

(1900) 01 CAL CK 0017
In the Calcutta High Court

Motilal Pal Chowdhry and Others

APPELLANT

Vs

Satya Prashad Pal Chowdhry and Another

RESPONDENT

Date of Decision : 09-01-1900

Acts Referred:

Probate and Administration Act, 1881 — Section 82, 92

Citation : (1900) ILR (Cal) 683

Hon'ble Judges : Stevens, J;Banerjee, J

Bench : Division Bench

Judgement

Banerjee and Stevens, JJ.—This appeal arises out of a suit brought by the plaintiffs-respondents against three persons, namely, Pramatha Nath Pal Chowdhry, Satya Prosad Pal Chowdhry, and Lolit Mohun Pal Chowdhry, for recovery of a certain sum of money due on hatchittas or signed accounts on the allegation that the late Koilash Chunder Pal Chowdhry, father of the defendants, carried on monetary dealings with the plaintiffs on hatchittas, on condition of paying interest at the rate of 12 annas per cent, per mensem and of renewing the hatchitta on the Ramnavami Puja day of each year, so that interest at the said rate might run from that day on the amount due as principal and interest; that Koilash Chunder Pal Chowdhry died in Assin 1300, after having executed his last hatchitta on the 14th of Cheyt preceding, for Rs. 27,527 odd; that on his death his widow Damini Dasi, mother of the defendants, having obtained probate of his will on the security of defendants 1 and 2, continued renewing his hatchitta year after year down to Cheyt 1302, as his executrix, her name being signed by defendant No. 2; that the said Damini Dasi as the executrix of Koilash Chunder Pal Chowdhry and for the benefit of his estate borrowed from the plaintiffs a further sum of Rs. 1,600, promising to pay interest at 1 per cent, per mensem; and that subsequently on the objection of defendant No. 1, Promatha Nath Pal Chowdhry, the grant of probate to Damini Dasi having been revoked, the defendants under the will of their father have become possessed of his estate and are liable for the amount claimed. The defence was limitation, denial of the plaintiff's right to sue without joining their mother as a plaintiff, denial of the

execution of hatchittas by Damini Dasi, and denial of her power as executor to borrow money or renew hatchittas,

2. The Court below has found for the plaintiffs upon all the issues raised in the case and has given them a decree.

3. Against that decree defendants No. 2 and 3, Satya Prosad Pal Chowdhry and Lolit Mohan Pal Chowdhry, have preferred this appeal; and it is contended on their behalf, first, that the Court below is wrong in holding that Damini Dasi alone was competent to exercise the powers of an executor when the will of Koilash Chunder Pal Chowdhry appoints not her alone but her and four other persons as executors, and directs that they shall act jointly; secondly, that, even if Damini Dasi was competent to act alone, the Court below is wrong in holding that the renewal of hatchittas by her as executrix was binding on the estate of the testator; thirdly, that, even if Damini Dasi was competent to act alone, the Court below was further wrong in holding that the estate of the testator was liable to pay the money borrowed by her; and fourthly, that the Court below ought to have held that the plaintiffs were not competent to maintain this suit without joining as a co-plaintiff their mother as heir of their deceased brother, who had a share in the money sued for.

4. In support of the first contention, paragraph 1 of the will of Koilash Chunder Pal Chowdhry and Section 92 of the Probate and Administration Act (Act V of 1881) are relied upon.

5. Paragraph 1 of the will no doubt shows that five persons, of whom Damini Dasi is one, were appointed executors, and that all the executors jointly are empowered to alienate any property for payment of debts and to borrow money for the improvement and preservation of the estate. And Section 92 of Act V of 1881 enacts that "when there are several executors or administrators the powers of all may, in the absence of any direction to the contrary in the will or grant of letters-of-administration, be exercised by any one of them, who has proved the will or taken out administration." The effect of this section, so far as it relates to executors, is, in our opinion, this, that where several executors obtain probate and the will directs them all to act together, none of them can act singly; but the section is not intended to disqualify, by reason of any such direction in the will, one of several executors who alone has obtained probate, the others having either renounced or refused to accept office. This view is supported by Section 82 of the Probate and Administration Act, which shows that it is only the executors, who have obtained probate, that can act as representatives of the testator; and we think it but reasonable that an executor, who renounces or refuses, or is unable to act, should be regarded as if he had never been appointed.

6. This being our view of the law, let us see how the facts stand. Of the five persons appointed as executors, the first, Promatha Nath Pal Chowdhry, defendant No. 1, the eldest son of the testator, never applied for probate, but stood as security when probate was granted to Damini Dasi; the second, Tarini

Prosad Pal Chowdhry, never applied for probate and is one of the plaintiffs in the suit; the third, Mohendra Nath Biswas, was dead when probate was granted to Damini Dasi; the fourth, Hira Lal Pal a son-in-law of the testator, never applied for probate, and was, as his own deposition shows, a naib or agent of Damini Dasi; and the fifth, Damini Dasi, is the only person who applied for and obtained probate. Thus the three executors other than Damini Dasi, who were alive when the last-named person applied for and obtained probate, if they had not formally renounced, must be taken practically to have refused to accept office. Damini Dasi was therefore, in our opinion, competent to act as executrix. We may add that the defendants, who were the beneficiaries under the will, and in particular two of them, namely, the two appellants, as appears from the depositions of defendants 1 and 2, acted for their mother Damini Dasi, and in fact did all that was done in her name as executrix.

7. For the foregoing reasons the first contention of the appellants must, in our opinion, fail.

8. Upon the second point it is urged for the appellants that, even if Damini Dasi was competent to act alone as executrix, she could not in that capacity bind the estate of the testator by executing the hatchittas in question, especially when by so doing she had heavily increased the debt originally due from the testator by allowing compound interest to be charged. It is argued that a contract of borrowing made by an executor only binds him personally, and that the only liability created by the hatchittas is a personal liability of the executrix; and in support of this argument, *Farhall v. Farhall* (1871) L.R., 7 Ch. A 123, and certain other cases referred to in *Williams on Executors*, Pt. IV, Bk. II, Ch. II, para. I, are relied upon.

9. No doubt one of the primary duties of an executor is to free the testator's estate of its debts and liabilities and not to add to its burdens; and for that purpose he can alienate the property of the testator subject only to certain restrictions. It is only in certain special circumstances that an executor's promise to pay money can bind the estate of the testator. *Mellish, L.J.*, in the case of *Farhall v. Farhall* (1871) L.R., 7 Ch. IA., 123, cited for the appellants, after quoting from *Williams' work on Executors*, the following statement of the law (9th edition, page 1661): "The more modern authorities have, however, established that in several instances the executor may be sued as executor on a promise made by him as executor, and that a declaration founded on such a promise will charge the defendant no further than a declaration on a promise of the testator," observes: "But if we look through the different cases which follow that statement, it will be found that in every one the consideration for the promise of the executor was a contract or transaction with the testator." And a little further on, after referring to two other cases--*Dowse v. Coxe* (1825) 3 Bingham, 20, and *Powell v. Graham* (1817) 7 Tau, 580,--the learned Judge says: "That shows no doubt that a count for money paid for the use of an executor is a good count to charge him in his representative character, when the demand

arises in consequence of a contract made with the testator." Let us then see what the demand in this case arises from and how far the consideration for the promise of the executrix arose out of a contract or transaction with the testator. The hatchittas in question were given by the executrix in successive renewal of hatchittas originally executed by the testator and renewed by him year after year on the Ramnavami day, and interest was allowed on interest in the hatchittas executed by the executrix in accordance with the practice followed by the testator himself. This fact is proved by the deposition of the plaintiff, Mati Lal Pal Chowdhry, and is not disputed. That being so we think the Court below was right in holding that the hatchittas executed by Damini Dasi as executrix were binding on the estate of the testator in the hands of the defendants.

10. There is another reason why these hatchittas should be held to be binding on the estate in the hands of the defendants. As we have observed in dealing with the first contention of the appellants, it is proved by the evidence of the defendants 1 and 2 and of other witnesses, that when Damini Dasi was in possession of the testator's estate as executrix, two of her sons, namely, the defendants 2 and 3, the appellants before us, conducted the monetary affairs of the estate on her behalf, and defendant No. 2 signed her name in the hatchittas as her agent; while defendant No. 1, who has not appealed against the decree, admitted in the Court below that the amount claimed was justly due. Moreover, when the plaintiffs in this and in another analogous suit, out of which appeal No. 380 arises, were about to institute their suits, the defendants or two of them (see the depositions of Hari Prosad Chatterjee and Narahari Mukerjee) induced them to forbear for a time upon promise of payment or renewal of hatchittas. It was argued for the appellants, upon the authority of the case of (1892) L.R. 19 I.A. 221 (Privy Council) , that as the defendants were then acting as agents of Damini Dasi, their representations could not bind them now when they are sued in their capacity as beneficiaries. This argument is not sound. The case cited is quite distinguishable from the present. For there the representations relied upon were made by a person who never was the reversionary heir to the widow for whom he acted as her agent, and who neither professed nor had any right to act in any other capacity, than that of agent; whereas here the defendants were the beneficiaries of the estate, and only one of them was the agent of Damini Dasi. The true view of the facts is clearly this, that while Damini Dasi acted as executrix in name, the business in connection with the renewal of the hatchittas was really conducted by her sons, the defendants, who were then, as they are now, the beneficiaries. It is not therefore open to them to question the binding character of the hatchittas. The second contention of the appellants must therefore also fail.

11. Nor has the third contention much force. It is true that a part of the claim in this suit is made up of two sums of Rs. 1,500 and Rs. 100 borrowed by Damini Dasi as executrix. But she had power under the will to borrow money as executrix for the improvement and preservation of the estate; and the evidence [see the depositions of defendant No. 1, Promatha Nath Pal Chowdhry, and the

plaintiff, Moti Lal Pal Chowdhry, and exhibits 1 (4) and 4 amply shows that the money was borrowed for paying off a certain decree in execution of which a portion of the Immovable property belonging to the estate had been advertized for sale. It was argued by the learned vakil for the appellants that as the power of borrowing money was given to five persons jointly, one of them, Damini Dasi, could not exercise that power singly. The answer to this argument is that the power was given not to the five persons in their individual capacity, but to them as executors and by virtue of their office; and if, as we have said above, Damini Dasi was, by reason of the death of one of the executors and refusal of the other three to act, alone competent to act as executrix, she was also competent to exercise the power of borrowing money by virtue of her office as executrix. The view we take is in accordance with that taken in the case of Crawford v. Forshaw (1891) L.R., 2; (1891) Ch. 261.

12. Upon the fourth and the last contention, it is enough to say that the evidence of the plaintiff, Moti Lal Pal Chowdhry, which is unrebutted, and which we see no reason to disbelieve, shows that his mother had many years before suit relinquished in favour of him and his brothers the right she had acquired by inheritance in the share of his deceased brother in the money claimed in this suit.

13. The contentions urged before us therefore all fail, and this appeal must consequently be dismissed with costs.

14. This judgment will govern appeals from Original Decrees Nos. 380 and 381, which are analogous to this case, with only this difference that the third and fourth contentions raised in this appeal do not arise in them. Appeals from Original Decrees Nos. 380 and 381 will accordingly be also dismissed with costs.