OFFICIAL ASSIGNEE, MADRAS v. SHEIK MOIDEEN ROWTHER.

that he may be found entitled to get from the insolvent. The garnishee should pay the taxed costs on the Original Side scale of the Official Assignee both in the appeal and before the learned Judge (including the costs of the commission).

*K. Ramachandra Chetti*, Attorney for appellant.

*V. Varadaraja Mudaliyar*, Attorney for respondent.

N.R.

---

## APPELLATE CIVIL.

*Before Mr. Justice Ramesam and Mr. Justice Cornish.*

1927, August 2.

DHANABAKKIYAMMAL (PETITIONER), APPELLANT,

*v.*

THANGAVELU MUDALIAR AND OTHERS (RESPONDENT AND OTHERS—EXECUTORS), RESPONDENTS.*

*Indian Succession Act* (XXXIX *of* 1925), *sec.* 301—*Administrator-General's Act* (V *of* 1902)—*Judicial Trustees' Act* (59 *and* 60 *Vic., Ch.* 35)—*Application under sec.* 301 *for removal of executor—Duty of Court to inquire—Remedy of petitioner—Suit for removal, whether necessary and competent—Sec.* 301, *construction of the word "may" in—Remedy by suit or application.*

Where an application is made to the High Court, under section 301 of the Indian Succession Act (XXXIX of 1925) for the removal of an executor, the Court ought to enquire into the allegations made by the petitioner and ought not to dismiss the petition without any kind of enquiry on the ground that the matter required the taking of a considerable quantity of evidence and that another remedy by way of suit was open to the petitioner.

Section 301 of the Indian Succession Act, 1925, reproduces section 4 of the Administrator-General's Act (V of 1902), which

* Original Side Appeal No. 124 of 1926.

itself reproduces the Judicial Trustees' Act of England (59 and 60 Vic., Chap. 35); and until the said Acts were passed, the Courts had really no power to remove an executor as distinguished from a trustee, though a limited power existed in the Court of imposing restraints on his powers by appointing a receiver: See *Ratcliff, In re.* [1898] 2 Ch., 352, and *Amerchand Madhowji, Ex parte* (1905) I.L.R., 29 Bom., 188.

But after the above Acts were passed in India, if the removal of an executor is sought, the only remedy that is open is by way of a petition under section 301 of the Indian Succession Act.

The use of the word "may" in section 301 of the Act shows merely that a proper case must be made out, and that the Court shall act only if a proper case is made out; to that extent the power is discretionary, but the discretion is not arbitrary but a judicial discretion.

APPEAL from the judgment of SRINIVASA AYYANGAR, J., dated 5th October 1926, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court and made in Original Petition No. 117 of 1926.

The material facts appear from the judgment.

*K. S. Krishnaswami Ayyangar* and *M. S. Venkataraama Ayyar* for appellant.

*S. Doraiswami Ayyar* and *J. A. Pinto* for first respondent.

JUDGMENT.

This is an appeal against an order of our brother SRINIVASA AYYANGAR, J., dismissing an application under section 301 of the Indian Succession Act XXXIX of 1925 to remove the executor Thangavelu Mudaliyar appointed under the will of Vaidyalinga Mudaliyar, dated 21st October 1925. An interim order appointing a receiver was made by our brother BEASLEY, J. When the matter came on for final disposal before SRINIVASA AYYANGAR, J., he held that the matters which had to be determined required a considerable quantity of evidence and the

DHANABAK-KIYAMMAL v. THANGAVELU MUDALIAR.

determination of various facts and issues some of which were really complicated. He was also of opinion that the petitioners have got another remedy for the removal of the executor by way of a regular suit and that the object of this section was merely to provide a summary remedy for such removal in addition to that by suit. No evidence was taken by the learned Judge in respect of the allegations made by the petitioner. On the view he has taken he dismissed the petition. He also expressed a suspicion that the petition was not made in good faith but was actuated by some other motives. Now section 301 of the Succession Act enacts section 4 of the Administrator-General's Act, V of 1902. That Act itself reproduces the provisions of the Judicial Trustees' Act of England, 59 and 60 Vic., Ch. 35. Until the Judicial Trustees' Act of 1896 was passed in England and the Administrator-General's Act (V of 1902), was passed in India, the Courts had really no power to remove an executor. If the character of executor has ceased and he becomes merely a trustee he might be removed from his position as a trustee, but if he continued to be executor he could not be removed from his position as executor. This is the view of KEKEWICH, J., in *Ratcliff, In re*(1). At page 356, he says

"That is to say, the Court can under this Act do what it could not do before—remove an executor."

The same view was taken in India by TYABJI, J., in *Amerchand Madhowji, Ex parte*(2). At page 190, he quotes Lewin on Trusts which says :

"An executor is regarded in some sense as a trustee, but he cannot, like a trustee, be discharged, even by the Court from his *executorship*. When the funeral and testamentary expenses, debts, and legacies have been satisfied, and the surplus has been

(1) [1898] 2 Ch., 352. (2) (1905) I.L.R., 29 Bom., 188.

invested upon the trusts of the will, the executor then drops that character and *becomes a trustee* in the proper sense, and may then be discharged from the office like any other trustee."

Mr. Doraswami Ayyar appearing for the respondent argues that even prior to the Judicial Trustees Act of 1896 there was certainly some jurisdiction in the Court of Chancery by which the estate can be protected. He concedes that an executor cannot be removed, but in the case of a bankrupt executor or in case of waste or improper disposition of the property by the executor, the Court of Chancery can appoint a receiver. But the Court will not interefere merely because an executor is poor. See William's on Executors, 10th Edition, page 1615 and Ingpen on Executors, 2nd Edition, page 51. But this seems to be a remedy of a very limited kind and it is of a very indirect character when the Court restrains an executor from acting merely by the appointment of a receiver. Now, much wider powers are conferred upon Courts both in India and in England for the removal of an executor. Mr. Doraswami Ayyar does not contend that a regular suit for the removal of an executor lies apart from section 301. It is, therefore, clear that, if the removal of an executor is sought and not an indirect restraint on him by merely getting the appointment of a receiver, the only remedy that is open is under section 301. The use of the word 'may' in this section shows merely that a proper case must be made out and the Court shall act only if a proper case is made out. To that extent no doubt, the power vested in a Court under this section is discretionary, but the discretion is not arbitrary but it is a Judicial discretion. It may be that the section does not try to exhaust the kinds of charges that may be brought against an executor or other circumstances that ought to be made out before his removal can be obtained. The fact that

DHANABAKKIYAMMAL v. THANGAVELU MUDALIAR.

BEASLEY, J., thought that a receiver ought to be appointed shows that in his opinion there was good reason for the appointment of a receiver. The learned Judge (SRINIVASA AYYANGAR, J.) does not say that the allegations made by the petitioner in this case do not make out a *prima facie* case, even if proved. That being so, we think the Court ought to enquire into the allegations made by the petitioner; and, if the facts proved do not make out a proper case, it is another matter. But it may not be open for a Court to dismiss the petition without any kind of enquiry into the allegations made. As to the apprehension that the Original side may be flooded by applications of this kind, all that I can at present say is I do not know how far the apprehension is justified. In many cases the allegations themselves may be *prima facie* frivolous and in such cases petitions may fail without even an enquiry. But assuming that there may be a large number of such applications that is no ground for refusing an obvious remedy now conferred upon the parties by the Legislature. I do not think it is necessary to pursue this kind of argument any further. The result is, the order of the learned Judge will be set aside and the case will go back to the Original side for enquiry into the petition.

We are informed that the receiver appointed by BEASLEY, J., has been discharged as a result of the dismissal of the petition. Now that the order dismissing the petition is set aside, we think it is safe in the interests of the estate and in the interests of all parties that the receiver should continue. We do not mean to express any opinion as to the allegations and counter-allegations made by the parties against each other at this stage. Seeing that there has been a receiver up to the dismissal of the petition and his discharge was really a result of the dismissal of the petition, we think it is

proper that he should continue, now that the Order dismissing the petition is set aside.

The receiver will act under the directions of the Court.

Costs up to this stage will abide the result.

Stamp paid on appeal will be refunded.

K.R.

---

## APPELLATE CIVIL.

*Before Mr. Justice Kumaraswami Sastri and Mr. Justice Ramesam.*

SANNIDHIRAJU SUBBARAYUDU AND OTHERS (PLAINTIFF'S LEGAL REPRESENTATIVES), APPELLANTS,

1927, April 19.

*v.*

THE SECRETARY OF STATE FOR INDIA (DEFENDANT), RESPONDENT.*

*Madras Irrigation Cess Act (VII of 1865)—River, when "navigable"—Riparian proprietor using water of non-navigable river, whether liable to pay irrigation cess.*

A river is not "navigable" unless it is navigable *throughout* the year for *steamers and big boats.*

Where only one side of a non-navigable river belongs to the Government and the other side belongs to a private owner, (e.g. a Zamindar with a permanent Sannad or, as in this case, an inamdar from him) the latter has the right as a riparian owner to take a reasonable quantity of water for irrigation purposes without any liability to pay any cess under the Madras Irrigation Cess Act (VII of 1865), the extent of the right being determined by the configuration of channels and sluices and the width of the river.

SECOND APPEAL against the decree of K. APPAJI RAO, Subordinate Judge of Rajahmundry, in Appeal Suit

---

* Second Appeal No. 1216 of 1924.