

PRIVY COUNCIL.

SECRETARY OF STATE FOR INDIA IN
COUNCIL

v.

PARIJAT DEBEE.

P. C.*
1935July 18, 19;
Oct. 14.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Administration—Residuary legatee dying intestate before completion—Claim by his heir—Procedure—Debt, Meaning of—Indian Succession Act (XXXIX of 1925), ss. 214, 302.

Under a compromise in an application for probate of a will of a Hindu in which a caveat had been entered, it was agreed that the minor son, T, of the testator, who was represented by his mother, P, should have a ten annas share in the residual estate. T died a minor before the estate was completely administered and his mother, P, as his heir under Hindu law, claimed payment to her of T's share and applied to the High Court by summons for directions under s. 302 of the Indian Succession Act, 1925, for a direction to the Administrator-General, who was administering the estate, to pay T's share to her. The Administrator-General moved the Court for directions as to whether the payment to P could be made without the production of a Succession Certificate, having regard to s. 214 of the Indian Succession Act, 1925.

Held: (i) that the residue of the estate not having been ascertained, the relationship of creditor and debtor did not exist between T and the Administrator-General at the time of T's death and s. 214 of the Indian Succession Act, 1925, did not, therefore apply.

Barnado's Homes v. Special Income-Tax Commissioners (1) relied on.

(ii) That P's application under s. 302 of the Indian Succession Act, 1925, was competent and that it was not necessary for her to institute a separate suit to enforce her claim.

Kamal Kumari Devi v. Narendra Nath Mukherji (2) distinguished.

(iii) That the other minors who were, through their representatives, parties to the compromise, were not necessary parties to P's application.

Judgment of the High Court (3) affirmed.

*Present: Lord Thankerton, Sir John Wallis and Sir Lancelot Sanderson.

(1) [1921] 2 A. C. 1.

(2) (1907) 9 C. L. J. 19.

(3) (1933) I. L. R. 60 Cal. 1135.

1935
 Secretary of State
 for India in
 Council
 v.
 Parijat Debee.

Appeal (No. 66 of 1934) from a judgment of the High Court at Calcutta in its Appellate Jurisdiction (April 24, 1933) affirming an order of a single Judge of the Court.

The facts of the case appear from the judgment of the Judicial Committee.

Dunne, K. C. and Wallach for the appellants. The order was made by the Court in the exercise of its Testamentary Jurisdiction. In Testamentary Jurisdiction the only question is probate of the will. When questions arise as to claims against an estate, the matter must be dealt with by the Court in its Ordinary Jurisdiction. The Court should not, in summary proceedings, have directed the Administrator-General to pay money under an agreement to which he was not a party recorded in a probate suit. *Pratima Debee* ought to have been relegated to an Originating Summons or a suit. The Court should not have acted under s. 302 of the Indian Succession Act, 1925. Where a minor is concerned, the proper course is to proceed by suit. *Kamal Kumari Devi v. Narendra Nath Mukherji* (1); *Provas Chandra Sinha v. Ashutosh Mukherji* (2). Payment could not be made without production of the certificate required by s. 214. The amount payable to *Teertha Pati* when ascertained would be payable under the agreement and would be a debt. The other minors who were parties to the agreement should have been made parties to the application.

Radcliffe K.C., Turnbull and Pringle for the first respondent. The substantial question is whether a succession certificate was necessary. The Administrator-General doubted whether he could pay without the production of a succession certificate. Having said in his affidavit that he was ready to

(1) (1907) 9 C. L. J. 19.

(2) (1929) I. L. R. 56 Cal. 979.

1935
 Secretary of State
 for India in
 Council
 v.
 Parijat Debee.

abide by the order of the Court, it was not open to him thereafter to carry the case to appeal and then come here. Government was allowed to intervene only on the question of the certificate. After the agreement was approved by the Court, there could be no question affecting the rights of the minors. It is common for persons who have interests under a will to deal with them by assignment or otherwise. The administrator deals with the claims of assignees. An administration suit is not necessary. If any proceedings were required, proceedings under s. 302 of the Indian Succession Act, 1925 or s. 28 of the Administrator-General's Act would be correct. The Court, in its discretion, can relegate the parties to a suit in a proper case. The question is one of form and not one of jurisdiction. Section 214 of the Indian Succession Act, 1925, is not applicable. There was nothing that could be called a debt between the Administrator-General and Teertha Pati. The only right of a residuary legatee is to call on the executor to administer the estate. "Debt" is interpreted in *Webb v. Stenton* (1). There cannot be a debt till the residue is ascertained. There may be no residue. *Baranado's Homes v. Special Income-Tax Commissioners* (2).

The second respondent was not represented.

Dunne, K. C. in reply.

The judgment of their Lordships was delivered by

SIR LANCELOT SANDERSON. This is an appeal from an order, dated April 24, 1933, and made by the High Court of Judicature at Fort William in Bengal in its Appellate Jurisdiction, affirming an order made by a Judge of that Court on March 17, 1931.

The facts out of which this appeal arises are shortly as follows: One Pashu Pati Mukherji, a resident of Calcutta, died on May 9, 1919, possessed of considerable property, having made a last will and

(1) (1883) 11 Q. B. D. 518, 525.

(2) [1921] 2 A. C. 1.

1935
 Secretary of State
 for India in
 Council
 v.
 Parijat Debee.

testament, whereby he appointed the Administrator-General of Bengal as his executor. By the said will, after making specific bequests and provisions for certain annuities and for the marriage of his daughter, it was provided that—

The residual estate shall be divided among the children of my late brother, when all of them shall have attained majority. Till then it shall be in the hands of the executor.

Half of my estate shall be divided equally among the sons of my late lamented elder brother and the remaining half shall be divided among my children in the proportion of two shares for a male child and one share for a female child.

The testator left surviving him his widow, Parijat Debee; a son, Teertha Pati Mukherji, who died on August 20, 1929, a minor; a daughter, Pratima Debee, a minor; and his brother's sons, of whom two out of three are still minors.

The Administrator-General of Bengal applied without delay as executor to the High Court of Judicature at Fort William in Bengal for a grant of probate of the will. A caveat was entered in the said proceedings by Parijat Debee, whereupon the matter was entered as a contentious suit, Suit No. 13 of 1920, as between the Administrator-General as plaintiff and Parijat Debee as defendant.

The matter came on for hearing before Costello J. sitting in the Original Side of the High Court, in its Testamentary and Intestate Jurisdiction and after 11 days the parties other than the Administrator-General came to an arrangement, which was embodied in an agreement dated March 3, 1928.

The parties to the agreement were Teertha Pati, who was then an infant, by his next friend and mother Parijat Debee of the first part, the said Parijat Debee of the second part, Pratima Debee, daughter of the said Pashu Pati, a minor, by her next friend and husband of the third part, Bidya Pati, Sree Pati and Bimal Pati, sons of Kashi Pati, the last two being minors by their mother and guardian Subhankari Debee of the fourth part and the said Subhankari Debee of the fifth part.

By the terms of the said agreement the payment of the pecuniary legacies in the will was confirmed, the main alteration was in the shares of the residual estate. Instead of the shares given by the will as already stated these under the agreement were to be as follows :—

1935
Secretary of State
for India in
Council
v.
Parijat Debee.

Teertha Pati—ten annas (in place of five annas eight pies under the will), Pratima Debee—two annas (instead of two annas five pies) and the three sons of the testator's predeceased elder brother—one anna four pies each (instead of two annas eight pies each).

The caveat was withdrawn and a decree in the said probate proceedings was made by the learned Judge on June 8, 1928.

Before that date, Teertha Pati and Pratima Debee, both being minors, and the abovementioned three nephews of the testator (two of them being minors) had been added as parties to the Suit No. 13 of 1920. The decree directed that the caveat should be discharged and that probate of the said will should be granted. The decree then proceeded as follows :—

And it appearing that the adult parties other than the plaintiff and the respective certificated guardian and the next friends of the respective infant defendants have arrived at an agreement bearing date, the third day of March, one thousand nine hundred and twenty-eight, a copy whereof is set forth in the schedule hereto annexed and marked "A" and this Court being of opinion that the said agreement would be for the benefit of the infant defendants. It is further ordered with the consent of the adult parties other than the plaintiff and of the respective guardians *ad litem* of the infant defendants by their respective advocates that the said agreement be recorded.

Accordingly the said agreement was annexed to the said decree.

As already stated, Teertha Pati died on August 20, 1929, and admittedly Parijat Debee was his heiress, entitled to the estate of a Hindu mother. On August 12, 1930, a summons was taken out

1935
 Secretary of State
 for India in
 Council
 v.
 Parijat Debee.

on behalf of Parijat Debee in the said suit (No. 13 of 1929). It was headed "Testamentary and Intestate Jurisdiction" and it was directed to the Administrator-General of Bengal.

It prayed for an order—

(a) that directions may be given to the Administrator-General of Bengal as executor of the will of the testator abovenamed directing him forthwith to make over to the applicant 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 Teertha Pati Mukherji was entitled to and/or that such for other directions may be given to the Administrator-General of Bengal in relation to the administration and final distribution of the estate as to this Honourable Court may seem fit.

The summons was supported by a petition of Parijat Debee in which she submitted that no representation was necessary to the estate of her deceased son and that she was entitled to the said ten annas share in the residuary estate in the hands of the Administrator-General.

An affidavit was filed by the officiating Administrator-General of Bengal in which he said he had found considerable difficulty as regards the making over the share of Teertha Pati to his mother for three reasons, which were as follows:—

(i) The Administrator-General was of the opinion that until the applicant took out representation of the estate of Teertha Pati Mukherji she could not claim the estate to be made over to her and she could not give the Administrator-General a proper and legal discharge.

(ii) That she had only a limited interest in the estate, namely, a Hindu mother's interest. But the properties which were likely to be made over to her consisted mostly of Government securities of a value which, on the allocation of the share of Teertha Pati Mukherji in the residuary estate, may come up to Rs. 25,00,000. The Administrator-General was of opinion that the petitioner should take out representation at least for such securities.

(iii) That upon a construction of the will of Pashu Pati Mukherji it might be held that the residuary estate is not distributable until the attainment of majority of all the residuary legatees, some of whom are still minors.

The Administrator-General declared in the said affidavit that he was willing to abide by any decision that the Court might give on the said application.

As one of the questions raised affected a considerable amount of stamp duty, the learned Judge directed that notice should be issued to the Secretary of State for India, who, accordingly, was represented at the hearing of the summons. The other parties represented at the hearing of the summons were Parijat Debee, Pratima Debee, and the Administrator-General of Bengal. The learned Judge ordered—

1935
 Secretary of State
 for India in
 Council
 v.
 Parijat Debee.

that the Administrator-General of Bengal as executor to the will of Pashu Pati Mukherji deceased do make over to Sreematee Parijat Debee, the widow of the deceased, that portion of the residuary estate of the testator in his hands, to which her deceased son Teertha Pati Mukherji was entitled after retaining in his hands a sum sufficient to cover any claim by the said Secretary of State for court-fees under s. 19E of the Court-fees Act, in case it be held that the said Sreematee Parijat Debee ought to have taken out a Succession Certificate as a condition precedent. And it is further ordered that the making of this order be without prejudice to any such claim which may be preferred by the said Secretary of State within three months from the date hereof. And it is further ordered that if no proceeding be taken by the said Secretary of State within the said three months the amount so to be retained by the Administrator-General be paid by him to Sreematee Parijat Debee. And it is further ordered that the said Administrator-General of Bengal do also make over to the said Sreematee Parijat Debee all accumulations in his hands belonging to Teertha Pati's share of the estate.

The Secretary of State and the Administrator-General of Bengal appealed against the abovementioned order.

The appeal was heard by C. C. Ghose A.C.J. and Mitter J., who disagreed in their opinions. The Acting Chief Justice was of opinion that the appeal should be dismissed, and Mitter J. was of opinion that the order of Costello J. should be set aside and that a declaration should be made that Parijat Debee was entitled to recover Rs. 25,00,000 worth of securities in the hands of the Administrator-General, it being a condition precedent to such recovery that she should produce a succession certificate in the High Court within a time to be fixed by the Court.

Inasmuch as the learned Judges differed in their opinions, the matter was referred to a third Judge under cl. 36 of the Letters Patent.

1935
 Secretary of State
 for India in
 Council
 v.
 Parijat Debee.

The points on which they differed were formulated as follows:—

(1) Whether, in the circumstances which have happened in this case, the applicant Sreematee Parijat Debee can invoke s. 104 of the Indian Succession Act in her favour ;

(2) Whether it is incumbent upon Sreematee 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 Teertha Pati Mukherji ; and

(3) 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.

The reference was heard by Pearson J.

The learned Judge, on April 24, 1933, held (1) that Parijat Debee could invoke s. 104 of the Indian Succession Act in her favour : (2) that it was not incumbent upon Parijat Debee to take out a succession certificate to enable her to recover the residuary share of the testator payable to her son Teertha Pati : (3) that the relief prayed for could be granted to Parijat Debee on such an application as she made and that she need not be relegated to a suit. The result of these findings was that the learned Judge was in agreement with the Acting Chief Justice and consequently the appeal was dismissed.

This is the order against which the Secretary of State for India in Council and the Administrator-General of Bengal have appealed.

As regards the first of the abovementioned questions it was argued on behalf of the appellants that s. 104 of the Indian Succession Act of 1925 had no application to the facts of this case.

The section is as follows :—

104. 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.

Their Lordships do not express any concluded opinion on this question ; inasmuch as the learned counsel for the respondents did not rely upon it.

They confine themselves to noting that one of the points relied upon by the appellants was that, inasmuch as Teertha Pati became entitled to the ten annas share of the residue by reason of the agreement which was made on March 3, 1928, it was impossible to say that he had a vested interest in that share from the day of the death of the testator, *viz.*, May 9, 1919. If it had become necessary to decide this question, it would have required further consideration.

With reference to the second of the above-mentioned questions, it was agreed by the learned counsel on both sides that it was not necessary for Parijat Debee to obtain a grant of letters of administration in respect of the estate of Teertha Pati, inasmuch as s. 212 (2) of the Succession Act provides that the section shall not apply in the case of the intestacy of a Hindu, which was the case now under consideration.

The question which has to be considered in respect of this part of the appeal is, *viz.*, whether it was incumbent upon Parijat Debee to obtain a succession certificate to enable her to receive from the Administrator-General the ten annas share of Teertha Pati in the residuary estate of the testator.

It was argued on behalf of the appellants that the amount payable by the Administrator-General in respect of Teertha Pati's ten annas share, when ascertained upon the completion of the administration of the estate, constituted a debt due from the Administrator-General to Teertha Pati, within the meaning of s. 214 of the Succession Act and that the Court should not have made any order in favour of Parijat Debee without the production of a succession certificate.

The material parts of s. 214 are as follows:—

(1) No court shall—

(a) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof . . .

except on the production, by the person so claiming, of—

(iv) a certificate granted under the Succession Certificate Act, 1899.

(2) The word "debt" in sub-s. (1) includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes.

1935

Secretary of State
for India in
Council

v.
Parijat Debee.

1935

Secretary of State
for India in
Council
v.
Parijat Debee.

In order to bring this case within s. 214 of the said Act, in their Lordships' opinion, it would be necessary for the appellants to show that Parijat Debee was claiming on succession to be entitled to the effects of her deceased son Teertha Pati, who died intestate and was asking for a decree against the Administrator-General as a debtor of her deceased son. There is no doubt that Teertha Pati died intestate and that Parijat Debee was claiming on succession to be entitled to his share in the residue of the testator's estate, but the material question remains whether the Administrator-General was a debtor in respect of the said share of Teertha Pati in the residue within the meaning of the abovementioned section, and the material time to be considered must be the date of the son's death.

It is clear, on the authorities, that the legatee of a share in a residue has no interest in any of the property of the testator until the residue is ascertained. His right is to have the estate properly administered and applied for his benefit when the administration is complete, see *Barnardo's Homes v. Special Income-Tax Commissioners* (1) per Viscount Finlay at p. 8. In the same case at p. 11, Lord Atkinson is reported to have said that until the claims against the testator's estate for debts, legacies, testamentary expenses, *etc.*, 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 residue is not enough. It must be actually ascertained.

In the present case, the administration of the estate at the time of Teertha Pati's death was not complete, and the residue had not been ascertained. Consequently, no specific share in the residue had vested in Teertha Pati at the time of his death and the sole right of Teertha Pati was to call upon the Administrator-General to administer the estate in due course.

(1) [1921] 2 A. C. 1.

In view of these considerations, their Lordships are of opinion that the relationship of creditor and debtor did not exist between Teertha Pati and the Administrator-General at the time of the former's death: consequently the terms of s. 214 are not applicable.

1935
Secretary of State
for India in
Council
v.
Parijat Debee.

Apart from the question of jurisdiction, which is dealt with hereinafter, this is the only ground on which the appellants rely for their contention that the production of a succession certificate was necessary before Costello J. could make an order or a decree in favour of Parijat Debee on her application, and their Lordships therefore agree with the conclusion of Pearson J. in respect of this matter.

The third and last point should really have been dealt with first, for if the relief asked for by Parijat Debee could not be granted upon the application which she made, the other two questions would not arise, but their Lordships have for the sake of convenience taken them in the order in which the High Court dealt with them.

The appellants' contention in respect of this matter must be that the learned Judge sitting on the Original Side and exercising Testamentary and Intestate Jurisdiction had no jurisdiction to entertain Parijat Debee's application and to make the order dated March 17, 1931, for if the question is merely whether the correct procedure was adopted, the appellants' contention can have no substance, for both the appellants submitted themselves to the jurisdiction of the learned Judge and all the necessary parties were before him.

The application was made by Parijat Debee in pursuance of s. 302 of the Indian Succession Act of 1925. This section is to be found at the end of Ch. IV of the said Act, which is headed "Of

1935
 Secretary of State
 for India in
 Council
 v.
 Parijat Debee.

“the Practice in Granting and Revoking Probates and “Letters of Administration” and is in the following terms :—

Where probate or letters of administration in respect of any estate has or have been granted under this Act, the High Court may, on application made to it, give to the executor or administrator any general or special directions in regard to the estate or in regard to the administration thereof.

The section is general in its terms as regards the application, and their Lordships have no doubt that it was open to Parijat Debee to make the application. Indeed this was not disputed.

It was argued, however, on behalf of the appellants, that the Administrator-General was no party to the agreement of March 3, 1928, that the said agreement referred to matters which were outside the scope of the Testamentary Suit No. 13 of 1920, that it was merely recorded in that suit, and that Parijat Debee being a party to the agreement and wishing to enforce the terms thereof, ought to have been relegated to a suit on the Original Side and that, therefore, the learned Judge had no jurisdiction to make the order of March 17, 1931.

Reliance was placed by the appellants upon the case of *Kamal Kumari Devi v. Narendra Nath Mukherji* (1). That was a suit by the widow of a testator to set aside an agreement made by the beneficiaries under the will and codicil of the testator,

Woodroffe J. in the course of his judgment at pp. 29 and 30 referred to the practice on the Original Side of the High Court, in a case where probate is granted and terms of settlement are recorded in a schedule annexed to the decree, and said that “such terms when they ordinarily are “beyond the scope of the suit are not the subject “matter of the decree and if not carried out must be “enforced by separate suit”. No doubt that is quite correct, and if this case were a claim by one party to

the agreement of March 3, 1928, against another on the ground that the terms had not been carried out, it would properly be the subject of a separate suit.

1935
Secretary of State
for India in
Council
v.
Parijat Debee.

There is not, however, in this case any dispute as to the said agreement, and no suggestion has been made that the terms thereof should not be carried out.

The application was for a direction that the Administrator-General, who was not a party to the agreement, but who had accepted probate of the will, should pay Parijat Debee her son's share of the residue in accordance with the terms of the agreement. The only substantial question was whether the Administrator-General should pay Parijat Debee her deceased son's share of the residue without the production of a succession certificate.

Their Lordships are of opinion that there is nothing in the order of Costello J. dated March 17, 1931, which does not come within the material words of s. 302, "in regard to the estate or in regard to the "administration thereof," and that the learned Judge had jurisdiction to entertain Parijat Debee's application.

They, however, feel it necessary to say that, in their opinion, the learned Judge should have decided the question whether it was necessary for Parijat Debee to produce a succession certificate in order to claim the share of her deceased son, before he directed the Administrator-General to pay any portion of the residuary estate to Parijat Debee. Notice had been served upon the Secretary of State, with the object of the question whether the production of a succession certificate was necessary being argued and decided. The Secretary of State was duly represented and it was incumbent on the Court to decide the point, which was in fact decided on appeal.

The learned counsel for the appellants drew attention to the fact that the minors, who were parties

1935
*Secretary of State
for India in
Council*
v.
Parijat Debee.

to the agreement through their respective guardians, were not made parties to the application of Parijat Debee. The learned Judge, however, had in the decree of June 8, 1928, expressed the opinion that the agreement was for the benefit of the infants, when they were represented by their respective advocates and, as their Lordships understand, there was no allegation when Parijat Debee's application was before the same learned Judge in March, 1931, that the said agreement was not binding on all the parties to it. Therefore, the absence of the minors was not a ground for refusing to give a direction to the Administrator-General to administer the estate in accordance with the agreement of the parties.

For these reasons their Lordships are of opinion that this appeal should be dismissed and that the appellants should pay to Parijat Debee, who was the only respondent who appeared, her costs of this appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellants: *The Solicitor, India Office.*

Solicitors for the first respondent: *Watkins & Hunter.*

C. S.