

(1934) 04 MAD CK 0023
In the Madras High Court

Peer Mohideen Rowther

APPELLANT

Vs

Asia Bivi and Others

RESPONDENT

Date of Decision : 20-04-1934

Acts Referred:

Citation : AIR 1934 Mad 686 : 152 Ind. Cas. 739

Hon'ble Judges : Venkatasubba Rao, J

Bench : Division Bench

Judgement

Venkatasubba Rao, J.—The question that arises in this appeal is, whether defendant I's liability is to be determined with reference to Section 90, Trusts Act (2 of 1882). Mr. Bajah Ayyar contends that the heirs of a deceased Mohammedan take as tenants-in-common, and that one co-tenant does not stand in fiduciary relation to his other co-tenants. The learned Counsel relies upon Kennedy v. De Drafford (1897) A.C. 180, and my judgment in Ramaswami Ayyar v. Subramania Ayyar 1923 Mad. 147, for the position that the relationship of one co-owner towards another is not of a fiduciary character. The question here however is not whether the mere fact that defendant 1 was a co-tenant, could render him liable to be treated as a fiduciary owner, but the point to decide is, whether by reason of his dealings with his co-owner's share and the responsibilities he assumed in regard to it he did not beyond being a bare tenant-in-common, also put himself in fiduciary relationship.

2. At the death of Meera Masthan, his son Nagoor Meeran (the plaintiff's husband) was a minor, and defendant 1 (the elder brother of Nagoor Meeran) was much his senior in age. The minor, after his father's death, lived with, and under the protection of, defendant 1; more than that, in obtaining the succession certificate, the elder brother acted as the minor's guardian; further, he acted in the same capacity in regard to the releases obtained on behalf of the minor. In the light of the facts proved, I must hold that the learned District Munsif has correctly held that the conduct of defendant 1 created, u/s 90, Trusts Act, such fiduciary relationship as entitled Nagoor Meeran to treat his brother as being in

the position of a trustee for him. The view I have taken is in conformity with Abdul Rahim v. Abdul Hakim 1931 Mad 553 and Shukrulah v. Zohra Bibi 1932 All. 512.

3. That being so, by the operation of Section 95, the provisions of Section 23 relating to the liability for interest apply. The question then is has it been shown that defendant 1 has actually received interest? It was his duty to have proved how he disposed of the moneys received on behalf of the minor. He admits that his own moneys fetched much more than 9 per cent, per annum compound; in regard to the minor's moneys he says that he invested them during the first two years at 9 per cent compound but how he disposed of them subsequently, he does not, choose to tell. When his own moneys were invested at a certain rate of interest, it would be legitimate to infer that the minor's moneys also fetched the same interest; in any event, it would not be improper to charge defendant 1 with a uniform rate of 9 per cent, per annum compound. For the lower appellate Court's direction, I substitute, that in respect of the moneys payable to Nagoor Meeran, interest will run from the very commencement to the date of suit; at 9 per cent per annum compound, with yearly rests. On the aggregate amount due on the date of suit, interest will be paid at 6 per cent, per annum till payment.

4. As to the disbursements the lower appellate Court has allowed in favour of defendant 1; my direction is, that from the date of any particular debit, interest shall cease on the amount so debited subject to the one exception that Rs. 203 debited for improvements shall not, as the Subordinate Judge holds, carry interest; in other words, that sum without interest shall be deducted as on the date of the taking of the account.

5. The moneys invested by defendant 1 in his firm of S.K.G. & Co. more or less represented what pertained to his share. I fail to see then why it should be inferred that the moneys employed were not those exclusively belonging to defendant 1, but were out of the common funds in which all the heirs, including Nagoor Meeran, were interested. Therefore there is no warrant for awarding any higher rate of interest in respect of any portion of the moneys differentiating it from the rest of the funds on the ground that the business yielded large profits. The direction I have given therefore will apply to all the moneys. The contentions of Mr. Rajah Ayyar in regard to the other matters do not require serious notice. In the result, the lower appellate Court's decree is confirmed, subject to the modification indicated above. The appellant shall pay the plaintiff's costs in this appeal.