

In Re: Eliza Martin

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Court : Kolkata

Decided On : Jul-17-1934

Reported in : AIR1935Cal511,157Ind.Cas.936

Appellant : In Re: Eliza Martin

Judgement :

ORDER

Remfry, J.

1. It appears that one Eliza Martin died intestate, on 15th January 1896, leaving some next of kin. Letters of administration were obtained to her estate by her daughter. That daughter died on 4th April 1905, and her son, the defendant obtained probate of her will. His mother had, it seems, put aside a sum of money said to be some Rs. 17,413-8-0 as the share of one of the brothers of Eliza Martin, one Thomas Jones, whose whereabouts were unknown. The defendant deposited this money in a Bank on interest. The present plaintiff obtained letters of administration de bonis non on 21st December 1933, to the estate of Eliza Martin. The defendant paid over to her same Rs. 17,413-8-0 as the share of Thomas Jones.

2. The plaintiff has applied on an originating summons in which she seeks to make the defendant account for all interest obtained or which may be deemed to have been earned by this sum of Rs. 17,000 since 1905, and for an inquiry as to what

moneys came into his hands. The first objection raised was that this relief could not be obtained on an originating summons. But the defendant's counsel could not point out any disputed question of fact; he did not dispute that the Rs. 17,000 odd came into the hands of the defendant in 1905. In my opinion the present question is one which arises in the administration of the estate, and there being no disputed question of fact, an originating summons licensee in re Powers (1885) 30 Ch D 291. That decision shows that in respect of an exactly similar rule in England, it is not necessary that the defendant should be interested in the estate, it is sufficient if he is a debtor to the estate. In my opinion the argument that the defendant was an executor de son tort is unsound. All that is alleged to have been done by him is to invest the money on interest and to make inquiries for the missing Thomas Jones or his heirs.

3. As regards the deposit of the money in a Bank on interest, that was but for the preservation of the money and comes within Section 303, Succession Act. It was clearly his duty to preserve the assets that came into his hands, and clearly he was right in investing the money on interest. Doubtless he did not invest it in securities which an executor should select, but that is not material on the present point. The fact that he made inquiries for the missing heir, was not an intermeddling with the estate at all. It is not a fair deduction that had he found the heir, he would have paid the money to him without insisting on the necessary legal formalities. The test is, was anything done which was legally wrong if the person doing it was not an executor or administrator? Judged by that test, inquiries for a missing heir were not wrong. The next point raised was whether leave under the Charter was necessary. It is contended that as the plaintiff obtained letters of administration from this Court, part of the cause of action arose within the jurisdiction. That point has been decided in other cases, in favour of the plaintiff, and doubtless it is too late now to raise the question whether a plaintiff's derivative title is really part of the cause of action against the defendant.

4. It is admitted that the rest of the cause of action arose in Darjeeling. No leave was obtained under the Charter. It was argued that an originating summons is not a suit, but a proceeding brought under the rules of the Court. It was held in *Sewdayal Ramjeedas v. Official Trustee of Bengal*, 1931 Cal 651 that an

originating summons was a suit, In *Maharajah Manindra Chandra Nundy v. Lalmohan Roy*, 1929 Cal 358 the actual point decided was that if an originating summons was held to be incompetent, and the summons were treated as a proper plaint and the matter heard in Court, leave was necessary. In my opinion the jurisdiction of this Court depends on the Charter as far as civil suits are concerned. The sections of the Code of Civil Procedure 17-20 do not apply under Section 120. It seems to me therefore very doubtful whether this Court could by rules under the Charter give itself a jurisdiction which by its Charter it did not possess. It appears to me impossible to claim a jurisdiction to adjudicate on matters in respect of which a suit lies under the Charter which are not within the jurisdiction given by the Charter on the ground of any inherited jurisdiction. It follows that even if this proceeding is not a suit, without leave under Clause 12, it is not a proceeding warranted under the Charter.

5. In my opinion however leave was necessary, for this proceeding is a suit, and I am unable to agree that by adjourning the matter into Court and at the same time giving leave under Clause 12 of the Charter, the Court can give itself jurisdiction. It may however be desirable to express my opinion on the last point taken whether the claim is barred by limitation. The claim is for an account of moneys received, and for interest on or profits earned by the Rs. 17,000 already paid. The defendant received the money in 1905. Admittedly he had no right to the money. It is therefore argued that Article 36, Limitation Act, applies. The plaintiff argues that Article 120 applies. If this claim comes under Article 120 it is argued that under Article 120 until the person in possession denies the title of the plaintiff the cause of action does not accrue. Reliance was placed on *Balo v. Koklan*, 1930 PC 270 and *Annamalai Chettiar v. Muthukarnppan Chettiar*, 1931 PC 9. These cases were concerned with claims against trustees who did not hold the money claimed under an express trust. The question is whether Article 62 does not apply. Doubtless that article does not apply to claims for an account against a trustee. Clearly, the defendant was not holding under an express trust, but the claim against him is an equitable claim, and by taking charge of a fund as executor to his mother, in respect of which the mother was clearly a trustee, although not holding on an express trust, the defendant, although he is not a derivative executor, rendered himself liable in equity to account for, the fund, and therefore this claim is within

Article 120; and as there has been no denial of or infringement of the right claimed, the claim is not barred by limitation.

6. But as in my opinion leave was necessary, this Court has no jurisdiction to try this matter. The plaintiff must pay the costs.

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