(1930) 11 CAL CK 0018

Calcutta High Court

Case No: None

Aswini Kumar Chakravarty and Another		APPELLANT
	Vs	
Sukhaharan Chakravarty and Others		RESPONDENT

Date of Decision: Nov. 19, 1930

Citation: AIR 1931 Cal 717

Hon'ble Judges: Mukerji, J; Guha, J

Bench: Full Bench

Judgement

Mukerji, J.
This is an appeal from an order passed by the District Judge of Dacca refusing to revoke a probate.

2. The will is dated 1895. The testator died in 1907. His widow applied for and obtained probate of the will in 1907. She was the sole executrix named in the will and was also the sole legates under it. In connexion with the application for probate only general citations wore issued. She did not disclose in her application the fact that the testator had left amongst others a stepsister Manikarnika and her two sons Aswini and Gokul. These two persons applied on 14th September 1928 for revocation of the probate alleging that no citations had been issued on Manikarnika, that they were both minors at the time, that no guardian had been appointed in respect of them, and that no citations had been issued on certain other persons who in case of intestacy would have been heirs of the testator. They alleged that the will was not duly executed, and that the testator had no free will nor sound disposing mind.

3. The District Judge has found that no special citations were issued. He has however refused to revoke the probate for the reason that Aswini''s story that ho came to know of the will and of the probate in 1924 was not true, that even if it was true, he did not take any steps for four years to have the probate revoked and the

explanation given for the delay was not acceptable, and that he had acquiesced in the executor''s dealings with the properties for nearly 20 years. Aswini and Gokul have then preferred this appeal.

4. The District Judge does not appear to have considered the case of Gokul at all. It is conceded that he was a minor at; the date of the probate proceedings. It is conceded also that though he may be taken to have had knowledge of the will or of the probate in 1924 or even earlier there are no circumstances raising an estoppel as against him. He attained majority about 1922 or thereabout. The only question therefore so far as Gokul is concerned, is whether the delay on his part will disentitle him to a revocation. He has offered an explanation of the delay alleging that he had no funds to start the case, but it must be conceded that there is no very convincing evidence to support this explanation.

5. Now, this is not a case in which the will was once proved in solemn form: it was only in common form that probate was granted. The recent decision in the case of Sadafal Kanu v. Gadari Hajam AIR 1931 Cal. 497 therefore has no relevancy to the case. It has been held that Article 178, Lim. Act, does not apply to an application for revocation of a probate : see Kashi Chandra v. Gopi Krishna [1892] 19 Cal. 48. But in support of the argument that delay may be held to bar an application for revocation reliance has been placed on behalf of the respondent upon the cases of Kunja Lal v. Kailas Chandra [1910] 7 I.C. 740 and Nalini Sundari v. Bejoy Kumar [1915] 30 I.C. 12. In the former of these cases when a probate was obtained in common form as a result of a compromise which has not binding on a minor, it was held that though an infant has a right in such cases to apply after he comes of age for revocation of probate obtained by consent, he may be barred by acquiescence and delay for a long time or by subsequent ratification of the dispositions of the will from putting the executor to the proof of the will in solemn form or from contesting its genuineness. For this proposition reliance was placed in the decision upon the cases of Hoppman v. Norris [1805] 2 Ph. 230 Note and Mohan v. Broughton [1900] Prob. 56.
This proposition was relied upon in the other case referred to on behalf of the respondent, but it will be seen that in that case there was not only waiver but also acceptance under the will. The authority which perhaps favours the respondent''s contention most is the case of Shyam Lal v. Rameswari [1916] 23 C.L.J. 82 in which at p. 100, para. 2 it was said:

Although there may not be a fixed time within which an application for revocation may be made, yet a person may be debarred by long delay in making such an application.

6. As authority for this proposition however reference was made in the judgment to the following passage in Williams on Executors, Edn. 10, Vol. 1, p. 244:

Long acquiescence unaccompanied by any special circumstances and acts done by a next of kin under the provisions of the will may (if no fact appears which excites a reasonable suspicion of the genuineness or validity of the will) amount to such a waiver of his rights as to preclude him from putting the will in suit.

7. It will be seen from this passage that jit is not mere delay that counts but delay or long acquiescence that leads to [an inference of waiver. In this case itself finding that no such inference was possible the probate was revoked after 32 years. In the case of Monorama v. Siva Sundari [1915] 42 Cal. 480 the probate was sought to be revoked after 17 years and it was refused because it was found that the petitioner for revocation herself had for a series of years, after attaining majority, received the allowance provided for by the will. In an unreported decision of this Court in the case of Srimati Rani Kadambini v. Srimati Rani Dikbasini Appeal from Original Decree Nos. 317 and 334 of 1901, Decided on 10th May 1904 a probate granted in 1882 was revoted in 1901. In that case reliance was placed on a number of deeds dated 1882 to 1897 in which there was reference to the will, and in which some members of the family, but not the petitioner for revocation had taken part. The learned Judges observed in that case:

This is no doubt a strong point against the petitioner but it is not we think fatal to it.

8. Quite recently in Haimabati Mitra Vs. Kunja Mohan Das, my learned brother Mitter, J., and myself had to revoke the probate of a will dated 1895 on an application for revocation made in 1927 on the ground of want of proper citation. Mere delay, in our opinion, will not stand in the appellants'' way and in this case there is nothing more.

9. We are not unmindful of the difficulties of proving a will after a long lapse of time but that consideration cannot outweigh the effect of noncitation of an infant of the position of Gokul, because the executor should have in prudence and for greater security proved the will in the first instance per testes and with the special citations that were necessary.

10. We allow the appeal and setting aside the decree of the Court below direct in accordance with the decision of the Judicial Committee in the case of Ramanandi Kuer v. Kalawati Kuer AIR 1928 P.C. 2 at p. 27 (of 55 I.A.) bottom, that the respondent be called upon to prove the will in the present proceeding. Costs of this Court and of the Court below will be costs in the cause. The hearing fee of this appeal is assessed at three gold mohurs.

Guha, J.

11. I agree.