

Present : De Sampayo A.C.J. and Garvin J.

1923.

IN re THE ESTATE OF KALIDEEN MARIKAR HADJIAR.

154—D. C. Kalutara, 1,206.

*Civil Procedure Code, ss. 712 and 714—Notice by administrator calling upon person in possession of money belonging to deceased to pay it to him—Claim by party noticed to hold the money for some special purpose as directed by the deceased—Costs of application.*

An administrator by a petition under section 712 of the Civil Procedure Code asked for an order compelling the appellants to pay to him as administrator a sum of money received by them from the deceased. The appellants said that the money was left in their charge, and entrusted to them for the purpose of paying certain debts and of spending the balance in defraying the funeral expenses and the expenses of certain religious ceremonies, &c.

*Held*, that they were not entitled to refuse payment.

The person cited under section 712 is not in the position of a party, but that of a witness; no costs should be awarded against such a person.

THE facts are set out in the judgment.

*Elliot, K.C.* (with him *E. W. Jayawardene* and *E. W. Perera*), for appellants.

*H. J. C. Pereira, K.C.* (with him *M. B. A. Cader*), for respondents.

April 25, 1923. DE SAMPAYO A.C.J.—

In these proceedings the estate of Abubakker Lebbe Marikar Kalideen Marikar Hadjiar is being administered by his brother Abubakker Lebbe Marikar Ahamado Cassim Marikar. The appellants are two other brothers who admittedly received from the deceased during his lifetime a sum of Rs. 5,750, and still have that sum in their charge. The administrator by a petition under section 712 of the Civil Procedure Code asked for an order compelling the appellants to pay that sum to him as administrator. The appellants sought to bring themselves under the last portion of section 714 of the Code, and to resist the administrator's claim. They said that this sum of money was left in their charge and entrusted to them for the purpose of paying certain debts, of spending the balance in defraying the funeral expenses and the expenses of certain religious ceremonies, and of paying a sum of Rs. 150 to an adopted daughter of the deceased. Their position is that the money became the subject of a trust, and should not be reclaimed by the administrator

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DE SAMPAYO  
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The part of the section referred to is in these terms :—" In case the person cited puts in an affidavit that he is the owner of any of the said property, or is entitled to possession thereof by virtue of any lien thereon and special property therein, the proceedings as to such property so claimed shall be dismissed."

The appellants in the circumstances of the case must show by the affidavit that they are the owners of the money or have a special property therein. In my opinion the affidavit they put in amounts to no more than that the money was given to them to carry out certain instructions of the deceased, and I think the facts alleged do not constitute a trust in the sense contended, for much less do they show that the appellants became the owners of the money or had special property therein, within the meaning of section 714. I think, therefore, that the order of the District Judge requiring the appellants to execute a bond was justified, section 716 of the Code is a little confused, but I think it does not provide for the bond covering any costs due to the petitioner. Consequently, the District Judge, I think, is not quite in order in requiring the appellants to execute a bond for the payment of costs of the contention to the administrator. It may be that the Court would have jurisdiction to order the payment of costs by a party who has failed in any contention. But that is rather different from requiring the bond to include the payment of any costs. That part of the order will, therefore, be deleted. Subject to that modification, I think the appeal should be dismissed. But in the special procedure under section 712 the person cited is not in the position of a party but that of a witness, and it has been pointed out that no costs should be awarded against such a person. In any case, I do not think that this is a case which calls for any order for costs. While affirming the order to the extent I have indicated, I direct that there should be no costs in the District Court or in this Court.

GARVIN J.—I agree.

*Varied.*