VENKATRAMA v. KRISHNA.

SESHAGIRI AYYAR, J.

If this is correct, it would be improper to deprive a man of what has been awarded to him without giving him an opportunity of supporting the decision in his favour.

The decision in *Ambakkagari Nagi Reddy* v. *Basappa of Medimakulapalli*(1) does not disapprove of the *dictum* of Sir S. SUBRAHMANIA AYYAR, J., in the earlier case. In *Guruswami Naicken* v. *Tirumurthi Chetty*(2) the only question was whether the Public Prosecutor should have had notice. I do not take these decisions to lay down as a rule of law that the accused to whom compensation has been awarded is not entitled to notice before the order in his favour is set aside. It may be that the legislature should provide specifically for notice. But as the law at present stands, I am unable to agree with the contentions of the learned Public Prosecutor that the accused is not entitled to be heard in the Appellate Court. The First-class Magistrate should give notice to the accused before disposing of the appeal.

C.M.N.

ORIGINAL CIVIL.

Before Mr. Justice Bakewell.

1915. October 1.

KUNTHALAMMAL (PLAINTIFF),

v.

P. N. K. SURYAPRAKASAROYA MUDALIAR *et al* (DEFENDANTS).*

Will—Construction—Money belonging to testator but not known to him—Residuary clause, not passing by—Rule of construction of residuary clause, in a will made in the town of Madras.

A testator in the town of Madras after stating in the preliminary clauses the properties moveable and immoveable to which he was entitled and which he by subsequent clauses in the will bequeathed to various beneficiaries and legatees, finally made a bequest in the following terms: "the sum which may be left after deducting the above mentioned legacies and such other expenses shall be utilised in my name for pooja and other charities in Vytheswarar temple." Unknown to the testator there was a sum of Rs. 4,000 lying to his credit with the Registrar of the High Court, which, after his death was paid to his executor on his application. In this suit by the widow of the testator for administration of the estate,

(1) (1910) I.L.R., 33 Mad., 89. (2) (1915) 27 M. L. J., 629.

* Civil Suit No. 274 of 1914.

Held, that the sum of Rs. 4,000 was not disposed of even under the above residuary clause of the will, that the plaintiff was entitled to it as on an intestacy and that the executor was liable to account for the same from the date of the testator's death on the footing of a wilful default.

The residuary clause in the form in which it appears in English wills is practically unknown to the ordinary testator in Madras and the rules of construction which have been laid down by English Courts are not applicable.

The facts are given in the judgment.

A. Durwiswami Ayyar for the plaintiff.

D. Chamier for the first defendant.

P. Sambandham for the second defendant.

N. Chandrasekhara Ayyar for the third defendant.

C. P. Ramaswami Ayyar for Venkatasubba Mudaliyar, applicant.

JUDGMENT.—One Dakshinamurthi Mudaliar was entitled to certain moneys in this Court under decree in Suit No. 45 of 1889. By an order in that suit, dated the 27th March 1893, certain moneys amounting to Rs. 4,056-12-3 were directed to be transferred by the Registrar to the Accountant-General for investment. These moneys represented certain jewels which were found to be part of the inheritance of Dakshinamurthi Mudaliar and not to have passed under the will of his father. At the date of the decree Dakshinamurthi Mudaliar was a minor, but having attained his majority he applied, in February 1904, for payment out of the funds in Court; and it appears from Exhibits H and H-1, the certificate of funds issued by the Accountant-General, that his application was confined to the moneys specified in that certificate. Owing to some mistake on the part of the legal advisers of the plaintiff in that suit, the moneys in the hands of the Registrar of the Court were not transferred to the Accountant-General in pursuance of the order of the 27th March 1893 and were lost sight of when the application was made by the plaintiff for payment out to him. This is clearly stated by the present first defendant in an affidavit filed by him in that suit on the 8th of August 1914 (Exhibit C). In paragraph 8 he states: "It appears that the said sum of Rs. 4,056-12-3 which appears to have remained in the hands of the Registrar of this Honourable Court was not known to exist and was consequently overlooked and I have now come to know that the said sum of Rs. 4,056-12-3 is standing to the credit of this suit." The amount was

BAKEWELL, J.

KUNTHAL-AMMAL v. SURYA-PRAKASAROYA MUDALIAR.

BAKEWELL, J.

accordingly paid out of Court to the first defendant who claimed it as the executor of the will of Dakshinamurthi Mudaliar.

This will is dated the 5th December 1905 and the testator died in the same month. The first defendant was appointed executor of the will and has been administering the estate of the deceased, and this suit is brought by the widow of the deceased, on behalf of herself and the other legatees under the will, for an account of the administration of the estate, and for its administration under the orders of the Court. The question has arisen as to whether this sum of Rs. 4,000 and odd passed to the residuary legatee under the will. The will follows the form, which is very well known in this Court, of first stating the property which the testator intends to dispose of and then dividing it up amongst the various beneficiaries. Clause No. 2 of the will reads as follows:—"The house No. 25 in Nattu Pillayar Covil Street and ready money were received (by me) under an order of the High Court according to my adoptive father's will. Of the amount left after deducting the sum spent therefrom, not only is a certain portion lodged in fixed deposit in Arbuthnot's House in my name and in the name of my senior elder brother P. N. K. Suryaprakasaroya Mudaliar but the remaining sum is in shape of secured and unsecured debts and ready money." The testator then proceeds to give various specific and pecuniary legacies, and in clause 13 he says: "The sum which may be left after deducting the abovementioned legacies and such other expenses shall be utilised in my name without defect for pooja once, that is, daily, and repairs and other charities for the temple of Sri Vaideswarar in Poonamallee." Having regard to the fact that the existence of this sum of Rs. 4,000 and odd was unknown to the testator at the time, and to the statement made by him that he is dealing with a particular house and the moneys which had been already received by him from the High Court, I think that the words in clause 13 refer to the residue of the moneys in his hands which have not been already disposed of by him under the will, and that the sum of Rs. 4,000 and odd is not disposed of by him. I may point out that the residuary clause in the form in which it appears in English wills is practically unknown to the ordinary testator in Madras and that the rules of construction which have been laid down by English Courts are not applicable.

The defendant has also pleaded a release by the plaintiff of all claims against him, but it is clear from the evidence that this document was executed by the plaintiff when she was a minor. It is also perfectly clear that it was executed under a mutual mistake and for that reason also it is not binding on the plaintiff.

The plaintiff has called for and put in a book purporting to be an account of the first defendant of his administration of the estate. It is not in his affidavit of documents and I think it is obviously a fraudulent concoction. Certain entries which appear in it have been proved, by the evidence called by the plaintiff, to be untrue.

There will, therefore, be a decree declaring that the sum of Rs. 4,056-12-3 did not pass under the will of the deceased but will go to the plaintiff as on an intestacy, that the estate must be administered by the Court and that the first defendant must account from the date of the death of the deceased on the footing of wilful default. The first defendant will pay the costs of the suit up to date. The first defendant is ordered to pay this sum of Rs. 4,056-12-3 into Court within ten days.

Messrs. *Branson and Branson*, Attorneys for the first defendant.

N.R.

ORIGINAL CIVIL.

Before Mr. Justice Bakewell.

1915. October 7.

MOHIDEEN BEE *et al* (PLAINTIFFS),

v.

SYED MEER SAHEB *et al* (DEFENDANTS).*

Muhammadan law—Joint business by two brothers—Death of one of them—Subsequent businesses by survivor and sons of the deceased—Properties purchased out of profits of joint business—Moneys collected by survivor—Suit by heirs of the deceased for their share—Nature of suit—Limitation Act (IX of 1908), arts. 106, 123 and 127—Joint family property, if exists in Muhammadan law—Exclusion, proof of, if necessary.

Two Muhammadan brothers carried on a joint business, and one of them died nineteen years before suit leaving three sons and three daughters. Some properties were purchased out of the profits of the joint business; in the same of the surviving brother; the latter subsequently carried on several other

* Civil Suit No. 23 of 1915.