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Bombay High Court

Case No: O.C.J. Miscellaneous No. 21 of 1935

In Re: Zulekhabai APPELLANT

Vs

RESPONDENT

Date of Decision: Dec. 2, 1936

Citation: (1937) 39 BOMLR 1175 : 173 Ind. Cas. 783

Hon'ble Judges: B.J. Wadia, J

Bench: Single Bench

Judgement

B.J. Wadia, J.

This is a chamber summons taken out by the Court Receiver as guardian of the property of the minor Bai Zulekhabai to vary the Commissioner''s certificate which was issued on April 2, and filed on April 16, 1936, in. respect of the amount of his commission on a sum of Rs. 3,300 which was held by the Accountant General of the High Court to the credit of the minor and which was ordered to be paid over to the guardian of the minor''s property.

2. The Court Receiver was appointed guardian of the property of the minor by an order dated November 7, 1930. By another order dated February 22, 1935, the Accountant General was directed to pay over to the guardian of the minor''s property the sum of Rs. 3,300 held by him to the credit of the minor, and on March 25, 1935, the amount was accordingly paid over to the guardian of the property who debited to the minor a sum of Rs. 165 by way of commission calculated at five per cent, on that sum under Rule 444 (b)(2) of the High Court Rules. The guardian of the minor''s property filed his account before the Commissioner in the usual way, and the Commissioner by his certificate disallowed the commission at the rate of five per cent, debited to the minor, and allowed one per cent only. There was some delay in making this application to the Court to vary the certificate which ought really to have been done within eight days after the filing of the certificate as required by Rule 451 of the High Court Rules, but the delay has been accounted for in paragraph 7 of his affidavit and is excused. The Commissioner has appeared in person before me on

the argument of this summons, having been authorised to do so by the Chief Justice, as I was informed.

3. The question for determination is, at what rate, should the commission claimed by the Court Receiver as the guardian of the minor''s property be allowed? It was argued on his behalf that he was entitled to charge five per cent, under Rule 444 (b)(2) on the ground that this was, an "outstanding recovered" by him from the Accountant General on behalf of the minor''s estate. The Commissioner disallowed the five per cent, and allowed one per cent, only under Rule 444 (b)(4) applying it by way of analogy. When the matter was first argued before me I had my doubts whether the Receiver as guardian of the property was entitled to commission under any part of Rule 444 (b), as in my opinion this was really a transfer of a sum of money from one officer of the Court to another. I was, however, told that it was a long-standing practice of the Receiver''s office to charge five per cent, in similar cases. I thereupon asked the Receiver to make his report, which he did, and in order not to disturb the practice I first thought that the five per cent, should be allowed pending any alteration or amendment that may be made in Rule 444 to cover a case like the one before me. On further consideration, however, I was of opinion that the practice of an office, however long-standing it may be, could not justify an order in accordance with that practice, if the practice was inconsistent with a correct interpretation of the rule in question, and resulted in saddling the estate with an amount which was not claimable. I, therefore, ordered the matter to be re-argued, as my previous order had not been sealed and acted upon, and also because I thought that this was a question of importance affecting the Government revenue.

4. Can it be said that the transfer of a sum of money from one officer of this Court to another, without more, is the recovery of an outstanding? In law the word '' recover'', strictly speaking, has a technical meaning. It signifies the obtaining of a thing or a sum of money, by an action and judgment of the Court or by any other legal procedure, e.g., when it is said that plaintiff recovered verdict for a certain sum of money by way of damages. The Advocate General, however, argued that the word had1 a larger and popular meaning under which to '' recover'' simply meant to obtain or to bring in or to get in a thing or a sum of money. That may be the popular meaning of the word. But I do not think that the High Court, in framing the rule in which the words "outstandings recovered" are used, meant to use the word ''recover'' in any popular sense. It is true that a recovery may be by action in a Court of law, or it may be perfectly peaceful, in the sense that no action was at all necessary in order to ''recover''. But even so, can it be said to be the recovery of an outstanding, when an officer of the Court applies to another officer to transfer a sum of money standing in a person''s account in the books of the one to the credit of the account of the same person in the books of the other, and the sum is transferred accordingly? Such a transfer cannot, in my opinion, be said, even by stretching the meaning of the words, to be the recovery of an outstanding.

5. It was also argued that the word "outstanding" should not be interpreted in the strict legal sense of the word. An outstanding, generally speaking, is a debt due in respect of a loan or in respect of moneys due generally, which have not yet been paid in. According to the Advocate General the word literally means an amount'' standing out'' in the hands of one person which ought really to be in the hands of another. But I do not think that the word was meant by the framers of this rule to be used in that literal sense.

6. In my opinion therefore, there is no recovery, much less the recovery of an outstanding, in this case.

7. The learned Commissioner seems to have applied Sub-rule (b)(4) by way of analogy in allowing one per cent, for commission. An argument by way of analogy is one which does not always appeal to me. Either the rule applies or it does not, and I do not see the1 sense in saying that though it does not, it can be applied by analogy. Sub-rule (4) is meant to cover cases in which the Receiver takes charge of moveable property which is not sold, and for that the commission is one per cent, on the estimated value of the property. A little confusion in the meaning of the sub-rule may well have been avoided by putting a comma after the word'' sold''. How a transfer of a sum of money from one officer to another is analogous to taking charge of moveable property which is not sold on its estimated value is a matter which I am unable to comprehend. In my opinion that sub-rule also does not apply.

8. Lastly, there is Sub-rule (6) which says that for any special work not provided in the other sub-rules the Receiver is entitled to such remuneration as the Court on his application shall think reasonable. That again does not apply by reason of the use of the word ''special'', because, as the Advocate General rightly stated, the words ''special work'' mean work which is something out of the ordinary, and there is nothing out of the ordinary in asking for a transfer of money from one office to another.

9. In my opinion, therefore, Rule 444 (b) does not apply at all. It is, however, desirable that in a case of this kind the Receiver as guardian of the property should be entitled to some remuneration, but for that this rule will have to be amended. That is not a question which arises on this summons. All that I can do is to suggest that in Sub-rule (4) a comma should be put after the word '' sold'', and in Sub-rule (6) the word ''special'' should be replaced by the words ''any other'', so that it may be open to the Receiver to apply to the Court for such remuneration as the Court thinks reasonable for any other work outside the scope and purview of the other sub-rules.

10. Certain letters which passed between the Commissioner of this Court and the Accountant General have been put in which show that it is the practice of the Accountant General''s office to charge commission at the rate of two and a half per cent, on the gross amount of interest realised by his office on the securities standing to the credit of a person''s account in his books. It seems, therefore, that in addition

to the commission asked for by the Receiver as guardian of the property out of the minor''s estate the minor''s estate has already been debited with a commission of two and a half per cent, by the Accountant General. The two rates of commission no doubt stand on a different footing; but I mention this in order to show to what extent a minor''s estate may have to pay, if in addition to the two and a half per cent, charged by the Accountant General''s office, the rate of commission asked for by the Receiver was allowed.

11. In the result, the order made by me on November 16 last will be vacated. The chamber summons, in which the Receiver as guardian of the property has applied that the certificate be varied by allowing him five per cent., is dismissed. The certificate must be varied by disallowing even the one per cent. allowed by the Commissioner. The amount already paid in to the Receiver should be refunded to the estate of the minor, and I order accordingly. I make no order as to the costs of the summons.