~~C.D.C.6~~ 32/1952

1491

No. 11 of 1952.

In the Privy Council.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA.

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 RESPONDENT.

RECORD.

1. This is an appeal from an Order dated the 3rd August, 1951, of the High Court of Australia (Dixon, McTiernan, Williams, Webb and Kitto, J.J.), allowing an appeal from an Order dated the 1st November, 1950, of the Full Court of the Supreme Court of New South Wales (Street, C.J., Maxwell, J. and Roper, C.J. in Eq.), pp. 53-54. p. 42.

pp. 33–34. dismissing an appeal from an Order dated the 4th August, 1950, of the Supreme Court of New South Wales (Sugerman, J.) dismissing
pp. 1–2. an application by the Respondent under the Testator's Family Maintenance and Guardianship of Infants Act, 1916-1938, for maintenance out of the estate of her deceased husband.

2. The statutory provisions relevant to this appeal are as follows:—

TESTATOR'S FAMILY MAINTENANCE and GUARDIANSHIP OF INFANTS ACT, 1916-1938.

3. (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, or 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.

4. (1) Every provision made under this Act shall, subject to this Act, operate and take effect as if the same had been made by a codicil to the will of the deceased person executed immediately before his or her death.

* * * * * * *

6. (1) Every order making any provision under this Act shall *inter alia*—

(a) specify the amount and nature of such provision;

(b) specify the part or parts of the estate out of which such provision shall be raised or paid, and prescribe the manner of raising and paying such provision;

(c) state the conditions, restrictions, or limitations imposed by the court.

(2) Unless the court otherwise orders the burden of any such provision shall as between the persons beneficially entitled to the estate of the deceased person be borne by those persons in proportion to the values of their respective interests in such estate:

Provided that the estates and interests of persons successively entitled to any property which is settled by such will shall not for the purposes of this subsection be separately valued, but the proportion of the provision made under this Act to be borne by such property shall be raised or charged against the corpus of such property

(3) The court shall in every case in which provision is made under this Act direct that a certified copy of such order be made upon the probate of the will or letters of administration with the will annexed or, as the case may be, letters of administration of the estate of the deceased person, and for that purpose may require the production of such probate or letters.

(4) The court may at any time and from time to time on the application by motion of the executor of the testator's estate or of the administrator of the estate of the intestate or of any person beneficially entitled to or interested in any part of the estate of the deceased person rescind or alter any order making any provision under this Act. Notice of such motion shall be served on all persons taking any benefit under the order sought to be rescinded or altered.

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."

EQUITY ACT, 1901 1941.

S82 (1) All appeals under this Act shall be by way of rehearing, and shall be brought by notice of appeal, and no petition or other formal proceeding other than such notice shall be necessary.

S84 (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.

(3) Upon 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.

(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.

p. 3, ll. 8-10. p. 3, ll. 32-38. p. 5, ll. 27-28. p. 5, ll. 22-28. p. 10, ll. 26-29.

3. The Respondent is the widow of Herbert Ellis, who died on the 28th July, 1949. There were three children of the marriage. Two of these were married at the time of the deceased's death; the third, Anne Maureen, then aged seventeen, was living at home with her parents. The Appellant was not related to the deceased. The deceased met her in 1931 at which time he had been married to the Respondent for some years, and between 1931 and 1933 she lived all, or part of, the time in the deceased's home. From 1933 until his death the deceased usually spent his week-ends with the Appellant.

4. By his Will, made on the 27th June, 1947, the deceased appointed the Appellant his sole executrix. He bequeathed three articles of furniture (one of which apparently did not exist) to her and the rest of his furniture to the Respondent. All his real estate and the residue of his personal estate he left to the Appellant. p. 6. p. 13, ll. 9–10.

5. The furniture in the deceased's house was valued for probate at £120 15s., of which £45 was attributable to the two articles bequeathed to the Appellant. The Respondent claimed that all this furniture belonged to her and not to the deceased. The only other asset of the deceased's estate was a house known as No. 2, Woids Avenue, Hurstville. This house was valued by the Valuer General at £1,000, and £886 13s. 3d. was owing by the deceased at the time of his death on a mortgage of the house. At the time of the Valuer General's valuation, and at the time of the deceased's death, the house was subject to the Land Sales Control Act, 1948, which in effect restricted its value to what would have been a fair and reasonable price for it on the 10th February, 1942. This Act ceased to apply to the house on the 1st September, 1949. p. 4, ll. 41–42. p. 8, l. 25– p. 9, l. 9. pp. 63–65.

6. Probate of the Will of the deceased was granted to the Appellant on the 15th February, 1950. In support of her application for administration the Appellant had sworn an affidavit, in which the only debt shown as due from the estate was the mortgage debt on the house. On the 8th March, 1950, the Respondent issued an originating summons claiming maintenance out of the deceased's estate under the Testator's Family Maintenance and Guardianship of Infants Act, 1916-1938. In support of this summons the Respondent swore an affidavit, in which she set out the facts mentioned above. She also swore that at the time of the deceased's death she was receiving 24s. per week wife's allowance in connection with the deceased's invalid pension, 25s. per week Social Service payments, 20s. per week from her daughter Anne Maureen for board, and substantial support from her son. Since the deceased's death her only source of income had been a widow's pension of 37s. per week, her daughter's payment of 20s. per week and whatever she might get from her son. Her only property was the furniture in No. 2, Woids Avenue, all of which she had bought at auction in 1920 and 1921. The furniture was insured in her name, and in 1933, after a fire in the house, she had received £600 from the insurance company. She had spent about £100 of this on furniture and had agreed with the deceased that the balance should be used to reduce the mortgage debt on the house, but she believed the deceased had not used the money for that purpose. She had lived at No. 2, Woids Avenue with the deceased since 1928, and had nowhere else to go. When the deceased bought the land on which the house was built, she had p. 3, ll. 12–14. pp. 57–66. pp. 1–2. pp. 3–6. p. 4, ll. 1–16. p. 4, ll. 17–23. p. 4, ll. 23–26. p. 4, l. 41– p. 5, l. 11. p. 4, ll. 31–37. p. 5, ll. 37–44.

p. 7, ll. 1–19. provided £100 towards the cost. Exhibited to the affidavit was a draft letter, written on the instructions of the deceased by his son in 1943 in which the deceased said that the contents of the house were
pp. 7–8. not his property. The son swore an affidavit stating that he had written this draft at his father's dictation.

7. The Appellant swore an affidavit on the 3rd July, 1950, in
p. 9, ll. 27–28. which she stated that she was 42 years old, single, and a clerk by occupation. The deceased owed her at his death £200 money lent
p. 9, ll. 9–18. on promissory notes, £205 10s. for repayments made by her on his behalf under the mortgage of the house, and £92 3s. 7d. money paid
p. 9, ll. 22–24. by her at his request. The Appellant also swore in this affidavit that the deceased in his lifetime refused to acknowledge Anne Maureen as his child.

pp. 10–12. 8. The Appellant swore another affidavit on the 12th July, 1950.
p. 10, ll. 13–20. She denied that the furniture belonged to the Respondent; the deceased had many years before given her receipts for various articles of furniture. The furniture in the house at the deceased's death was the same that had been there in 1931, excepting a settee and
p. 10, ll. 21–25. some tapestry. She had done all the deceased's correspondence for about twenty years, and had never seen or heard of the letter
p. 12, ll. 12–15. exhibited to the Respondent's affidavit. Apart from the sums mentioned in her affidavit of the 3rd July, 1950, she had frequently given the deceased financial help.

9. The summons came on for hearing before Sugerman, J. sitting in Equity, on the 28th and 31st July, 1950. The Respondent
p. 13, ll. 23–26. said in evidence that Anne Maureen was the child of her and the deceased, and the deceased had never questioned this in his lifetime.
p. 15, ll. 44–45. He had told her that he was making a Will leaving all his possessions to her (the Respondent). The Respondent was also cross-examined at some length about the ownership of the furniture and the extent of the deceased's association with the Appellant.

p. 24, l. 26– 10. The Appellant said in evidence that she earned £9 per week
p. 25, l. 15. as an accountant. She earned about £80 per year from other sources, and was getting about £200 from the estate of her people. She had
p. 23, l. 42– sold some land for £70, and had about £20 of that left; she also had
p. 24, l. 3. jewellery. She had not mentioned the debts due to her when swearing her affidavit for administration because if she had done so the estate would have been bankrupt and she would not have got
p. 23, ll. 29–38. probate. She could produce no receipts for the £92 3s. 7d. excepting one receipt for £4 10s. 5d. The Appellant was also cross-examined about the other sums which she alleged to be due to her from the deceased's estate.

11. Sugerman, J. delivered a reserved judgment on the 4th August, 1950. The learned Judge assumed that the gross assets available for making further provision for the Respondent were the interest in the house, valued at £113, and the two articles of furniture bequeathed to the Appellant, valued at £45. The Appellant's claim against the estate, if not supportable in full, appeared to be supportable at least to an amount of £200-£300. On probate values the estate was clearly insolvent. The house might fetch more than the figure of the valuation, made subject to land sales control, but there was no evidence that it would leave a surplus. The testator appeared to have made his Will in order to protect the Appellant against difficulties in establishing what financial help she had given him, and in recognition of a moral obligation to her. Provision ought to be made for the Respondent, if there were assets available, but there were no assets available, and the only effect of an order would be to disturb arrangements made by the testator to simplify the discharge of his obligations to the Appellant. Therefore, no order should be made. The learned Judge held that it had been quite proper to make the application, and both parties' costs should come out of the estate.

p. 30, l. 33–p. 31, l. 2. p. 31, ll. 6–27. p. 31, ll. 28–32. p. 31, ll. 36–42. p. 31, l. 43–p. 32, l. 4. p. 32, ll. 40–41; p. 33, ll. 22–24.

12. The Respondent appealed to the Full Court of the Supreme Court of New South Wales. The grounds of her appeal were: that the learned Judge had been wrong in holding that either the fact that the estate was apparently insolvent, or the fact that the only result of an order would be to disturb the testator's arrangements for simplifying the discharge of his obligation to the Appellant, was a good reason for refusing to make an order; that further evidence was available to show that the estate was not insolvent; and upon all the evidence an order should be made. The Respondent sought to put in affidavits of two real estate valuers, sworn after the hearing before Sugerman, J. Both valuers had inspected No. 2, Woids Avenue. One estimated its market value at £2,500 and the other at £2,450.

p. 35. pp. 36–37.

13. The Full Court heard the appeal on the 1st November, 1950. Street, C.J. stated the facts, and said the substantial ground argued in support of the appeal had been that the fresh evidence of the valuers ought to be admitted. It was said that on this evidence the estate was not insolvent, but would leave a surplus available for the Respondent. The learned Chief Justice thought this evidence ought not to be admitted. Fresh evidence was admissible if it had been discovered since the hearing, or there had been some element of surprise. The value of the house had been one of the central points of argument at the hearing, and the Respondent had relied on the Valuer General's valuation. There had been no surprise. The

p. 38, l. 11–p. 39, l. 24. p. 39, ll. 24–31. p. 39, ll. 32–33. p. 40, ll. 1–4. p. 40, ll. 4–25.

situation at the time of the hearing had been exactly the same as it was at the time of the appeal. It might be a hard case, but the Court would not be justified in admitting the fresh evidence. It was not a proper approach to say that although the estate might be insolvent, an order ought to be made, so that the widow would have a chance of getting something if the estimated value of the estate turned out to be wrong. If, on the evidence presented to the Court, the order would confer no benefit, the Court would not be justified in making an order. Maxwell, J. and Roper, C.J. in Eq. agreed with the judgment of the Chief Justice, and the appeal was dismissed with costs.

p. 40, l. 39–p. 41, l. 8.

p. 41, ll. 38–42.

14. The Respondent appealed by special leave to the High Court of Australia. The grounds of her appeal were that the Full Court was wrong in holding that an applicant wishing to argue that there were assets from which an allowance could be made should furnish evidence of the fact, in holding that the apparent insolvency of the estate was a good reason for not making an order, and in refusing to admit the fresh evidence; and that upon all the evidence an order should be made.

pp. 44–45.

15. The High Court heard the appeal on the 18th July, 1951, and gave judgment on the 3rd August, 1951. Dixon, Williams and Kitto, J.J. stated the facts, and said that an order should clearly be made in the Respondent's favour if it were possible. Sugerman, J. had recognised this, but because he was not satisfied that there would be a surplus had declined to interfere with the Appellant's right under the Will. He had apparently thought that an order ought not to be made in favour of a deserving applicant unless it was shown that there were sufficient assets to satisfy it, and the Full Court had taken the same view. This was not the right approach. If the Court thought a claim was justified, it should refuse the claim only if it was clearly impossible to make an effective order. In this case the only established debt was the mortgage debt; the validity of the debts to the Appellant was doubtful. The Respondent's application should not be refused for fear of disturbing the testator's arrangements for discharging his obligations to the Appellant; the Appellant should be left to prove her debt if she could. There was little evidence before Sugerman J. of the value of the house, but common experience would suggest that it was in all probability worth much more than £1,000 by the middle of 1950. The Respondent, if she had the house, could live there with her unmarried daughter and take at least one lodger. Her son gave her financial help from time to time. It was likely, therefore, that she would be able to pay the funeral and testamentary expenses and any debt due to the Appellant, and then have the house. It was more than likely

p. 45, l. 20–p. 46, l. 26.

p. 46, ll. 27–43.

p. 46, l. 44–p. 47, l. 11.

p. 47, ll. 12–37.

p. 47, l. 38–p. 48, l. 16.

that an order in her favour would be effective, and she ought to have been given the whole estate. While it was thus not necessary to discuss the fresh evidence, these learned Judges thought it ought to have been admitted. The Act conferred a discretionary jurisdiction, but there was a difference between a discretion on a point of practice and a discretion determining substantive rights. An appellate Court had a duty to interfere with a judge's exercise of discretion under the Act, if that was necessary to prevent a miscarriage of justice. The fresh evidence in this case was directed to shewing that Sugerman, J. had exercised his discretion on an incorrect assumption of fact. It was necessary to admit the evidence if the Full Court was to remedy an injustice. The principles on which the Full Court had acted applied to setting aside a verdict and sending a case for retrial; a court invited to receive fresh evidence for the determination of an appeal was exercising a different function. Appeals under the Equity Act were by way of rehearing, and the Act gave the Full Court a discretionary power to receive further evidence on special grounds. The common law rules governing the grant of a new trial for discovery of fresh evidence might sometimes be a valuable guide, but in an appeal such as this the important consideration was whether the new evidence would materially help the court. Here the Respondent was entitled to succeed, unless it was impossible to make an effective order. If the house was worth anything like £2,500 an injustice had been done. There were special circumstances, and the Full Court ought to have admitted the evidence. The learned Judges thought, however, that Sugerman, J. ought to have made an order even on the evidence before him. The Appellant should have her costs of the application out of the estate, but should pay the costs of both appeals.

p. 48, ll. 17–30. p. 48, l. 31– p. 49, l. 18. p. 49, ll. 19–31. p. 49, l. 33– p. 50, l. 36. p. 50, l. 36– p. 51, l. 4. p. 51, ll. 13–31.

16. McTiernan, J. said that Sugerman, J. had dismissed the application solely because he thought that, the estate being bankrupt, any order would be futile, and the Full Court had agreed with him. It was not wrong to refuse an order if there was no property in the estate. Whether there would in this case be a surplus depended on the value of the house. The Valuer General's valuation was made when the price at which the house might be sold was controlled, and it was notorious that when the control was lifted the price of houses rose. The valuation at £1,000 was "prima facie" too low, and in the absence of evidence of the true value it should not be assumed that the estate was bankrupt. There should be an order that any surplus be paid to the Respondent. Webb, J. said that Sugerman, J. had refrained from making an order because it might disturb the testator's arrangement. As against the Respondent, the testator's moral obligation, if any, to the Appellant should be disregarded. If he had disregarded it, Sugerman, J. must have

p. 51, l. 33– p. 52, l. 6. p. 52, ll. 7–33. p. 52, ll. 34–46. p. 53, ll. 6–22.

p. 53, ll. 1-2, 23-24. made an order giving the whole estate to the Respondent, and leaving the Appellant to establish what rights she could as a creditor. McTiernan and Webb, J.J. found it unnecessary to consider the question of the fresh evidence.

17. The Respondent respectfully submits that the High Court was right in holding that an applicant who satisfies the requirements of the Act should not be deprived of its benefits unless it is clearly impossible to make an effective order. The burden of shewing this must rest on the executor, since Rule 5 of the Rules made under the Act oblige him to furnish evidence of the value of the estate. In this case the Appellant failed to furnish up-to-date evidence of the value of the house, and Sugerman, J. who recognised the likelihood that the valuation was too low, ought not to have concluded that the estate was insolvent. The Appellant's claims against the estate had not been put forward before these proceedings were begun, and the learned Judge ought not to have regarded them as proved to any extent. It would defeat the purpose of the Act if the testator's supposed obligations to his mistress were to be allowed to deprive his widow of support. An order making provision for an applicant can be reopened under Section 6 (4) of the Act, but there is no machinery for reopening an order dismissing an application. The Respondent respectfully submits, therefore, that, in a case in which the insolvency of the estate is not clearly established, any presumption should be in favour of, rather than against, an applicant. All the learned Judges in Australia have held the Respondent entitled to an order if it can effectively be made, and the Respondent respectfully submits that the order of the High Court, directing the Appellant to hold the whole estate on trust for her absolutely, is reasonable.

p. 51, ll. 21-26.

18. The Respondent respectfully submits that the High Court was right in holding that the Full Court ought to have admitted the fresh evidence; if, therefore (contrary to the Respondent's respectful submission), Sugerman, J. ought not to have made an order in the Respondent's favour on the evidence before him, the case ought to be remitted to him for consideration of the fresh evidence.

19. The Respondent respectfully submits that the order of the High Court of Australia was right, and this appeal ought to be dismissed, for the following (amongst other)

REASONS.

1. BECAUSE the facts satisfied the requirements of the Testator's Family Maintenance and Guardianship of Infants Act, 1916-1938, Section 3 (1);

2. BECAUSE Sugerman, J. was satisfied that provision ought to be made for the Respondent out of the estate if it was possible to do so, and erred in concluding that it was not possible;

3. BECAUSE on the evidence there was no reason why an order should not be made in the Respondent's favour.

4. BECAUSE Sugerman, J. exercised his discretion wrongly, and on wrong principles, and, the appeal being by way of rehearing, the Full Court ought to have set aside his order and made an order in favour of the Respondent;

5. BECAUSE there was no evidence which would have justified Sugerman, J. had he exercised his discretion rightly, in declining to make an order in favour of the Respondent;

6. BECAUSE Sugerman, J. exercised his discretion upon wrong principles in holding that because there was a possibility or likelihood that the estate might be insolvent no order should or could be made.

7. BECAUSE the Supreme Court of New South Wales ought on the material before them to have allowed the Respondent's Appeal;

8. BECAUSE the provision made for the Respondent by the order of the High Court of Australia is reasonable.

FRANK SOSKICE.

J. G. LE QUESNE.

No. 11 of 1952

In the Privy Council.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA.

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,

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— AND —

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