

(1949) 02 CAL CK 0003
In the Calcutta High Court
Case No : Extra Ord. Suit No. 1 of 1948

In the Goods of Borendra Nath Mitter and Sudhirendra Nath Mitter APPELLANT

Vs

Arunendra Nath Mitter and Others RESPONDENT

Date of Decision : 08-02-1949

Acts Referred:

Succession Act, 1925 — Section 247

Citation : AIR 1952 Cal 418 : (1952) 1 CALLT 387

Hon'ble Judges : Banerjee, J

Bench : Single Bench

Advocate : Sarat Chandra Bose, S. Choudhury and Amiya Nath Bose, for the Appellant; N.N. Bose and D.N. Sinha, S.M. Bose, General, E.R. Meyer and S.P. Misra, for the Respondent

Judgement

Banerjee, J.—The application is for an administration "pendente-lite" touching a Will—The power to grant such administration is conferred on the Court by Section 247, Succession Act.

2. The words "may appoint" in the sections indicate that the Court has a discretion in the matter. That discretion is judicial & not arbitrary, to be exercised on established principles of law.

3. This section replaces Section 34, Probate & Administration Act of 1881. It is based on the Court of Probate Act, 1857, 20 & 21 Vict., C. 77, Section 70 & is substantially in the same words. The English decision therefore, are authorities on the question under consideration. In any event, they may be relied on for the exercise of a sound discretion under this section.

4. But before I consider the decisions under the statute, I turn to the earlier English decisions, for the principle on which that discretion was exercised before the Statute. I read only the leading cases.

5. In "King v. King" (1801) 6 Ves 172. opposite claims were set up under

different Wills, & a decision had been made that one Will had not been sufficiently proved. It was objected, in opposition to the Motion, that the property did not appear to be in danger, & that Ecclesiastical Court (Court which used to grant probate of a Will) would appoint a, receiver "pendente-lite", that is, an administrator "pendente-lite". Lord Eldon said,

"This is almost a motion of course.....The Court goes upon this, that it will do its best to collect the effects. The property is in danger, in this sense, that it may get into the hands of persons who have nothing to do with it."

6. In "Rendall v. Rendall" (1841) 1 Hare 152, Sir James Wigram, V.C. after referring, to "King v. King" (1801) 6 Ves 172, said,

"From this case, in which the rule of the Ct is so clearly laid down, I pass to the late case of "Wood v. Hitching" (1840) 2 Beav 289, in which the same principle was acted upon, the chief cases upon the subject having been referred to. I omit the intermediate cases, with the single observation which I believe will be found correct, that the proposition laid down by Lord Eldon, in "King v. King", is unimpeached by a single decision or dictum. Special reasons have sometimes been relied upon for not appointing a Receiver; (administrator "pendente lite"), where there was no actual representative (as in "Jones v. Frost" 3 Mad. 1); but those very reasons affirm the general proposition that where there is no representative to collect the assets, & there is a "bona fide" litigation respecting the title to that representation the appointment of a receiver, pending the litigation, is almost of course. Then, has Lord Cottenham impugned the rule by anything he did or said in "Watkins v. Brent" (1835) 1 Myl & Cr 97, or in "Marr v. Littlewood" (1837) 2 Myl & C 454?"

7. The learned Vice-Chancellor, after discussing the two judgments of Lord Cottenham, took the view that Lord Cottenham did not, & concluded thus.

"Nor can I better conclude these observations than in the language of Lord Cottenham ("Watkins v. Brent" 1835 1 Myl & Cr 97), "There is no doubt that by the rule of this Court if the representation is in contest, & no person has been constituted executor, the Court interferes, not because of the contest, but because there is no proper person to receive the assets".

8. The Court of Probate Act was passed in England in the year 1857. In 1865, Sir J P Wilde in a considered judgment in the case of "Bellew v. Bellew" (1865) 4 Sw & Tr 58, observed as follows:

"An application was made last week for the appointment of an administrator "pendente lite" in this suit. The applicant's affidavit did no shew, & it was not pretended that it did shew, that the estate was in any jeopardy or peril; but it appeared that some of those who were opposing the appointment of an administrator had applied to the Court of Chancery "to appoint a receiver. It was argued that it was not necessary in this Court to show that the estate was in peril, but that it was competent to either party who desired to have the

management of the estate confided to some indifferent person, to obtain a grant of administration "pendente-lite, without the consent of- the other side. Not only the text books, but the cases cited against that argument, unquestionably established the proposition that in the Ecclesiastical Courts administration was never granted, unless with the consent of all parties, or unless a case of necessity was made out. Has the practice of this Court been different from that of the Ecclesiastical Courts? In one case since I had the honour to presiding here, I refused to grant administration "pendente-lite, on the ground that no necessity was made out for it. I have taken some pains to ascertain whether the same course was followed by my learned predecessor. A case has been found in the Registry where the property was more within the category of property in danger, than the property in this case, being money due in respect of freight, shares in railways & other companies household furniture & cash. Although in that case there was quite as much or more than there is in this case to call for such a grant, & although an attempt was made with some success to show that the person who then had possession of the estate could not be trussed, because he had been convicted of an offence "against the custom laws", Sir C. Cresswell refused the application with costs. I take it therefore that it is plain that the practice of the Ecclesiastical Courts and of this Court has been only to grant administration "pendente-lite in cases where necessity for the grant is made out. That being so, the debt was wrong in applying for administration "pendente lite", & the parties who applied to the Court of Chancery for a receiver were right. It would be improper to depart in this case from the practice hitherto followed in this Court & I therefore refuse to appoint an administrator "pendente lite. I have taken some pains to ascertain whether the rule of the Court of Chancery with regard to the appointment of a receiver is wider than the rule of this Court with regard to the appointment of an administrator "pendente-lite, & I think that it is. The rule of the Court of Chancery appears to be, that wherever there is a "bona fide" suit pending, the Court will appoint a receiver quite irrespective of the condition of the estate, or of the person who has the actual possession of it, on the ground that while the, suit is pending there is no one legally entitled to receive or to hold the assets, or to give discharges. I wish to give notice that I shall in future assimilate the practice of this Court to that of the Court of Chancery, & that I shall grant administration "pendente-lite" wherever the Court of Chancery would appoint a receiver."

9. I have set out the observation "in extenso" to show how discretion was exercised before & "after the judgment of "Bellew v. Bellew" (1865 4 Sw & Tr 58). The wider rule of the Court of Chancery was from this time adopted in the Probate Court in the matter of appointment of an administrator "pendente lite" & the discretion conferred u/s 70, Court of Probate Act was used following this rule.

10. The same learned Vice-Chancellor in "Horrell v. Witts" (1866) 1 P & D 103 made the following observation:

"The rule which I laid down in the case of "Bellew v. Bellew" (1865 4 Sw & Tr 58)

is not applicable to all cases. Where there is no one who is "legally entitled to represent or to take possession of the deceased's property, & it is requisite to bring actions, or to make demands for the payment of money due to his estate, it is often necessary that an administrator "pendente lite" should be appointed; but where the deceased at the time of his death was in partnership with another person, the case is very different. The deceased & the plff. were joint tenants of this property; it belonged to them in partnership, & if an administrator were to be appointed, there would be nothing for him to lay his hands upon until an account of the estate has been taken in Chancery."

11. These principles are firmly established in England. There cannot even be a suggestion of doubt as to their correctness. In our Court they have been followed & adopted by Sir Ashutosh Mukherjee, J., in "Brindaban v. Sureswar" 10 CLJ 263, in "Bhuban Mohini v. Kiran Bala" 13 C L J 47, in "Promila Bala v. Jyotindra" 28 CWN 576. In "Brindaban v. Sureswar", the learned Judge after referring to "Bellew v. Bellew" (1865 4 Sw & Tr 58) observed:

"The Court of probate would grant administration "pendente-lite" in all cases where the necessity for the grant is made out."

12. I do not think I would be doing any injustice to the parties or would be using my discretion in a wrong way, if I use my discretion in the light of these principles.

13. The question, therefore, is what is necessity? What is the test for it? What are the reasons thereof?

14. It seems that the necessity arises when there are assets to be collected & there is no representative to collect them & there is a "bona -fide" litigation respecting the title to that representation.

15. The reason of the thing Seems to be this: that though a man makes a Will, & appoints an executor, yet if the executor be under any incapacity or disability of acting as such, he is, during his incapacity, in many respects as no executor, & therefore for that time it is considered as an intestacy.

16. Within the same reason is the case, where upon the death of a man there is a litigation in the Probate Court touching the executorship to the deceased; since during this contest none can act as executor; & therefore, the Probate Court may grant administration to another, pending this suit, which administrator may collect the effects, may sue, if necessary, it being part of his office to recover & get in the debts of the deceased. Such a grant is necessary to use the words of Lord Raymond C. J. in "Walker v. Woollaston" (1731) 2 P Wms 576, "for the ease & convenience of the subject, which ought to be considered-"

17. The same result follows from another point of view, namely, that indicated by Sir James Wilde, in "Bellew v. Bellew" (1865 4 Sw & Tr 58) that a Probate Court may grant administration "pendente lite" wherever the Court of Chancery appoints a receiver.

18. It is well known that the Court of Chancery appoints a Receiver.

"Where the property is as it were "in medio", in the enjoyment of no one, it is the common interest of all parties that the Court should prevent a scramble, & a receiver is readily appointed.""

(Kerr on Receiver 9th Edn. at p. 6). During the contest touching the validity of a Will, there is, as it were, an intestacy, & the deceased's property is, "in medio". Therefore, applying the principle of the Court of Chancery for the appointment of a Receiver, the Court may appoint an administrator "pendente-lite".

19. I do not for a moment suggest that it is an inflexible rule that whenever there is a suit pending, touching the validity of a Will, it is obligatory upon the Court to appoint an administrator "pendente lite". We may take the following illustrations. A man makes a Will, & appoints an executor. He dies leaving rupees ten lakhs in the Imperial Bank of India & a dwelling house in Calcutta, say of the value of rupees ten lakhs. The executor named in the Will applies for probate. The Will is contested as a forgery. Assuming the contest to be "bona fide" should the Court appoint an administrator "pendente lite"? The answer must be in the negative, because here it is not necessary to collect anything pending grant of administration to the executor, or to give discharge to anybody. But suppose in that case, the man, instead of leaving a dwelling house, left a house yielding a monthly income of Rs. 3,000/-, is there a necessity? The answer must be in the affirmative, for it is the duty of the Court to do its best to collect the assets & see that the persons who pay the money get the proper discharge. It is no longer necessary to show peril or danger to the estate.

20. In "13 C L J 47", the case was this: After the death of the alleged testator, his nephews propounded a Will alleged to have been executed by the testator, the effect of which in substance was to leave the estate to the daughter of the testator & practically to disinherit the widow. Probate was granted in common form. Subsequently an application for revocation of probate was made by the widow, on the ground that the Will was a forgery, & the grant had been obtained by fraud. The Dist. J. revoked the probate. The daughter appealed- to this Court in its appellate jurisdiction & made an application for appointment of an administrator "pendente lite" till the disposal of the appeal. In her petition she alleged that the widow was incompetent to manage the property, & that if an administrator "pendente-lite" was not appointed, the estate was likely to be wasted. These allegations were, however, repudiated on the side of the widow. The learned Judge at p. 50 made the following observations:

"The evidence on both sides makes it reasonably plain that the estate consists principally of valuable zamindari & Govt. securities. So far as the former are concerned, the widow as the heiress at law in the event of intestacy, has got herself registered under the Land Registration Act, & under the provisions of that Act read with Section 60, Bengal Tenancy Act, she is entitled to realise rent from the tenants. In so far as the Govt. securities are concerned, the widow has

offered to deposit them with the Collector, for the due discharge of Govt. demands in accordance with the provisions of the Revenue Sale Law. She is not anxious to draw the interest as it accrues due, & no harm is likely to result to the estate if such interest accumulates for a short time. There is no suggestion that any claim for sum due to the estate or otherwise, has to be enforced, nor is there any indication that the estate is liable to be sued for the enforcement of any claim against it. No question, therefore, arises as to any necessity for the due representation of the estate in any litigation. It was suggested on behalf of the daughter that the rents in any event have to be collected & matters may be mismanaged, as the widow is a lady of somewhat feeble intellectThe widow has, however, given an undertaking not to alienate in any manner, the properties belonging to the estate, & also to pay regularly all Govt. demands & to meet other necessary expenses.....".

21. On these observations no grant was made. It is clear that the Court did not think fit to appoint an administrator "pendente-lite" because the widow could legally give discharges for rent she would realise, which she was entitled to do under the provisions of the Land Registration Act, read with Section 60 Bengal Tenancy Act. As to the rest of the properties belonging to the estate, sufficient undertaking had been given for their safeguard.

22. In this case the learned Advocate General on behalf of the executor named in the Will says that the executor is willing to give undertaking for protection of the deceased's property & asks to be allowed to collect the rent of the estate. This submission, I think, is a recognition of the principle that there must be somebody, clothed with the necessary authority to collect the assets & give proper discharge; without the representation there is nobody who can give the discharge.

23. Turning to the facts of this case, I find the testator was an old man who died leaving a widow, a son (who is the executor named in the Will), & two grandsons by a predeceased son who are opposing the grant.

24. The estate is considerable. It is admitted on behalf of the executor that the monthly rent realised is Rs. 3,500/-; that a sum of about Rs. 1,16,000/- is due from the Govt; on this basis the value of the estate would be about Rupees ten lacs; that there are decrees outstanding in favour of the estate, though it is said they are barred by limitation. There are Govt. Promissory Notes belonging to the estate which the executor says have all matured.

25. I am not in a position to say now Whether the decrees are barred by limitation or not. They may be or may not be. But the fact remains that there are decrees which if not barred, are to be realised. I am not in a position to say whether the Govt. Promissory Notes have matured. These matters require investigation. In any event, the rent must be realised. The tenant must be given proper" discharge.

26. It appears from an account sent by the executor to the applicants pursuant

to an order of this Court that between March & December, 1948, he realised or could realise about Rs. 11,000/- & spent about Rs. 41000/- from the estate. The difference it is alleged represents money advanced by the executor to the estate.

27. It follows therefore, that though there are monies belonging to the estate which may be realised, that have not been realised for some reason or other & the executor himself, if it is true, advanced money for the purpose of the estate. I find also that there are twelve suits pending in this Court & as many proceedings pending before the Land Acquisition Collector.

28. In this case I have not the slightest doubt that the litigation is a "bona fide" one.

29. To sum up, therefore, I find that the estate is of considerable value, there are various suits pending concerning the estate, there are assets to be realised & there is no one legally entitled to receive or to hold the assets or to give discharge.

30. Further, in this case the parties are uncle & nephews. They have got ample funds at their commands. The suit threatens to be a protracted one. The nearer the blood, the more keen is the fight.

31. In these circumstances, I think necessity for appointment of an administrator "pendente lite" has been made out.

32. But it is contended on behalf of the executor named in the Will that in a partition suit pending in this Court between the parties, Sinha, J. in May last year, did not appoint a receiver, & therefore this Court should not appoint an administrator "pendente lite".

33. The answer is two-fold: The question in England arose whether an application for a receiver will lie pending a suit touching probate or administration. In several suits the Chancery Division refused to entertain an application for a receiver: "Re. Ivory" 1879 10 Ch. D. 372; "Hitchen v. Birks" (1871) 10 Eq. 471. Recently however the Chancery Division, though appointed a receiver pending a suit in the Probate Division, expressed its opinion that it would be better to apply, where possible, to the Probate Division : Re. Oakes (1917) 1 Ch. 230. Perhaps that may be the reason why Sinha J. did not appoint a receiver in the partition suit.

34. Further, even if in the partition suit a receiver was appointed, that would not be a bar to the appointment of an administrator "pendente lite". "The Court will appoint an administrator "pendente lite", if it is just & proper so to do, though a receiver may have been appointed by the Chancery Division in a suit pending between the same parties & affecting the same properties as the testamentary or administration suit". Williams on Executor, 12th Edn., p. 353-4.

35. It was next contended that the Court will not appoint an administrator "pendente lite" where there is a person named in the Will as executor. But that

principle applies where the appointment is not questioned. "Mortimer v. Paull" 2 P & D 85.

36. Therefore, I think I should appoint an administrator "pendente lite".

37. Learned counsel on behalf of the executor finally says that if a temporary grant is made at all, the executor should be appointed administrator "pendente lite". The executor has expressed his willingness to work without any remuneration & gave undertakings to the Court for ensuring the safety of the estate. The offer is very attractive for it reduces the costs of administration.

38. But the general rule is that a party "unconnected with the suit is the most proper person to be appointed administrator pendente lite. A party to the suit is not, as a rule, appointed, unless all other parties consent, though where circumstances make it desirable, the Court may appoint a party in the absence of such consent. (Tristram & Coote's, Probate Practice, Ed. 19 at p. 436).

39. In this case, the parties do not consent to the executor's appointment as administrator pendente lite.

40. Very serious allegations have been made against him attacking his integrity & honesty.

41. It is alleged that the executor conspired with other persons & has fabricated the Will. Counsel for the applicants have drawn my attention to certain features of the case to establish that the Will is a fabricated one.

42. At this moment I do not express any opinion whatsoever on the genuineness or otherwise of the Will I heard the criticisms on the Will with a view to ascertain whether there is a "bona- fide" litigation touching the validity of the Will.

43. It is alleged that the executor, taking advantage of the testator's physical disability & loss of eye-sight, induced him to convert his personal account into a joint account in the names of the testator, his widow the executor & his wife; and that the executor has since the death of the testator been operating the account. It is also alleged that the executor has removed & secreted cash, jewellery, & other movables & the books of account of the estate with a view to deprive the applicants of their just rights in the estate. It is further alleged that the executor is acting adversely to the interest of the applicants, & when they sought to get an order for an inventory of the assets of the estate, the executor strenuously opposed the application. It is also alleged that the executor is doing away with the Govt. Promissory Notes belonging to the estate.

44. The executor has given explanation as to the conversion of the testator's account into the joint account; he has given explanation for the Govt Promissory Notes. I have nothing to do with those explanations at this stage. I do not for a moment say or suggest that the charges made against the executor are true. They may be true or may not be true.

45. I also note that the widow of the testator supports the executor in his

opposition & says that if at all an appointment is made, the executor named in the Will should be appointed that is to say, persons representing two-third share of the estate oppose the application for a grant of administration pendente lite & say that if an administration pending litigation is at all granted, the executor named in the Will should be appointed.

46. I do not think, I should be exercising my discretion properly if in the face of the charges made against the executor named in the Will, I appoint him administrator "pendente lite. The administrator "pendente lite" should be like a receiver, an impartial person, & I venture to think that an executor, who is so mixed up in the case as this executor is, should not be appointed the administrator "pendente lite".

47. It is the duty of the Court to see that the estate is not subjected to unnecessary costs of administration.

48. I believe that it would be possible to find a gentleman of undoubted probity & impartiality who would be willing to take up the office of the administrator "pendente lite" on a fixed monthly remuneration. In the "Chanchal Raj Will's case", Khundkar, J. appointed a member of the Bar to that office on a monthly remuneration. I can do that in this case if the parties consent. The remuneration would be a trifling sum in comparison with the value of the estate, & ultimately a lot of costs would be saved. For I am sure, if I appoint the executor named in the Will as administrator "pendente lite", there would be constant wrangle & innumerable proceedings in Court objecting to the administration of the executor.

49. I, therefore, appoint at present the Administrator General of Bengal as administrator "pendente lite", but if before the drawing up of the order the parties agree to a name, I shall be only glad to appoint him. But I say this, such an appointment by consent will not in any way prejudice the right of any party to appeal from this order.

50. Costs in the cause.