
(1927) 03 BOM CK 0033

In the Bombay High Court

Case No : O.C.J. Appeal No. 13 of 1925 and Suit No. 3937 of 1923

Ladkavahoo

APPELLANT

Vs

Charandas Chaturbhuj

RESPONDENT

Date of Decision : 08-03-1927

Acts Referred:

Citation : AIR 1927 Bom 519 : (1927) 29 BOMLR 1082

Hon'ble Judges : Blackwell, J; Amberson Marten, J

Bench : Division Bench

Judgement

Amberson Marten, Kt., C.J.—This application is with reference to a deficiency in the income of funds set apart to answer an annuity payable to the appellant, defendant No. 5, under an order of this appellate Court dated January 25, 1926. Under the will of her husband this lady was given inter alia by Clause 7 an annuity of Rs. 750 a month. It was directed to be paid out of the residuary estate. A decision was given by Mr. Justice Kajiji which subsequently went to the appellate Court who reversed it and directed an inquiry before the Commissioner to ascertain in effect the proper sum to be set apart to answer the annuity. Unfortunately although we have a full judgment on the first hearing when the appellate Court ordered a reference before the Commissioner, we have no judgment on the second occasion when the order in question was made. That order expressly provides that the lady is to be paid the interest on a particular sum of Rs. 2,29,500 as and when such interest should accrue due, but not exceeding a sum of Rs. 11,475 every year for the purposes mentioned in the said Commissioner's report. Then the order went on to say that the receiver appointed should continue to act "until further order of this Honourable Court, and that any of the parties are to be at liberty to apply to the Court as there may be occasion."

2. Now this maximum of Rs. 11,475 was approximately the yearly amount of the annuity mentioned in Clause 7 of the will, together with certain other payments. But the order did not expressly provide as to what was to happen in the event of

the income of the fund being insufficient to meet the annuity. What happened was that when the Commissioner made his report, and when the Court made its order, the selected Government security, namely, five per cent, loan 1945, was standing at or a shade below par. When, however, the money came actually to be invested some months later by the Accountant General, this loan had risen largely in the market. Consequently the securities actually purchased are insufficient by their income to meet the annuity in question. It appears that the lady then made an application to the Chamber Judge for an increased sum to be brought into Court, but that application was refused as it was considered to be a matter for this appellate Court.

3. Now in the above order of the appellate Court, the liberty to apply was somewhat ambiguously worded, for it was not made clear whether an application thereunder was to be made to this appellate Court or whether it was to be made to the trial Court. I take it that in the case of an ordinary administration suit, it is wrong to come to the appellate Court merely because at some phase of the case the matter has been before the appellate Court. Once the matter has been decided by the appellate Court, then all future applications with regard to the administration of the estate should come before the Judge of first instance in the ordinary way. But I do feel here that in one sense there is a deficiency in the order of the appellate Court in that it did not provide for the invested sum not providing an adequate income; and consequently that it is not unnatural to apply to this Court to remedy the defect. Accordingly without in any way departing from what I personally consider to be the proper general practice, I think that in this particular case we may properly make a supplementary order. If the point had been expressly mentioned to the appellate Court as to what was to happen in the event of the fund being insufficient to answer the annuity, I am sure the appellate Court would have added an appropriate provision to meet that contingency. Accordingly I think we can still do it now.

4. With regard to the law on the point, it is clear that in a case like the present, where an annuity is charged on the residuary estate, the Court has jurisdiction to set apart a fund to answer the annuity, and thereupon to release the rest of the property and to hand it over to the legatees or next-of-kin. At the same time, it is equally clear that if there is any deficiency in the fund the annuitant is entitled to resort to the corpus, at any rate where she has a charge on corpus as here. Moreover, it may be that she has also the right to follow the residuary estate into the hands of the residuary legatees. She has also got the right to prevent distribution before the Court sets apart a proper fund to answer the annuity.

5. In *Harbin v. Masterman* [1896] 1 Ch. 351 Mr. Justice Stirling sets out clearly in his judgment in the Court below what he considers to be the proper practice. Then, on appeal, Lord Justice Lindley says (p. 362) :-

The view taken by Stirling J. in the present case is the common sense view; and it is, as I have said already, supported by the uniform practice of the Court, which is to let the residuary legatees have what is theirs, subject to the setting

aside of a sufficient sum for the payment of the annuities. Of course, if in some unforeseen event it should become necessary for the annuitant to have recourse to the capital so set apart, she would be entitled to do so.

6. Then in *In re Evans and Bettell's Contract* [1910] 2 Ch. 438, Mr. Justice Parker stated (p. 442) :-

The jurisdiction of the Court, exercised in *In re Parry : Scott v. Leak* (1889) 42 Ch. D. 570 and in *Harbin v. Masterman* is, in my judgment, a jurisdiction founded on administration only. When an annuity is charged on the income of residuary real and personal estate, and the personal estate is amply sufficient to provide for all the rights of the annuitants, the Court, in the exercise of its administration jurisdiction, sets aside a fund and distributes the rest of the estate. But, as North J. points out in *In re Parry : Scott v. Leak*, that exercise of jurisdiction does not release the rest of the estate; and if the fund fails, owing to unforeseen circumstances, to answer the annuity, the annuitant may follow the rest of the property into the hands of those entitled to it, since it is still subject to the annuity. I am not sure that the jurisdiction has ever been exercised, or could well be exercised, with regard to real estate.

7. Accordingly in the present case, I think this Court may make an order supplementary to that of January 25, 1926, and that it may follow substantially the form handed up to us by counsel which provides for the sale of a sufficient part of the corpus year by year to meet any deficiency in the income to answer that annuity. There is now no opposition to that order from any of the parties actually before the Court. The Official Assignee has been given notice, and he has intimated that he leaves the matter in the hands of the Court. The original application asked that a certain further fund should be set apart to answer the annuity and not for the above sale which was suggested by this Court. But having regard to the age of the annuitant and the size of the fund, I take it that the parties will be satisfied by the above provision for sale of a sufficient part of the corpus to meet any deficiency.

8. The costs of all parties of the present application will come out of the estate.