

1940

*Present : Soertsz and Keuneman JJ.*VYRAVEN CHETTIAR *v.* SEGAPPAI ACHY.

29—D. C. Colombo, 8,010.

Administration—Application for letters by attorney of deceased's widow—Absence from the Island—Conflict of interest with duty—Discretion of Court.

The attorney of a widow, who is resident in India, should not be appointed to administer the estate of a deceased person, where the attorney resides for the most part in India or where his interest conflicts with his duty.

A PPEAL from an order of the District Judge of Colombo.

H. V. Perera, K.C. (with him *S. J. V. Chelvanayagam* and *E. B. Wikremanayake*), for fifth respondent, appellant.

N. Nadarajah (with him *C. Thiagalingam*), for petitioner, respondent.

Cur. adv. vult.

March 3, 1940. KEUNEMAN J.—

The present case involves a contest for letters of administration to the estate of Peria Caruppen Chettiar, deceased. The petitioner is the widow of the deceased, and the fifth respondent is an adopted son and, under the

Hindu law, entitled as sole heir to the property of the deceased, subject to the right of the widow and her unmarried daughter to maintenance. Admittedly, in Ceylon, the fifth respondent is the heir to the bulk of the estate, which consists of a business and other movable property. But the deceased also left certain immovable property in Ceylon. The title to this immovable property will be in the widow and her daughters, and the fifth respondent has no interest in it.

On June 3, 1937, the widow (petitioner) through her attorney filed petition and affidavit in D. C. (Testy.) Colombo, No. 8,010, claiming letters of administration. In her petition the widow claimed letters of administration for herself, and the order made thereon was: "Let *order nisi* be issued for service and publication". The *order nisi*, however, declared that "the petitioner be and he is hereby declared entitled as attorney of the widow" to letters of administration.

On being served with the *order nisi*, the fifth respondent intervened, opposed the grant of letters to the petitioner, and claimed the letters for himself. After inquiry, the District Judge made order against the fifth respondent, who now appeals.

It is not quite clear in the order whether letters of administration have been granted to the petitioner or to her attorney. In the earlier part of his order, the District Judge treated the contest for letters as being between the petitioner and the fifth respondent, but towards the end of his order the District Judge deals with the question whether the attorney of the widow had a preferent claim to letters of administration, and speaks of granting letters to the attorney. The journal entry of that date runs as follows: "Judgment delivered and filed. Letters to issue to the widow's attorney". This is subject to the giving of certain security. It is not clear from the proceedings how there was a transition from the claim of the widow to that of her attorney for letters of administration, and I cannot find that the widow at any time claimed that her attorney be appointed administrator, nor does the attorney appear to have claimed letters for himself.

The District Judge has, in the course of his order, dealt with section 523 of the Civil Procedure Code, which gives the widow a preferent claim to letters of administration. At one time it was considered that the widow had an absolute right to obtain letters, but this view was modified in the case of *Sethukavaler v. Alvapillai*¹, where the Divisional Court held that while in ordinary circumstances the widow is to be preferred, yet the Court has the power to pass over her claims in favour of others for good reason. It was held that the Court has a discretionary power in this respect.

In this case, if we regard the widow as having claimed letters of administration for herself, there is a very strong and vital objection to such a claim, namely, that the widow resides, not in Ceylon, but in India, outside the jurisdiction of the Court. It is not even suggested that the widow intends to come to Ceylon for the purpose of administering the estate of the deceased. I think it undesirable to appoint an absentee administrator, and on that ground I am of opinion that letters should not be granted to the widow.

¹ 36 N. L. R. 281.

I do not however hold that in fact the District Judge ordered letters to issue to the widow. He appears rather to have given the letters to the widow's attorney. He purported to follow the reasoning in *Moosajee v. Carimjee*,¹ where it was held that the preferent right to a grant of letters of administration may be claimed by the attorney of a widow, who is absent from the Island. It will be noticed that this decision is based upon the older view of our Courts, namely, that the widow had a preferent right, and I think it may be desirable in an appropriate case to consider whether this finding is correct in view of the decision in *Sethukavalar v. Alvapillai* (*supra*). I notice that the very point in issue here was referred to the Divisional Court in the latter case, but was not decided. I do not, however, think it is necessary to decide that point in this appeal.

Apart from the irregularities and confusion, which I have mentioned, in the proceedings and in the District Judge's order, there are two points of substance which we have to consider in this connection. The first is that the widow's attorney is, as the District Judge says, "a gentleman residing for the most part in India". The same objection can be raised against him as against the widow, although not to the same degree. The second point is that the second respondent, who is a son of the widow's attorney has filed a petition claiming from the estate a sum of Rs. 16,647.33 as a debt due to him. This debt is not admitted by the fifth respondent, who had worked with the deceased and had full knowledge of the business transactions of the deceased. The learned District Judge seems to have appreciated the fact that this was a substantial objection to the claim of the widow's attorney, but thought it sufficient to make a special order that the amount claimed by the second respondent should not be paid without further orders from the Court and without notice to all the other heirs. I do not think this is a sufficient safeguard, for there is nothing to prevent the second respondent from suing the widow's attorney as administrator and obtaining a decree which will bind the estate. I think it is very undesirable to place the widow's attorney in an office in which his interest or affection may conflict with his duty to the estate.

If then the District Judge has appointed the widow's attorney as administrator, I think that he has manifestly exercised a wrong discretion, and that the objections to such appointment more than counterbalance any preferent claim which the widow's attorney may have.

I am of opinion that the appeal must be allowed, and the appointment made by the learned District Judge must be set aside. The District Judge has not considered the claim of the fifth respondent, and it is not possible in this appeal to grant him letters of administration.

I send the case back for inquiry into this claim. I may add that in view of the distinct conflict of interest between the fifth respondent and the petitioner, the parties may be well advised to decide on having an official administrator, either as a sole administrator or jointly with some other person.

The appellant is entitled to the costs of this appeal. The costs of the inquiry already held will be in the discretion of the District Judge.

SOERTSZ J.—I agree.

Appeal allowed.