

In Re: Laurence Claude Levack

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Court : Chennai

Decided On : Aug-28-1953

Reported in : AIR1954Mad898; (1954)IIMLJ249

Judge : Rajamannar, C.J., ;Balakrishna Ayyar and ;Venkatarama Ayyar, JJ.

Acts : [Succession Act, 1925](#) - Sections 228, 237, 238, 239, 241, 276 and 276(1)

Appeal No. : O.P. No. 89 of 1953

Appellant : In Re: Laurence Claude Levack

Advocate for Pet/Ap. : Adv. General;King and Partridge

Disposition : Application allowed

Judgement :

Rajamannar, C.J.

1. One Lina Dalrimple Hay, a British National, died in England on 30-12-1950. She left behind her her last Will and Testament dated 24-6-1944. In and by the said Will the testatrix appointed her two nieces, Miss E. J. E. Butcher and Miss B. Butcher, both residents of London, to be the executrices thereof. Probate of the said Will was duly obtained by the said executrices from the Probate Division of the High Court of Justice in England on 3-5-1951. On 23-8-1952 the said twoexecutrices appointed Lloyds Bank Ltd., Calcutta, as their attorneys for them,

on their behalf and in their names to apply for and obtain from the High Court of Judicature, Madras, or from any other competent Court in India Letters of Administration with a copy of the said Will annexed of the estate of the deceased and effects in India. By a power of substitution, dated 17-12-1952 the said Lloyds Bank Ltd., Calcutta appointed Laurence Claude Levack (the petitioner herein), an Officer of the said Bank, Madras Branch, to be the duly constituted attorney of the said two executrices to apply for and obtain from this court letters of administration with a copy of the will.

Thereupon, the above petition was filed by Levack for the grant of Letters of Administration of the estate and effects of the said deceased with a copy of the said Will annexed to have effect only in the State of Madras to him as the duly constituted attorney of the executrices with probate in England of the said Will and for their use and benefit until they or either of them shall apply for and obtain probate in Madras. Along with the petition, the petitioner filed a certified true copy of the probate of the said Will issued under the seal of the Principal Registry of the Probate Division of the High Court of Justice in England. A question was raised, if, before Letters of Administration could be granted to the petitioner, an administration bond should be given to this court under Section 291, Succession Act, (Act 39 of 1925, hereinafter referred to as the Act). It was contended on behalf of the petitioner that the grant in this case was a grant under Section 241 of the Act and therefore the provisions of Section 291 of the Act do not apply. It was therefore necessary to determine whether the petition fell within the scope of Section 241 of the Act.

On behalf of the petitioner, reliance was placed on the decision of a Bench of this court in 'In re Wilfried Hazell Sell' : AIR1940 Mad680 in support of the position that the grant in this case should be deemed to be under Section 241. The matter first came up before Subba Rao J. sitting on the Original Side of this court, and he passed the following order:

'The judgment of this court in : AIR1940 Mad680 appears to me to be in the teeth of the express provisions of Section 241 of the Indian Succession Act. But sitting alone, I am bound by the Bench decision. This may be placed before the learned

Chief Justice for consideration whether the question may be placed before a Division Bench.'

The petition was posted thereafter before a Division Bench consisting of Satyanarayana Rao and Rajagopalan JJ. The learned Judges thought that the matter required consideration by a fuller Bench. They also suggested that as this matter was of sufficient importance notice should go to the Advocate General to assist the court in coming to a decision in the matter. It now comes up before this Full Bench after notice to the Advocate General who has appeared and has been of considerable assistance to us.

2. Section 241 of the Act runs thus:

'When any executor is absent from the province in which application is made, and there is no executor within the province willing to act, letters of administration, with the Will annexed, may be granted to the attorney or agent of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself.'

The conditions which have to be satisfied before Section 241 can apply are, (1) the executor is absent from the province in which the application is made and there is no executor within the province willing to act, and (2) the person applying is the attorney or agent of the absent executor. In the present case there can be no doubt that the petitioner must be deemed to be the attorney or agent of the two executrices. The question therefore is whether the executrices can be said to be 'absent from the province.' 'Absent' literally, that is, etymologically, means 'not present'. 'Present' means 'being in the place in question.' It follows that when an executor is not in the province in which the application is made at the time of the application, the first condition must be held to be satisfied. There is no implication in the word 'absent' that the person should have been at any time present, or the person is only temporarily not present.

In -- 'Ashbury v. Eillis', 1893 AC 339 (B) the Judicial Committee of the Privy Council had to construe the word 'absent' which occurred in a rule of the New Zealand Code, the material part of which is as follows:

'In actions founded on any contract.....onproof that any defendant is absent from the colony at the time of the issuing of the writ, and that he is likely to continue absent..... the court may give leave to the plaintiff to issue a writ and proceed thereon without service.'

The following observations deal with the point: 'The only other contention related to the word 'absent' in Rule 53. The appellant seeks to confine it to persons who at some previous time have been domiciled or resident in New Zealand. It is not easy to appreciate the reasons why such an artificial sense should be put upon the word; and during the argument their Lordships expressed agreement with the Judges of the Court of Appeal, who held that the word is used in its ordinary sense, and describes persons who are not in New Zealand.'

'Prima facie', therefore, it looks as if both the conditions are satisfied in this case and the petitioner is entitled to the grant of Letters of Administration under Section 241.

3. The question then arises whether the section will not apply because the petitioner in this case is unable to produce along with his petition the original will. The production of the original will is not incumbent by reason of any provision in Section 241 of the Act, but because of the provisions of Section 276(1) of the Act, which says that an application for probate or for letters of Administration with the will annexed shall be made 'with the will' except in cases mentioned in Sections 237, 238 and 239. These three sections deal with the case of a lost or destroyed will and the case of a will in the possession of a person residing out of the province in which the application for probate is made and who has refused or neglected to deliver it.

4. It is in this connection that Section 228 becomes important. It runs thus:

'When a will has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of the province, whether within or beyond the limits of India, and a properly authenticated copy of the will is produced, letters of administration may be granted with a copy of such copy annexed.'

The will concerned in this case has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of the province, i. e., in the English Court. A properly authenticated copy of the will has also been produced. Though not mentioned in Section 276, a case coming under Section 228 would also be an exception to the general rule in Section 276. A great deal of confusion has resulted on account of the expressions 'letters of administration with will annexed', 'with copy of the will annexed' and 'with a copy of such copy'. In our opinion, there is no substantial significance in these expressions so far as the light of the petitioner goes. Even when letters of administration are granted on an application made along with the production of the original Will, the original Will itself is never annexed to the letters granted. It is only a copy of the original will that is annexed to the letters.

Ordinarily this is so, because ordinarily the original will is produced along with the application for letters. But when the original will cannot be produced because it has already been lodged in a court of competent jurisdiction, the letters can be granted not with a copy of the will annexed, but only with a copy of the properly authenticated copy of the will. That no significance attaches to the expression "will annexed" is evident from a perusal of some of the sections of the Act. In Section 231 which provides for the grant of letters of administration when an executor renounces or fails to accept an executorship within the prescribed time, the language used is

'The will may be proved and letters of administration with a copy of the will annexed may be granted'.

In the next Section 232 which provides for the grant of letters of administration to a universal or residuary legatee in certain contingencies, the language used is

'Letters of administration with the will annexed may be granted'.

In Section 213 the language used is: 'has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed'.

In our opinion the expression 'Letters of Administration with will annexed' is used in antithesis to letters of administration granted on intestacy. Reading therefore Section 241 along with Section 228 of the Act it follows that an attorney or agent of an absent executor can obtain letters of administration without producing the original will if the will had been proved and deposited in a competent court and a properly authenticated copy of the will is produced.

5. In : AIR1940 Mad680 , the correctness of which is the matter for consideration by us, one Me Cankie died in England leaving a will, probate of which was obtained in England. The testator appointed one Mrs. Hawkins as his executor. She not being able to go to Madras, granted a power of attorney to one Sell to enable him to apply as her agent. The agent made an application, and it was held that it fell within Section 241. The learned Judges there ruled that letters of administration with a copy of the Will annexed could be granted under that section i. e., Section 241 without security in favour of an agent who applies on behalf of the principal who had obtained probate of the Will in England. The learned Chief Justice who delivered the leading judgment of the Court referred to the practice of this court ever since the Succession Act of 1865 to grant letters of administration with a copy of the will annexed in cases such as that before him without requiring security to be furnished. The Court was also informed that the same practice prevailed in the Calcutta and Bombay High Courts. Of the two decisions cited before the learned Judges, namely, 'In the goods of Leckie', 15 Beng LR (App) 8 (C) and 'in the goods of William Ashton', 1905 All WN 251 (D), the learned Judges preferred to follow the decision in '15 Beng. L. R. (App) 8 (C)'. The learned Chief Justice repelled the contention that Section 241 was intended to apply only to cases where the executor was temporarily absent from the province but his return was contemplated. The other learned Judge, Krishnaswami Aiyangar J. came to the same conclusion as the learned Chief Justice but not without hesitation. He also referred to the uniform practice of this court and of the Bombay and Calcutta High Courts which appears to have solely influenced him to agree with the learned Chief Justice.

6. Derbyshire C. J. and Gentle J. followed the Madras decision in 'In the goods of Sidney Thomas Mathison, AIR 1949 Cal 560 (E)'. They held that where the original

will had been proved and deposited in another court outside the province and could not be produced letters of administration with a copy of the will annexed may be granted to the attorney of an absent executor for use and benefit of his principal limited until he obtains the grant himself under Section 241 read with Section 228, Succession Act The learned Judges followed the rulings in -- '15 Beng. L. R. (App.) 8 (C) and : AIR1940 All80 , and dissented from the decision of the Allahabad High Court in -- '1905 All W. N. 251 (D)'.

7. The Act in force when -- '15 Beng. L. R. (App) 8 (C)' was decided was the Succession Act of 1865 and the section corresponding to Section 241 of the present Act was Section 212. A British subject possessed of property both in India and England died in England leaving a Will by which he appointed four persons to be his executors in England and one W. D. his executor in India. Probate was granted to the four English executors in England but W. D., the Indian executor, renounced probate. One D. G. L., the attorney in India of the English executors, filed an application for letters of administration with the will annexed. It was held that the attorney was entitled to letters of administration. Phear J. observed that it would be in accordance with the practice of the Court that letters of administration with the will annexed should be granted to the attorney.

8. A contrary view was taken by the Allahabad High Court in -- '1905 All W. N. 251 (D)'. In that case the will of one William Ashton was duly proved by the executors in England. As some portion of the estate dealt with by the will was in India, the authorised attorney of the executors applied to the High Court for grant of letters of administration. He filed along with the application an authenticated copy of the probate. The learned Judges held that the application could not be sustained, first because only a copy of the will and not the original was produced and secondly because the executors could not under the circumstances ever obtain probate of the will in India. In their opinion the section which was intended to apply to cases of this kind was Section 180 of the Act of 1365 which corresponds to Section 228 of the present Act.

9. A Full Bench of the Allahabad High Court in -- 'In the goods of Alexander James Milne' : AIR1948 All351 followed the earlier ruling of their Court in -- '1905 All W.

N. 251 (D)' and refused to follow the decision of our Court in : AIR1940 Mad680 . The learned Judges held that according to the scheme of the Indian Succession Act Sections 228 and 241 are intended to apply in very different circumstances, the former where the Will has been proved abroad and the latter where it has not been proved at all. While a Court in India can, when acting under Section 226, grant administration without further proof of the Will, on a petition under Section 241 the Will has to be established. Where a Will had been proved and deposited in a competent Court in Scotland, letters of administration with a copy of the authenticated copy of the Will annexed could be granted under Section 228 to the absent executor, but letters of administration could not be granted under Section 241. The learned Judges dealt with the question after observing that there was never any question of the right of the attorney of an executor who has proved a Will in a foreign court to obtain from an Indian court a grant of letters of administration with a copy of the Will annexed. The only question was whether the grant should be under Section 228 or under Section 241. In their opinion the appropriate section was Section 228. They referred to the longstanding practice obtaining in the Presidency High Courts of grants being made under Section 241 and the section in the previous Act corresponding to it, but there was no such practice in the Allahabad High Court. Mootham J. who delivered the leading judgment of the Full Bench encountered some difficulty in the application of either section to the case, the facts of which are almost identical with the facts of our case, because Section 228 did not make provision for the grant of administration to an agent or attorney and Section 241 assumed production by the attorney of the original Will.

10. With great respect to the learned Judges of the Allahabad High Court we prefer to follow the decision in : AIR1940 Mad680 Which affirms a longstanding practice of this court extending very nearly to a century. In our opinion Sections 228 and 241 should not be read as if they provided for separate circumstances and they were mutually exclusive. On the other hand, we think that in a proper case they could be read together. It is true that the objects of these two sections differ. The real object of Section 228 is to dispense with the production of the original Will and proof thereof for a very good reason, viz., that it had already been proved and had been deposited in a court of competent jurisdiction. The real

object of Section 241 is to dispense with an application by the executor himself when he is absent from the province in which the application is made. We do not see why both these sections cannot apply to a case where (1) the Will has been proved and deposited in a court of competent jurisdiction and (2) the executor is absent from the province in which the application is made. In such a case Section 228 would dispense with production and proof of the Will and Section 241 would enable an attorney of the executor to make the application. If the attorney of the executor applies in a case where the Will has not been proved before, then his application would come only under Section 241, and the applicant will have to produce and prove the Will.

11. We think that undue weight has been given to the words 'with the will annexed'. They only indicate that the administration should be in accordance with the terms of the will in antithesis to the case of administration on intestacy.

12. Section 241 and the corresponding section in the prior Act obviously have their origin in the practice of the Ecclesiastical Courts in England to grant limited administration 'durante absentia'. When such administration is granted, the grantee has the same rights and liabilities as an executor. The section as it stands applies to cases of Wills executed in India as well as to Wills executed outside in respect of which the proper court to grant probate would be a foreign court. It contemplates the case of an executor applying for letters of administration which can only be under Section 228.

13. Section 291(1) of the Succession Act of 1925 exempts a person to whom letters of administration are granted under Section 241 from giving an administration bond. Sub-section (2) of that section enacts that the exception made in respect of a grant under Section 241 shall not operate when the deceased was a Hindu, Mahomedan, Buddhist, Sikh, Jain or an exempted person. It is not necessary to speculate as to why the grantee of Letters of administration under Section 241 should be exempted and why this exemption should not apply in the case of the Wills of Hindus, Mahomedans, Buddhists, Sikhs and Jains. All that we have to find out is if the present application falls within Section 241. In our opinion it does. Letters will therefore issue without insisting upon security being

furnished.

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