Privy Council Appeal No. 81 *of* 1915.

Soona Mayna Kana Roona Meyappa Chitty - *Appellant,*

v.

Soona Navena Suppramanian Chitty - - - *Respondent,*

FROM

THE SUPREME COURT OF THE STRAITS SETTLEMENTS (SETTLEMENT OF SINGAPORE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND MARCH, 1916.

Present at the Hearing:

EARL LOREBURN.
LORD ATKINSON.
LORD PARKER OF WADDINGTON.
LORD SUMNER.

[*Delivered by* LORD PARKER OF WADDINGTON.]

The facts of this case are not in dispute. Soona Ahna Suppramanian Chitty, a native of and domiciled in British India (hereinafter referred to as "the testator"), carried on for some years prior to his death a money-lending business in Singapore, in the Straits Settlements, in co-partnership with the respondent. He died on the 11th November, 1904, having by his will appointed Soona Ravenna Mana Ramasany Chitty and another to be his executors. Caveats were entered against the proof of this will, and in August, 1907, S. R. M. R. Chitty (his co-executor having renounced probate) presented a petition in the Court of the District Judge of Madura, in the Madras Presidency, propounding the will in solemn form. Ultimately, after protracted litigation, the High Court of Judicature at Madras ordered the District Judge at Madura to grant probate of the will to S. R. M. R. Chitty, and such probate was on the 10th March, 1912, granted accordingly. An appeal from the order of the High Court of Judicature in Madras has recently been dismissed by His Majesty in Council.

Meanwhile, on the 7th March, 1910, letters of administration *pendente lite* to the estate of the testator, situate within the jurisdiction of the Supreme Court of the Straits Settlements, were granted by that Court to Pana Lana Mana Avenna

Vina Meyappa Chitty, the attorney of the testator's widow, and on the 23rd October, 1911, the administrator *pendente lite* instituted the present action, asking for a declaration that the partnership existing between the testator and the defendant had been dissolved by the testator's death, and for the usual partnership accounts. The first question their Lordships have to decide is whether this action was at the date of its institution barred by section 4 of the Straits Settlements Ordinance No. 6 of 1896, being an ordinance to amend the law relating to the limitation of suits.

The 4th section of this ordinance provides that (subject to the provisions contained in sections 5 to 25 thereof inclusive) every suit instituted after the period of limitation prescribed therefor by the second schedule thereto shall be dismissed, provided that limitation has been set up as a defence. The period prescribed in the second schedule in the case of an action for an account and a share of the profits of a dissolved partnership is three years from the date of the dissolution. The date of dissolution was in the present case the testator's death; and unless there is something to the contrary contained in sections 5 to 25 of the ordinance, it is not disputed that time had run prior to the institution of the present action.

Reliance is, however, placed on section 17 (1) of the ordinance, which provides that when a person who would, if he were living, have a right to institute a suit or make an application dies before the right accrues, the period of limitation shall be computed from the time when there is a legal personal representative of the deceased capable of instituting or making such suit or application. It is contended that there was no legal representative of the testator capable of instituting this action until the appointment, on the 7th March, 1910, of an administrator *pendente lite*, and that therefore the period of limitation must be computed from the 7th March, 1910.

Assuming, but without deciding, that this is to be deemed to be a suit, which the testator would, if he were living, have a right to institute, their Lordships have come to the conclusion that this contention cannot be upheld. It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the rules of the Court, he is allowed to prove his title. An administrator, on the other hand, derives title solely under his grant and cannot, therefore, institute an action as administrator before he gets his grant. The law on the point is well settled (see *Comyn's Digest* "*Administration*," B. 9 and 10; *Thompson* v. *Reynolds*, 3 C. & P. 123; *Woolley* v. *Clark*, 5 B. & Ald. 744).

It would seem, therefore, that an executor is not only the legal representative of his testator, but capable of instituting an action within the meaning of section 17 (1) of the ordinance in question. There is nothing in the ordinance to confine "legal representative" to a person to whom the Court has actually made a grant. But, in their Lordships' opinion, the words "capable of instituting an action" mean capable of instituting an action in which a decree might be obtained. The will under which the executor claims must therefore be capable of probate; otherwise the action must fail. It has to be determined, therefore, whether the testator's will was in the present case capable of probate in the Straits Settlements. This question depends on the Civil Procedure Code Ordinance No. 31 of 1907.

The 3rd section of this code provides that where no other provision is made by the code or any law in force for the time being, the procedure and practice for the time being in force in the Supreme Court of Judicature in England shall, as near as may be, be followed and adopted. There is nothing in the code or in any law in force in the Straits Settlements precluding the Supreme Court of the Straits Settlements from granting probate of the will of a person wherever domiciled. The English practice is therefore applicable. According to English practice, probate may be granted of the will of a person domiciled abroad upon proof that it is a valid will according to the law of the domicile, and that there are assets within the jurisdiction. It is not necessary that it should be first proved in the Courts of the domicile. (See "*Jarman on Wills*," 6th ed., vol. i, p. 7; and *Robinson* v. *Palmer*, 1901, 2 I.R., 489). It follows that the testator's will could have been proved in the Straits Settlements (1) because it was valid according to the law of the testator's domicile, as shown by its admission to probate in the Court of the District Judge at Madura; and (2) because there were assets of the testator locally situate in the Straits Settlements.

There was a good deal of discussion before their Lordships' board as to what would have been the result had the English statutes of limitation been applicable. This discussion, though perhaps not strictly relevant, was useful as illustrating the principles which ought to guide the Court, and throwing light on the meaning of the ordinances of the Straits Settlements. For the purpose of the English statutes of limitation, time runs from the accruer of the cause of action, but a cause of action does not accrue unless there be someone who can institute the action. In the case of a cause of action arising in favour of the estate of a deceased person at or after his death, time will at once begin to run, if there be an executor, even though probate has not been obtained (*Knox* v. *Gye*, L.R. 5 H. of L. 656); but if there be no executor, time will run only from the actual grant of letters of administration (*Murray* v. *East India Company*, 5 B. & Ald. 204). It is, in their Lordships' opinion, probable that section 17 (1) of the ordinance in question was intended to apply this rule. A good deal was also

said as to what would be the effect if the executor who might have instituted proceedings subsequently renounced probate. Their Lordships at first thought that this might be important for the purposes of the present case, because it is doubtful whether one of two joint executors can properly institute proceedings on behalf of their estate. On reference, however, to the record on the appeal from the order of the High Court of Judicature at Madras directing probate to be granted, it appears that S. R. M. R. Chitty's co-executor renounced probate at some time before August, 1907. Since August, 1907, S. R. M. R. Chitty was therefore sole executor and capable of instituting the action. The three years prescribed by the ordinance must therefore in any case have elapsed before the action was instituted.

The second question argued before their Lordships turns upon the effect of section 22 of the limitation ordinance. That section provides that when after the institution of a suit a new plaintiff is substituted or added, the suit shall as regards him be deemed to have been instituted when he was so made a party; provided that when a plaintiff dies, and the suit is continued by his legal representative, it shall as regards him be deemed to have been instituted when it was instituted by the deceased plaintiff. It appears that after the grant of probate by the Court of the District Judge at Madura the letters of administration *pendente lite* granted to the original plaintiff in this action were cancelled, and in lieu thereof letters of administration with the will annexed were granted by the Supreme Court of the Straits Settlements to the appellant as attorney for the proving executor. Subsequently, on the 14th April, 1913, an order was made in the action striking out the original plaintiff and substituting the appellant as plaintiff in the action. It is contended that, as regards the appellant, the suit therefore must, under section 22 of the ordinance, be deemed to have been instituted on the 14th April, 1913, at which date the action was barred, even if it was not barred when the action was instituted by the original plaintiff. Having regard to their Lordships' decision on the first question, it is not, strictly speaking, necessary to decide this point. In view, however, of its importance in practice it may be desirable to deal with it.

Their Lordships are of opinion that section 22 contemplates cases in which an action is defective by reason of the person or one of the persons in whom the right of action is vested not being before the Court. Section 133 of the Civil Procedure Code provides against the defeat of an action on this ground, and enables the proper party to be added or substituted. If A is the right person to sue, it would be clearly wrong to allow him, for the sake of avoiding the limitation ordinance, to take advantage of a suit improperly instituted by B. Their Lordships do not think that section 22 of the ordinance has any application to cases in which the action was originally properly constituted as to parties, but has become defective because there has been a change or devolution of interest. Such cases do not fall within

section 133, but within section 169, of the Civil Procedure Code, and the proper remedy is by way of an order to carry on proceedings, and not of an order adding or substituting parties. The proviso to section 22 of the ordinance may have been inserted *per cautelam*, and cannot be relied on as controlling the operative words. The difficulty really arises out of the form of the order of the 14th April, 1913. What was required was an order under section 169 of the code, and, if the order was competent, it was competent under this section only. Their Lordships do not think that the respondent can take advantage of the form of order to escape a liability to which he would have been subject if the order had been made in proper form.

Under the circumstances, their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

SOONA MAYNA KANA ROONA MEYAPPA CHITTY

v.

SOONA NAVENA SUPPRAMANIAN CHITTY.

DELIVERED BY

LORD PARKER OF WADDINGTON.

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