

(1941) 05 CAL CK 0025
In the Calcutta High Court

Syed Abbas Ali

APPELLANT

Vs

Nawab Abid Jahan

RESPONDENT

Date of Decision : 20-05-1941

Acts Referred:

Evidence Act, 1872 — Section 114

Citation : AIR 1942 Cal 66a

Hon'ble Judges : Ameer Ali, J

Bench : Division Bench

Judgement

Ameer Ali, J.—The order which is sought by the receiver is upon a petition for directions originally moved before me on 5th April 1940. The prayer to the petition is to "give directions for the settlement of the suit." The application was made in the administration Syed Abbas Vs. Nawab Abid Jehan Begum, . The suit, the settlement of which was in question, was Suit No. 1950 of 1937, a suit brought by a lender to the late mutwalli against the receiver. On 24th April 1940, I gave a short judgment setting out what seemed to me the appropriate practice and directing the receiver to take the opinion of counsel. The petition was renewed on 22nd November 1940 with the opinion of counsel annexed. I then directed the receiver to take no action except upon a definite proposal of settlement. Such proposal has now been made by the plaintiff in the shape of an offer to accept a payment of Rs. 4200 on what is called an ex gratia basis--no order as to costs. The case, I am told, lasted six days and the costs on both sides must be heavy. In the normal case I should not have hesitated in directing the receiver to accept these terms--something not much more than half the original claim and no costs. This, however, is not the normal case. The law laid down in Mackintosh Burn Ltd. Vs. Shivakali Kumar, and Sailendra Nath Palit Vs. Syed Hade Kaza, was challenged by the plaintiff. It was a test case. Other claims of a similar, and possibly of a more meritorious nature remain, and the proposed settlement will make it embarrassing when these claims come to be renewed. The committee, however, of whom the counsel in the case is one, consider the settlement desirable. It will undoubtedly bring a matter which has long been

pending to an end. In the event of an appeal, as Mr. Fazle Akbar pointed out, there is little chance of costs being recovered from the plaintiff. Moreover, the learned Judge trying the case has taken in the matter so much personal interest that it would be unbecoming on my part to exaggerate difficulties. I propose, therefore, to allow the receiver to compromise the suit upon the terms mentioned. I think, however, that in so doing I should reiterate shortly the grounds upon which leave to the receiver to defend the suit and to continue the defence of this suit was given.

2. To restate the position--there was an administration Syed Abbas Vs. Nawab Abid Jehan Begum, against the mutwalli who died pending the suit. That is in law immaterial--his heirs were substituted. In this suit (No. 1950 of 1937) neither the mutwalli nor his heirs were impleaded. It was assumed by the plaintiff that because the loan had been made to the mutwalli or trustee, therefore, the estate is liable. In giving leave to the receiver to defend, the following principles were considered to apply : (1) Indemnity and subrogation-- *Sailendra Nath Palit Vs. Syed Hade Kaza*, and *Mackintosh Burn Ltd. Vs. Shivakali Kumar*, Frame of suit. It seemed to follow from the principle of indemnity and subrogation that a suit brought directly and solely against the beneficiary or the receiver does not lie. There existed one Syed Abbas Vs. Nawab Abid Jehan Begum, by a beneficiary or beneficiaries for administration and accounts. In that suit a receiver was appointed. He may probably be taken to represent the estate or the beneficiaries. He is certainly not the trustee nor the personal representative of the trustee.

3. The second suit (No. 1950 of 1937) is upon a loan to the late trustee brought against the receiver. There has been no claim in the administration suit which is one of the courses clearly open to a creditor; there has been no decree against the trustee in any other proceedings. In *Mackintosh Burn Ltd. Vs. Shivakali Kumar*, it was assumed that a creditor of a trustee, an administrator, or mutwalli may proceed against the estate in the same suit as that brought against the trustee. It does not follow that the frame of the suit is a mere matter of form. The decision in *Mackintosh Burn Ltd. Vs. Shivakali Kumar*, should not be read as implying that a creditor can ignore the trustee, or disregard the matter of accounts, or is excused from establishing his right against the estate through the medium of a "clean account". In this suit, the suit of 1987, the trustee is not at all sued, no attempt as against him to establish let alone recover the debt has been made. See on this point *In re Morris* (1889) 23 LR Ir 333 and *Jennings v. Mather* (1901) 1 QB 108 at p. 114 and the other cases cited in *Seton*, vol. II, p. 1499. That is the point relating to the constitution of the suit.

(3) The third question is one of onus. In this particular case the trustee or mutwalli had filed an account, the account required under the Wakf Act, which did not show this loan to him as a loan taken for the wakf. There were no books. There was no suggestion of collusion between the receiver and the trustee or the trustees representatives. I was of opinion that the onus was upon the plaintiff.

The question of onus arose in *Ghasiram Bhuniwalla v. Sm. Thakurani Kusum Kumari*, No. 1558 of 1930, a suit by a trade creditor of an administratrix against the administratrix and the beneficiary. I was told by Mr. S.N. Banerjee, an unreported decision, to the effect that the onus is upon the estate to prove that the trustee is in default. In the absence, however, of any reported decision the following extracts -from the judgment in that suit still represent my opinion on the matter:

In my opinion the onus is upon B, the administratrix, and hence upon A who is seeking the benefit of the right of indemnity. B would fail without any proof, i. e., without any accounting. I think that is so both according to principle, to the provisions of the Evidence Act and to the English authorities : see cases cited in *Seton Vol. II*, p. 1499. I am not unmindful of Section 114, Evidence Act, and the presumption of regularity but I do not think such presumption takes the place of accounts or counteracts accounts obviously defective. Clearly, however, the onus may shift (reference to *Murugesam Pillai v. Gnana Sambhandha Pandara Sannadhi* ("17) 4 AIR 1917 PC 6 at pp. 408 and 409).

The case of subrogation and indemnity is clearly distinguishable from the case of necessity or necessities. The administratrix or trustee or mutwalli is no doubt vis a vis the beneficiary, a "third party". But third parties in law may not be third parties in fact. There may be circumstances sufficient to indicate that the trustee and beneficiary are combining against the lender, and thus to create a presumption that the books, if produced, would support the plaintiff's claim.

It seems to me, therefore, generally speaking, that accounting involves (i) establishing that the money was taken for the purposes of administration. (ii) That the money was spent on the estate, (iii) That on balance of accounts, B has not in fact taken or reimbursed herself from the income of the estate.

In other words she is a creditor of the estate. The accounting party has to show "clean accounts" before he or she can at law claim an order or decree for payment out of the estate.

On the other hand I think that once having accounted and there being accounts prima facie in order showing B to be a creditor of the estate, the onus will then fall upon the beneficiary to show that account notwithstanding, B is in some special default.

4. It was for reasons above indicated indemnity and subrogation, defective frame of the suit, and onus, that leave to defend was given to the receiver in this case. The receiver is given leave to compromise the suit upon the terms mentioned in the letter placed before me of 12th May 1941. He may take the costs of this application out of the estate as between attorney and client. Certified for counsel.