A

RAM SHARAN

v.

KANYAWATI

B

[COURT OF APPEAL, 1969 (Gould V.P., Hutchison J.A., Marsack J.A.), 4th, 7th November]

Civil Jurisdiction

Probate and administration—will executed day before death of testator—action by executrix of earlier will alleging testator not of sound mind memory or understanding—counterclaim—onus of proof on party maintaining later will—obligation to begin—Supreme Court Rules 1968 0.35 r.7—Rules of the Supreme Court 1965 (Applied) 0.35 r.7—Wills Act 1837 (7 Will.4 & 1 Vict., c.26) (Imp.)

C

Practice and procedure—onus—obligation to begin—action for probate alleging testator not of sound mind, memory or understanding at time of later will—Supreme Court Rules 1968 0.35 r.7.

Counsel—application to withdraw from case—no authority in court to prevent withdrawal if counsel unable to continue to serve his client's best interests.

D

The testator died on the 24th June, 1965. Probate of a will executed by him on the 23rd June, 1965, was granted to the appellant. The respondent, as executrix named in a will of the testator dated the 30th September, 1964, brought an action alleging that the will of the 23rd June, 1965, was not signed or acknowledged by the deceased and that at the time he was not of sound mind, memory or understanding. The appellant denied these allegations and counterclaimed, asking for probate in solemn form of the will of the 23rd June, 1965.

E

Held: The burden of proving all the issues in the case was upon the appellant, and the trial judge was correct in ordering him to begin, whether as a matter of principle or under Order 35 rule 7 of the Supreme Court Rules 1968.

F

Per curiam: For counsel to withdraw from a case as a protest against a ruling of a judge as to the course of the trial, whether with or without the consent of the judge would at least be discourteous, but a court has no authority to prevent counsel from withdrawing if he feels he is unable to continue to serve his client's best interests.

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Case referred to: *Lockhart-Smith v. United Republic* [1965] E.A. 211.

Appeal from a judgment of the Supreme Court in a probate action; reported only upon two procedural matters.

S. M. Koya for the appellant.

K. A. Stuart and *D. S. Sharma* for the respondent.

H

The following judgments were read:

HUTCHISON J.A.: [7th November 1969]—

Narayan Singh died on the 24th June, 1965. On the day before his death he executed a will, probate of which was granted on the 7th September, 1966, to the appellant. Plaintiff, respondent in this Court, the adopted daughter of Narayan Singh, as executrix named in a will executed by him on the 30th September, 1964, brought this action alleging that the will of the 23rd June, 1965, was not signed or acknowledged by the deceased and that at the time he was not of sound mind, memory or understanding. These allegations were denied by defendant, appellant in this Court. He counter-claimed, asking the Court to pronounce against the will dated 30th September, 1964 propounded by respondent and to decree probate in solemn form of the will already probated in common form.

The action came originally before Mr. Justice Moti Tikaram, when counsel for respondent started to open his case by calling the plaintiff, but, when a question arose as to whether she was of age or whether she required a guardian ad litem, the case was adjourned. Finally it came on before Mr. Justice I. R. Thompson, and, according to the record Mr. Stuart, who was appearing for the respondent, said that the case had started before but he assumed that the trial would be *de novo*. The learned Judge ruled that it should be *de novo*.

Mr. Koya's first submission, on a ground which he was given leave to present in addition to the grounds set out in his Notice of Appeal, was that the whole trial before Mr. Justice Thompson was irregular, because Mr. Stuart had not made an application to the Judge to start *de novo*. I think he did make such an application, as appears from the record, and, in my opinion, there is nothing at all in this point.

After that preliminary ruling by the Judge, the point was raised before him of who should begin and the Judge ruled that the appellant should begin. Thereupon counsel for appellant, who was not Mr. Koya, asked leave to withdraw the defence and counter-claim and for leave for himself to withdraw, which applications were refused. Then, after taking advantage of two short adjournments for consideration of his attitude, he elected to call no evidence.

Mr. Koya's main ground of appeal was that the learned trial Judge erred in ruling that the appellant should begin. Subsidiary points concerning the application to withdraw the defence and counter-claim and counsel's application for leave to withdraw Mr. Koya argued under the 2nd and 3rd grounds, and I leave them for the time being.

Mr. Koya agreed that the burden of proof rested on appellant. What he was admitting, however, was that the ultimate burden of proof rested upon him. He claimed that, before one reached that point, there were presumptions in his favour. By that I understood him to mean that, because the will which his client set up had on the face of it been executed in accordance with the Wills Act, there was a presumption that the testator's mind went with his signature and that he was of sound mind, memory and understanding at the time. But these presumptions were not available to appellant in this case. These were the very matters which were challenged by the respondent, and, in my opinion, it is abundantly clear that the burden of proof on these issues, which were all the issues in the case, rested upon appellant. That being so, the learned trial Judge was perfectly correct in his ruling that appellant should begin.

When one looks at the appropriate rule, 0.35 r.7 set out in the Supreme Court Practice 1967 Part I at p.475, which became operative in Fiji from the 3rd March 1969, before this case was heard, by virtue of the Supreme Court Rules 1968, one sees that the ruling was in accordance with that rule. The relevant part of the rule is this — A

> "7. (1) The judge before whom an action is tried .... may give directions as to the party to begin and the order of speeches at the trial, and, subject to any such directions, the party to begin and the order of speeches shall be that provided by this rule. B
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> (2) Subject to paragraph (6), the plaintiff shall begin by opening his case.
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> .....
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> (6) Where the burden of proof of all the issues in the action lies on the defendant or, where there are two or more defendants and they appear separately or are separately represented, on one of the defendants, the defendant or that defendant, as the case may be, shall be entitled to begin, and in that case paragraphs (2), (3) and (4) shall have effect in relation to, and as between, him and the plaintiff as if for references to the plaintiff and the defendant there were substituted references to the defendant and the plaintiff respectively." C

Appellant came within paragraph (6) because the burden of proof of all the issues in the action lay on him. Mr. Koya said that under paragraph (6) this entitled him to begin, but did not impose a duty on him to begin. But, in saying that, he has, in my opinion, overlooked the last four lines of paragraph (6), the effect of which is that, when the burden of proof lies on the defendant, paragraph (2) is to be read as if "defendant" were substituted for "plaintiff". It does not matter, then, whether the Judge gave this direction on principle or on paragraph (1) or on the combined effect of paragraphs (2) and (6). In any way of looking at it, it was correct. D E

Linked with this ground was the complaint made in grounds 4 and 5 that the learned trial Judge erred in refusing to allow appellant to call evidence on his counter-claim or to call rebutting evidence after the close of respondent's case. There was no need to file the counter-claim. If the plaintiff-respondent's case had failed on her claim, appellant's probate would have stood unchallenged, and the request to be allowed to call evidence on the counter-claim or in rebuttal was simply a method of getting round the ruling of the Judge that defendant-appellant had to begin, and, in my opinion, the Judge was perfectly right in refusing leave. F

Then a number of smaller points were raised, none of which, in my opinion, is of any importance on this appeal. Counsel complained (Ground 6) of the form of the citation to bring in the probate of the will that was attacked. I think that the correct form was used in accordance with what is said in *Tristram and Coote's Probate Practice* 22nd Ed. p.524 paragraph (d), but, even if it was not, it would be no more than an irregularity and would afford no ground for allowing the appeal. He complained in Grounds 2 and 3 that the trial Judge refused to allow the applications of counsel then acting, first to withdraw the defence and counter-claim and then to withdraw from the action. These two applications were obviously enough made as a protest against the Judge's ruling that defendant should begin and as some form of tactic calculated to embarrass the Judge in the hearing of the case; and, as such, in my G H

opinion, he was fully justified in declining to give them any such recognition as a granting of the applications would have done. In any event, I am quite unable to see what counsel hoped to gain by, as he said, withdrawing the defence and counter-claim. He could, of course, have said "I do not proceed on the counter-claim, and I withdraw the denials in the statement of defence", and that was all that he would have achieved if there had been any right in him to "withdraw the defence and counter-claim" and he had been allowed to do so; but that would only have made the case easier for the other side. As to his application for leave to withdraw from the case, I do not think that this raises any question of law. I think that the observation of Weston J. in *Lockhart-Smith v. United Republic* [1965] E.A. 211, 215, cited by counsel —

> "..... whatever may be the position as between advocate and client, a court has no authority of which I am aware to prevent an advocate from withdrawing from a case if for any reason he feels he is unable to continue to serve his client's best interests."

is apt to the case to which he was referring, the case where counsel feels that he is unable to continue to serve his client's best interests. But it may be quite a different thing, when the withdrawal is a protest against a ruling of the Judge as to the course of the trial, in which case, with or without consent, the withdrawal would at least be discourteous.

Grounds 7, 8 and 9 challenged the judgment of the learned Judge on the facts. I think that his judgment was demonstrably correct, and nothing that counsel said has caused me any doubt about that.

I think that the appeal should be dismissed with costs.

Before I leave this case, I would like to say that I think, from this and other cases, that some counsel have forgotten the sound view that procedure is a good servant but a bad master.

GOULD V.P.: I have had the advantage of reading the judgment of Hutchison J.A. I entirely agree with it and have nothing to add.

MARSACK J.A.: I also concur.

Appeal dismissed.