
(1952) 10 BOM CK 0002
In the Bombay High Court
Case No : O.C.J. Appeal No. 115 of 1952

Hirjibhoy Rustomji Patel

APPELLANT

Vs

The State of Bombay

RESPONDENT

Date of Decision : 15-10-1952

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 35
Succession Act, 1925 — Section 219, 259

Citation : AIR 1953 Bom 228 : (1953) 55 BOMLR 122 : (1953) ILR (Bom) 748

Hon'ble Judges : Chagla, C.J.;Tendolkar, J

Bench : Division Bench

Advocate : Jamshedji Kanga and P.P. Khambatta, for the Appellant; M.P. Amin, General (amicus curiae), for the Respondent

Judgement

FACTS

One Rattanshaw, a Parsi inhabitant in Bombay, died intestate on October 9, 1950. He left him surviving his mother Meherbai and a brother Hirjibhoy (applicant). On March 22, 1951, Meherabi applied for letters of administration to the estate of her son Rattanshaw, which were granted to her on May, 2, 1951. Before she could fully administer the estate, Meherbai died on December 6, 1951.

The applicant applied, On May 14, 1952, for, grant of letters of administration "de bonis non" to administer the unadministered estate of his brother Rattanshaw.

Coyajee J., who heard the application, rejected it, on July 31, 1952, observing that under S. 259 the grant was only to be made to those persons only to whom the original grants might have been made and that inasmuch as the grant had already been made to the mother Meherbai, the estate was the estate of Meherbai, and in those circumstances the petitioner must in due course take out letters of administration to the estate of the mother and the fact that in doing so extra probate duty was to be paid, was incidental to the construction to be

properly put on sections 259 and 219 and that on a proper reading of section 259 he was not prepared to depart from the precedents in the office in similar circumstances, namely that letters "de bonis non" cannot be issued to the petitioner but that he must proceed to take out representation to the estate of his mother for the purposes of due administration. Further he also directed costs of the petitioner of the application as between attorney and client to come out of the estate and assessed the costs of the Advocate-General who appeared as amicus curiae at Rs. 250 to be also paid out of the estate. The applicant appealed.

Chagla, C.J.

(1) One Rattanshaw died on October 9, 1950. He left behind him his mother Meherbai and a brother Hirjibhoy, who is the appellant before us. He also left children of a predeceased brother and a predeceased sister. On 2-5-1951, Meherbai applied for letters of administration to the estate of Rattanshaw and letters were granted to her. Meherbai died on 6-12-1951, and it is common ground that when Meherbai died the estate of Rattanshaw was not fully administered. Thereupon the appellant applied for letters of administration "de bonis non" to the estate of Rattanshaw. This application was rejected by the learned Judge below on the ground that the appellant should have applied for letters "of administration to the estate of Meherbai, his mother, and not to the estate of his brother Rattanshaw, and the ground on which the learned Judge based his rejection was that Meherbai was the sole heir of Rattanshaw and as such she became entitled to the estate of Rattanshaw and therefore letters of administration should have been sought to the estate of Meherbai and not Rattanshaw. Now, with very great respect to the learned Judge, the whole judgment proceeds on a fallacy and on a misapprehension of the correct effect of Section 259, Succession Act. That section provides that "in granting letters of administration of the estate not fully administered, the Court shall be guided by the same rules as apply to original grants, and shall grant letters to those persons only to whom original grants might have been made."

Therefore, the original grant was made u/s 259 to Meherbai, she being the mother and the heir of Rattanshaw. If the estate had been fully administered by her, then undoubtedly she would have been entitled to whatever Rattanshaw left, and if an application had been made to administer the estate of Meherbai, then duty would have had to be paid not only on what Meherbai left but on what was inherited by her from Rattanshaw. But the position here is that the estate of Rattanshaw is not still fully administered, and therefore what the appellant is seeking is not to administer the estate of his mother Meherbai but to administer the estate of his brother Rattanshaw. Now, it is difficult to understand why in law he is prevented from asking the Court to grant him letters of administration "de bonis non" to administer the estate which has not yet been fully administered. In pur opinion he is entitled to letters of administration to the estate of Rattanshaw because he is one of those persons to whom original grant could have been

given, because if the mother was not alive he would have been the next in line of succession under the Parsi law of succession, and he would have been entitled to letters of administration to the estate of Rattanshaw. It is also difficult to understand why at this stage the appellant is bound to pay duty over again on the estate of his brother in respect of which duty was already paid by Meherbai when she applied for letters of administration.

(2) The Advocate-General's contention is that inasmuch as Meherbai was the heir of her son, the appellant is bound to pay duty on the estate of his brother Rattanshaw. But it is not to the estate of his mother that the appellant is applying for representation. Meherbai held property in two capacities. She held her own property and she held property as the administratrix of her son. Till the estate is administered, the property of her son does not belong to her. She only held it as the administratrix of her son. And as she has not administered fully the estate of which she was the administratrix, some one else can come forward and ask for permission to administer the estate and apply for letters of administration. Therefore, there was no obligation whatever upon the appellant to apply for letters of administration to the estate of Meherbai. It is perfectly true that when the estate of Rattanshaw is administered and when the property of Rattanshaw belongs to the estate of Meherbai as the heir of Rattanshaw and an application is made for letters of administration to the estate of Meherbai, duty would have to be paid not only on the property which Meherbai left in her own right but also in her capacity as the heir of Rattanshaw. But that situation would only arise when an application is made for letters of administration to the estate of Meherbai. The estate of Rattanshaw has remained unadministered and the appellant is entitled, in our opinion, to have the estate administered by getting letters of administration "de bonis non".

(3) Our attention has been drawn by the Advocate-General to two precedents pointed out in the office note where an estate was unadministered, and the person who applied for letters of administration was given letters of administration not to the estate of the person whose estate was unadministered but to the estate of a person who was the heir of the person whose estate remained unadministered. In our opinion, those precedents are not in accordance with law. When a party applies for letters of administration "de bonis non", letters can only be issued to the estate of the person whose estate has not been administered. That is the whole object and reason for giving letters of administration "de bonis non". Therefore, in our opinion, with respect to the learned Judge below, there was no justification for refusing to the petitioner the letters of administration "de bonis non" to the estate of Rattanshaw.

(4) There is one other point of practice which might be set right. The Advocate-General very kindly appeared before the Court below as "amicus curiae" to assist the Court in coming to the right conclusion and the Advocate General has equally kindly appeared before us as "amicus curiae". The learned Judge below gave to the Advocate General his costs fixed at Rs. 250. In our opinion, it is entirely

wrong for any counsel to be paid costs when he appears as "amicus curiae". Members of the bar have always been willing and anxious to help the Court, and if parties are not in a position to instruct counsel, they have voluntarily come forward to give their assistance to the Court on difficult questions of law and practice, and the Advocate General in consonance with the highest traditions of the bar helped the Court in coming to a proper conclusion. But if he did help the Court and if he appeared as "amicus curiae", then he should not fee given his costs. The very basis of costs is that a counsel appears as a matter of right. Counsel appearing as "amicus curiae" do not appear as a matter of right. They appear at the instance of the Court to assist the Court, and under those circumstances they are not entitled to costs. The Advocate General draws our attention to a case reported in *In Re Adarji Mancherji Dalal*, where Sir Jamshedji, who was the then Advocate-General, appeared before Mr. Justice Rangnekar "amicus curias" and Rangnekar J. gave him costs. Sir Jamshedji himself is startled to find that he was responsible for getting this wrong order from Mr. Justice Rangnekar. In our opinion, with respect to the learned Judge, the order made was erroneous and we must set right the wrong practice.

(5) The appeal will be allowed with costs. The order of costs in favour of the Advocate General vacated. We direct that letters of administration u/s 259 "de bonis non" to issue to the appellant.

(6) Appeal allowed.