



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller, Hancox JJA & Nyarangi Ag JA)

CIVIL APPEAL NO. 52 & 53 OF 1982

BETWEEN

GURBAKSH SINGH & SONS LTD.....APPELLANT

AND

**BANK OF CREDIT & COMMERCE INTERNATIONAL (OVERSEAS)
LTD.....RESPONDENT**

ORDER

Mr Khanna, for the appellants, by a motion on notice of February 2, 1984, expressed to be brought under rules 42 and 96 of the Court of Appeal Rules, asks this court to substitute as a party to the appeal in place of the late second appellant, Ajit Gurbaksh Singh, either Harbans Kaur, the widow, or one or both of the named executors of the deceased's will who are Amrik Singh Gurbaksh Singh and Joginder Singh Gurbaksh Singh, the third and fifth appellants, and the hearing of the appeal be continued thereafter between the appellants, including the substituted party or parties, and the respondent, and the costs of the application abide the result of the appeal to all of which Mr Gautama, for the respondent, agrees. Alternatively, it seems, for it is not entirely clear, Mr Khanna, moves for an order that the executors of the deceased be substituted now and the hearing of the appeal be deferred pending the production of their grant of probate, or the substitution and the hearing be deferred until the executors have obtained grant of probate. Mr Gautama opposes both these applications. We will refer to each Mr Singh, alive or dead, in the rest of this order by his first name only. We need to set out now the chronology of the matter so far.

These two consolidated appeals were filed on September 28, 1982 and they are from the rulings of August 20, 1982 of the High Court (Mr Justice Chesoni, as he then was) in Nairobi dismissing with costs the appellants' applications for temporary injunctions to restrain the respondent from enforcing a debenture and a first mortgage between one or more of the appellants and the respondent until the hearing and determination of their suit against the respondent. The hearing of these appeals began on August 2 last year before Simpson CJ, Potter JA and Kneller JA and was adjourned to the next day but most unfortunately had to be adjourned *sine die* because Potter JA was indisposed.

On September 21 the advocates for the parties agreed the hearing should continue or begin *de novo* on February 6 this year. Ajit, the second appellant, died in London on October 24, 1983. He had appointed Amrik, the third appellant, and Joginder, the fifth appellant, his executors and trustees by his will of April 14, 1977 which Amrik attests is Ajit's last will. The deceased's relatives went into mourning for him. Joginder was then, and is, in India. He was incapable of managing and administering his own property

and affairs when the suit was filed on August 8, 1982 and when the appeal was filed on September 29, 1982 so that he sued and appealed by his next friend, Charanjit Kaur, his wife. One consequence is that grant of probate of the written will has not been applied for by either executor. An inventory of the assets of the deceased, and an account of his income and expenditure at the time of his death will have to be made. Joginder had a brain operation in England and was the patient of a neurological surgeon in Kenya before August 12, 1982 and is now said to have recovered his sanity. Amrik intends to obtain a special power of attorney from Joginder for Amrik to apply for probate on his behalf jointly with Amrik. He will require a medical certificate as to Joginder's fitness to manage his affairs once more.

Harbans Kaur, the widow of the deceased, Ajit and Amrik one of his executors and also Amrik, as the lawful attorney for Joginder, the other executor, each consents to being substituted as a party for the deceased by a special order of the court if this is proper but Mr Khanna, for all the appellants, said that these proposals were put forward as manifesting the appellants' good faith, but that he doubted whether this court had jurisdiction, at this stage, to accept them or one of them.

Rule 96 provides that:

“An appeal shall not abate on the death of the appellant or the respondent but the court shall, on the application of any interested person, cause the legal representative of the deceased to be made a party in place of the deceased.”

Rule 42 states that all applications to the court must be by motion unless it is made in the course of a hearing when it can be made informally or if it is made by consent of all parties when it may be made informally by letter. Mr Khanna prepared such a consent letter for the executors on December 28, 1983 and sent it to the advocates for the respondent on or about that date but it was not signed or returned until the motion was being urged.

Returning to rule 96 (*ibid*) the important words “legal representative” concern us in this application. Who is the legal representative of the late Ajit Singh? According to section 2 of the Civil Procedure Act (cap 21):

“legal representative” means a person who in law represents the estate of a deceased person ...”

There are no difficulties these days in connection with estate duty certificates. We do not know one way or another if anyone has objected or is likely to object to the will or the grant of probate in due course to the executors. No one has applied for a limited grant. A question might arise as to whether any person is or is not the legal representative of the deceased appellant and then the appropriate court would have to decide it: see order XXIII rules 5 and 10 Civil Procedure Rules.

Mr Gautama, when invited to produce authority against Mr Khanna's submission, was able only to state that there was still Mr Khanna's application on the record which had not been withdrawn, and to which he was prepared to consent, taking the risk of any adverse consequences that might flow therefrom. We would observe that of the three alternative people presented as suitable “legal representatives”, one is not an appointed executor under the will, and another has been mentally ill, and although believed to have recovered we have not been furnished with evidence of this supervening fact. Moreover, he is beyond the jurisdiction. We are not to be taken as stating that in no circumstances will the court accept as a legal representative of a deceased appellant the executors of his will before grant of probate. In the circumstances of this application, however, we decline to substitute Harbans Kaur, the widow, or Amrik, the third appellant, on his own as the legal representative of Ajit the deceased appellant.

So far as the application to replace the deceased second appellant with Amrik and Joginder, the third appellant, together is concerned we make no order pending proof of the written will and grant of probate of it to those two appointed executors. This, we presume, would involve Joginder proving his mental capacity to be an executor of it. We give liberty for that part of para i of the motion to be restored on notice. This being so, the application in para ii for the hearing of the appeal to continue between the appellant with the substituted ones and the respondent, or deferred until the executors produce the grant of

probate, abates.

The costs of this application are reserved. Orders accordingly.

Dated and Delivered at Nairobi this 7th day of February 1984.

A.A.KNELLER

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JUDGE OF APPEAL

A.R.W.HANCOX

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JUDGE OF APPEAL

J.O.NYARANGI

.....

AG. JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR