Privy Council Appeal No. 66 *of* 1934.
Bengal Appeal No. 15 *of* 1932.

The Secretary of State for India in Council and another - *Appellants*

v.

Srimutty Parijat Debi and another - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 14TH OCTOBER, 1935.

Present at the Hearing:
LORD THANKERTON.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.
[*Delivered by* SIR LANCELOT SANDERSON.]

This is an appeal from an order dated the 24th of April, 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 the 17th of March, 1931.

The facts out of which this appeal arises are shortly as follows. One Pasupati Mukherjee, a resident of Calcutta, died on the 9th May, 1919, possessed of considerable property, having made a last will and 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 Debi; a son, Tirthapati Mukherjee, who died on the 20th August, 1929, a minor; a daughter, Pratima Debi, 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 Debi, whereupon the matter was entered as a contentious suit, Suit No. 13 of 1920, as between the Administrator-General as plaintiff and Parijat Debi 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 the 3rd of March, 1928.

The parties to the agreement were Tirthapati who was then an infant by his next friend and mother Parijat Debi of the first part, the said Parijat Debi of the second part, Pratima Debi daughter of the said Pasupati, a minor, by her next friend and husband of the third part, Bidyapati, Sreepati and Bimalpati, sons of Kasipati the last two being minors by their mother and guardian Suvankari Debi of the fourth part and the said Suvankari Debi 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 :—

> Tirthapati—ten annas (in place of five annas eight piès under the will) Pratima Debi—two annas (instead of two annas five piès) and the three sons of the testator's predeceased elder brother—one anna four piès each (instead of two annas eight piès each).

The caveat was withdrawn and a decree in the said probate proceedings was made by the learned Judge on the 8th of June, 1928.

Before that date, Tirthapati and Pratima Debi both being minors and the above mentioned 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 Tirthapati died on the 20th of August, 1929, and admittedly Parijat Debi was his heiress, entitled to the estate of a Hindu mother. On the 12th of August, 1930, a summons was taken out on behalf of Parijat Debi in the said suit (No. 13 of 1920). 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 Tirthapati Mukherjee 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 Debi 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 Tirthapati 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 Tirthapati Mukherjee 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 Tirthapati Mukherjee 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 Pashupati Mukherjee 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 Debi, Pratima Debi, and the Administrator-General of Bengal. The learned Judge ordered

> " that the Administrator-General of Bengal as executor to the Will of Pasupati Mukherjee deceased do make over to Srimati Parijat Debi, the widow of the deceased, that portion of the residuary

estate of the testator in his hands to which her deceased son Tirthapati Mukherjee was entitled after retaining in his hands a sum sufficient to cover any claim by the said Secretary of State for Court-fees under Section 19E of the Court Fees Act in case it be held that the said Srimati Parijat Debi 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 Srimati Parijat Debi. And it is further ordered that the said Administrator-General of Bengal do also make over to the said Srimati Parijat Debi all accumulations in his hands belonging to Tirthapati's share of the estate."

The Secretary of State and the Administrator-General of Bengal appealed against the above-mentioned 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 Debi 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 Clause 36 of the Letters Patent.

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

"(1) Whether in the circumstances which have happened in this case the applicant Srimutty Parijat Debi can invoke Section 104 of the Indian Succession Act in her favour;

"(2) Whether it is incumbent upon Srimutty Parijat Debi to take out a Succession Certificate to enable her to recover the residuary share of the estate of the testator payable to her son Tirthapati Mukerji; 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 the 24th April, 1933, held (1) that Parijat Debi could invoke section 104 of the Indian Succession Act in her favour: (2) that it was not incumbent upon Parijat Debi to take out a succession certificate to enable her to recover the residuary share of the testator payable to her son Tirthapati: (3) that the relief prayed for could be granted to Parijat Debi 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 above-mentioned questions it was argued on behalf of the appellants that section 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 Tirthapati became entitled to the ten annas share of the residue by reason of the agreement which was made on the 3rd of March, 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. : the 9th of May, 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 Debi to obtain a grant of letters of administration in respect of the estate of Tirthapati, inasmuch as section 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 Debi to obtain a succession certificate to enable her to receive from the Administrator-General the ten annas share of Tirthapati 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 Tirthapati's ten annas share, when ascertained upon the completion of the administration of the estate, constituted a debt due from the Administrator-General to Tirthapati within the meaning of section 214 of the Succession Act and that the Court should not have made any order in favour of Parijat Debi without the production of a succession certificate.

The material parts of section 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-section (1) includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes."

In order to bring this case within section 214 of the said Act, in their Lordships' opinion, it would be necessary for the appellants to show that Parijat Debi was claiming on succession to be entitled to the effects of her deceased son Tirthapati 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 Tirthapati died intestate and that Parijat Debi 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 Tirthapati in the residue within the meaning of the above-mentioned 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. *Income Tax Special Commissioners* [1921] 2 A.C. 1 per Viscount Finlay at page 8. In the same case at page 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 Tirthapati's death was not complete, and the residue had not been ascertained. Consequently no specific share in the residue had vested in Tirthapati at the time of his death and the sole right of Tirthapati was to call upon the Administrator-General to administer the estate in due course.

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

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 Debi 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 Debi 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 Debi's application and to make the order dated the 17th March, 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 Debi in pursuance of section 302 of the Indian Succession Act of 1925. This section is to be found at the end of Chapter IV of the said Act, which is headed " Of 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 Debi 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 the 3rd of March, 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 Debi 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 the 17th of March, 1931.

Reliance was placed by the appellants upon the case of *Kamal Kumari Devi* v. *Narendra Nath Mukwji* 9 Cal. L.J.19. 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 pages 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 the 3rd March, 1928, against another on the ground that the terms had not been carried out, it would properly be the subject of a separate suit.

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 Debi 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 Debi 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 the 17th March, 1931, which does not come within the material words of section 302, " in regard to the estate or in regard to the administration thereof ", and that the learned Judge had jurisdiction to entertain Parijat Debi'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 Debi 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 Debi. 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 to the agreement through their respective guardians were not made parties to the application of Parijat Debi. The learned Judge however had in the decree of the 8th of June, 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 Debi'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 Debi who was the only respondent who appeared, her costs of this appeal. Their Lordships will humbly advise His Majesty accordingly.

(30948—3A) Wt. 9034—41 180 10/35 P. St. G. 338

In the Privy Council.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER

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