintiff that the rule in England depended on the existence of separate Courts with separate jurisdiction, but the Judicial Committee in the case cited laid down the rule for the Courts in India, and where probate has been granted, it is only a Court with probate jurisdiction sitting as such that can recall that probate on the ground that the will was forged. However if necessary this suit could be adjourned until the decision of a Court of probate was obtained.

17. Then the learned Judge proceeded to deal with the effect of the suit of 1884. Holding, as I do, that the proceedings in suit No. 61 of 1884 were not so constituted that they can have any effect whatever on the will of 1880 it follows that this appeal must be allowed and the plaintiff''s suit dismissed. We think that the unsuccessful plaintiff must pay the costs to the representatives of Hira Mohan and the

representatives of Nagendra Mohan and the costs of the Thakur both of the trial Court and this Court. The Thakur is entitled to retain its costs out of the Debutter estate in any event. The cross-objections are dismissed without costs. The receiver will be discharged.

Panckridge, J.

18. I agree. In my opinion if we were constrained to dismiss this appeal the result would be a manifest injustice. The learned Judge properly held that it was not competent for the plaintiff in these proceedings to challenge the validity of the will or the grant of probate. It follows that the only arguments upon which the plaintiff was entitled to rely are those based on para. 3 of the additional written statement. Before the learned Judge it appears that the only aspect of the paragraph which was dealt with by the plaintiff was that which concerned with the question of res judicata. Before us, however,learned Counsel for the plaintiff sought to base a contention upon the paragraph to the effect that the decree of the Hooghly Court had operated to transfer the estate of the testator from the executors to the ten anna co-sharers, or, in other words, to confer upon the testator''s widow a Hindu widow''s estate in the testator''s undivided share

19. It appears to me to be a sufficient answer to this submission to say that the testator''s estate was not represented in the proceedings and therefore the decree could not affect it. The plaint in the Hooghly suit makes no mention of the testator or his will or of the fact that the defendant Hira Mohan Kundu was the executor named in the will and had obtained probate of it. The testator''s widow, so far from claiming to be interested as on an intestacy, expressly disclaimed such interest, and relied upon the will. The only fact upon which the plaintiff relies as indicating that the testator''s estate was before the Court is that in the written statement of defendants 3, 5 and 7, defendant 3 Hira Mohan purports to file it "for self and as executor to the estate of Kishori Mohan Kundu Choudhury, deceased." In my opinion this fact makes no difference to the position. It cannot be suggested that the plaintiff by his plaint had made the representatives of Kishori Mohan''s estate parties to the suit in their representative capacity. I consider that to make them parties at a subsequent stage, a formal application was required and such formal application was never made. In these circumstances it appears to me unnecessary to deal with the application of the plaintiff''s counsel for leave to amend the additional written statement or the plaint in such a way as to put forward a claim to the testator''s estate based upon the suggested transfer effected by the decree of the Hooghly Court.

20. In my opinion, it would be useless to allow such an amendment, because in any event the plaintiff''s claim, if founded upon the suggestion of such a transfer, is bound to fail. The same considerations seem to me to be applicable to the question of res judicata. If the representatives of Kisbori''s estate were not, as such, parties to the proceedings in the Hooghly Court, no decree or decision of that Court can

operate as res judicata against them. Accordingly, I am of opinion that the will of Kishori stands and that nothing took place in the Hooghly Court which had the effect of transferring his estate from the executors or from those claiming under the will to the 10 anna co-sharers as a body or to the testator''s widow in her capacity of a Hindu widow. I therefore concur in the order that the appeal should be allowed and the suit dismissed. The defendants are entitled to their costs here and in the trial Court.