KRISHNAN v. SOMI. LEACH C.J.

the sons. We do not consider that *Raja Ram* v. *Raja Bakhsh Singh*(1) had overruled the decision of the Full Bench in *Periasami Mudaliar* v. *Seetharama Chettiar*(2). In our opinion the decision of the Full Bench remains unaffected and a decree-holder in circumstances like we have here, may proceed to execute the decree against the sons' interests in the family property.

The appeals will be allowed with costs in this Court and in the second appeals but the Advocate's fee will be allowed only in Appeal No. 97 of 1938 of this Court and in the corresponding second appeal. The result is that the decrees of the Subordinate Judge will be restored.

N.S.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Krishnaswami Ayyangar.

1939, December 12

WILFRID HAZELL SELL (PETITIONER), APPELLANT.*

Indian Succession Act (XXXIX of 1925), ss. 228, 241 and 291—Principal obtaining probate of will in England—Agent applying in India for letters of administration with copy of will annexed—Grant in favour of, without security under sec. 241.

Under section 241 of the Indian Succession Act letters of administration with a copy of the will annexed could be granted without security in favour of an agent who applies on behalf of his principal who had obtained probate of the will in England.

APPEAL from the order of SOMAYYA J., dated 14th day of September 1939, and made in the exercise of

(1) (1937) I.L.R. 13 Luck. 61 (P.C.). (2) (1903) I.L.R. 27 Mad. 243 (F.B.).

* Original Side Appeal No. 51 of 1939.

the Original Testamentary Jurisdiction of the High Court in Original Petition No. 164 of 1939. W. H. SELL, *In re.*

O. T. G. Nambiar for appellant.

Advocate-General (*Sir A. Krishnaswami Ayyar*), *Government Solicitor* (*H. M. Small*) and *K. S. Rajagopalachari* amicus curiæ.

JUDGMENT.

LEACH C.J.—This is an appeal from an order of SOMAYYA J. directing that letters of administration to the estate of one Edward Carmichael McCankie be issued to the appellant on the furnishing of security under section 291 of the Indian Succession Act. The appellant contends that the learned Judge should have held that he was entitled to letters of administration with a copy of the will annexed under section 241 of the Act, in which case he could not be called upon to furnish security. The deceased died in Littlehampton, England, leaving a will, dated 21st February 1936. Probate of the will was obtained in England. The testator appointed Mrs. Madeline Emily Hawkins his executrix. The executrix was not able to come to India to take out letters of administration and she granted a power of attorney to the appellant to enable him to apply as her agent. Since the Succession Act of 1865 it has been the practice of this Court to grant letters of administration with a copy of the will annexed in cases such as this without requiring security to be furnished. The Court is informed that the same practice has prevailed in the Calcutta and Bombay High Courts. The learned Judge considered that the practice was in conflict with the wording of section 241 and he refused to follow it. He held that the appropriate section was section 228 which meant that security would have to be furnished. LEACH C.J

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Section 228 says that, when a will has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of the province, whether within or beyond the limits of His Majesty's Dominions and a properly authenticated copy of the will is produced, letters of administration may be granted with a copy of the authenticated copy of the will annexed. Section 228 is in Chapter I of Part IX of the Act. This chapter contains general provisions with regard to the grant of probate and letters of administration. Section 241 falls in Chapter II which deals with limited grants. This section says that, when an executor is absent from the province in which the application is made and there is no executor within the province willing to act, letters of administration with the will annexed may be granted to the attorney or agent of the absent executor, for the use and benefit of his principal, limited until he obtains probate or gets a grant of letters of administration to himself. In addition to the assistance rendered by the learned Advocate for the appellant the Court has had the assistance of the learned Advocate-General. It has been accepted by Counsel that, unless the executrix in England can avail herself of the provisions of section 241, she must come out to India and apply herself for letters of administration, there being no other section which can be read as permitting of an application being made by an agent in such a case as this. Sections 242 and 243 allow applications by agents but they do not apply here. Section 242 relates to the case where the person to whom, if present, letters of administration with the will annexed might be granted is absent from the province, and section 243 to an application for letters of administration on intestacy.

I do not think that it could have been the intention of the Legislature to compel an executor living abroad to come to this country to take out letters of administration personally when he has obtained probate of the will in his own country. It might be impossible for him to come to India and then the estate here would have to remain unadministered. Although it has never before been called upon to give a judicial pronouncement on the question, this Court, in common with the other Presidency High Courts, has, as I have already indicated, read section 241 as covering an application for letters of administration with a copy of the will annexed when the original cannot be produced because it is held by a Court abroad as the result of that Court having granted probate. The question was raised in the Calcutta High Court in 1875 and it was decided that section 212 of the Succession Act of 1865, which is the same as section 241 of the present Act, did apply in a case like the present one. The Calcutta case is *In the goods of Leckie*(1). There, a British subject possessed of property both in India and in England died in England leaving a will by which he appointed four persons to be his executors in England and one person to be his executor in India. The English executors obtained probate in England, but the Indian executor renounced. An application was then filed in the Calcutta High Court for letters of administration with the will annexed to be granted to the attorney of the English executors. It was held that the attorney was entitled to the grant. PHEAR J. who decided the case said that it would be in accordance with the practice of the Court that letters of administration with the will annexed should be granted to the attorney of the English executors.

(1) (1875) 15 B.L.R. Appx. 8.

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LEACH C.J

In the course of his judgment SOMAYYA J. expressed the opinion that section 241 is intended to apply to the case where the executor is temporarily absent from the province but his return is contemplated. I do not share this opinion. I appreciate that the section might be read, as the learned Judge has read it, as applying only to the case where there is an application for letters of administration with the original will annexed, but to do so is to disregard the scheme of the Act. Inasmuch as it has been read by this Court and other High Courts for so many years in the broader sense and in a sense which avoids anomaly and hardship, I consider the Court would not be justified in insisting on the strict construction.

The learned Judge in the course of his judgment has referred to two cases ; *In the goods of William Ashton*(1) and *Deputy Commissioner of Singhbhum* v. *Jagadish Chandra Deo Dhabal Deb*(2). It has not been suggested at the Bar that the latter case has application and in my opinion it has no bearing. The former case is in point. A Bench of the Allahabad High Court there insisted on the observance of the strict letter of section 212 of the Act of 1865. The argument that the strict letter must be followed is one that cannot be lightly brushed aside, but I consider that it should not prevail in view of the fact it has been read differently for over half a century and that the broader construction is in keeping with the scheme of the Act. Consequently I would allow the appeal and direct that letters of administration be issued to the petitioner under section 241, which means without security.

KRISHNASWAMI AYYANGAR J.

KRISHNASWAMI AYYANGAR J.—I have come to the same conclusion but not without hesitation. But

(1) 1905 All W. N 251.

(2) (1921) 6 P.L.J. 411.

for the uniform practice of this Court and of the Bombay and Calcutta High Courts I should have been inclined to agree with the opinion of SOMAYYA J. which is the same as the opinion expressed by the Allahabad High Court. I do not feel that the language of section 241 is sufficiently clear to set aside this long practice, more especially when a strict interpretation is likely to lead to this result, namely, that there would be no provision in the Act for an agent of an executor in a foreign country to apply for letters of administration in this country in circumstances similar to those present in this case.

Solicitors for appellant :—*King and Partridge.*

G.R.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Krishnaswami Ayyangar.

RAMANATHA GURUKKAL *alias* PARAMESWARA GURUKKAL (APPELLANT), APPELLANT

1939, November 22.

v.

V. V. R. ARUNACHALAM CHETTIAR, MANAGER OF TIRUPALATHURAI SIVA DEVASTHANAM AND ANOTHER (RESPONDENTS), RESPONDENTS.*

Hindu Religious Endowments Act, Madras (II of 1927), sec. 43—Dismissal of archaka by trustee—Right of archaka to sue in Court—"Final" in sec. 43—Meaning of.

An archaka of a temple dimissed from his office by the trustee has no right to challenge the correctness of the trustee's action in a Court of law. His remedy is limited by section 43 of the Madras Hindu Religious Endowments Act, 1926,

* Letters Patent Appeal No. 75 of 1938.