Nibaran Chandra Mitter Vs Prafulla Kumar Mitter

Court: Calcutta High Court

Date of Decision: July 17, 1953

Acts Referred: Civil Procedure Code, 1882 â€" Section 588
Civil Procedure Code, 1908 (CPC) â€" Order 40 Rule 1, Order 43 Rule 1, Order 43 Rule 1(s), 104, 115
General Clauses Act, 1897 â€" Section 16
Succession Act, 1925 â€" Section 247, 268, 295, 299

Citation: (1955) 2 ILR (Cal) 203

Hon'ble Judges: P.N. Mookerjee, J; Guha Ray, J

Bench: Division Bench

Advocate: Bankim Chandra Banerjee, Pashupati Ghosh and Sushil Chandra Dutta, for the Appellant;A.K. Sen, Junior Standing Counsel and Jnanendra Kumar Dutta, for the Respondent

Final Decision: Dismissed

Judgement

P.N. Mookerjee, J.
The Appellant, who had applied before the District Judge of 24-Parganas for the revocation of a probate, granted to

the Respondent No. 1, in respect of the alleged will of one Probodh Chandra Mitter, filed the present appeal against the order of the learned

District Judge rejecting his application for removal of Respondent No. 1 from his charge of the disputed properties as receiver and administrator

pendente lite under an appointment, made in the said revocation case. By consent of the parties, Respondent No. 1 was originally appointed the

administrator pendente lite in respect of all the said properties under certain terms and conditions and, thereafter, in the course of the revocation

case, the said appointment and its terms and conditions were varied from time to time and eventually the parties agreed to accept the position that

Respondent No. 1 would be the receiver in respect of the Bristol Hotel and would continue to be the administrator pendente lite in respect of other

properties upon certain modified terms. For our present purpose, it is not necessary to set out in any detail the terms of appointment, eventually

accepted by the parties, excepting that under the said terms of his appointment Respondent No. 1 was to pay Rs. 450 per month as a monthly

allowance to the Appellant and was also to submit monthly accounts.

2. The Appellant alleged inter alia that Respondent No. 1 had been consistently neglecting his above duties, specially set forth in the preceding

paragraph, and flouting the orders of the Court, made in that behalf, and, upon such allegations, he applied to the Court on March 18, 1952, for

removal of Respondent No. 1 from his charge of the disputed properties as receiver and administrator pendente lite as aforesaid.

3. The allegations were denied and the prayer for removal was strongly opposed before the learned District Judge and eventually the matter was

heard by the learned Additional District Judge, 2A.-Parganas.

4. The learned Additional District Judge, after considering the explanations, given by Respondent No. 1, actually found that there had been some

default on the part of Respondent No. 1 in the matter of payment of the Appellant''s monthly allowance and in the matter also of submission of the

monthly accounts. But, as, in his opinion, the lapses made were not sufficient, in the circumstances of the case, to justify the removal of the receiver

and administrator pendente lite, he warned the Respondent to carry out his duties strictly in accordance with the terms and conditions of his

appointment and refused the Appellant''s prayer for the Respondent''s removal. Against this order of the learned Additional District Judge, the

present appeal has been filed by the Appellant.

5. At the hearing a preliminary objection was raised by the Respondent''s learned Counsel Mr. A.K. Sen. He strongly urged that no appeal lay

from an order rejecting an application for removal of a receiver and/or an administrator pendente lite and that, accordingly, the present appeal was

incompetent. We shall presently consider the merits of the Respondent''s preliminary objection.

6. The Respondent No. 1, as we have already said, was appointed receiver in respect of the Bristol Hotel and administrator pendente lite in

respect of the other properties and the order, challenged in this appeal, is really in two parts, namely, one, refusing to remove him from his charge

as receiver as aforesaid, and the other, refusing to remove him from his charge as administrator pendente lite. It appears, however, that the

complaints, made against the Respondent No. 1, cover acts or omissions and incidents where his said two capacities are inextricably mixed up.

For the purpose of deciding the preliminary objection, therefore, it would not be profitable in the present case to proceed upon the distinction, if

any, between an appeal from an order, refusing to remove a receiver, and an appeal from a similar order in the case of an administrator pendente

lite. In the circumstances of this case, if the objection succeed as regards the Respondent''s position as receiver, nothing will remain of this appeal.

Similarly, also, if the objection succeed as regards his position as administrator pendente lite, this appeal will fail in its entirety. It will be seen further

in the course of this judgment that if the order, refusing to remove the Respondent from his charge as receiver as aforesaid, be appealable, the

order, refusing to remove him from his charge as administrator pendente lite, will also be appealable. For judging the competency of the appeal,

therefore, the moot point for consideration will be whether the lower Court''s refusal to remove the Respondent No. 1 from his charge as receiver

as aforesaid is appealable under the law.

7. The Respondent''s appointment as receiver was obviously made either u/s 268 or u/s 295 of the Indian Succession Act which make the

provisions of the CPC applicable to probate and/or revocation cases as far as practicable, there being in the Succession Act itself no direct or

particular provision for such an appointment as in the case of an administrator pendente lite (vide Section 247). The Respondent''s appointment,

therefore, as receiver, as aforesaid, must be taken to have been made under the Indian Succession Act, read with the Code of Civil Procedure,

and whichever of the above two sections (Section 268 and Section 295) applies to revocation proceedings-and judicial opinion is, apparently, not

uniform on this point [Vide Pratap Chandra Saha v. Kali Bhajan Saha (1900) 4 C.W.N. 600; Garabini Dassi v. Protap Chandra Saha (1900) 4

C.W.N. 602; Sheikh Azim v. Chandra Nath Namdas (1904) 8 C.W.N. 748; Khirodamoyi Barmani v. Bagala Shundari Barmani (1906) 4 C.L.J.

492 and Saroda Kanto Das v. Gobindo Mohan Dass (1910) 12 C.L.J. 91] -the appointment will doubtless attract Order XL, Rule 1, of the

Code.

8. Proceeding to the next stage we find that there is some divergence-apparently, a mild cleavage,-of judicial opinion on the point as to whether in

the case of an order, passed under the Indian Succession Act, read with the Code of Civil Procedure, the right of appeal would be governed solely

by the Indian Succession Act or by the relative provisions of the Code as well [vide Uma Charan Das v. Muktakeshi Dasi (1900) 5 C.W.N. 443;

Sarat Chandra Pal v. Benode Kumari Dasi (1915) 20 C.W.N.28; T. Lucas v. H. Lucas ILR (1891) 20 Cal. 245; Prosad Narain Singh v. Mt.

Dulhin Genda Koer (1913) 18 C.L.J. 612; Indubala Dassi v. Panchumoni Dasi (1914) 19 C.W.N. 1169; Sreelal Chamaria v. Hariram Goenka

AIR [1926] (Cal.) 180; Brojonath Pal v. Dasmony Dassee (1878) 2 C.L.R. 589; Abhiram Dass v. Gopal Dass ILR (1889) 17 Cal. 48; Sheikh

Azim v. Chandra Nath Namdas (supra); Rangini Dasi v. Debendra Narain Singha (1904) 8 C.W.N. 748 and Lakhi Narayan Shaw v. Multan

Chand Daga (1912) 16 C.W.N. 1099 : 17 C.L.J. 230]. For our present purpose, however, it is quite unnecessary to go into that larger question.

So far as the present appeal is concerned we may safely assume that in such a case the wider terms of Section 299 of the Indian Succession Act

will be controlled by the relative provisions of the CPC and that, therefore, the tests under the Code will have to be satisfied before the appeal can

be held maintainable. In dealing, therefore, with the question of appealability of the order before us, so far as it relates to the Respondent''s position

as receiver, we shall proceed on the footing that the said question will have to be answered in the light of the relative provisions of the Code of

Civil Procedure; or, in other words, that, for that purpose, his appointment as receiver as aforesaid will have to be treated, in effect, as one under

Order XL, Rule 1, of the Code. Indeed, this position is accepted by both the parties before us and they agree at least in this that the appealability

of the order in question, so far as it relates to the Respondent No. 1''s position as receiver, will ultimately depend upon the appealability of an

order, refusing to remove a receiver, appointed under Order XL, Rule 1, of the Code of Civil Procedure.

9. It is beyond dispute that an order, refusing to remove receiver, appointed under Order XL, Rule 1, of the Code, will not be appealable except

under Order XLIII, Rule 1(s). Admittedly also, under this latter statutory provision all orders under Rule 1 of Order XL of the Code are

appealable. This, indeed, appears plain when we turn to the dual scheme, adopted by the Code in the matter of appealability of orders. In certain

cases, appeals lie from all orders, passed under a particular rule or provision [vide, for example, Clause (g) of Section 104 and Clauses (f), (j), (l),

(m), (p), (q), (r) and (s) of Order XLIII, Rule 1]. In others, only certain specified types of orders under a particular rule or provision have been

made appealable [see in this connection Clause (c), (d), (k), (n), (o), (t), (v) and (w) of the said Order XLIII, Rule 1]. Order XL, Rule 1, of the

Code clearly falls within the former category [vide Order XLIII, Rule 1(s)] and, hence, all orders under that provision are appealable.

10. It thus follows from what has been stated above that in order to be appealable the impugned order in the present case, so far as it relates to the

Respondent''s position as receiver, must be found to be one under Order XL, Rule 1, of the Code but, once that finding is made, an appeal would

clearly lie, without more, from that part of the order.

11. It is worth noticing at this stage that Section 247 of the Indian Succession Act, under which the Respondent''s appointment as administrator

pendente lite was obviously made, alike Order XL, Rule 1, of the Code of Civil Procedure, under which he was, aa stated before, appointed

receiver by the Court below, deals expressly only with the question of appointment,-the former of an administrator pendente lite, the latter of a

receiver. There is also no controversy that if the order, refusing to remove the receiver, can be brought under Order XL, Rule 1, of the Code so as

to be appealable under Order XLIII, Rule 1(s), the order, refusing to remove the administrator pendente lite, would, on similar reasonings and

principle, come u/s 247 of the Indian Succession Act and would thus be appealable u/s 299 of the said Act.

12. In the above premises the scope of our present enquiry becomes considerably limited and the question for consideration narrows down and

just reduces itself, broadly speaking, only to this, namely, whether an order, refusing to remove a receiver, appointed under Order XL, Rule 1, of

the Code, is an order under that statutory provision. In express terms, Rule 1 of Order XL of the Code, as already stated, deals only with the

Court"s power to appoint a receiver. A power to appoint, however, necessarily includes a power of refusal in that behalf. When an application is

made to the Court for appointment of a receiver, the Court may either grant such application or reject it. In either case, however, the order is one,

disposing of an application under Order XL, Rule 1, of the Code, and is thus an order under that provision, and, therefore, appealable under

Order XLIII, Rule 1(s), of the Code. This proposition is now plainly beyond controversy, [vide Manindra Chandra Ray Chaudhury and Another

Vs. Suniti Bala Debi and Others, ; Cursetji Dinshaw Bolton v. G.L. Gaikwad AIR [1915] (Bom.) 137 and Muni Lal v. Jagannath AIR [1916]

(All.) 338] [See also the cases of Boidya Nath Adya v. Makhan Lal Adya ILR (1890) Cal. 680; Khagendra Narain Singh v. Shashadhar Jha ILR

(1904) 31 Cal. 495; Sangappa v. Shivlasawa ILR (1899) Bom. 38 and Venkatasami v. Stridavamma ILR (1886) Mad. 179, decided under the

corresponding provision (Section 588) of the old Code of 1882]. Even under the older Code of 1877 this Court held a similar view in the case of

Gossain Dulmir Puri v. Tekait Hetnarain (1880) 6 C.L.R. 467.

13. We turn then to another aspect of the matter which is nearer to our present problem. u/s 16 of the Indian General Clauses Act, which is just a

statutory rule of interpretation [vide the decision in the case of K.V.R. Nayanar v. K.V.V. Madhavi Amma AIR [1950] (F.C.) 140] a power to

appoint implies and includes within itself a power to remove or dismiss. Order XL, Rule 1 of the Code, therefore, read in the light of this statutory

rule of interpretation, must be held to contain also, at least by implication, a power to remove a receiver, and an application for removal of a

receiver would thus be one under Order XL, Rule 1, of the Code and an order, disposing of the same, whether granting it or rejecting it, would

clearly be an order under that statutory provision, and, therefore, appealable under Order XLIII, Rule 1(s). The conflict of judicial opinion, which

at one time was quite acute on this point, has now been set at rest by the recent pronouncement of the Federal Court, cited above.

14. In the case of Sripati Dutta and Others Vs. Bibhuti Bhusan Dutta and Others, , and also in the case of Mano Mohan Neogy Vs. Surendra

Kumar Ray Chowdhury and Others, , this Court held that an order, removing a receiver, was appealable. The same view was adopted by the

Allahabad High Court in its recent decision in the case of Allahabad Bank, Ltd. Vs. Maharaj Kishore Khanna and Others, . In the case of

Bhimnath Misra and Others Vs. Shyamanand Singh and Others, , the Patna High Court also was inclined to this view and in Abdul Kader v.

R.M.P. Chettyar Firm AIR [1938] (Rang.) 387, the Rangoon High Court followed a similar principle. A contrary opinion was, however,

expressed by the Madras High Court in the case of M.K. Subramania Iyer v. Mathulakshmi Ammal [1912] M.W.N. 1208 : (1912) 17 I.C. 583,

and Kutteer Vengayil Rayarappan Nayanar, Karnavan of Kutteer Vengayil Tarwad Vs. Kutteer Vengayil Valiya Madhavi Amma and Others, .

[reversed in AIR (1950) (F.C.) 140], and also by the Allahabad High Court in its earlier decision, reported in (Major) Anthony Ullyssess John and

Others Vs. Agra United Mills Ltd. and Another , and the principle of the above two Calcutta decisions did not also find favour with the Patna High

Court in its later decision, reported in Surendra Nath Sarkar Vs. Nagar Chand Goenka and Another, : AIR [1947] (Pat.) 418.

15. There was thus a clear conflict of judicial opinion when the point arose in the case of K.V.R. Nayanar v. K.V.V. Madhavi Amma (Supra)

before the Federal Court in the appeal from the Madras decision K.V.R. Nayanar v. K.V.V. Madhavi Amma (supra), already cited, and there, in

the Federal Court, the Calcutta view, as laid down in the case of Sripati Datta v. Bibhuti Bhusan Datta (Supra), was expressly approved and the

Madras decision K.V.R. Nayanar v. K.V.V. Madhavi Amma (supra) was reversed and directly overruled. The appealability of an order of

removal of a receiver upon the footing that the application in that behalf is one under Order XL, Rule 1, of the Code is, therefore, no longer open

to question and that in a large measure also clears the ground for a right of appeal against an order, refusing to remove a receiver. The same line of

reasoning as was adopted in the parallel case of deducing a right of appeal against an order, refusing to appoint a receiver, from a right of appeal

against an order, making such an appointment, namely, that in both these latter cases the order would be one on an application under Order XL,

Rule 1, of the Code for appointment of a receiver,-granting the same in one case and rejecting it in the other,-and would thus be an order under

that statutory provision, would obviously apply and sustain an appeal from an order, refusing to remove a receiver.

16. We have already shown that it is now well-established and beyond the range of controversy that an application for removal of a receiver is one

under Order XL, Rule 1, of the Code. Clearly, therefore, an order rejecting such an application,-and an order refusing to remove a receiver is

none else,-is an order under the said provision of the Code and is, therefore, appealable under Order XLIII, Rule 1(s) of the Code. A refusal to

remove is, therefore, as much appealable as an order of removal or an order of appointment or refusal to appoint. That this is so is impliedly

recognised in the Federal Court''s decision, already cited, and, although their Lordships did not expressly overrule the Patna decision, in Surendra

Nath Sarkar v. Nagar Chand Goenka (Supra), where a contrary view was, apparently, taken, they did, in the clearest possible terms, disapprove

the similar decision of this Court, namely, the case of Eastern Mortgage and Agency Co., Ltd. v. Premananda Saha AIR [1916] (Cal.) 824, and

the Madras decision in Ramaswami Naidu v. Ayyalu Naidu (1923) 46 M.L.J. 196 : AIR [1924] (Mad.) 614 rejecting as incompetent appeals

from orders of removal of a receiver, and approve the Rangoon case of Abdul Kader v. R.M.P. Chettyar Firm (Supra), and the principle, laid

down by the Federal Court on that occasion, is hardly reconcilable with the Patna decision, cited above. Nayanar''s case, therefore, may well be

regarded as an authority and, indeed, a settlor on the point, in favour of competency of such an appeal, and the contrary decisions, including the

case of this Court, reported in Sahebjada Faridan Shiko v. Fakir Mohammad AIR [1914] (Cal.) 786, must be deemed to have been overruled by

that decision. We have also shown that such an appeal is clearly sustainable on principle. We have, therefore, no hesitation in holding that an order,

refusing to remove a receiver, is appealable under the law.

17. The discussion, so far made, clearly shows that an order, refusing to remove a receiver is an order under Order XL, Rule 1, of the Code so as

to be appealable under Order XLIII, Rule 1(s). A parity of reasonings will at once equally well establish that an order, refusing to remove an

administrator pendente lite, would clearly be an order u/s 247 of the Indian Succession Act and as such appealable u/s 299 thereof. We hold,

therefore, that the present appeal is maintainable in law and its competence is beyond question and we, accordingly, overrule the Respondent''s

preliminary objection.

18. Next we turn to the merits of the appeal. The learned Additional District Judge has found that there have been some laches on the part of the

Respondent No. 1 in the discharge of his duties as receiver and administrator pendente lite, but, in his opinion, those laches, in view of the

explanations, given by the Respondent, would hardly justify his removal. The learned Judge has not approved of the Respondent''s conduct and

has not accepted his explanations as sufficient or quite satisfactory, but, at the same time, he has felt that, on the allegations, proved before him,

when read in the light of those explanations, the removal of Respondent No. 1 would not be either just or proper in the circumstances of the

present case. The Respondent, however, has been warned by the learned Judge, both before and after the presentation of this appeal, to be more

careful in his future actions and to make up his defaults, and we are informed by the learned advocates on both sides that this warning has borne

fruit as the Respondent No. 1 is now faithfully carrying out the orders of the Court.

19. We have carefully considered the circumstances of this case and, in our opin1:15 PM 01/10/2011ion, on the present state of the records, there

is no ground for any interference with the order of the learned Additional District Judge. In the view which we are taking it is unnecessary to go into

the details of the allegations, made against the Respondent, or of the arguments, advanced before us on this part of the case. Although there was,

at the earlier stages, some scope for complaint against the Respondent''s conduct, the learned Judge in the Court below took appropriate steps in

the matter as soon as the same was brought to his notice and, after he had administered the necessary warning, and he repeated the same once

more after the presentation of this appeal-the Respondent became fully alive to his position and responsibilities and he has since conducted himself

in quite a satisfactory manner. We are also clearly of the view that the learned Judge in the Court below was perfectly right, in the circumstances of

this case, in refusing to remove the receiver and administrator pendente lite on the charges, proved against him, and in letting him off just with a

stern warning. That amply meets the present situation and if, in future, there is any remiss of the necessary magnitude on the part of Respondent

No. 1, it will always be open to the Appellant to approach the learned Judge for appropriate redress-may be, by way of removal of Respondent

No. 1 from his charge as receiver and administrator pendente lite. This has also been impliedly, if not expressly, recognised in the learned Judge''s

order, against which the present appeal is directed, and, in a subsequent order, the learned Judge has made the position even clearer. There is,

therefore, no ground for disturbing the learned Judge''s order, complained against in the present appeal.

20. This appeal must, accordingly, fail and it is dismissed, but, in the circumstances, we make no order as to costs.

21. In view of our above findings, no order is necessary on the application u/s 115 of the Code, except that it does not lie under the law and must,

therefore, fail and that it is, accordingly, rejected.

22. We have dismissed above the Appellant''s appeal on the merits. We have rejected also his revisional application u/s 115 of the Code of Civil

Procedure. We feel, however, in view of certain observations, appearing at certain places in the records, that we ought to make it clear that

nothing that has happened so far in the present proceedings will in any way affect the title of the parties to the Bristol Hotel, over which there is an

acute controversy, nor will it prevent the Appellant from having a hearing on the merits, of his objections to the accounts, submitted by Respondent

No. 1 as receiver and administrator pendente lite, as aforesaid and those objections will be duly heard by the learned Judge in the Court below on

the merits in accordance with law.

Guha Ray, J.

23. I agree.