
(1933) 04 CAL CK 0035

Calcutta High Court

Case No: Original Order No. 15 of 1932

Secretary of State for
India in Council

APPELLANT

Vs

Parijat Debee

RESPONDENT

Date of Decision: April 24, 1933

Citation: (1933) 04 CAL CK 0035

Final Decision: Dismissed

Judgement

Pearson, J.

This matter has been referred to me under Clause 36 of the Letters Patent, upon a difference of opinion between the Acting Chief Justice and Mr. Justice Mitter, sitting in appeal, against an order of Mr. Justice Costello, upon an application made to this Court in its Testamentary and Intestate Jurisdiction.

2. The facts are not in dispute. Pasupati Mukherji died on the 9th May, 1919, leaving a will of the same date. By that will, he; made bequests of substantial amounts in legacies and annuities: he also provided for expenses of his daughter's marriage and for certain rights of residence for the ladies of his family. He appointed the Administrator-General of Bengal his executor. And he directed that, as regards the residue, one-half should go among the sons of his deceased elder brother, and the other half between his own son and daughter, Teerthapati and Pratima Debee, in the proportion of two-thirds and one-third.

3. The Administrator-General applied for probate. Caveat was entered by the widow, Sreemati Parijat Debee, and protracted contentious proceedings went on until, after 11 days" hearing, in 1928, an arrangement was arrived at. This arrangement was embodied in a memorandum of agreement, dated the 3rd March, 1928. The caveat was withdrawn. The decree in the probate proceedings was made on the 8th June, 1928, by which probate of the last will and testament of the testator was granted to the Administrator-General of Bengal, and the agreement was ordered to be recorded:and it

was annexed to the decree.

4. By the terms of the; agreement, the payment of the pecuniary legacies was confirmed; the main alteration was in the shares of residue. Instead of the shares given by the will, as stated above, these were now, under the agreement, to be as follows: Teerthapati--ten annas (in place of five annas eight pies under the will): Pratima Debee--two annas (instead of two annas four pies): and the three sons of the testator"s predeceased elder brother?one anna four pies each (in place of two annas eight pies each).

5. On the 20th August, 1928, Teerthapati died. Admittedly Parijat was left as his heiress, being entitled to the estate of a Hindu mother.

6. In 1930, the summons in the present proceeding was taken out on behalf of Parijat in the Testamentary and Intestate Jurisdiction of this Court, asking for an order that directions should be given to the (Administrator-General of Bengal, as executor, directing him to make over to Parijat Debee "that "portion of the residuary estate of the testator in his "hands to which (under the decree mentioned in the "petition) the applicant"s son Teerthapati Mukherji "was entitled or that such further or other orders may "be given to the Administrator-General of Bengal in "relation to the administration and final distribution "of the estate as to this Court may seem fit".

7. The application has all along proceeded on the footing that what is involved in the language used is the ten annas share of Teerthapati.

8. Mr. Justice Costello ordered that the Administrator-General should make over to Parijat Debee Teerthapati"s share of the residuary estate, after retaining in his hands a sum sufficient to cover the fees in the event of it being held that she ought to have taken out a succession certificate as a condition precedent.

9. The Secretary of State for India in Council and the Administrator-General of Bengal have appealed.

10. In these circumstances, the points, upon which the Acting Chief Justice and Mr. Justice Mitter differed, are thus formulated--

(i) Whether, in the circumstances which have happened in this case, the applicant Sm. Parijat Debee can invoke Section 104 of the Indian Succession Act in her favour ?

(ii) Whether it is incumbent upon Sm. Parijat Debee to take out a succession certificate to enable her to recover the residuary share of the estate of the testator payable to her son Teerthapati Mukherji ?

(iii) Whether any relief can be granted to her, on an application such as she made to the High Court on its Original Side or whether she must be relegated to a suit ?

11. I shall deal with these points in the order mentioned.

(i) Section 104 of the Indian Succession Act, 1925, comes under Chapter VI of the Act, which deals with the construction of wills. It provides that if a legacy is given in general terms without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and if he dies without having received it, it shall pass to his representatives. That is as much as to say, in the present case, that Teerthapati would take a vested interest in his residuary share under the will, and since he died without receiving it, it passes to his mother Parijat Debee. Mr. Justice Mitter, however, is of opinion that Section 104 can have no application in the present case, and I think his reason may be put in this way, that Section 104 could only apply if Parijat Debee was asking for the handing over of the residuary estate in terms of the will, whereas, in fact, her application is based on the family arrangement: Parijat's application has reference to the ten annas share of residue under the agreement, not to the five annas four pies share of residue under the will. Or, as he puts it in another part of the judgment, Parijat Debee has travelled from the realm of bequest into the realm of contract, and it is from the latter region that she makes her application to the Court. With the greatest respect, I am not able to agree with this point of view. It is true that Parijat Debee may be claiming in part under the agreement between the parties, so far as the quantum of the share is concerned. But what is it that gives her the right to claim at all? That right appears to me to have its roots in the will, in the testator's appointment of the Administrator-General as executor, and in the decree granting probate to the executor. The administration of the estate under the will is not superseded by the agreement: otherwise there would have been no reason for the grant of probate. The executor holds title to the property under the will and the probate, and so far as he is concerned he has to carry out his administration according to what the law lays down. The decree contains a declaration that the testator rightly and duly executed the will of 9th May, 1919, and "did will give and bequeath devise and dispose and do "all things as therein contained". It is the estate under that will which the executor is authorised to administer. So far as the agreement is concerned, it is to be observed that the Administrator-General is no party to it himself. No doubt, where all the parties have agreed he has consented to give effect to the agreement in his administration of Pashupati's estate. Disputes between the parties might have resulted in the executor being driven back on the strict terms of the will itself, and in the parties being driven to a civil suit for determination of their rights under the agreement; but for determination of a question of the destination of a share of residue under the will, I do not see why Section 104 should not be resorted to, though the amount of the share has been augmented under the agreement. I think the executor may and should refer to Section 104 for the due administration of the estate in his charge. Upon this point of difference, therefore, I would hold that, in the circumstances which have happened in this case, the applicant, Sreemati Parijat Debee, can invoke Section 104 of the Indian Succession Act in her favour.

(ii) The second point of difference is as to whether it is incumbent upon Sm. Parijat Debee to take out a succession certificate to enable her to recover the residuary share of the estate of the testator payable to her son Teerthapati Mukherji.

12. It is admitted that the necessity for letters of administration does not exist in the present case, having regard to Section 212(2) of the Indian Succession Act, and to the fact that the parties are Hindus. The question then is whether, in the present application, what Parijat Debee is seeking to recover is a "debt" within the meaning of Section 214 of the Indian Succession Act: if it is, then it is said a succession certificate must first be taken out by Parijat Debee and produced to the Court.

13. Teerthapati's share was a share of residue, and it does not seem to me to be of assistance to consider the position of an executor in regard to a specific bequest to which he has assented. A residuary share is on a different footing. In *Trethewy v. Helyar* (1876) 4 Ch. D. 53. Sir George Jessel says, --

It appears to have been long-settled law that there is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and all costs of the administration of the estate of the testator. Therefore, until you have paid the costs, you do not arrive at the net residue at all, and when you do arrive at it, it is distributed according to law. That is the principle.

14. It is with reference to that passage that Younger L.J. says in *Rex v. Commissioners for Special Purposes of Income Tax, Ex parte Dr. Barnardo's Homes National Incorporated Association* [1920] I.K.B. 468, 484., the principle is that

Until the residue is ascertained, and until its existence as net residue has been acknowledged by the executor either by payment to the residuary legatee, or, if the residue be settled, by the appropriation of a fund to meet the settled residue, the residuary legatee has no interest in any specific part of that which subsequently becomes residue as a specific fund, but that his right is, until that moment of time arrives, subject of course to any interim distribution, to have the estate administered in due course.

15. In the same case before the House of Lords, in *Special Income Tax Commissioners* [1921] 2 A.C. 1. the same principle was upheld, following the case of *Lord Sudeley v. Attorney General* (1920) 1 K.B. 468, 484. It is laid down that the legatee of a share in the residue has no interest in any of the property of the testator until the residue has been ascertained: and Lord Atkinson says (at p. 11) the case of *Lord Sudeley v. Attorney General* [1897] A.C. 11. conclusively established that, until the claims against the testator's estate have been satisfied, the residue does not come into actual existence. It is a non-existent thing until that event has occurred. The probability that there will be a residue is not enough. It must be actually ascertained. The case of *Attenborough v. Solomon* [1913] A.C. 76., referred to in argument before me, does not appear to me to bear on the present case: that was a case where the circumstances were such that the

true inference to be drawn from them was held to be that, in pledging certain chattels belonging to the residuary estate, the executors were not acting as such, because the residuary estate had, at that time, become vested in the trustees as trustees. In the present case, the residuary never became so vested in the Administrator-General as trustee, either under the agreement or otherwise.

16. I have already said that, in my judgment, the Administrator-General of Bengal was administering the estate under the will and his title to the property was under the will--that also seems to be a fact recognised by the agreement; he is not a party to the agreement and is not even brought into it in any capacity of trustee. Now, in regard to Teerthapati's share of the residuary estate in the present case, I find the Acting Chief Justice says "It was admitted "on all hands at the hearing before us that the costs, "debts and pecuniary legacies have not been paid." Mr. Justice Mitter, on the other hand, says in one passage "it is not the case of either party that the "residue of Teerthapati's estate has not been "ascertained at. the date of the application". Mr. Justice Mitter further refers to various statements that the share of Teerthapati may come up to twenty-five lakhs. He refers to a statement of the Administrator-General in a letter that the estate has not been completely administered, as the residuary estate had not been divided among the different residuary legatees: and he adds that that is a very different thing from saying that the residuary estate of Teerthapati had not been ascertained. Later on he again refers to the twenty-five lakhs "which may be "allocated to the share of Teerthapati," and then he goes on to say that the amount of the residue was ascertained after his (Teerthapati's) death and that it was a debt in the hands of the Administrator-General. Now I find that, in his letter of the 30th May, 1930, the Administrator-General says that the estate of Pashupati Mukherji has not been completely administered. On the 21st June, he writes that all the costs have not yet been paid nor has the residue been allocated. And in paragraph 5 of his affidavit he refers to the fact that the share of Teerthapati in the residuary estate may, on allocation, come up to twenty-five lakhs. In this position of affairs and upon the authorities referred to above, it seems clear enough that the residuary estate has never yet been ascertained and that in that event there can be no question of any debt in respect of it. Nor do I see any reason for saying that "debt" in Section 214 of the Indian Succession Act is to be construed in any wider or other sense than the meaning given in *Webb v. Stenton* (1883) 11 Q.B.D. 518., as a sum of money which is now payable or will become payable in the future by reason of a present obligation. In these circumstances, it is unnecessary to discuss the further argument that, under the Indian Securities Act, 1920, and Section 370 of the Indian Succession Act, Teerthapati's share is a debt in so far as it consists of Government securities, from the point of view that these are debts by Government to the holder. Upon this point, therefore, I find myself in agreement with the Acting Chief Justice, and that it is not incumbent upon Sm. Parijat Debee to take out a succession certificate to enable her to recover the residuary share of the estate of the testator payable to her son Teerthapati Mukherji.

(iii) The last point of difference is upon the question whether any relief can be granted to Parijat Debee on an application such as she has made to the High Court on its Original Side or whether she must be relegated to a suit. The Acting Chief Justice held that the procedure by application was unobjectionable by reason of the fact that all the parties were before the Court, and that there was no dispute on the facts. Mr. Justice Mitter holds that the procedure u/s 302 of the Indian Succession Act by application in the Testamentary Jurisdiction is not strictly available because the matter is no longer under the will but under the agreement. I have already given my reasons for not accepting this latter view. The Administrator-General still must rest primarily on the will and the grant of probate for his authority for administration of the estate. The administration is not yet complete, and I apprehend that, for these reasons and so long as the administration is alive, the procedure by application u/s 302 (or u/s 28 of the Administrator-General's Act) would be available to the Administrator-General if he required directions "in regard to the estate or in regard to the administration thereof." And if, as I think, that procedure is open to him, I can see no reason why it is not available to any one of the parties to the administration, including Parijat Debee. I "would, therefore, hold that relief can be granted her on such an application as she has made, and that she need not be relegated to a suit.

17. The result on the whole appeal is that I am in agreement with the Acting Chief Justice upon all three points. The order must be made as proposed by him: the appeal will be dismissed. The Administrator-General will pay his own costs. The costs of the Secretary of State for India in Council will come out of the estate. Srimati Parijat Debee will pay her own costs.