

In Re: Pasupati Nath Mukerjee

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Court : Kolkata

Decided On : Apr-24-1933

Reported in : AIR1933Cal841

Appellant : In Re: Pasupati Nath Mukerjee;secy. of State and anr.

Respondent : ;parijat Debi and anr.

Judgement :

C.C. Ghose, Ag. C.J.

1. The facts involved in this appeal, shortly stated, are as follows: One Pasupathi Nath Mukerjee, a wealthy Hindu inhabitant of Calcutta, died on 9th May 1919 possessed of considerable movable and immovable properties and leaving a will executed by him on the said 9th May 1919. The Administrator-General of Bengal was appointed, executor under the will. He applied for Probate of the said will to this Court on its Original Side and a caveat was entered by the widow of the testator Srimutty Parijat Debi. The application for Probate was set down to be heard as a contentious cause and it was numbered as suit No. 13 of 1920. A period of nearly eight years was taken to obtain evidence on commission of various witnesses on both sides. The suit came on for hearing before Costello, J., some time in 1928 and after the hearing had gone on for 11 days, the parties beneficially interested in the testator's estate came to a settlement whereby the caveat was discharged and probate of the said will was granted to the Administrator-General of Bengal and it was ordered that the settlement or

agreement arrived at between the parties, which related to the division of the testator's estate in manner different from that indicated in the will, should be recorded. That agreement will be found printed at pp. 8 to 12 of the paper book in this appeal.

2. Shortly after the date of the decree granting probate to the Administrator-General of Bengal, Tirtapathi Mukerjee, son of the testator died, while an infant without leaving any issue, but leaving his mother the present respondent Srimutty Parijat Debi as his sole heiress under the Dayabhaga School of Hindu law by which he was governed. Under the will of the testator, as modified by the terms of the said agreement, Tirtapathi Mukerjee was entitled to a ten ananas share of the residuary estate of the testator absolutely. He died without the said residuary share being made over to him. The petitioner Srimutty Parijat Debi thereupon demanded of the Administrator-General of Bengal the delivery to her of the said residuary share. The Administrator-General of Bengal having failed and neglected to do so, she applied to this Court on its original side some time in August 1930, for an order that directions might be given to the Administrator General of Bengal, as executor under the said will, to make over to her that portion of the residuary estate of the testator to which the said Tirtapathi Mukerjee was entitled to. The application came on before Costello, J., who by his order dated 17th March 1931, directed that the Administrator General of Bengal should hand over, to Srimutty Parijat Debi, Tirtapathi's share of the residuary estate, less a sum sufficient to cover any claim which might be made by the Crown upon the footing that she ought to have taken out a succession certificate as a condition precedent to her right to have the said residuary share handed over to her.

3. The present appeal is by (1) the Secretary of State for India in Council and (2) the Administrator-General of Bengal. So far as the Administrator General of Bengal is concerned, we are informed that he has since the date of Costello, J.'s order made over to Srimutty Parijat Debi the share of Tirtapathi in the residuary estate less a certain sum of money which may be required for payment of duty on a succession certificate, should it be held that such a certificate is necessary to enable Srimutty Parijat Debi to obtain the said residuary share. So far as the Secretary of State for India in Council is concerned, Mr. Pugh's contention is that it

ought not to be decided on an application under Section 302, Succession Act, that Srimutty Parijat Debi automatically steps into the shoes of her deceased son by reason of her relationship to him and the operation of the principle of Hindu law which exempts Hindus from the necessity of taking out Letters of Administration in enabling them to succeed to the rights of a deceased relative. Mr. Pugh's further argument is that inasmuch as the said residuary share consists largely, if not entirely, of Government promissory notes and as the obligation in respect of the said promissory notes was between Government and the testator's son Tirtapathi, if the applicant, Srimutty Parijat Debi, is to succeed to Tirtapathi's legal position, she must prove that she is entitled to the benefit of the (debt) as between the Government and whoever may be for the time being the holder of the promissory notes in question. On this argument of Mr. Pugh which has been advanced before us and which was also advanced before Costello, J., the latter observed as follows:

In other words Mr, Pugh says that before this lady can get possession of these Government notes, she will have in effect to establish her right to have assigned to her the debt owing by the Government to her deceased son Tirtapathi. This, if I may say so, is a very ingenious argument. It is possible that there is something in it. I am about to say however that without considering the matter further, I am not prepared to give an opinion on the matter one way or the other I think that is a matter which ought to be left open. If the Crown still wishes to argue that in the circumstances of this particular case there is an obligation on the present applicant to take out a succession certificate and to pay the appropriate duty, they ought not to be shutout of so doing.

4. For reasons which appear later, I am of opinion that there is no substance in Mr. Pugh's contention. In this appeal, the main question that has been argued on behalf of the appellants is that unless Srimutty Parijat Debi takes out a succession certificate, she is not entitled to the delivery to her of the said residuary share, and secondly that she cannot have an order in her favour by mean's of an application under Section 302, Succession Act. It will therefore be necessary to consider and determine whether what Srimutty Parijat Debi wants is the payment of 'debt' within the meaning of Section 214, Succession Act, and if not whether there are any real

obstacles to her recovering the said residuary share from the hands of the Administrator-General of Bengal. It is said that if it be held that there was no debt and that the residue had not been ascertained, then Costello, J., was incompetent to make the order he did.

5. Now, before we go into these questions, it is necessary to see what exactly was the position of the Administrator-General of Bengal at the time when Srimutty Parijat Debi made her application. By the decree of this Court, dated 8th June 1928, probate of the said will was granted to the Administrator-General of Bengal and the agreement arrived at between the parties as regards the division of the testator's estate was ordered to be recorded. In other words, simultaneously with the grant of probate to the Administrator General of Bengal all the parties beneficially interested in the testator's estate agreed that the same should be disposed of by the executor, not in complete accordance with the terms contained in the will, but in a particular manner desired by them and referred to in detail in the said agreement. The Administrator-General of Bengal was therefore to distribute, and he undertook to distribute, the estate in accordance with the terms of the agreement annexed to the decree of this Court. I am of opinion that there is no substance in Mr. Pugh's contention that from and after the date of the decree granting Probate to the Administrator-General of Bengal, he, in the events which happened, was not holding the estate as executor but, by virtue of the agreement between the parties, as trustee. The Administrator-General of Bengal, if he was to hold the property as trustee, could only do so if the procedure indicated in the Administrator-Generals Act was followed. That obviously was not done and therefore, in my opinion, the Administrator-General could not hold the estate as trustee. Further it is quite clear, apart from everything else, that the stage when he could claim to hold the estate as trustee had not arrived when Tirtapathi died. His sole authority to hold the estate was as executor and he continued to do so in that capacity down to the date when Srimutty Parijat Debi's application was made to this Court.

6. Tirtapathi was entitled, to a 10 annas share in the residuary estate. At the time when he died, the residue had not been ascertained. It was admitted on all hands at the hearing before us that costs, debts and pecuniary legacies had not been

paid; the residuary legatee had therefore no property' in any portion of the testator's estate at the time of his death. In other words, the residuary legatee, such as Tirtapathi was, had no right to any specific item of property at all; and until the executors had discharged all payments, there was nothing which could be regarded as residue: see in this connexion *Lord Sudeley v. Attorney-General* (1897) AC 11. In the case of a specific bequest, the beneficiary acquires title by relation back when the executor gives his assent; but the doctrine of relation back is not applicable to the bequest of a residue as the residue only comes into existence when the administration is completed. There is no such thing as an assent to a residuary gift, the whole object of an assent being to complete the title of the specific legatee to the particular legacy. When the executor has assented to the various specific gifts, he has a residuum which is available for the residuary legatees: See in this connexion *Barnardo's Homes v. Special Income-tax Commissioners* (1921) 2 AC 1. It therefore follows that the residue not having been ascertained up to the time of the death of Tirtapathi, it was nonexistent and there was no 'debt' due to Tirtapathi in his lifetime, If there was no 'debt' due, no question of obtaining a Certificate under Section 214, Succession Act can possibly arise.

7. In the events therefore which happened and the entirety of the estate of the testator being in the hands of the Administrator-General of Bengal as executor, Section 104, Succession Act, is attracted to the present case. The section runs as follows:

If a legacy is given in general terms, without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and, if he dies without having received it, it shall pass to his representatives.

8. It makes no difference that the bequest to Tirtapathi under the will had been augmented by the agreement between the parties. At any rate, the rule laid down in Section 104 is applicable to this case by analogy. Tirtapathi died without having received the residuary estate and therefore the same passed to his representative. In this case the representative is his heiress under the Hindu law and it is not

necessary under Section 212, Succession Act, for the representative or heiress, she being a Hindu, to take out Letters of Administration or any other kind of representation, because the representative or heiress sufficiently represented and represents the estate of the deceased. Costello, J. 's order means nothing more than this that the Administrator-General of Bengal should hand over the residuary estate referred to above when the administration is completed. It is not understood why the learned Judge was not competent to make this order.

9. I now come to the question whether Srimutty Parijat Debi can get the relief she wants by means of an application. All the parties interested were before Costello, J., and there is no reason whatsoever why relief should not be granted to Srimutty Parijat Debi on an application such as she made, seeing that no intricate questions of fact had to be determined on evidence of witnesses. Procedure after all is mere machinery; and in my opinion Srimutty Parijat Debi could get all that she wanted by means of an application whether one treats the application as coming either under Section 302, Succession Act, or under Section 28, Administrator. Generals Act. There are no compelling reasons to hold that she must be driven to a suit. It is all form; but if there is no substance behind the form, Court will not hesitate to grant that relief to the applicant to which she appears to be entitled. The result therefore is, that in my opinion this appeal has no substance and should be dismissed. The Administrator General of Bengal will pay his own costs; but so far as the Secretary of State for India in Council is concerned, the same will come out of the estate. Srimutty Parijat Debi will pay her own costs. As however my learned brother is of a different opinion, the matter must be referred to a third Judge under Clause 36, Letters Patent.

Mitter, J.

10. I regret I am unable to concur in the judgment of the learned Acting Chief Justice which has just been read. I regret it all the more as the question raised by this appeal is one of considerable importance as it affects the stamp revenue of Government on the one hand and concerns the liability of the subject to pay considerable amount of stamp duty to the Crown on the other. I have therefore given my most anxious consideration to the case and I am constrained to arrive at

the conclusion that this appeal should be allowed for reasons to be detailed hereafter. This is an appeal from an order of my learned brother Costello, J., by which he directed the Administrator-General to hand over to the respondent Sreemati Parijat Devi her son's (Tirthapati's) share of the residuary estate left by Pashupati Mukherjee, husband of the respondent, less a sufficient sum to cover any claim which may be made by the Crown on the footing that the respondent ought to have taken out a succession certificate as a condition precedent to her right to have the funds handed over to her. The appeal is preferred both by the Secretary of State for India in Council and the Administrator-General of Bengal who have appeared through the same counsel. It is necessary to state the facts with sufficient fulness in order to decide the questions of law that fall for determination in this appeal. The facts are these: One Pashupati Mukherjee, who was a Hindu resident of the town of Calcutta, died on or about 9th May 1919 possessed of considerable movable and immovable properties situate within and outside the local limits of the ordinary original jurisdiction of this Court having before his death and on 9th May 1919 made and published his last will and testament in the English language whereby he appointed the Administrator-General of Bengal, or failing him the Official Trustee of Bengal, as the executor. By the said will, after making certain specific bequests and making provisions for certain annuities and for the marriage of his daughter, the testator disposed of the residue of his estate in the following terms:

Half of my estate shall be divided equally among the sons of my late lamented elder brother, and the remaining half shall be divided among my children in the proportion of two shares for a male child and one share for a female child.

11. Pashupati was survived by his widow Parijat Devi, his son Tirthapati, his daughter Protima and his brother's sons. After the death of the testator the Administrator-General of Bengal as the executor named in the will applied to the High Court in its testamentary and intestate jurisdiction for the grant of probate of his will. Caveat was entered in the said proceedings by Parijat. Eventually the parties came to a settlement where by probate was granted to the Administrator-General of Bengal and certain terms were arrived at for the disposal of the properties. Those terms were incorporated in the decree in the sense that the said

agreement was also recorded and the Court certified also that the agreement was for the benefit of the infant defendants in the probate suit and the Caveat was discharged. Amongst other things the share of Tirthapati in the residuary estate was increased to 10 annas from 5 annas 4 pies given by the will and the share of Protima was decreased from 2 annas 8 pies given by the will to 2 annas. The details of the agreement are given on pp. 8, 9, 10 and 11 of the paper-book. The decree which recorded the agreement is dated 8th June 1928. Shortly after the decree Tirthapati, the only son of the testator, died on 6th May 1930. Messrs. Dutt and Sen wrote a letter to the Administrator-General of Bengal on behalf of their client Parijat Devi of making over to their client all the properties belonging to Tirthapati in the custody of the Administrator-General. On 30th May the Administrator-General wrote to Messrs. Dutt and Sen that the estate of Pashupati Mukherjee had not been fully administered as the residuary estate had not been divided amongst different residuary legatees and further that before the securities to be earmarked to the estate of Tirthapati Mukherjee could be made over to the persons beneficially interested, administration to that estate must be obtained. On 4th June 1930 Messrs. Dutt and Sen wrote back to the Administrator-General and in that letter occurs the following passage:

As a stake holder we do not think it is within your province to go into the question of our client's interest in the estate which she has inherited as the heiress of her son.

12. I will have to return to this passage. On 14th June, Messrs. Dutt and Sen wrote a letter to the Administrator-General, Bengal, in which they asked the Administrator-General to let them know what acts beyond the division of estate declared by the decree remained to be done. On 21st June the Administrator-General acknowledged the receipt of the letters dated 4th, 11th and 14th June and wrote to Messrs. Dutt and Sen a letter stating that the specific legacies had been paid except those payable to the minor legatees but all the costs had not been paid nor had the residue been allocated to the residuary legatees. In this letter it was further pointed out that the question of representation to Tirthapati Mukherjee's estate had been raised at a certain meeting and accepted as being necessary. There were certain other correspondence between the Administrator-

General and Messrs. Dutt and Sen between 3rd and 11th July to which it is not necessary to refer. On the 11th Messrs. Dutt and Sen wrote to the Administrator-General enquiring whether the latter was prepared to pay to Parijat Devi 10 annas share of the residuary estate. In reply, on 17th July 1930, the Administrator-General pointed out that the question of payment of 10 annas share of the income of residuary estate to Parijat Devi also depended on the question of Tirthapati Mukherjee's estate being represented. On 18th July Messrs Dutt and Sen wrote back saying that they noted the fact that the Administrator-General was not willing to make over the corpus of the residuary estate to their client and was even unwilling to pay the income from the same.

13. On 12th August 1930 a Master's summons was taken out to the effect that an application would be made on behalf of Parijat Devi for direction to the Administrator-General to make over to her a portion of the residuary estate of the testator now in the hands of the Administrator-General under the decree mentioned in the application. The application which is set forth at p. 2 of the paper book recited the settlement whereby probate of the will was granted to the Administrator-General and certain terms were arrived at as regards the disposal of the properties. It also recited the death of the applicant's son Tirthapati and stated that the applicant was his sole heiress under the Bengal school of Hindu law. It recited the fact that notwithstanding the petitioner's repeatedly calling upon the Administrator General to make over to the applicant her share in the residuary estate the Administrator-General refused to do so. In para. 7 of the said petition she submitted that no representation was necessary to be taken by her to the estate of her deceased son Tirthapati and that as a mother and heiress under the Hindu law she was entitled to 10 annas share in the residuary estate of the testator which was directed to be made over to her son under the decree which recorded the terms of settlement. In reply to this petition the Administrator-General stated amongst other things that until the applicant took out representation of the estate of Tirthapati Mukherjee she could not claim the estate to be made over to her and she could not give the Administrator-General a proper end legal discharge. It was also objected that as in any event the properties which were likely to be made over to her consisted mostly of Government securities of a value which, on the allocation of the share of Tirthapati Mukherjee in the residuary

estate, might come up to Rs. 25,00,000, the petitioner should take out representation at least for such securities. As the question raised by the Administrator General affected a considerable amount of stamp duty payable to Government notice was directed to be issued to the Crown in order that the Crown might be represented at the hearing and the question argued as to whether the applicant was liable to pay duty, The Crown appeared in these proceedings and contended that the applicant ought to have taken out a succession certificate as a condition precedent to her right to have the funds handed over to her. Costello, J., however refused to decide whether the applicant was liable to pay the stamp duty, but in order that the Crown's right on this behalf may not be prejudiced, made the following remarks:

The Crown is not to be prejudiced in any way by the making of this order, and I direct the Administrator-General to retain the appropriate sum which I have already mentioned for a period of three months. If no-proceedings are taken by the Crown within that time the amount outstanding will also be handed over.

14. With these remarks the learned Judge directed the Administrator-General to hand over to Parijat Devi Tirthapati's share of the residuary estate less a sufficient sum to cover any claim which may be made by the Crown upon the footing that the applicant ought to have taken out a succession certificate as a condition precedent to her right to have the funds handed over to her. Costello, J., refused to decide whether the application of Parijat Devi was an application under Section 302, Succession Act of 1925, as was contended for on her behalf. The application was made to the Court in its testamentary jurisdiction and not the Court in its ordinary original civil jurisdiction. The learned Judge proceeded to deal with the application on the footing that as all the necessary facts and circumstances were before the Court and indeed all the persons who in any way could be said to be interested in the matter were fully represented, it was of no importance whether or not the application was in technically correct form, and so treating the application the learned Judge made the order as already indicated.

15. Against this order the present appeal has been brought both by the Administrator-General and the Secretary of State for India in Council. Mr. Pugh

appearing both for the Crown and the Administrator General has, in an able argument, contended that the learned Judge was in error in passing an order for the payment of the share of Tirthapati Mukherjee in the estate of Pashupati Mukerjee by the Administrator-General to Parijat Devi without deciding that the title of Parijat Devi to Tirthapati's estate could be proved otherwise than by producing a succession certificate relating to the estate of Tirthapati. He has further contended that as the share of Tirthapati depended upon a compromise effected after the death of Pashupati and no longer depended on the will of Pashupati such share could only be dealt with in the ordinary original civil jurisdiction by a suit or on originating summons and not in the testamentary jurisdiction. His contention is that as the bulk of the estate consists of Government promissory notes of considerable value in the hands of the Administrator-General, the Administrator General was a debtor to Tirthapati under the terms of the agreement which was recorded in the decree issuing probate, and on the death of Tirthapati he became a debtor to Parijat Devi and no decree should have been passed or order made against a debtor of Tirthapati for payment of his debt except on the production of a succession certificate as is required by Section 214, Succession Act. Mr. Pugh, argues that after the agreement the Administrator-General was holding the estate not in terms of the will but in terms of the family settlement arrived at between the beneficiaries under the will. It is said that everybody had agreed to put aside the disposition of the will and the Administrator-General was holding as a person who has assented to the terms of the agreement, and he could not be holding as executor any longer after having assented to the legacies in terms of the agreement. In support of this proposition the learned Counsel has relied on two decisions, *George Attenborough & Son v. Solomon* (1913) AC 76, and *Wise v. Whithburn* (1924) 1 Ch 460. These cases are authorities for the proposition that when an executor assents to a specific legacy the effect of the assent is to strip the executors of their title as executors and to clothe them with a title as trustees. Reference in particular is made to the following passage in the judgment of Lord Chancellor Haldane in *Attenborough's case* (1913) AC 76:

The executors had long ago lost their vested right of property as executors and become, so far as the title to it was concerned, trustees under the will. Executors they remained, but they were executors who had become divested, by their assent

to the disposition of the will, of the property which was theirs virtue officio and their right in rem, their title of property, had been transformed into a right in personam, a right to get the property back by proper proceedings against those in whom the property should be vested if it turned out that they required it for payment of debts for which they had made no provision.

16. This decision does not apply to the case of a residuary bequest and is not of much assistance. It is argued that there is a reorganisation of the whole bequest and the application of Parijat could not be an application under Section 302, Succession Act, for she is not relying on the will but on the agreement which alone entitled Tirthapati to 10 annas share in the residuary estate much in excess of the share allotted to him under the will. It is said that she was really entering into the realms of contract and was asking for performance of the terms of the contract which entitled her son to a 10 annas share of the net residue after the payment of costs and certain legacies. This argument resolutely and ably advanced by Mr. Pugh is deserving of careful consideration and to my mind there seems to be considerable force in this contention which I shall examine presently. Mr. S.M. Bose who appears for Parijat Devi contends that *Attenborough's case* (1913) AC 76 is distinguishable, for in that case the executors were also trustees appointed by the will and the estate had been fully administered and consequently executors ceased to be executors and argues that in the present case the administration had not been complete on the date of application, and that therefore the Court in its testamentary jurisdiction has jurisdiction under Section 302, Succession Act, to give general or special direction in regard to the administration of the estate. He argues that the effect of the agreement is mutual assignment as between the beneficiaries for it is said that the will was not altered in any way but that Parijat was getting a portion of the residuary estate under the will and she was getting something more from those who are entitled to the excess under the terms of the will. It is difficult to my mind to accept this contention in view of the fact that her son could not claim 10 annas share of the residuary estate except under the agreement and the agreement could only be enforced by a suit. For as Woodroffe, J., points out in the case of *Kamal Kumari Devi v. Narendra Nath Mukherji* (1909) 1 IC 573, where the circumstances were similar to the present case:

There could be no 'amended probate' as stated in the ekrarnamah, but when a testamentary instrument is propounded and a caveat against the grant is entered, it is common practice that opposition to the grant should be withdrawn upon terms. Upon this being done, the promovent proceeds to prove the will unless probate has already been granted in common form. In such a case and according to the practice on the original side of the Court the caveat is discharged and the grant made. Such an order is alone within the scope of the suit. But if a settlement has been arrived at under which opposition has been withdrawn, it is recited in the decree that the parties have agreed to terms of settlement and it is ordered that such terms be recorded. The terms are then recorded in a schedule annexed to the decree. Such terms, when as they ordinarily are beyond the scope of the suit are not the subject matter of the decree, and if not carried out, must be enforced by separate suit.

17. It is important to remember in this connexion that the applicant treated the Administrator-General as a mere stake-holder in her solicitor's letter dated 4th June 1930 to which reference has already been made. Mr. Bose however relies on the observation of Woodroffe, J., in Kamal Kumari's case (1909) 1 IC 573 to the effect that the agreement in question recorded in the decree granting probate may be given effect to either by a redistribution by and amongst themselves after the executor shall have made over the property in terms of the will or without waiting for such a distribution in conformity with the will by a direction given by all beneficially interested to the executor to give direct effect to the agreement which the parties have arrived at as to the disposition of the properties given to them by the will. Suppose the executor refused to give effect to the direction of the beneficiaries: a suit will have to be brought. The agreement could only be enforced by an action and could not be enforced in the course of administration, for it is not part of the decree in the probate action.

18. Mr. Bose next argues that under Section 104, Succession Act, an executor has to pay the legacy to the legatee and that if the legatee dies before receipt the person to receive the legacy is the heir of the deceased legatee. Mr. Pugh in reply says that Section 104 can have no application as there is no question of any legacy of the residuary estate under the will but there is a question of succession

to the residuary estate as under the agreement, and he wants us to reject the contention of Mr. Bose based on Section 104. I have already given my reasons for holding that the present application is based on the agreement. In this view Mr. Pugh's contention must be accepted. It may be difficult to give effect to the contention of Mr. Pugh, that the Administrator-General was holding the estate of Tirthapati not as an executor in terms of the will but in pursuance of the agreement. The difficulty is occasioned by the fact that the Administrator-General's functions, duties and privileges are regulated by the statute and in view of the provisions of Section 27, Administrator-Generals Act it is difficult to ascribe to the Administrator-General any other capacity than that of an executor.

19. It is however a fallacy to suppose that merely because the Administrator-General functions as an executor the provisions of Section 104, Succession Act, must apply to the case, for in order to attract the provisions of that section it is essential to show that the legal representative of the deceased legatee was asking for the handing over of the residuary estate as in terms of the will. And this essential element is lacking in the present case and Parijat Debi's application is not on the footing of the bequest but on the footing of the family arrangement which in my opinion could only be enforced by suit. Section 104, Succession Act, cannot in my judgment, be attracted to the facts of the present case for is the lady Parijat Debi resting her application on the ground that as the residuary legatee, her son, had died before the receipt of the legacy which consisted of 5 annas 4 pies of $\frac{2}{3}$ rd of 8 annas share of the residue as mentioned in the will it has passed to her as his sons legal representative, or is she resting her application on the family arrangement which entitled her son to share in ten annas share of a different residuary estate? There can be no doubt that she is resting her case to succeed to the son's share in the residuary estate as defined by the agreement or family arrangement which has been certified by the Court as being beneficial to the infant beneficiaries. She has travelled from the realm of bequest into the realm of contract and it is from the latter region that she makes the application to the Court. As a result of the family arrangement the residuary estate of Tirthapati has not only changed in form but in substance. It has swelled from five annas four pies of one residuary estate to ten annas of a different residuary estate, and it is this different and larger residuary estate that she is asking the Administrator-General

to make over to her and the latter rightly says:

I am willing to give the sum to you provided you produce a succession certificate for the bulk of Government securities to show you are entitled to succeed to your son.

20. The next argument of Mr. Bose may be summed up as follows in his own words:

Where however the legacy is a residuary one, or, in other words, in the case of a residuary bequest the executor is not required to give his assent to any such legacy until he has distributed the estate in accordance with the directions in the will. As a matter of fact if the estate has been distributed prior to the handing over of the residuary bequest no question arises of the executor's giving his assent, because when the estate has been distributed the executor's functions come to an end and the residuary estate is taken by the residuary legatee as a matter of course. Therefore it is said that until the residue has been ascertained the residuary legatee cannot be described as the proprietor of the residuary bequest: see in this connexion *Ganoda Sundari v, Nalini Ranjan* (1909) 36 Cal 28. It follows from what has been stated above that a residuary legatee at any point of time between the date of the death of the testator and the date when the residuary bequest is handed to him can look upon the residuary bequest in the hands of the executor as a debt due to him. That follows from what has been stated above and put in the fewest possible words, for the reason that the residue is not ascertained until the moment when the residuary bequest is handed over to the residuary legatee. If what has been stated above is correct, then whether the application of the present respondent was headed 'in the testamentary or intestate jurisdiction' or 'ordinary original civil jurisdiction, the substance of the matter will have to be looked at and the application would lie under Section 302, Succession Act, and also under Section 28, Administrator-General's Act.

21. In support of Mr. Bose's contention that the residue is not ascertained until the moment when the residuary bequest is handed over to the residuary legatee reliance has been placed on a decision of the House of Lords in the case of *Dr. Barnardo's Homes v. Commissioners for Special Purposes of the Income-tax Acts*

(1921) 2 AC 1. It is necessary to state the facts of that case in order to see if it has any application to the state of facts in the present case. The facts are these: A testator who died on 14th November 1914 by his will bequeathed the residue of his property, which consisted of stocks and shares to a charitable institution absolutely. Between the date of the testator's death and 4th December 1916, when the residue was finally ascertained and distributed, the executors received income of the estate from which income-tax had been deducted at the source. The income so received by the executors was part of the fund handed over in due course by them to the charitable institution. The institution claimed the return of the income-tax deducted on the ground that the deduction was contrary to Section 105, Income-tax Act, 1842.

22. In this state of facts it was held that until the date when the residue was ascertained the institution had no property in any specific investment forming part of the estate, or in the income therefrom, that the payment by deduction of income-tax made by the executors in respect of the income was not made on behalf of the institution, and that the institution was therefore not entitled to repayment of the income-tax so paid. On the authority of this case it is argued that the legatee of a share in a residue has no interest in any of the property of the testator until the residue has been ascertained. His right is to have the estate properly administered and applied for his benefit when the administration is complete, and special stress is laid on a passage in the speech of Lord Atkinson which runs as follows:

The case of *Lord Sudeley v. Attorney-General* (1897) AC 11 decided in this House conclusively established that until the claims against the testator's estate for debts, legacies, testamentary expenses etc., have been satisfied, the residue does not come into actual existence. It is a nonexistent thing until that event has occurred. The probability that there will be a residue is not enough. It must be actually ascertained.

23. The decision before the House of Lords cannot govern the present case, for it is not the case of either party that the residue of Tirthapathi's estate had not been ascertained at the date of the application. As a matter of fact the Administrator-

General in his reply to the Master's summons states in para. 5, Clause (11) that the properties which were likely to be made over to her consisted mostly of Government securities of a value which, on the allocation of the share of Tirthapati Mukherjee in the residuary estate, may come up to Rupees 25,00,000. The applicant Parijat Debi also made the application asking for an order for a payment of the share of Tirthapati in the residuary estate on the footing that the residue had been ascertained prior to the date of the application, and Mr. Pugh rightly points out that the two arguments, namely that on the one hand Parijat is entitled to an order for payment of the residuary estate and on the other hand that the residuary estate had not yet been ascertained, are mutually destructive. The Administrator-General in one of the letters says that the estate had not been completely administered as the residuary estate had not been divided amongst the different residuary legatees. That is a very different thing from saying that the residuary estate of Tirthapati had not been ascertained. The question whether the residue had been ascertained and the bequest assented to by the executors or trustees is a question of fact and must depend on the circumstances of each particular case: see *Commissioners of Inland Revenue v. Smith* (1930) 1 KB 713.

The question in all cases is as the administration of the estate reached a point of ripeness at which you can infer an assent, at which you can infer that the residuary estate has been ascertained and that it is outstanding and not handed over merely for some other reasons.

24. Looking broadly at the facts disclosed by the correspondence it appears that the residuary share of Tirthapati's estate had been ascertained to be about Rupee 25,00,000. Indeed it does not appear that the applicant took the objection before the learned Judge that the residuary estate had not been ascertained and for a very good reason, namely if she took up that position it would cut away from the ground of her application for payment of Tirthapati's share in the residuary estate to her. Even assuming that the residuary estate had not been ascertained it is doubtful whether for the purpose of probate or succession duty payable by the executor of the person entitled to residuary estate who died after executing a will and before the undue is ascertained, the residuary estate should be regarded as non-existent. This doubt of mine is based on an examination of the case of Lord

Sudely v. Attorney-General (1897) AC 11. In the case of Lord Sudely the facts were these: The Honourable Algernon Gray Tollemache by his will and codicil after bequeathing various legacies and annuities gave one-fourth part of the residuary estate to his wife Mrs. Tollemache. The testator died in 1892, domiciled in England, and the will and codicil were proved in England by his executors who were domiciled in England. The testator's estate included mortgages on real estate in New Zealand. His wife died in 1893 and her will was proved in England by her executors. In estimating the probate duty payable upon her one-fourth share of her husband's residuary personal estate the executors excluded the value of the New Zealand mortgages which in all exceeded 440,000. The Attorney General having filed an information against the executors of the widow of the testator claimed that one-fourth of the value of the New Zealand mortgages ought to have been included for probate duty. The executors in their answers to the interrogatories stated that at the time of the wife's death her husband's personal estate had not been fully administered and was in course of administration; that one legacy only given by his will then remained unpaid; that the amount of the clear residue had not been ascertained; but that it had been ascertained that there would be a large residue (excluding the New Zealand mortgages) ever and above the debts and legacies, and that fact had to the best of their belief been communicated to the wife during her life by her husband's executors; that no appropriation had been made of the New Zealand mortgages, nor of any securities or portions of securities to particular shares of the net ultimate residue.

25. In these circumstances the House of Lords, affirming the decision of the Court of appeal, declared that one-fourth part of the value of the New Zealand mortgages, forming part of the husband's residuary personal estate, was liable to probate duty under the Customs and Inland Revenue Act, 1881, as part of the estate and effects of the wife, in respect of which probate of her will was granted to the defendants, and ordered them to pay the amount of that duty. The basis of this decision of their Lordships was that there was no right to the particular New Zealand assets in Mrs. Tollemache or her executors, but that she had right to-and what her executors had right to-was one-fourth of the clear residue of Mr. Tollemache's estate, that is to say what remains of his estate after satisfying debts and legacies, and that it was impossible until the estate was fully administered to

say of what assets the residuary estate would consist of. Mrs. Tollemache's executors were required to pay probate duty on one-fourth part on the value of New Zealand's mortgages also. This case therefore shews that for the purposes of probate duty the interests of the executors of Mrs. Tollemache in her husband's residuary estate were taken into account in assessing probate duty. On the authority of this case it would be right to hold that Parijat Devi might have had to pay the duty if she was required to take out letters of administration even before the ascertainment of the residuary estate of Tirthapati. But as she is a Hindu it is not obligatory on her to take out letters of administration to Tirthapati's estate.

26. The question still remains whether the bulk of the properties which consist mostly of Government securities of value of Rs. 25,00,000 and which may be allocated to the share of Tirthapati in the residuary estate, may be regarded as a debt for which succession certificate is necessary, under Section 214, Succession Act. It is argued by Mr. Pugh that the Government securities should be regarded as a debt due from Government to the Administrator-General and the sum representing the value of the said Government securities might be regarded as a debt due from the Administrator-General to Tirthapati, for the Administrator-General holds the assets in his hands and was bound to pay Tirthapati if he was alive in pursuance of the agreement entered into between several beneficiaries under the will of Pasupati as soon as the 10 annas residuary share was ascertained.

27. It is now well settled so far as this Court is concerned that a debt is a sum of money which is now payable or will become payable in future by reason of a present obligation. That is the definition given by Lindley, L.J., in *Webb v. Stenton* (1884) 11 QBD 518. That is also the definition of the word 'debt' as used in Section 4, Succession Certificate Act, which now corresponds with Section 214, Succession Act: see the decision of the Full Bench in *Bancha Ram Mazumdar v. Adyanath Bhattacharyya* (1909) 36 Cal 936. By the terms of the will and the agreement there was a promise to pay the residue when ascertained. There can be no doubt that on the date of the agreement Tirthapati became beneficially interested in 10-annas share of the residuary estate. The amount of the residue was ascertained after his death. The Administrator-General was indebted to Tirthapati for 10-annas share of whatever amount might eventually be determined

to be the net residue. On Tirthapati's death his mother Parijat Devi as his sole heiress became entitled to recover that debt from the hands of the Administrator General, and in view of the provisions of Section 214 she could only recover the amount of the residue which consists of Government securities to the value of Rs. 25,00,000 on production of a succession certificate. The right of a residuary legatee or heir is only to share in the ultimate residue which may remain for final distribution after all the liabilities of the estate including the expenses of administration have been satisfied. It is not a contingent right but a right transmissible by sale and the purchaser from a residuary legatee or heir buys subject to any disposition which may be made of the deceased's estate in due course of administration: see *Chutterput Singh v. Maharaj Bahadur* (1905) 32 Cal 198.

28. It was a debt, in my opinion, due to Tirthapati in his lifetime although it became payable after his death, after the residue was ascertained, 10-annas share of which was payable to Tirthapati in terms of the family arrangement. For reasons given before I will treat this application of Parijat as a suit in the ordinary original civil jurisdiction of this Court and hold that she is not entitled to recover the Government Securities of the value of Rs. 25,00,000 without production of a Succession Certificate in respect of Government securities.

29. I would therefore set aside the order of Costello, J., and declare that she is entitled to recover the Rs. 25,00,000 worth of securities in the hands of the Administrator-General, it being a condition precedent to such recovery that she produces a succession certificate in this Court within a time to be fixed by the Court. It is now well settled that it is a sufficient compliance with the provisions of Section 214, Succession Act, if the succession certificate is produced before decree: see *Kumar Chandra Kishore v. Prasanna Kumari* (1911) 38 Cal 327, *Sital v. Maniak* (1909) 1 IC 254. It is stated in this case that the Administrator-General has already made over about 23,00,000, twenty-three lakhs, to Srimati Parijat Debi and holds about two lakhs worth of Government securities in his hands. From out of this sum Parijat Debi should be required to pay the necessary duty for obtaining succession certificate and the succession certificate may be produced in this Court. In my view the costs of both the Secretary of State and Administrator-

General should be borne by Parijat Debi, who must pay her own costs.

30. The points upon which we have differed are: (1) whether in the circumstances which have happened in this case the applicant Sm. Parijat Debi can invoke Section 104, Succession Act, in her favour; (2) whether it is incumbent upon Sm. Parijat Debi to take out a succession certificate to enable her to recover the residuary share of the estate of the testator payable to her son Tirthapati Mukherji; and (3) whether any relief can be granted to her on an application such as she made to the High Court on its original side or whether she must be relegated to a suit.

Pearson, J.

31. This matter has been referred to me under Clause 36, Letters Patent, upon a difference of opinion between the Acting Chief Justice and Mitter, J, sitting in appeal against an order of Costello, J., upon an application made to this Court in its testamentary and Intestate Jurisdiction. The facts are not in dispute. Pasupati Mukerjee died on 9th May 1919 leaving a will of the same date. By that will he made bequests of substantial amounts in legacies and annuities: he also provided for expenses of his daughter's marriage and for certain rights of residence for the ladies of his family. He appointed the Administrator-General of Bengal his executor. And he directed that as regards the residue one-half should go among the sons of his deceased elder brother, and the other half between his own son and daughter, Tirthapati and Pratima Debi, in the proportion of two-thirds and one-third. The Administrator General applied for probate. Caveat was entered by the widow, Sm Parijat Debi, and protracted contentious proceedings went on until, after 11 days hearing, in 1928 an arrangement was arrived at.

32. This arrangement was embodied in a memorandum of agreement dated 3rd March 1928. The caveat was withdrawn. The decree in the probate proceedings was made on 8th June 1928 by which probate of the last will and testament of the testator was granted to the Administrator-General of Bengal, and the agreement was ordered to be recorded, and it was annexed to the decree. By the terms of the agreement the payment of the pecuniary legacies was confirmed; the main

alteration was in the shares of residue. Instead of the shares given by the will as stated above, these were now, under the agreement, to be as follows: Tirthapati-ten annas (in place of five annas eight pies under will), Pratima Debi-two annas (instead of two annas four pies); and the three sons of the testator's predeceased elder brother one anna four pies each (in place of two annas eight pies each). On 20th August 1928 Tirthapati died. Admittedly Parijat was left as his heiress, being entitled to the estate of a Hindu mother. In 1930 the summons in the present proceeding was taken out on behalf of Parijat in the testamentary and intestate jurisdiction of this Court asking for an order that directions should be given to the Administrator-General of Bengal as executor directing him to make over to Parijat Debi

that portion of the residuary estate of the testator in his hands to which (under the decree mentioned in the petition) the applicant's son Tirthapati Mukerjee was entitled, or that such further or other orders may be given to the Administrator-General of Bengal in relation to the administration and final distribution of the estate as to this Court may seem fit.

33. The application has all along proceeded on the footing that what is involved in the language used is the 10 annas share of Tirthapati. Costello, J., ordered that the Administrator-General should make over to Parijat Debi Tirthapati's share of the residuary estate, after retaining in his hands a sum sufficient to cover the fees in the event of it being held that she ought to have taken out a succession certificate as a condition precedent. The Secretary of State for India in Council and the Administrator-General of Bengal have appealed. In these circumstances the points upon which the Acting Chief Justice and Mitter, J., differed are thus formulated: (1) Whether in the circumstances which have happened in this case the applicant Srimati Parijat Debi can invoke Section 104, Succession Act, in her favour. (2) Whether it is incumbent upon Srimati Parijat Debi to take out a succession certificate to enable her to recover the residuary share of the estate of the testator payable to her son Tirthapati Mukerjee. (3) Whether any relief can be granted to her on an application such as she made to the High Court on its original side or whether she must be relegated to a suit. I shall deal with these points in the order mentioned.

(1) Section 104, Succession Act, 1925, comes under Ch. 6 of the Act which deals with the construction of wills. It provides that if a legacy is given in general terms without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and if he dies without having received it, it shall pass to his representatives. That is as much as to say, in the present case, that Tirthapati would take a vested interest in his residuary share under the will, and since he died without receiving it, it passes to his mother Parijat Debi. Mitter, J., however, is of opinion that Section 104 can have no application in the present case, and I think his reason may be put in this way: that Section 101 could only apply if Parijat Debi was asking for the handing over of the residuary estate in terms of the will, whereas in fact her application is based on the family arrangement: Parijat's application has reference to the ten annas share of residue under the agreement, not to the five annas four pies share of residue under the will. Or, as he puts it in another part of the judgment, Parijat Debi has travelled from the realm of bequest into the realm of contract, and it is from the latter region that she makes her application to the Court. With the greatest respect, I am not able to agree with this point of view. It is true that Parijat Debi may be claiming in part under the agreement between the parties, so far as the quantum of the share is concerned. But what is it that gives her the right to claim at all? That right appears to me to have its roots in the will, in the testator's appointment of the Administrator-General as executor, and in the decree granting probate to the executor. The administration of the estate under the will is not superseded by the agreement; otherwise there would have been no reason for the grant of probate. The executor holds title to the property under the will and the probate, and so far as he is concerned he has to carry out his administration according to what the law lays down. The decree contains a declaration that the testator rightly and duly executed the will of 9th May 1919 and:

did will, give and bequeath, devise and dispose and do all things as therein contained,

34. It is the estate under that will which the executor is authorised to administer. So far as the agreement is concerned, it is to be observed that the Administrator-General is no party to it himself. No doubt where all the parties have agreed he

has consented to give effect to the agreement in his administration of Pasupati's estate. Disputes between the parties might have resulted in the executor being driven back on the strict terms of the will itself, and in the parties being driven to a civil suit for determination of their rights under the agreement; but for determination of a question of the destination of a share of residue under the will, I do not see why Section 104 should not be resorted to, though the amount of the share has been augmented under the agreement. I think the executor may and should refer to Section 104 for the due administration of the estate in his charge. Upon this point of difference therefore I would hold that in the circumstances which have happened in this case the applicant Srimati Parijat Debi can invoke Section 104, Succession Act, in her favour.

(2) The second point of difference is as to whether it is incumbent upon Srimati Parijat Debi to takeout a succession certificate to enable her to recover the residuary share of the estate of the testator payable to her son Tirthapati Mukerjee. It is admitted that the necessity for letters of administration does not exist in the present case, having regard to Section 212(2), Succession Act, and to the fact that the parties are Hindus. The question then is whether in the present application what Parijat Debi is seeking to recover is a 'debt' within the meaning of Section 214, Succession Act: if it is, then it is said a succession certificate must first be taken out by Parijat Debi and produced to the Court.

35. Tirthapati's share was a share of residue, and it does not seem to me to be of assistance to consider the position of an executor in regard to a specific bequest to which he has assented. A residuary share is on a different footing: In *Trethewy v. Helyar* (1879) 4 Ch D 53 Sir George Jessel says:

It appears to have been long settled law that there is no residue of personal estate until after payment of the debts, funeral and testamentary expenses all cost; of the administration of the estate of the testator. Therefore until you have paid the costs, you do not arrive at the net residue at all, and when you do arrive at it, it is distributed according to law. That is the principle.

36. It is with reference to that passage that Younger, L.J., says in the *Dr. Barnado s Homes* case (1920) 1 KB 468 (at p. 484) the principle is that:

until the residue is ascertained, and until its existence as net residue has been acknowledged either by payment to the residuary legatee, or if the residue be settled, by the appropriation of a fund to meet the settled residue, the residuary legatee has no interest in any specific part of that which subsequently becomes residue as a specific fund, but that his right is, until that amount of time arrived, subject of course to any interim distribution, to have the estate administered in due course.

37. In the same case before the House of Lords *Attenborough's case* (1921) 2 AC 1 the same principle was upheld following *Lord Sudeley's case* (1897) AC 11. It is laid down that the legatee of a share in the residue has no interest in any of the property of the testator until the residue has been ascertained: and Lord Atkinson says (at p. 11) that *Lord Sudeley's case* (1897) AC 11 conclusively established that until the claims against the testator's estate have been satisfied, the residue does not come into actual existence. It is a non-existent thing until that event has occurred. The probability that there will be a residue is not enough. It must be actually ascertained. The case of *Attenborough v. Solomon* (1913) AC 76 referred to in argument before me does not appear to me to bear on the present case: that was a case where the circumstances were such that the true inference to be drawn from them was held to be that in pledging certain chattels belonging to the residuary estate the executors were not acting as such, because the residuary estate had at that time become vested in the trustees as trustees. In the present case the residuary estate never became so vested in the Administrator-General as trustee, either under the agreement or otherwise. I have already said that in my judgment the Administrator-General of Bengal was administering the estate under the will and his title to the property was under the will, that also seems to be a fact recognized by the agreement; he is not a party to the agreement and is not even brought into it in any capacity of trustee. Now in regard to *Tirthapati's* share of the residuary estate in the present case, I find the Acting Chief Justice says:

It was admitted on all hands at the hearing before us that the costs, debts and pecuniary legacies have not been paid.

Mitter, J.,

38. On the other hand says in one passage:

it is not the case of either party that residue of Tirthapati's estate has not been ascertained at the date of the application.

Mitter, J.,

39. Further refers to various statements that the share of Tirthapati may come up to 25 lakhs. He refers to a statement of the Administrator-General in a letter that the estate has not been completely administered as the residuary estate and had not been divided among the different residuary legatees; and he adds that

that is a very different thing from paying that the residuary estate of Tirthapati had not been ascertained.

40. Later on he again refers to the 25 lakhs which may be allocated to the share of Tirthapati, and then he goes on to say that the amount of the residue was ascertained after his (Tirthapati's) death and that it was a debt in the hands of the Administrator-General. Now I find that in his letter of 30th May 1930 the Administrator-General says that the estate of Pasupati Mukerjee has not been completely administered. On the 21st June he writes that all the costs have not yet been paid nor has the residue been allocated. And in para. 5 of his affidavit he refers to the fact that the share of Tirthapati in the residuary estate may on allocation come up to 25 lakhs. In this position of affairs and upon the authorities referred to above it seems clear enough that the residuary estate has never yet been ascertained and that in that event there can be no question of any debt in respect of it. Nor do I see any reason for saying that 'debt' in Section 214, Succession Act, is to be construed in any wider or other sense than the meaning given in *Webb v. Stenton* (1884) 11 QBD 518 as a sum of money which is now payable or will become payable in the future by reason of a present obligation. In these circumstances it is unnecessary to discuss the further argument that under Securities Act, 1920 and Section 370, Succession Act, Tirthapati's share is a debt in so far as it consists of Government Securities, from the point of view that these are debts by Government to the holder. Upon this point therefore I find myself in agreement with the Acting Chief Justice, and that it is not incumbent upon Sm.

Parijat Debi to take out a succession certificate to enable her to recover the residuary share of the estate of the testator payable to her son Tirthapati Mukerjee.

(3) The last point of difference is upon the question whether any relief can be granted to Parijat Debi on an application such as she has made to the High Court on its original side or whether she must be relegated to a suit. The Acting Chief Justice held that the procedure by application was unobjectionable by reason of the fact that all the parties were before the Court, and that there was no dispute on the facts. Mitter, J., holds that the procedure under Section 302, Succession Act, by application in the testamentary jurisdiction, is not strictly available because the matter is no longer under the will but under the agreement. I have already given my reasons for not accepting this latter view. The Administrator-General still must rest primarily on the will and the grant of probate for his authority for administration of the estate. The administration is not yet complete, and I apprehend that for these reasons and so long as the administration is alive the procedure by application under Section 302, (or under Section 28, Administrator-General's Act) would be available to the Administrator-General if he required directions "in regard to the estate or in regard to the administration thereof." And if, as I think that procedure is open to him, I can see no reason why it is not available to any One of the parties to the administration, including Parijat Debi. I would therefore hold that relief can be granted her on such an application as she has made, and that she need not be relegated to a suit.

41. The result on the whole appeal is that I am in agreement with the Acting Chief Justice upon all three points. The order must be made as proposed by him: the appeal will be dismissed. The Administrator-General will pay his own costs. The costs of the Secretary of State for India in Council will come out of the estate. Srimutty Parijat Debi will pay her own costs.