forthcoming setting out the reasons why he did not apply under section 43. We do not see sufficient grounds for holding that the creditor who applied for the annulment of adjudication is not entitled to the remedy which the law gives him. We may also point out that the annulment of adjudication does not necessarily re-vest the property in the debtor as the Court can under section 37 give directions in whom the property should vest pending further orders.

We set aside the order of the District Judge extending the time and direct that he should dispose of the matter before him according to law. As regards costs, we direct that the costs of the appellant in this appeal do come out of the estate of the insolvent.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss.

V. AKKAYYA (PETITIONER),

1927, November 21.

v.

VANAMA LAKSHAMMA (RESPONDENT).*

Indian Succession Act (XXXIX of 1925), sec. 302—Hindu will—Application by executor, to the High Court, under sec. 302 for directions—Previous suit by testator's widow and legatee in a Sub-Court- Decree in favour of widow against executor to deliver property—Provision for charity in the will, not dealt with by the suit or decree—Application to High Court by executor for directions as to charity—Jurisdiction of High Court—Directions, when given.

Under section 302 of the Indian Succession Act (XXXIX of 1925), the High Court has, on an application made to it under

* Civil Miscellaneous Petition No. 4396 of 1927.

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that section, ample power to settle any question arising between the executor and the legatees and between the legatees themselves, and also power to construe a will whenever the Court is asked to do so. The High Court has power, under section 302, to give the directions, which the Court of Chancery in England has under Order LV, rule 3, of the Rules of the Supreme Court.

Where a decree was obtained by a legatee against the executor for delivery of the property in a suit in a Sub-Court, and subsequently the executor filed a petition in the High Court under section 302 of the Act for directions as to a fund relating to a charity mentioned in the will but not dealt with by the decree of the lower Court, the High Court had jurisdiction to give directions, as the matter was not adjudicated in the suit but would not give directions where the matter has been definitely settled in a properly constituted suit.

PETITION under section 302 of the Indian Succession Act, 1925, praying the High Court to give directions in respect of a will of one Subba Rao (subject matter of O.P. No. 24 of 1927 in the District Court of Kistna) in regard to the administration thereof.

The material facts appear from the judgment.

Ch. Raghava Rao and *V. Pattabhirama Sastri* for petitioner.

P. Satyanarayana Rao for respondent.

JUDGMENT.

This is an application under section 302 of the Indian Succession Act, praying for the issue of general or special instructions in regard to the administration of an estate and for an injunction restraining the respondent herein from executing the decree in O.S. No. 65 of 1925 on the file of the Sub-Court, Bezwada, and such other order or orders as this Court may deem fit to pass.

One Subba Rao died on the 13th November 1920. He executed a will on the 11th November 1920 giving power to his wife to adopt a boy and directing the executor to pay a certain amount to her for maintenance

and for the management of the estate. The executor who is the petitioner did not put the respondent in possession of a portion of a house mentioned in paragraph 3 of the will and did not give her maintenance for a considerable time, in consequence of which she was obliged to file O.S. No. 65 of 1925 for the recovery of the whole of the property as the widow of the deceased Subba Rao. The suit was resisted on various grounds and the Subordinate Judge passed a preliminary decree in favour of the respondent overruling the objections of the petitioner. An account was taken and a large amount was found due and both the petitioner and the respondent entered into a compromise under which it was arranged that Rs. 9,000 should be paid to the respondent as being the amount due to the estate in the possession of the executor. She has obtained possession of the portion of the house mentioned in the will. The petitioner has deposited the amount of Rs. 9,000 into the District Court at Guntūr and has come up here for the directions of this Court as regards the handing over of the amount to her and as regards the amount that should be allowed to remain in his hands for the performance of some charity.

Mr. Satyanarayana for the respondent raised a preliminary objection that an application under section 302 does not lie in this case. His argument is that the Court can only be asked to give advice to the executor, but when the right of the respondent to receive the whole of the estate is disputed, this Court has no jurisdiction to give any directions under section 302 and he relies upon *In re Lorenz's Settlement*(1), *In re Samuel Marie Brereton*(2) and *In re Lakshmi Bai*(3). No doubt, under sections 30, 22 and 23 Vict., Cap. 35, the Court

(1) (1861) 1 Dr. & Sm., 401; 62 E.R., 433.
(2) (1888) I.L.R., 7 Bom., 381. (3) (1888) I.L.R., 12 Bom., 636.

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had no jurisdiction to decide upon the conflicting claims of parties claiming under a will. The relevant portion of section 30 is as follows :—

"Any trustee, executor, or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the High Court of Chancery or by a summons upon a written statement to such Judge in Chambers for the opinion, advice or direction of such Judge on any question respecting the management or administration of trust property or the assets of any testator or intestate."

The section is clear that what is asked for is the opinion, advice or direction of the Judge. It was held that, under this section, the Court of Chancery had no power to give a decision upon contested questions and upon conflicting claims. In *In re Lorenz's Settlement*(1) it was held—

"The Court will not upon a petition presented by a trustee or executor under the 30th section of 22 and 23 Vict., Cap. 35, for the opinion, advice or direction of the Court, construe an instrument or make an order affecting the rights of parties to property. Such petitions should relate only to the management and investment of trust property."

KINDERSLEY, V.C., observed at page 434—

"My understanding of the section of the Act is that it was intended by the legislature that the Court should have power to advise a trustee or executor as to the management and administration of the trust property in the manner which will be most advantageous to the parties beneficially interested but not to decide any question affecting the rights of those parties *inter se*. Otherwise, the effect would be, that a deed or will involving the most difficult questions, and relating to property to an amount however large, might be construed and most important rights of parties decided by a single Judge, without any power of appeal whatever."

The jurisdiction of the Court of Chancery under 22 and 23 Vict., Cap. 35, section 30 or 38 was only advisory. This provision in 22 and 23 Vict., Cap. 35, was enacted

(1) (1861) 1 Dr. & Sm. 401 ; 62 E.R., 433.

in section 43 of the Trustees' and Mortgagees' Powers Act, XXVIII of 1866. Under section 43

"Any trustee, executor or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the High Court for opinion, advice or direction of such judge on any question respecting the management or administration of the trust property or the assets of the testator or intestate."

In *In re Samuel Marie Brereton*(1), it was held by a judge sitting on the Original Side that section 43 did not empower the Court to decide any question of considerable difficulty and importance. Mr. Justice LATHAM relied upon the observation of KINDERSLEY, V.C., in *In re Lorenz's Settlement* quoted above and held that,

"the Court should not deal, under the power here given, with a point of law, like the present one, on which so much may depend, and which is in itself so full of difficulty."

This case was followed in *In re Lakshmibai*(2). In that case also an application was made under section 43 of the Trustees' and Mortgagees' Powers Act of 1866, praying (1) that the trusteee might be advised whether she had power to grant the proposed lease, (2) whether the Court will sanction or direct the said lease and (3) that the Court will advise in the premises as may seem fit. Mr. Justice SCOTT, observed at page 644,

"The questions on which the Court has advised trustees have related strictly to undisputed matters of management, such as questions of advancement, maintenance, change of investment, sale of a house, compromises, taking proceedings. But disputed points of law or fact have never been included. The Court will not, for instance, construe an instrument or make any order affecting the rights of parties."

These cases have no application to proceedings under section 302. This section was enacted in the year 1919 as section 264-B of the Indian Succession Act and 87-B

(1) (1883) I.L.R., 7 Bom., 381. (2) (1888) I.L.R., 12 Bom., 638.

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of the Probate and Administration Act. It is now embodied in the new Act as section 302. Under this section,

"the Court has got power on an application made to it to give to the executor or administrator any general or special directions in regard to the estate or its administration."

"Any directions as regards the administration of an estate" means such directions as the executor may seek in order to administer the estate properly. This section gives ample power to the Court to settle questions arising between the executor and the legatees and between the legatees themselves and also power to construe a will whenever the Court is asked to do so. It is difficult to hold that the Legislature when it enacted section 264-B in the year 1919 overlooked the well known English practice which has been prevailing in the Court of Chancery for the last so many years. The Court of Chancery has full power to give directions as regards the administration of an estate, whether an application is made to it by the executor or by the administrator or by the legatee or other person interested in it. Order LV, rule 3 (g) of the Rules of the Supreme Court, 1883, is as follows :—

"The determination of any question arising in the administration of the estate or trust."

That is wide enough and I do not think the language of section 302 cuts down the power of the Court. In *Conway* v. *Fenton*(1) Mr. Justice KEKEWICH observed at page 515—

"The question is raised on an originating summons under Order LV, rule 3 (*e*). The object of that order was to enable trustees or persons beneficially interested under a settlement or will to come by summary mode to the Court and to obtain the determination of any question, whether of administration, or of law, or of construction, without the necessity of what used to be known as an administration suit or action. I take it that, for

(1) (1888) 40 Ch D., 512.

all purposes, or almost all purposes, the Court is precisely in the same position on the hearing of an originating summons as if there were really an administration action properly constituted, and that I have precisely the same jurisdiction under an originating summons as I should have in an administration action—neither more nor less."

I hold that the High Court has power under section 302 to give the directions which the Court of Chancery in England has under Order LV, rule (3).

The next point urged by Mr. Satyanarayana is that the matter between the parties has been concluded by the judgment of the Subordinate Judge and therefore this Court cannot give directions in variance with the judgment of the Subordinate Judge. When a matter has been properly litigated in a Civil Court and has been adjudicated upon, this Court will be very reluctant to give directions which would in any way conflict with the judgment between the parties already arrived at. Though this Court had jurisdiction to go into the matter, it should, in cases where the matter has been definitely settled in a properly constituted suit, hold its hands. But the question that is now raised before me was not disposed of in the lower Court, for Mr. Raghava Rao raised the question whether he is entitled to hold a certain sum of money in his hands for the performance of a trust which he says has been constituted under the will. The following passage in the will is relied upon as having created a trust and as having appointed the petitioner the trustee for performing the charity mentioned in that passage :

"So long as the said amount remaining after excluding the amount paid for maintenance to my wife from out of my property, continues, I have authorized my junior uncle Vanama Akkayya Garu to give provisions, rice, dholl, tamarind, etc., to two guests once a day from to-day onwards."

Mr. Raghava Rao's contention is that this clause in the will establishes a trust in favour of charity and

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consequently it constitutes the petitioner a trustee for carrying out the terms of the trust. It is unnecessary in the view I take to consider whether this clause creates a proper trust for the feeding of two guests. The amount that is to be spent on the feeding of guests is not mentioned and there is nothing in the will itself to show what portion of the property should be set apart for feeding two guests a day.

The question that requires decision is whether the petitioner is entitled to keep the whole or any portion of the corpus in his hands for the purpose of carrying out the trust. The contention is that till a boy is adopted and till he attains majority he is entitled to keep a portion of the corpus in his hands for feeding guests. The widow may or may not adopt and if no adoption takes place there could be no boy who can come to maturity. The petitioner, according to Mr. Raghava Rao's contention, is entitled to keep the money till the boy attains majority. If that is so, seeing that there is no boy and there is no likelihood of the widow adopting a boy, I fail to see how he can keep any portion of the corpus for the performance of charity. If a boy is adopted, on his attaining majority the charity should be performed by him. If no boy is adopted, the widow if she likes may give effect to the intention of the testator as regards charity, but I fail to see how an executor who is only asked to be in possession for a time can hold on to the property on the ground that an uncertain event was likely to happen. It is clear that a bequest in favour of a person not in existence at the time of the testator's death, when there is no intervening life-interest before the expiration of which he could come into existence is void, but that will not give a right to the executor to hold on to the property indefinitely. The petitioner is only an executor and he having

invoked the provisions of section 302 is bound by the directions of this Court. Seeing that the respondent has obtained a decree for the whole of the amount in a civil suit, he is not entitled to keep any money in his hands for the purpose of carrying out the objects of the charitable trust. He being an executor must render an account to the Court and must hand over the property to the person entitled to it.

The widow not having adopted a boy is entitled to the whole of the corpus. No doubt, if she adopts a boy according to the terms of the will, she would be entitled to maintenance according to the terms of the will and the corpus would go to the adopted boy. The executor is not entitled to keep any portion of the corpus in his hands in the hope a boy would be adopted to his testator. My direction therefore is that the petitioner should hand over the whole of the corpus to the respondent and should not raise any objection to doing so in his capacity as executor.

I am satisfied that this application is not a bona fide one, for the petitioner having fought the respondent in the Bapatla Sub-Court and having been worsted there has thought of putting obstacles in her way by making this application. I therefore direct him to pay personally the costs of this application and vakil's fee Rs. 100.

K.R.