

1961

Present : Basnayake, C.J., and Sansoni, J.

NAGAPPAN, Appellant, and SATCHITHANANDA and others,
Respondents

S. C. 96/60—D. C. Colombo, 17493/T.

Administration of estates—Administrator's claim to recover property alleged to belong to estate—Denial of his right by opposing party—Maintainability of claim—Proceedings to discover property withheld—Procedure—Incapacity of Court to appoint an administrator pendente lite—Civil Procedure Code, ss. 712, 713, 714—Estate Duty Ordinance, s. 52.

A person, claiming to be entitled to the grant of administration of a deceased person's estate, applied to Court for an order that the appellant should hand over to him property alleged to belong to the estate. The appellant disputed the right of the deceased to the property and asserted that he was part owner and entitled to the possession thereof.

Held, (i) that the English law which empowers the Court to appoint an administrator *pendente lite* has no force in Ceylon. The administrator cannot be given authority by Court to exercise the duties of his office until he receives the letters of administration after due payment of estate duty in terms of section 52 of the Estate Duty Ordinance.

(ii) that in a proceeding under Section 712 of the Civil Procedure Code, the form of the prescribed citation should be strictly followed.

(iii) that Sections 712, 713 and 714 of the Civil Procedure Code do not enable an executor or administrator to recover property in cases in which the administrator's right to recover that property is disputed. Those Sections prescribe a procedure by which an executor or administrator may obtain possession of property which ought to be delivered to him and in regard to which there is no denial of his right. In a case in which there is a denial of his right, a regular action is the proper remedy.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *M. Tiruchelvam, Q.C.*, and *K. Sivagurunathan*, for Appellant.

N. Kumarasingham, with *Bala Nadarajah*, for 1st Respondent.

E. B. Wikramanayake, Q.C., with *S. Sharvananda*, for 2nd Respondent.

No appearance for 3rd Respondent.

Cur. adv. vult.

July 12, 1961. BASNAYAKE, C.J.—

This is an appeal from a decision of the District Judge over-ruling the objections of the appellant to the application of Kumarasamy Satchithananda (hereinafter referred to as the applicant) for an order that he should hand over to him the following :—

- “ (a) The entire assets of the estate left by the deceased on his death together with all additions and accretions.
- (b) All books of accounts, ledgers, day books, rough books, cash books, journals, cheque books, cheque counterfoils, Bank statement of accounts, receipts, vouchers, and other papers.
- (c) Income Tax returns and files.
- (d) A full list of all the immovable properties ; a certified list of all liabilities of the business as at date of handing over.
- (e) All movables together with an Inventory of all the movables in the business carried on by the deceased and now carried on by the 2nd respondent including cash in hand at the time of handing over.
- (f) Annual balance sheets of the business from 16th September 1956 to date of handing over of possession within fourteen days of handing over,”

In his application the applicant prayed :—

- (a) that the appellant be ordered to hand over to him all matters referred to above, and
- (b) that he be ordered to give him all information about the business and all papers and sign all the necessary documents.

Among the objections taken by appellant to the application are the following :—

- “ (a) There is no provision in law for the application that has been made by the petitioner.
- (b) Even if the law permits this application, it is not competent for the petitioner to make this application before he is clothed with letters.
- (c) The prayers ‘A’ and ‘B’ are vague and indefinite and incapable of being carried out. ”

The learned District Judge held that the applicant was entitled to take charge and possession of the estate of the deceased on the Court making an order declaring him entitled to the grant of letters of administration, that he need not wait to exercise his powers until the letters of administration are issued to him, and that he was entitled to an order as prayed for in his petition.

It is not necessary for the purpose of this appeal to go into the matters which are in dispute between the widow of the deceased and the appellant, who is his adopted son.

The main question we have to decide is whether the applicant is entitled to exercise the powers of an administrator before letters of administration are issued to him, by virtue of the following order :—

“ I appoint Mr. Kumarasamy Satchithananda as administrator *pendente lite*. He will make the necessary arrangements with the Commissioner of Estate Duty with regard to the payment of estate duty. When the Provisional Certificate has been issued, Letters may be issued to him. He will be entitled to take charge of the estate forthwith.”

The expression “ administrator *pendente lite* ” is unknown to our Civil Procedure Code, which makes no provision for the appointment of an administrator pending the decision of a dispute as to the person who is entitled to the grant of letters of administration. Administrator *pendente lite* is an office known to the English legal system and is now expressly provided for by statute. The statement of the English Law on this subject in Williams on Executors and Administrators—13th Ed. (Vol. 1, p. 226) is as follows :—

“ S. 381. Former Law

In case of a controversy in the Spiritual Court concerning the right of administration to an intestate, it seems to have been always admitted, that it was competent to the Ordinary to appoint an administrator *pendente lite*. Though it was at one time considered that a grant of this species of administration was void where the controversy before the Ordinary respected a will, it has long been settled that the court had power to grant administration *pendente lite* whether the dispute related to an executorship or to the right to administration.

The Court of Probate, as constituted under the Court of Probate Act, 1857, was empowered by section 70 of that Act to grant administration ‘ pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling or revoking any probate or any grant of administration.’ Section 70 applied only to personal estate, but section 71 gave the Court of Probate power to appoint a receiver of real estate, though only pending a suit “ touching the validity of any will ” of any deceased person by which his real estate might be affected.

Though Sections 70 and 71 are repealed as to death since 1925, they continue to apply in cases of death before 1926. If the deceased died between 1897 and 1926 the grant to the administrator *pendente lite*, as a rule, and unless the order otherwise directs, includes the real and personal estate. Generally it will not be so made unless the heir-in-law has been served with notice and is made a party to the application ; but such notice may be dispensed with in special circumstances.

382. Modern Law

With respect to deaths occurring after 1925, Sections 70 and 71 are replaced by Section 163 (1) of the Judicature Act, 1925 which provides that :

‘ Where any legal proceedings touching the validity of the will of a deceased person, or for obtaining, recalling or revoking any grant are pending, the High Court may grant administration of the estate of the deceased to an administrator, who shall have all the rights and powers of a general administrator, other than the right of distributing the residue of the estate, and every such administrator shall be subject to the immediate control of the court and act under its direction.’

In the case of deaths after 1925, an order for the appointment of an administrator *pendente lite* provides for the administration of the real and personal estate, unless the judge otherwise directs.”

The English Statutes referred to above which empower the Court to appoint an administrator *pendente lite* have no force in Ceylon. But as learned counsel for the appellant did not canvass the power of the District Court to make such an appointment it is not necessary to decide that question in the instant case. An examination of the relevant provisions of Chapter LIV reveals that they do not enable an executor or administrator to recover property in cases in which the administrator’s right to recover that property is disputed. Section 712 reads :

“ (1) An executor or administrator may present to the court from which grant of probate or administration issued to him a petition entitled as of the action in which such grant issued, setting forth upon knowledge, or information and belief, any facts tending to show that money or other movable property which ought to be delivered to the petitioner, or which ought to be included in his inventory and valuation, is in the possession, under the control, or within the knowledge or information of a person who withholds the same from him, or who refuses to impart any knowledge or information he may have concerning the same, or to disclose any other fact which will in any way aid the petitioner in making discovery of such property, so that it cannot be inventoried and valued ; and praying an inquiry respecting it, and that the person complained of may be cited to attend the inquiry and to be examined accordingly.

“ (2) The petition may be accompanied by affidavits or other evidence tending to support the allegations thereof.

“ (3) If the court is satisfied upon the materials so presented that there are reasonable grounds for inquiry, it shall issue a citation accordingly, which may be made returnable forthwith, or at such future time as the court shall direct. ”

No grant of administration has issued to the petitioner, and the order is not the issue of a grant of administration. The administrator has no power to exercise the duties of his office until he receives the letters of administration. The order which reads "He will be entitled to take charge of the estate forthwith" is not one the learned Judge has power to make. But in the instant case even if the applicant had actually received the letters of administration the appellant would still resist his application because his position is that the property in question is not property which ought to be delivered to the administrator. A further objection is raised on the ground that summons and not a citation has issued on the appellant. The form of citation to be used in a proceeding under section 712 is set out in the Schedule to the Code and is as follows:—

“ (Title)

To :

Whereas one A. B. (executor of the last will of, deceased, or administrator of the estate and effects of, deceased) has presented a petition to this court praying that you may be cited to attend an inquiry whether (*set out shortly the substance of the application*) and whereas the said A. B. has satisfied this court that there are reasonable grounds for such inquiry: You are hereby cited and required personally to be and appear before this court on the day of, 19....., at o'clock of the forenoon, then and there to answer (*set out what the subject of the inquiry is*).

(Signed, &c.)....., District Judge.”

Clearly a summons is not a citation and where the law prescribes a procedure to be observed in seeking a special remedy that procedure and no other should be followed. The complaint of the appellant's counsel that the wrong procedure has been followed is justified, the more so because sections 713 and 714 contain special provisions in regard to a citation issued under Section 712. Those sections read :

“713. (1) There shall be annexed to, or endorsed on, the citation an order signed by the Judge, requiring the person cited to attend personally at the time and place therein specified.

“ (2) The citation and order must be personally served, and the service shall be ineffectual unless it is accompanied with payment or tender of the sum required by law to be paid or tendered to a witness subpoenaed to attend a trial in a civil court.

“ (3) Failure to attend as required by the citation and order may be punished as a contempt of court.

“ 714. (1) Upon the attendance of a person in obedience to such citation and order, he shall be examined fully and at large, on oath or affirmation, respecting any money or other property of the testator or intestate, or of which the testator or intestate was in possession at the time of or within two years preceding his death.

“ (2) A refusal to be sworn or to answer any question allowed by the court is punishable in the same manner as a like refusal by a witness in a civil case.

“ (3) In case the person cited puts in an affidavit that he is the owner of any of the said property, or is entitled to the possession thereof by virtue of any lien thereon or special property therein, the proceedings as to such property so claimed shall be dismissed.”

If the application had been properly made under the provisions of Chapter LIV the Court would have had to dismiss the proceedings as required by section 714 (3), because the appellant disputes the right of the deceased to the property claimed and asserts that he is part owner and is entitled to the possession thereof. An administrator cannot maintain an action *qua* administrator without first obtaining letters of administration as section 547 prohibits it. Chapter LIV provides a procedure by which an executor or administrator may obtain possession of property which ought to be delivered to him and in regard to which there is no denial of his right. The provisions of that Chapter cannot be invoked in a case in which there is a denial of his right. In such a case a regular action is the proper remedy.

Learned counsel for the respondent stated that the application was not made under the provisions of Chapter LIV but that the applicant sought to invoke the inherent powers of the Court in order that it may make an order necessary for the ends of justice. It is not necessary for the ends of justice that a person should be ordered to hand over to an administrator *pendente lite* property which he claims and the administrator's right to which he denies.

As we have observed above the applicant has not obtained the grant of letters of administration and until the estate duty is paid he is not entitled to obtain letters for the reason that the Estate Duty Ordinance, section 52, prohibits the grant of probate or letters of administration until a certificate from the Commissioner of Estate Duty as provided for by that section is produced. In this case it is not claimed that such a certificate has been produced.

The applicant is therefore a person to whom the Court has no power in law to grant letters of administration until he complies with the requirements of the Estate Duty Ordinance.

We allow the appeal and set aside the order of 14th November, 1960.

The appellant is entitled to the costs both here and below.

SANSONI, J.—I agree.

Appeal allowed.