

In Re: Premchand Moonshee, Deceased

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Court : Kolkata

Decided On : Jun-04-1894

Reported in : (1894)ILR21Cal832

Judge : Sale, J.

Appellant : In Re: Premchand Moonshee, Deceased;bidhatree Dassee

Respondent : ;mutty Lall Ghose and anr.

Judgement :

Sale, J.

1. This is a suit by a legatee to obtain payment of a legacy given to her by the will of her grandfather Prem Chand Moonshee. The will gives various legacies amounting to Rs. 68,000. It also gives an annuity of Rs. 5 a month, and directs that provision be made for the maintenance of a widow, for the support of a charitable dispensary, and for the performance of certain sradh ceremonies. It then dedicates the residue of the estate for the sheba of the family thakoor and appoints three of the testator's sister's sons executors and shebait.

2. The defendants, being two of the executors, proved the will. The value of the estate as given in their petition for probate is Rs. 1,17,999-5-9.

3. The plaintiff states in her plaint that, notwithstanding repeated demands, she has failed to obtain payment of the legacy from the defendants.
4. The defendants in their written statement say (1) that the plaintiff is a person of unsound mind and was incapable of instituting the suit and is incapable of maintaining it; (2) that the assets are insufficient; that they offered to pay a proportion of the legacy, not to the legatee herself, she being under disability, but to any person legally authorized to receive the same.
5. The defendants have now applied under Section 380 of the Code for an order requiring the plaintiff to give security for her costs of suit. The application is supported by an affidavit, which states that the suit is for money, that the plaintiff is a parda nashin lady, and that she is not possessed of any immoveable property within British India.
6. The plaintiff's son has in opposition to this application made an affidavit, in which he says that, acting for his mother, he frequently asked the defendants for payment of the legacy; that he was put off' from time to time with the promise of payment; that he then caused a letter of demand to be written by an attorney, but received no reply; that the allegation in the written statement of the defendants that the plaintiff is of unsound mind is 'wholly false'; that the allegation in the affidavit used in support of this application that the plaintiff is not possessed of any immoveable property within British India is also untrue : and then follows this allegation: 'Baboo Woomesh Chunder Mitter who was my grandfather by his will gave and devised all his moveable and immoveable estate in favour of his three daughters, of whom my mother is one, in equal shares for their respective lives, and after their death in favour of their respective heirs per stirpes'.
7. There is no dispute that the plaintiff is a, parda nashin lady, and that this is a suit for 'money.' But it; is said on the part of the plaintiff that, having regard to the terms of her father's will, she is possessed of immoveable property within British India.
8. Under this will, the immoveable properties left by the plaintiff's father are to be held by the executors upon trust to pay the residue of the income after providing

for certain specified trusts, to his three daughters in equal shares. I think it would be unduly straining the language of the section to hold that the plaintiff, being entitled to a beneficial interest in a part of the surplus income derived from immoveable property, becomes thereby possessed of 'sufficient immoveable property' within the meaning of the section. The question then is whether it follows of necessity that the Court is bound to make the order asked for, or whether it has a discretion in exercising the power given under the section.

9. It has been contended on the part of the defendants that the power is not discretionary but obligatory, and that the word 'may' in the latter clause of the section must be read as 'shall.' I am not aware of any cases now regarded as authorities which can be cited for the proposition that the word 'may' is, in any connection, to be read as meaning 'shall,' though, as explained in the case of *Delhi and London Bank v. Orchard* I.L.R. 3 Cal. 47, 57, the word 'shall' may under certain circumstances be substituted for the word 'may.' On the contrary, in *Julius v. Bishop of Oxford* L.R. 5 App. Cas. 214 Lord Selborne speaking of the words 'may,' 'it shall be lawful,' and the like, says 'they are potential and never in themselves significant of any obligation.' And Lord Cairns in the same case says of the same words: 'They confer a faculty or power, and they do not of themselves do more than confer a faculty or power.' So also Cotton, L.J., says: 'I think that great misconception is caused by saying that in some cases 'may' means 'must.' It never can mean 'must' so long as the English language retains its meaning, but it gives a power, and then it may be a question in what cases where a Judge has a power given him by the word 'may' it becomes his duty to exercise it '-In *re Baker Nichols v. Baker* L.R. 44 Ch. D. 262, 270. See also the observations of Jessel, M.E., in *Morgan v. Thomas* L.R. 9 Q.B.D. 643, 645-6.

10. No doubt when a power or faculty is given to the Court that it may be exercised for a particular purpose or for the benefit of particular persons under certain specified circumstances, and it is shown that the particular circumstances exist under which it was contemplated that the power should be exercised, then it may be that an obligation is cast upon the Court to exercise that power. In that sense words which are in themselves enabling merely may under certain circumstances impose an obligatory duty.

11. The object of the section clearly is to provide for the protection of defendants in certain cases where in the event of success they may have difficulty in realizing their costs.

12. The latter clause of the section was introduced by the Debtors Act (VI of 1888) which prohibits the arrest or imprisonment of a woman in execution of a decree for money, and it is to be observed that it is only in suits for money that the power given under this clause of the section can be exercised. When therefore litigation is harassing and vexatious, or where the real plaintiff is not before the Court, or where, though liable in certain events for the defendant's costs, the plaintiff is a person of no means, in such cases, the Court would doubtless exercise this power for the protection of the defendant. But there are cases in which the plaintiff in a suit for money (the claim being real and open to no objection) cannot be rendered liable for the defendant's costs of suit. In illustration I may refer to an administration suit by a creditor or legatee where the claim is admitted, or to a suit on a mortgage or promissory note, where there is no defence. Is it to be supposed that it was intended that the defendant in such cases should be in a position to ask as a matter of absolute right that security may be given for costs that he may choose to incur needlessly? It surely was not intended by this section that a perverse litigant should have the right of calling on the Court to assist him in throwing an obstacle vexatiously and unnecessarily in the way of a woman desirous of prosecuting a just claim, which possibly is not even denied.

13. It seems to me that the power given under the section is discretionary and one which the Court ought or ought not to exercise according to the circumstances of each case, and that, unless it is shown that the exercise of its power is necessary for the reasonable protection of the defendant, the Court ought not to interfere. This, I think, was in substance the opinion of Wilson, J., who in a similar application used these words: 'I should be very sorry to lay down, and I guard myself against laying down, that this section is imperative on the Court, and that the Courts have no discretion but to order security to be given-Degumbari Dabi v. Aushootosh Banerjee I.L.R. 17 Cal. 610, 613.

14. Then what are the facts here? The plaintiff as a legatee is entitled to ask for payment of her legacy. The defendants are in possession of the estate, which was originally of large value. They make no reply to the plaintiff's demand for payment. They do not even inform her of the position of the estate, which according to the case now made in their written statement is not sufficient to pay the legacies in full. The plaintiff therefore had no alternative but to seek the assistance of the Court. It is clear that the suit must proceed in the form of an administration suit, and the plaintiff must in the ordinary course obtain a decree for the amount of her legacy without abatement if the assets should prove sufficient; otherwise subject to abatement. In either case the plaintiff, as plaintiff in an administration suit, will be entitled to be paid her costs out of the general estate. In neither case can she be deprived of her costs or be made liable to pay the defendants' costs.

15. The present application therefore was wholly unnecessary and must be refused with costs.

16. It is scarcely necessary to add that it was not sought to support this application on any ground connected with the plaintiff's disability alleged in the defendant's written statement. The grounds relied on were merely those indicated in Section 380 of the Code.