courtkutchehry.com

Company : CourtKutchehry
Website : www.courtkutchehry.com
Printed For :
Date : 15/09/2026

(1939) 07 PRI CK 0005

In the Privy Council

Case No : Privy Council Appeal No. 59 of 1938

Atisukhlal Bhaidas and others — APPELLANT

Vs

Natvarlal Ichharam Desai — RESPONDENT

Date of Decision : 20-07-1939

Acts Referred:

Citation : (1939) AIR(PC) 238

Hon'ble Judges : Jayakar, George Rankinand, Lord Romer, JJ.

Advocate : Hy. S.L. Polak & Co., T.L. Wilson and Co., W. Wallach, T.B.W. Ramsay, Sir Thomas Strangman, for the Appearing Parties.

Judgement

Mr. Jayakar, J.

This is an appeal from a judgment and decree of the High Court of Judicature at Bombay in its appellate jurisdiction dated 27th September 1935, reversing a decree of the Joint First Class Subordinate Judge of Surat dated 1st July 1929. The facts relating to the suit out of which this appeal arises are as follows : One Lalbhai Gulabdas, member of the Visa Modh Gaubuja Bania caste of Surat, resided in Bombay until his death on 25th March 1908. He left a widow Gangabai, a daughter Chandrabhaga, and a will dated 19th March 1908, whereof he appointed Gangabai and his two friends, Maganlal Modi and Ichharam Desai (the father of the defendant) as executrix and executors. After providing for a few legacies, the will contained the following provisions about the residue :

As to the moneys that may remain over, my executors shall invest the same in substantial securities during the lifetime of my wife and as to the interest that may be received therefrom, and as to the pension for which I have made an arrangement for my wife, my wife shall maintain herself honourably thereout, living in Bombay.

Then followed certain provisions for expenditure during her life and in connexion with her death, after which, out of the balance, various bequests were made, including one of Rs. 1000 to his said caste of Surat, for the purpose of

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/atisukhlal-bhaidas-and-others-…

celebrating a festival in his name. The ultimate residue was also bequeathed to the said caste in trust for the encouragement of education among the boys of the caste at Surat Lalbhai left property including ornaments and shares, and certain amounts which were, at the time of his death, deposited with a printing press in Bombay, called the Guzerati Printing Press, of which Ichharam was the owner. After Lalbhai''s death, these moneys remained deposited with the press. On 5th December 1912 Ichharam died, leaving four sons, one of whom is the defendant. They became owners of the press. In 1924 the eldest son retired from the business, which was thereafter continued by his three brothers. Gangabai died on 31st March 1921.

On 24th May 1923 the defendant commenced correspondence with the representatives of the caste, whereby he, at one time, expressed his willingness to pay to the caste the legacy of Rs. 1000, but ultimately failed to do so. The caste thereupon commenced proceedings against the defendant by filing a representative suit on 19th April 1926, at Surat, for the enforcement of its claim to the legacy. This correspondence and the proceedings in the said suit were relied upon by the appellant in the lower Courts as creating an estoppel, which prevented the defendant from denying that he was an executor of Lalbhai''s will for the purposes of the present suit, by reason of the circumstance : (1) that in a letter forming a part of the said correspondence, he had described himself as such executor and signed a caste resolution under the same description, and (2) that, in his written statement in the said suit, he did not deny his character as such executor, though the plaint had alleged it. This point of estoppel, however, has not been pressed before their Lordships and it is not necessary to go into greater detail relating to the said correspondence and proceedings. The defendant''s description of himself as an executor was obviously a misdescription arising, as explained in his deposition in the present suit, from a mistake about his legal position, which, at a later stage, he appears to have realized. Lalbbai had not appointed him an executor of the will, either expressly or by implication, and a misdescription of his position by the defendant would not make him so or raise an estoppel against him. The suit for the legacy of Rs. 1000 was ultimately decreed against the defendant with interest and costs.

Maganlal Modi, the surviving executor of Lalbhai''s will, died on 13th August 1926. On 20th September 1926 the caste gave notice to the defendant, claiming from him, as executor of Lalbhai''s will, the ultimate residue bequeathed by the will in their favour, and inspection of accounts and administration of Lalbhai''s estate. Upon the defendant failing to comply with the requisition and denying his liability as an executor, the caste, through its representatives, filed the present suit on 19th October 1926. Para. 6 of the plaint was as follows :

Looking to the original will, the defendant is not an executor appointed under the will, but his father was one of the executors. However, the defendant has acted as an executor and has admitted having the accounts with him, having intermeddled and dealt with the estate. Moreover, he has not denied the fact of

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/atisukhlal-bhaidas-and-others-…

his being an executor in the suit (relating to the legacy of Rs. 1000). Nay, he has acted as such. Therefore he is now estopped from denying such liability of his and by his acts he is liable to render an account of the estates of the deceased Lalbhai.

In his written statement, the defendant denied his liability to account as an executor and stated that, before the death of Maganlal, he had acted according to his directions and was merely his agent and at most he was an executor de son tort and as such was liable only to the extent of the assets which had come into his hands and not on a general account, nor on the basis of wilful default; he had made up with Maganlal the last account of Lalbhai''s trust estate and, at the foot of that account, Rs. 962-10-5 were due to the defendant from that estate and that nothing was due to the plaintiffs as residuary legatees. The particulars showing the amounts which had come into his hands and how they had been disbursed, leaving a balance of Rs. 962-10-5 due to him, were contained in a statement of account, which the defendant had sent through his pleader in reply to the notice mentioned above. Two issues were raised in the suit:

(1) Whether any and what amount had remained in balance at the foot of the account of the estate of Lalbhai to be paid to the plaintiffs as residuary legatees, (2) What decree should be passed.

After the matter had proceeded through some preliminary stages, the Subordinate Judge, on 17th January 1928, passed a preliminary decree directing the following accounts to be taken :

1. The account in respect of the property of the deceased Lalbhai that came into the hands of the executors, 2. The account in respect of the income received by the executors. 3. The account in respect of the sums expended out of the assets as well as out of the income received by the executors and the account in respect of such sums which it is disputed have not been properly spent. 4. The account of what remained, or what ought to have remained, with the defendant out of the property and income of the said Lalbhai.

The Subordinate Judge also appointed a commissioner to take the said accounts. It is to be noted that the defendant did not prefer an appeal from this decree. The commissioner proceeded with the accounts. The defendant brought in, as the account of the estate, a book (Ex. 11/7), which he stated he had received from Maganlal a month before the latter''s death. This book contained an account of the dealings between Lalbhai''s estate and the Guzerati Printing Press, for the years 1908-26, and purported to show a balance of Rs. 962-10-5 in the defendant''s favour. The plaintiffs filed objections to the accounts, some in the nature of surcharges and the defendant filed an explanation thereto. The commissioner, after recording evidence, held that on the facts of the case the defendant must be held to be an executor of Lalbhai''s will and on that footing the commissioner found that a sum of Rs. 13,492-0-8, exclusive of interest, was payable by the defendant to the plaintiffs. Exceptions to the report were filed by

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/atisukhlal-bhaidas-and-others-…

each side and eventually the Subordinate Judge, at the final hearing of the suit on 23rd March 1928, held that as the defendant had not appealed from the preliminary decree, all that remained to be done was to see if the account made up by the commissioner was in accordance with the directions contained therein. On the question of the liability of the defendant to account as an executor, it is not clear from his judgment whether he intended to hold the defendant liable as an executor by the tenor of the will or as an executor de son tort. After examining the several items objected to, the Judge ordered the defendant to pay to the plaintiffs Rupees 9124.11.3, the costs of the suit, and interest on Rs. 5349.14.3 at 6 per cent. from the date of the suit.

The defendant preferred an appeal to the High Court and the plaintiffs filed cross. objections. On 27th September 1935 Barlee J. held that it was probable that Ichharam and his family managed the estate after Gangabai''s death, but the management by the family after Ichharam''s death was not, and could not, be looked upon as management by the defendant in the capacity of executor; it was rather in the capacity of manager of the press; that the defendant''s conduct in describing himself as an executor did not create an estoppel and that the explanation of his styling himself executor was that he was, in fact, acting as an executor; that the Subordinate Judge, if he intended to hold that the defendant was an executor by the tenor of the will, was wrong; that the preliminary decree did not decide that point directly, the first three directions were suitable for an account from executors and might suggest that in the opinion of the Subordinate Judge the defendant was liable to account as an executor, the question was not decided and if it was decided, it was decided the other way, there was no issue on the point, the only issue being whether any and what amount had remained in balance at the foot of the accounts of the estate of Lalbhai to be paid to the plaintiffs as residuary legatees. He further held that if the Subordinate Judge intended to make the defendant liable as an executor de son tort, then his decree for the amount decreed against the defendant was wrong. An executor de son tort is liable for the amounts received by him and not accounted for (S.304, Succession Act); the defendant was entitled to deduct all payments made to Gangabai, who was the rightful executrix. He is not liable to pay the amount drawn by her in excess of interest, or used by her. On the amounts surcharged by the plaintiffs, the learned Judge held that it was not proved that the defendant had received the amounts of Rs. 6000 and Rs.2000 alleged by the plaintiffs; there was no dishonesty on the defendant''s part and it was not right to sue him, who was a mere boy when Lalbhai died and was connected with the estate only as a part owner of the press.

On these grounds, the High Court held that there was nothing due to the plaintiffs from the defendant on accounts taken as directed by cl. 4 of the preliminary decree. It allowed the appeal and dismissed the suit with costs throughout. Prom this an appeal has been preferred to His Majesty in Council. The question of the status of the defendant, whether he was an executor by the tenor of the will or an executor de son tort does not appear to their Lordships to

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/atisukhlal-bhaidas-and-others-…

be important, having regard to the fact that the preliminary decree directed certain accounts to be taken under cl. 4 and the defendant having preferred no appeal against it, the direction is binding on him and the accounts have to be taken on the footing mentioned therein. It is not necessary, in this view, to decide the question of the status of the defendant by reference to the provisions of Ss. 303 and 304, Succession Act. Their Lordships agree with the High Court''s view of the preliminary decree and the defendant''s liabilities thereunder. Clauses 1 to 3 of the decree do not appear to their Lordships to be intended to direct that the defendant was to be accountable as an executor of the will. These clauses were apparently findings on issue 1 raised by the Subordinate Judge and had no reference to the defendant or his accountability. This part of the decree appears to their Lordships far from intelligible. If it was intended to be a direction against those who were and had acted as executors of the will, it must be noted, that they were not represented before the Subordinate Judge. There was likewise no account before that Court showing the amounts received and disbursed by the defendant out of Lalbhai''s estate. The account book which was before the commissioner related to the dealings between Lalbhai''s estate and the Guzerati Printing Press, which appears to have acted throughout as his banker. This book did not show either the date from which the defendant had begun to manage, nor the amount which had come into his hands at the commencement of his management.

It appears from portions of the Subordinate Judge''s judgment that what he found as due from the defendant was in fact due from the press and that many of the disbursements which the defendant had made were as manager of the press, the banker of Lalbhai''s estate. In this view of the case, it is difficult to hold that any unauthorized payments by him in his capacity as a partner or manager of the press would make him an executor de son tort. In his examination-in-chief, the defendant gave what appears to their Lordships a clear and intelligible account of how the management of Lalbhai''s estate was carried on after his death. He said :

All the three persons (executors) carried on the management jointly until 1912, in which year Ichharam died on 5th December. Thereafter, the executors Bai Ganga and Maganlal Modi were carrying on the management. These people carried it on till 30th March 1921. After the death of Bai Ganga, Maganlal alone carried on the management. Other executors were not appointed in the place of those who had died. Maganlal died on 13th July 1926. Until that date he had acted as executor. Maganlal during the last two or three years had been ill and for one year prior to his death he was seriously ill. During this period, I used to act under the orders of Maganlal as an executor of the will. I acted as an agent of Maganlal. After his death, I have been completing the work left remaining, in accordance with the instructions given by him to me. The payment of moneys which I have made and the management which I have carried on are done by me in accordance with his suggestions. I received this account book (Ex. 11/7) one month prior to the death of Maganlal. This account book was given to me by

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/atisukhlal-bhaidas-and-others-…

Maganlal.

There is nothing in this witness''s cross-examination which shakes his version of the management, nor do the depositions of two witnesses, Ochavalal and Maganlal, called by the plaintiffs, have that effect. The only account which their Lordships have before them, which can be said to be material on the defendant''s liability, is the one which the defendant sent through his pleader on 22nd October 1926, showing a balance of Rs. 962-10-5 in his favour. It is headed " Particulars of the account of moneys spent by the hands of the defendant Natvarlal. " On the credit side are total receipts consisting of three amounts, Rs. 500, Rs. 4600 and Rs. 19-10-4, received by the defendant at various dates in December 1923, making a total of Rs. 5119-10-4 at the end of that year.

These items are corroborated by the entries contained in the accounts of the press (Ex. 11/7), where they are shown as payments made to the defendant by the press on the respective dates, which agree with those mentioned in the defendant''s account. The defendant admits the receipt of these amounts. In the years, 1924-25-26, the amounts of interest are credited and the total amount which he had received at the end of 1926 was Rs. 5884-10-4. On the debit side of this account are shown the defendant''s disbursements, amounting in the aggregate to Rs. 6847-4-5, leaving a balance of Rs. 962-10-5 due to the defendant. The High Court has accepted the defendant''s accounts. It has held that sub-stantially the defendant''s story is correct and that there was no dishonesty on his part. Their Lordships can find no reason to differ from the High Court''s view.

Their Lordships'' attention was invited to a list of items showing the several amounts allowed by the commissioner and it is alleged, wrongly disallowed by the Subordinate Judge and the High Court. It is not the practice of this Board to embark on a minute examination of the details of accounts which were subjected to a careful scrutiny by the Courts below, except in cases where some recognised principle of accounting or rule of law has been violated. The High Court has in this case carefully examined the various items and their Lordships can find no reason to differ from its view.

Their Lordships had the benefit of a careful and detailed argument from the appellant''s counsel on the merits of the several items. Many of them however appear to their Lordships to be such that the defendant cannot be held liable for them. Some of them are payments made to or during the lifetime of Gangabai. She was an executrix of the will, was in the habit of looking into the accounts and on 12th July 1919 admitted their correctness. Other items are payments made during the lifetime of Maganlal, the surviving executor. The appellants'' counsel, at one stage of his argument, endeavoured to fix the defendant with liability as a constructive trustee of Lalbhai''s estate. Their Lordships cannot accept this argument; it is contrary to the plaintiffs'' contentions in the plaint, was not urged at any of the previous stages of these proceedings and will not improve the plaintiffs'' position, for, even as a constructive trustee, the defendant

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/atisukhlal-bhaidas-and-others-…

will not be liable except for moneys which he is proved to have received.

Out of the several items to which their Lordships'' attention was called, the only amounts which may be charged to the defendant are the sum of Rs. 203-2-5 and two other sums of Rs. 75 each. These relate to the costs incurred by the defendant in connexion with his unsuccessful defence in the suit filed by the caste for recovery of the legacy of Rs. 1000. Similarly, the sum of Rs. 100 paid to a Surat educational charity and another sum of Rs. 500 for presents on the occasion of the wedding of Lalbhai''s granddaughter, being unauthorized payments, might be properly charged to the defendant. But it is clear from the defendant''s account, to which reference has been made, that these five items were included on the debit side and have been discharged, leaving a balance of Rs. 962-10-5 due to him from Lalbhai''s estate. Their Lordships agree with the view of the High Court and are of opinion that its decree be affirmed and this appeal dismissed. The appellants will pay the respondent''s costs of this appeal. Their Lordships will humbly advise His Majesty accordingly.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/atisukhlal-bhaidas-and-others-…