Lakhya Dasya Vs Umakanto Chuckerbutty and Another

Court: Calcutta High Court

Date of Decision: July 1, 1909

Judgement

1. This was a suit by Lakhya Dasya, widow of one Nyasa Das, to recover possession of certain lands on declaration of her title thereto and for

that purpose to have set aside the decree in Suit No. 222 of 1897 and the sale in execution of that decree in case No. 609 of 1899 as illegal,

fraudulent and without consideration. The plaintiff"s suit has been dismissed by both the Courts below and she has preferred this second appeal to

this Court.

2. The question argued before us is whether the learned District Judge was right in holding, first, that the plaintiff"s suit was barred u/s 244 of the

Code of Civil Procedure, 1882, and, secondly, that in the former suit the estate of Mohe Narain, the father of Nyasa Das, was sufficiently

represented.

3. To take the question of Section 244 first it is clear that that section could only be a bar if the plaintiff"s right to set aside the decree in suit No.

222 of 1897 was negatived. If that decree be held to be good, then no doubt, as Nyasa Das was a nominal party to that Suit and as the present

plaintiff is his representative, an application to set aside the sale would have to be made u/s 244 and a separate suit would not lie. But it is

questionable whether the decree in execution of which that sale took place can itself stand, and to set aside the decree a suit would clearly be

necessary. The parties defendants in that suit were Nyasa Das, son of Mohe Narain, as heir of his father and Kalidas Chuckerbutty, the defendant

No. 3 in this suit, as executor of the will of Mohe Narain. It is now urged that Nyasa Das Was in fact of unsound mind, that the summons which

was alleged to have been served on him was but nominally served because he was not competent to understand the contents of it, and that thus he

did not properly represent his father"s estate. With regard to the executor, it is urged that he had not obtained probate of the will from the Court,

and so he too did not represent the testator Mohe Narain. The learned District Judge has found that Kalidas as the executor named in the will was

fully qualified to represent the estate of the testator. The facts are that, he applied for a grant of probate on the 24th February 1896 and an order

was made by the District Judge on the 27th March 1896 that probate be granted to him; but as a matter of fact no probate was. in the proper

sense of the term granted to the executor because he did not pay the necessary fees for that purpose. He does not appear, so far as we can see, to

have intermeddled in any way with the estate and he has not from that time till now taken the necessary stens to complete the grant of probate to

himself. Probate as defined in Section 3 of the Probate and Administration Act, 1881, is necessary before an executor can be sued as such and as

representing the testator''s estate. This is well established and the learned pleader for the respondent has not been able to show us any authority to

the contrary. The learned District Judge has proceeded upon Sections 4 and 12 of the Probate and Administration Act, but those sections do not

affect the actual question before us. An executor cannot be made liable until he has accepted the position of executor and he cannot be said to

have fully accepted that position until he has obtained a grant of probate from the Court. It is true that he has certain powers before that date and it

is also true that u/s 12 probate when granted renders valid all intermediate acts from the death of the testator. But that is not enough. With regard

to suits, there are matters in which he does not fully represent the estate, and there is no authority for saying that an executor, who has not obtained

probate and is sued in respect of the estate fully represents it. The learned District Judge taking an erroneous view of the case in this respect has

thought it immaterial to decide whether Nyasa Das was or was not insane at the time of the suit but in the view which we take this becomes an

important issue : and we think that the case must go back for its determination. It has been held that the provisions of the CPC of 1882 with

respect to the representation of lunatics is not exhaustive and that a guardian ad litem should be assigned to a defendant who is of unsound mind

although not so found. If Nyasa Das was, in fact, of unsound mind at the date of the suit and the date of the service of summons upon him, it is

clear that he should have been represented by a guardian ad litem, that he was not in a position to defend the suit himself and he would, therefore,

not be for the purpose of the suit a proper legal representative of his father. We, therefore, set aside the decree of the learned District Judge

dismissing the appeal and remand the case to him for the determination of the issue whether Nyasa Das was or was not insane at the time of the

institution of the suit or of the decree and for the disposal of the appeal in accordance with such finding. The learned District Judge may consider

the propriety of admitting further evidence on the point if he thinks that the evidence on the record is not sufficient to enable him to come to a

proper decision in the case. Costs of this appeal will abide the result.