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No. 11 of 1952.

In the Privy Council.

UNIVERSITY OF LONDON
W.C.1.
21 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA IN ITS APPELLATE JURISDICTION.

IN THE MATTER of the ESTATE OF HERBERT ELLIS late of Hurstville in the State of New South Wales Electrical Engineer Deceased.

IN THE MATTER of the APPLICATION of NANCE ELLIS of Hurstville in the said State Widow.

AND IN THE MATTER of the TESTATOR'S FAMILY MAINTENANCE and GUARDIANSHIP of INFANTS ACT, 1916-1938.

Between EDIE MAUD LEEDER - - - - - - *Appellant*

AND

NANCE ELLIS - - - - - - - *Respondent.*

CASE FOR THE APPELLANT.

RECORD.

1. (*a*) This is an appeal from an Order of the High Court of Australia made on the 3rd August 1951 allowing an appeal by the Respondent from an Order of the Full Court of the Supreme Court of New South Wales made on the 1st November 1950. The said Order of the High Court directed that the said Order of the Full Supreme Court should be set aside and that an Order made by Sugerman J. in the Supreme Court of New South Wales on the 4th August 1950 (on appeal from which the said Order of the Full Supreme Court was made) should be set aside except as to costs and that provision should be made for the Respondent out of the estate of Herbert Ellis deceased by direction that in lieu of the beneficial dispositions of the will of the said deceased his Executrix should be directed to hold the whole of his real and personal estate on trust for the present Respondent absolutely.

p. 53. p. 42. p. 33.

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RECORD.

p. 1. (*b*) The application before Sugerman J. was an application by the Respondent to which the Appellant was respondent claiming that adequate provision for the proper maintenance of the Respondent should be made out of the estate of the said deceased and that an order should be made specifying the amount and nature of such provision. Sugerman J. by his aforesaid Order refused to p. 33. make any Order on the said application save that the costs of both parties as between solicitor and client should be paid out of the estate of the said deceased. p. 35. From this Order the Respondent appealed to the Full Court of the Supreme Court of New South Wales which Court dismissed such appeal. The Appellant desires to submit that the decision of the Full Court of the Supreme Court and **10** that of Sugerman J. were correct and should be restored.

2. On the 28th July 1949 Herbert Ellis (hereinafter called "the Deceased") formerly and at all material times resident at Sydney in the State p. 6. of New South Wales in the Commonwealth of Australia died having first made his last Will and Testament dated the 27th June 1947 (hereinafter referred to as "the Will") which omitting formal parts was as follows:—

> "This is the last Will and testament of me Herbert Ellis of Kogarah in the State of New South Wales Electrical Engineer I hereby revoke all former wills and testamentary dispositions heretofore made by me and declare this to be my last will and testament I appoint Edie Maud **20** Leeder sole Executrix and Trustee of this my will I bequeath to the said Edie Maud Leder one genuine chesterfield warbrobe one spanish mahogany wardrobe and my grandfather clock and I bequeath the rest and residue of my furniture to my wife Nance Ellis I devise all my real estate wheresoever situate and I bequeath the rest and residue of my personal estate of whatsoever kind and wheresoever situate subject to the payment of my just debts funeral and testamentary expenses to the said Edie Maud Leeder absolutely."

3. The Deceased was married once only and left him surviving his Widow Nance Ellis (the above named Respondent) and three children Herbert Claude **30** Ellis, Floria Patricia Magazinovic (a married woman) and Anne Maureen Ellis aged 33, 27 and 17 years respectively at the time of the application hereinafter mentioned.

4. On the 15th February 1950 Probate of the Will was granted to the Appellant by the Supreme Court of New South Wales in its Probate Jurisdiction.

5. The Estate of the Deceased was sworn by the Appellant for Probate p. 57. at the net sum of one hundred and thirteen pounds six shillings and ninepence (£113.6.9.).

p. 1. 6. On the 8th March 1950 the Respondent as Widow of the Deceased **40** issued a Summons out of the Supreme Court of New South Wales in its Equity Jurisdiction under and by virtue of the provisions of the Testator's Family Maintenance and Guardianship of Infants Act 1916-1938 claiming that she had been left without adequate provision for her proper maintenance education or advancement and that such provision should be made out of the estate of the Deceased

and that an order be made *inter alia* specifying the amount and nature of such provision. Notice of such application was served upon the Appellant as executrix of the said Will. RECORD.

7. (*a*) Section 3 of the Testator's Family Maintenance and Guardianship of Infants Act, 1916-1938, provides as follows:—

"(1) If any person (hereinafter called "the Testator") dying or having died since the seventh day of October one thousand nine hundred and fifteen, disposes of or has disposed of his property either wholly or partly by will in such a manner that the widow husband or children of such person, or any or all of them, are left without adequate provision for their proper maintenance, education of advancement in life as the case may be the Court may at its discretion, and taking into consideration all the circumstances of the case, on application by or on behalf of such wife, husband, or children, or any of them, order that such provision for such maintenance, education and advancement as the Court thinks fit shall be made out of the estate of the Testator for such wife, husband or children or any or all of them.

Notice of such application shall be served by the applicant on the executor of the will of the deceased person.

The Court may order such other persons as it may think fit to be served with notice of such application.

(2) The Court may attach such conditions to the Order as it thinks fit, or may refuse to make an order in favour of any person whose character or conduct is such as to disentitle him to the benefit of such an order.

(3) In making an order the Court may, if it thinks fit, order that the provision may consist of a lump sum, or periodical, or other payments."

(*b*) Rule 5 of the Rules made in pursuance of the said Act is as follows:

"The Executor, or administrator, as the case may be, when entering an appearance, shall file and serve an affidavit setting out the nature and amount of the estate and giving such information as is available to the deponent as to the family of the testator or intestate and the persons entitled beneficially in the said estate."

8. The said Summons was heard by Sugerman J. on Friday the 28th July 1950 when the matter was part heard and on Monday the 31st July 1950 when the evidence was concluded and His Honour reserved Judgment. Affidavit evidence supplemented by oral evidence was tendered by the Respondent and the Appellant, both of whom were subjected to cross-examination. pp. 3-30.

9. The following evidence so far as is material to this Appeal was submitted before His Honour:—

(i) Apart from certain furniture which was claimed by the Respondent as her own property the only asset in the estate of the Deceased was a cottage property situated at Hurstville near Sydney aforesaid. pp. 8, 9.

RECORD.

pp. 3, 4.

(ii) The Respondent in an affidavit sworn by her on the 8th March 1950 said that the said cottage was valued by the Valuer-General at One hundred and forty pounds (£140.0.0.) unimproved capital value and one thousand pounds (£1,000.0.0.) improved capital value.

p. 8.

(iii) The Appellant in an affidavit sworn on the 3rd July 1950 said *inter alia* " The nature and amount of the Deceased's property at the date of his death is as follows: —

(*a*) A house property No 2 Woid's Avenue Hurstville valued at one thousand pounds (£1,000.0.0.) as per Valuer-General's Certificate. 10

(*b*) The furniture in the above premises not as yet valued.

(*c*) The sum of eight hundred and eighty-six pounds thirteen shillings and three pence (£886.13.3). was owing by the Deceased at the date of his death to the War Service Homes Commission in respect of a Mortgage on the above property.

(*d*) The Deceased was at the date of his death indebted to the Appellant in the sum of four hundred and ninety-seven pounds twelve shillings and sevenpence (£497.12.7)."

pp. 21-30.

(iv) The Appellant in her oral evidence swore that sums of money were lent by her to the Deceased from time to time giving circumstantial 20 detail of the occasion and nature of the loans.

(v) The Appellant tendered in evidence promissory notes to the value of two hundred pounds (£200.0.0.) made by the Deceased in her favour and put in other documentary evidence to support her claim that the Deceased was indebted to her as hereinbefore set forth.

(vi) The Appellant also gave evidence that the estate was indebted in the sum of thirty pounds (£30.0.0.) in respect of funeral expenses for the Deceased and also for an unascertained amount for the cost of administration.

10. Section 76 (1) of the Valuation of Land Act, 1916, provides: — 30

" On application in writing, and on payment of the prescribed fee, the Valuer-General shall supply to any person in such form as the Valuer-General may determine, a certified copy of entry in a valuation roll. Such certificate of valuation shall in all proceedings and for purposes be evidence of the matters and thing stated therein, and that the calculation therein mentioned has been duly made in accordance with this Act."

11. The price at which land might be sold in the State of New South Wales was controlled by virtue of the Land Sales Control Act 1948 the operation of which terminated as at the 20th September 1949. 40

p. 30.
p. 33.
p. 31.

12. (*a*) On the 4th August 1950 Sugerman J. delivered Judgment on the said Summons. His Honour refused to make any order and dismissed the application. During the course of his Judgment His Honour said " Miss Leeder, the Executrix and residuary beneficiary, claims to be a creditor in respect of various debts totalling four hundred and ninety seven pounds (£497.0.0.); two

hundred pounds (£200.0.0.) of this is secured by Promissory Notes. The rest depends largely upon her own uncorroborated evidence but some items are supported by vouchers and at least one item the applicant is in a position to deny but has not denied. Other circumstances tend to support Miss Leeder's claim." Subsequently His Honour said, "Apart from what is now claimed as a debt she (the Appellant) also assisted him (the Deceased) by way of gift. . . . Even if Miss Leeder's claim (in respect of the debts) is not supportable for its full amount it appears to be supportable as to a substantial part of it at least an amount of somewhere between two hundred pounds (£200.0.0.) and three hundred pounds (£300.0.0.). The question then is whether there is likely to be any surplus out of which further provision for the Widow might be made. On Probate values the estate is clearly insolvent. It is possible and perhaps likely that the cottage would now realise more than the Probate value which was made while Land Sales Control was still in force. How much more does not appear and there is no evidence that it would be so much as to leave a surplus. Indeed that is not how the Applicant's case has been conducted and her Counsel has said that the interest in the cottage would not be worth much at the present day. The Applicant has sought rather to cut down Miss Leeder's claim." His Honour concluded his Judgment as follows:—

RECORD. p. 31.

> "It may be granted that if there were available in the estate the means of making further provision for the Applicant, that should be done; that is to say, that Miss Leeder's claim, regarding her as a beneficiary simply and not as a creditor, should not be regarded as competing with the widow's claim. But since it does not appear that there is anything out of which further provision might be made for the widow and since the only result would appear to be to disturb the arrangements which the testator has made partly with a view to simplifying the discharge of his obligation to Miss Leeder, in my opinion no order should be made in this application."

pp. 31-32.

(*b*) During the hearing and before the evidence was completed His Honour indicated to Counsel that on the evidence before him and in the absence of any other evidence as to value the estate appeared to be insolvent. Counsel for the Appellant said that he intended to rely upon a submission to that effect and Counsel for the Respondent said that would depend upon the view that was taken of the debts claimed by the Executrix.

13. The Respondent appealed from the Judgment of Sugerman J. The Appeal was heard by the Full Court of the Supreme Court of New South Wales (Street, C.J., Maxwell J. and Roper C.J. in Equity) on the 1st November 1950.

p. 35.

14. At the hearing of the Appeal the Respondent sought leave to adduce fresh evidence to the effect that the value of the said land was somewhere between two thousand four hundred pounds (£2,400.0.0.) and two thousand five hundred pounds (£2,500) and submitted

pp. 36, 37.

- (i) That the evidence which she sought to adduce, if admitted and accepted, would show that the estate was solvent and that if the estate was solvent an order should be made in favour of the Respondent, and

RECORD.

(ii) That an order should be made in favour of the Respondent even if the estate was insolvent.

15. Section 84 of the Equity Act provides as to appeals from a single Judge sitting in Equity as follows: —

"(1) The full Court shall have all the powers and duties as to amendment and otherwise of the Judge, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court, by Affidavit, or by deposition taken before the Master or a Commissioner.

(2) Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decree or order from which the appeal is brought. 10

(3) On appeals from a decree or order upon the merits at the trial or hearing of any suit or proceeding, such further evidence (save as aforesaid) shall be admitted on special grounds only, and not without special leave.

(4) The Full Court shall have power to make any decree or order which ought to have been made and such further or other order as the case may require. 20

(5) The powers aforesaid shall be exercised by the Full Court notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and such powers may also be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have appealed from or complained of the decision.

(6) The Full Court shall have power to make such order as to the whole or any part of the costs of the appeal as may seem just."

16. The Full Supreme Court of New South Wales unanimously dismissed the Appeal of the Respondent with costs. In his Judgment (with which Maxwell J. and Roper C.J. in Equity expressed their agreement) Street C.J. dealt first with the claim to admit fresh evidence; he said, "When the applicant put evidence before the Court in support of her application her own affidavit contained a statement of the fact that these cottage premises had been valued by the Valuer-General at the sum of one thousand pounds (£1,000. 0s. 0d.) and she furnished no other evidence as to the value of this asset." Later in his Judgment the Chief Justice said, "Again and again the Courts have laid down principles with regard to the admissibility of fresh evidence and where it has been discovered since the hearing or there is some element of surprise Courts have acceded to applications to permit this evidence to be tendered. But it is quite obvious that the value of this house was the central point or one of the central points round which the evidence and the argument revolved at the hearing before His Honour. His Honour refers expressly in his Judgment to the fact that it may be likely that the cottage would then realise more than the probate valuation which was made while the land sales control was still in force but no such evidence was given before His Honour and it was upon that evidence that 30 40

p. 38.
p. 39.
p. 40.

was tendered at that time that this case must be determined." The Chief Justice further said " The applicant contented herself her with relying upon the statement of the Valuer-General's valuation. It was no surprise. This was not a matter which had come to the knowledge of the applicant after the hearing had taken place." The Chief Justice therefore held that no fresh evidence should be admitted.

RECORD.

p. 40.

With reference to the third ground on appeal (viz., that the fact that the estate was apparently insolvent was not a sufficient reason for refusing to make an order) the Chief Justice made the following observations:—

10 " It was also argued that, it being conceded that if there were an estate from which provision could be made, the applicant would obviously be entitled to some order, this Court ought to make an order even though the estate might be insolvent; that is to say, that the Widow ought to have the chance of receiving something if the estimate of the value of the estate, as presented to His Honour at the hearing below, should turn out to be incorrect as a result of some future happening. I do not think that that is the proper way to approach the matter. The application has to be determined on the position as presented to the Court at the time of the hearing, when undoubtedly future prospects should be taken into account, if there 20 were evidences justifying a conclusion that the estate was likely to appreciate or depreciate in the future. If there were no evidence to that effect, then the matter must be dealt with on the evidence as it then stands, and if on that evidence the order would be in effect a nullity and would confer no benefit, then I do not think the Court would be justified in making an order on the chance that it might, in some unforseen circumstances, provide some benefit for the applicant."

p. 40.

17. (*a*) The Respondent by leave of that Court appealed to the High Court of Australia against the Judgment and Order of the Supreme Court of New South Wales. Her appeal was heard by the High Court of Australia 30 (Dixon, McTiernan, Williams, Webb and Kitto J.J.) on the 18th July, 1951. The High Court of Australia unanimously allowed the appeal and ordered that the Order of the Full Court of the Supreme Court of New South Wales to be set aside that the order of Sugerman J. be set aside except as to costs and ordered that provision made for the Respondent out of the estate of the deceased by direction that in lieu of the beneficial dispositions of the Will the Executrix be directed to hold the whole of his real and personal estate on trust for the Respondent absolutely.

p. 43.
p. 44.

p. 5

(*b*) In a joint judgment, Dixon, Williams and Kitto J.J. referred to the general principle governing the administration of the Act which appeared to 40 them to be involved in the judgment of Sugerman J. viz. " that an order should not be made in favour of a deserving application unless the Court is satisfied that the order will be effective, or in other words, that there will be assets available to satisfy it and that no order should be made unless the likelihood of an estate proving insolvent is negatived "; and they observed that " In the Full Court the Chief Justice, in whose judgment Maxwell J. and Roper C.J. in Equity concurred, took the same view and was emphatic about it," and they quoted his

p. 45.

p. 46.

RECORD.

statement that "the estate . . . . at the best is so small that no effective order could be made" and his conclusion that "if on that evidence the order would be in effect a nullity and would confer no benefit, then I do not think that the Court would be justified in making an order on the chance that it might, in some unforseen circumstances, provide some benefit for the applicant."

p. 47.

With regard to the foregoing statement of principle their Honours said "With all respect to these views, they do not, in our opinion, represent the right approach to the administration of the Testator's Family Maintenance Act. If the Court thinks that a claim is justified it should seek ways to give effect to it. It should only refuse such a claim where it is clear that it is impossible to make an effective order." 10

The learned Judges sought to show that in the case before them it was not "impossible to make an effective order" by throwing doubt on the claim of the Appellant as a creditor of the estate (though her evidence as to such claims was accepted by Sugerman J.). They said with reference to the promissory notes put in evidence by the Appellant "they may be bound up with illicit cohabitation between her and the deceased and their validity may be doubtful," and added "No tenderness need be shown to a creditor whose debt grew out of a liaison between her and a married man." With reference to the value of the cottage, they said there was "a paucity of evidence before Sugerman J." and that "common experience would suggest the very high probability that such a cottage had a value considerably above £1,000 in the middle of 1950." On these grounds their Honours concluded that "the case was clearly one in which, on the evidence before him His Honour should have made an order in her (the Respondent's) favour and in all the circumstances given her the whole estate." 20

p. 47.
p. 47.
p. 47.
p. 48.

Their Honours then proceeded to discuss the principles on which an appellate court should exercise its discretion in cases arising under the Testator's Family Maintenance Act. Referring to the case of *In re. Gilbert* (46 S.R. 318), they expressed their agreement with the opinion of Jordan C.J. in the case "that there is a material difference between the exercise of a discretion on a point of practice or procedure and the exercise of a discretion which determines substantive rights." Holding that the exercise of jurisdiction under the Testator's Family Maintenance Act determined substantive rights, Their Honours appear to have held that the normal principle that "an appellate Court will not interfere with the exercise of the Judge's discretion except on ground of law" does not apply in such cases and that the Court has "an overriding duty to intervene to prevent a miscarriage of justice" which in the present case entitled it to exercise its discretionary power afresh. 30

p. 49.

Dealing with the application to admit fresh evidence, their Honours referred to the principles regarding the admissibility of fresh evidence by an appellate court on which the judgment of the Supreme Court has founded and proceeded "those principles are concerned with the justice of setting aside a verdict obtained after regular trial between the contesting parties and sending the cause down for trial before another jury. A court of appeal invited to receive further evidence to enable it better to determine an appeal which is before it is exercising a different function." The learned Judges then referred 40

p. 49.

to the provisions of Section 84 of the Equity Act 1901-1947 conferring discretionary power on the Full Court to receive fresh evidence and observed that "the same considerations of policy as gave rise to the Common Law Rules governing the granting of new trials for the discovery of fresh evidence may sometimes, indeed often, provide valuable guides in the exercise of the discretion," but that such considerations "have little application to an appeal of the present nature and the kind of evidence tendered." They held that the Full Court should have admitted the evidence sought to be adduced by the Respondent. RECORD. p. 50.

10 Apart from such evidence, their Honours held that Sugerman J. ought in the exercise of his discretion to have made an order on the evidence before him, and exercising such discretion afresh their Honours made an Order, as hereinbefore stated, in favour of the Respondent. p. 51.

(*c*) In dealing with the question of costs, their Honours held that the Petitioner, in including in her affidavit sworn in these proceedings the value of the estate as at the date of the Testator's death, as certified by the Valuer-General for probate purposes, had not fulfilled the obligation, cast on her by Rule 5 of the Testators Family Maintenance etc. Rules, to "serve an affidavit setting out . . . the nature and amount of the estate." Their Honours held that 20 the failure of the Petitioner to file evidence in accordance with their interpretation of the Rule had "resulted in a miscarriage of justice," a conclusion which your Petitioner submits must have been based on an acceptance of the untested valuations proffered by the Respondent. It was partly on this ground (viz. that the Rule required a revaluation of the estate for the purposes of the Act) that their Honours held that the Petitioner should pay the costs of the appeal to the Supreme Court and to the High Court. p. 51.

(*d*) McTiernan and Webb J.J. in separate judgments, agreed that the appeal should be allowed and an Order made in favour of the Respondent. No ground for allowing the appeal was advanced by either of the learned Judges 30 other than those put forward in the joint judgment of Dixon, Williams and Kitto J.J. pp. 51-53.

18. The Appellant desires humbly to submit that the decision of the High Court of Australia is erroneous and that the decision of the Full Court of the Supreme Court of New South Wales should be restored for the following among other

REASONS.

(1) Because on the evidence before Mr. Justice Sugerman and accepted by him the only inference that could be drawn was that the estate was insolvent;

40 (2) Because even on the footing that such evidence did not justify the inference that the estate was insolvent, it did not justify a reversal of the Order made by Mr. Justice

Sugerman and still less a positive Order awarding to the Respondent the whole beneficial interest in the estate;

(3) Because on the evidence before and accepted by him, Mr. Justice Sugerman did not err in principle or in the exercise of his discretion in dismissing the application;

(4) Because Mr. Justice Sugerman having exercised the discretion conferred upon him by the Testator's Family Maintenance and Guardianship of Infants Acts, 1916-1938, it was not in accordance with the principles on which an appellate court should review such an exercise **10** of discretion for the High Court (as it did) to exercise its discretion afresh in the matter;

(5) Because the High Court erred in principle in exercising its discretion in making its Order;

(6) Because Mr. Justice Sugerman and the Full Court of New South Wales expressed and applied the correct relevant principle upon which applications under the Testators Family Maintenance Act should be approached and considered;

(7) Because the High Court was wrong in holding that fresh **20** evidence should have been admitted, because

(*a*) the Respondent was bound by her conduct at the trial;

(*b*) no special ground existed for the admission of such evidence;

(*c*) special leave had not been obtained;

(8) Because if the High Court was right in holding that fresh evidence should have been admitted, that conclusion though it might justify an order for a new trial would not have justified a positive order in favour of the **30** Respondent;

(9) Because the order of the High Court for costs against the Appellant was unwarranted and contrary to accepted principle and, but for the making of such an order, the balance in the Testator's estate upon any view could not have warranted the order for maintenance made by the High Court;

(10) Because the Judgment of the High Court was wrong and the Judgment of the Full Court of the Supreme Court and of Sugerman J. were right.

G. E. BARWICK.

PETER FOSTER.

No. 11 of 1952.

In the Privy Council.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN

EDIE MAUD LEEDER (Respondent) - *Appellant*

AND

NANCE ELLIS (Applicant) - - - *Respondent.*

Case for the Appellant.

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