

(1941) 07 MAD CK 0019
In the Madras High Court

T.M. Venugopala Mudaliar and Another	APPELLANT
Vs	
T.K. Embaru Naidu and Others	RESPONDENT

Date of Decision : 18-07-1941

Acts Referred:

Succession Act, 1925 — Section 317

Citation : AIR 1941 Mad 851 : (1942) ILR (Mad) 137 : (1941) 54 LW 267 : (1941) 2 MLJ 378

Hon'ble Judges : Alfred Henry Lionel Leach, C.J

Bench : Division Bench

Judgement

Alfred Henry Lionel Leach, C.J.—This appeal is concerned with the interpretation of Order 45, Rule 1, Clause (d) of the Rules of the

Original Side of this Court. Order 45, states when an originating summons may issue. Clause (d) of Rule 1 provides for the issue of an originating

summons to compel executors, administrators or trustees to pay into Court moneys in their hands. The appellants say that before an order can be

passed under this clause it must be admitted by the defendant that he has money actually in his hands. The respondents say that this interpretation is

too narrow and the Court can on the issue of an originating summons investigate accounts of an executor, administrator or trustee and order him to

pay into Court what is found to be due by him.

2. The relevant facts of this case are these. On the 7th December, 1926 one Chellammal died leaving a will dated the 19th August, 1926. She

appointed three executors, two of whom are the present appellants. On the 4th May, 1927, the executors applied to this Court for probate of the

will and probate was granted. The will directed that a sum of Rs. 6,000 should be paid to Balammal, a grand-daughter of the testatrix, for the

purchase of a house. The will also directed that the house should be enjoyed by Balammal during her lifetime and that after her death the property

should be divided equally among her children when the youngest had attained majority. The respondents are the children of Balammal and on the

20th October, 1939 they took out the originating summons which has given rise to this appeal. They asked that the appellants should be directed

(i) to pay into Court a sum of Rs. 3,717 alleged to be in their hands as executors, (i)to exhibit a true and proper account of receipts and

disbursements in connection with the administration of the estate and (iii) to bring into Court such further sums as might be found to be due on the

taking of the account. The allegation that the appellants had in their hands the sum of Rs. 3,717 was based on a statement of account filed in Court

by the executors on the 3rd November, 1927 in accordance with the provisions of Section 317 of the Indian Succession Act requiring a statement

to be filed within one year of the grant of probate. It is, common ground that until the present proceedings were instituted no final statement of

account was filed by the executors. The defence was that the appellants had not got in their possession this sum of Rs. 3,717. They averred that

they had lawfully disposed of it in connection with the administration of the estate.

3. Without considering whether in the circumstances the respondents were entitled to ask for an order against the appellants under Order 45, Rule

1, Clause (d), the Assistant Registrar embarked upon an investigation into the accounts and his conclusion was that the appellants were liable to the

estate in the sum of Rs. 716-15-0. The Assistant Registrar did not hold that the appellants had this money in their hands. His order indicates that he

accepted the appellants' statement that the money had been expended, but he found that they were liable for the Rs. 715-15-0 because the

disbursements which they pleaded were wholly or partially unwarranted. For instance, the appellants said that they paid an advocate Rs. 300 for

obtaining probate. The Assistant Registrar apparently did not doubt that the advocate had been paid, but he considered that a reasonable fee was

Rs. 75, which was all that he allowed. Another sum of Rs. 300 was disallowed because the Assistant Registrar was not satisfied that this

disbursement had been authorised by Balammal. The appellants had debited the estate with the sum of Rs. 560 as being costs incurred in a certain

suit. The Assistant Registrar disallowed Rs. 130 out of this amount. There is no suggestion in the Assistant Registrar's report from beginning to end

that the appellants had the Rs. 716-15-0 in their hands.

4. The Assistant Registrar's report was considered by Gentle, J., who accepted it and directed that the appellants should pay into Court the sum

of Rs. 716-15-0. The learned Judge's order proceeds on the basis that the appellants had the money in their hands. He did not consider whether

the respondents were entitled to an order in the circumstances. The failure to consider this question was no doubt due to the fact that the case was

not put before him as it has been put before us.

5. The wording of Clause (d) of Rule 1 of Order 45 is free from any ambiguity. An originating summons may be taken out under its provisions for

an order directing payment into Court of moneys in the hands of the executors, administrators or trustees. The clause does not refer to moneys

which ought to be in their hands. This rule corresponds to Order 55, Rule 3, Clause (d) of the rules of the Supreme Court in England. The wording

is almost identical. The meaning to be attached to Order 55, Rule 3, Clause (d), was considered by the Court of Appeal in. *Nutter v. Holland*

(1894) 3 Ch.D. 408. There Lindley, Lopes and Davey, L., JJ., had no hesitation in holding that money cannot be ordered to be paid into Court by

executors, administrators or trustees under Order 55, Rule 3, Clause (d) unless the money is actually in their hands. It is not sufficient that it has

been in their hands and they are responsible for it.

6. Lindley, L.J., said:

I think that rule means what it says. It applies only to money actually in the hands of the trustee, executor or administrator, and if it is not in his

hands, although he is responsible for it and ought to have it, that rule does not apply.

7. Lopes, L. J. said:

I agree that the rule means what it says, and that it is confined to money which is actually in the hands of the executors, administrators or trustees.

8. Davey, L.J., said:

. . . . that before an order is made under it for payment into Court it must be shown that the trustee has money belonging to the trust actually in his

hands; it does not apply to money which may or may not be found due from him on the result of an investigation.

9. Mr. T.S. Venkatesa Aiyar has drawn our attention to a passage in Williams on Executors, 12th Edition, Vol. II, page 1286 where it is said that

when there is a sufficient admission by the executor of assets once come to his hands, he cannot relieve himself from paying them into Court by

showing any unauthorised application of them, or any investment or disposition of them which in substance amounts to a breach of his duty as

executor.

10. The learned authors are here referring to the position before the passing of the Judicature Act when there was no Order 55, Rule 3, Clause

(d). This statement is based on decisions arising out of administration actions. There can be no doubt whatever that the appellants can be made to

refund to the estate all moneys which they have improperly expended; but that is not what the Court is now concerned with. The Court is

concerned with the question whether there can be an investigation into accounts and a consequential order passed on an originating summons taken

out under the provisions of Order 45, Rule 1, Clause (d), of the Rules of the Original Side of this Court. It seems to me that the only conclusion

which can legitimately be arrived at is that the respondents misconceived their remedy. In the circumstances the remedy is by suit and not by an

originating summons under Order 45. The Court is not considering a case where an executor has denied possession of funds and it is clear that his

denial is false. Moreover it must be remembered that Order 45 is intended to provide a summary remedy in specified circumstances and not an

alternative remedy to an, administration action.

11. In *Nutter v. Holland* (1894) 3 Ch.D. 408 the Court was able to deal with the matter without relegating the plaintiffs to a regular suit, but that

was because Clause (c) of Rule 4 of the English Order 55 provides that any of the persons named in Rule 3 may in like manner apply for and

obtain an order for the administration of the trust. There is no corresponding rule in Order 45 of our rules. It is unfortunate that the matter has been

allowed to go so far, but the respondents are mainly to blame for this. They applied for the issue of an originating summons in respect of an account

which had been filed twelve years before and much could have happened in the

meantime. It has been impressed upon us that the respondents are minors but that fact does not preclude them from bringing a suit nor does it in any way alter the position. If they have not the means to pay the necessary court-fee there is procedure by which they could be allowed to sue in forma pauperis. It may be that the matter of the court-fee was the factor which governed the procedure adopted. It has not been suggested that the allowing of the appeal will adversely affect the respondents but, even if it should, we have no option but to hold that Order 45, Rule 1, Clause (d) does not apply to a case like this. The appeal will be allowed but we will make no order as to costs.

12. It is said that the appellants have paid into Court Rs. 1,235. The respondents state that they will file a suit within a fortnight and by consent this money will remain in Court to the credit of the suit to be filed. If the suit is not in fact filed within that time, the appellants will be entitled to withdraw the money from Court.