
(1870) 05 CAL CK 0004

Calcutta High Court

Case No: Regular Appeal No. 268 of 1869

Mi Khan Mhaw

APPELLANT

Vs

Nga Tha Ya

RESPONDENT

Date of Decision: May 8, 1870

Judgement

Norman, J.

The plaintiff, who is one of the widows of Nga Tha, brought this suit against Mi Kho Oo, another widow of Nga Tha, who had obtained a certificate, under Act XXVII of 1860, for the administration and division of the estate of Nga Tha. The Recorder found that the property of Nga Tha, which had come to the hands of the defendant, Mi Kho Oo, since the decease of Nga Tha, consisted of 316 logs of teak timber; that the plaintiff, as one of the widows of Nga Tha, was entitled to a moiety of the clear residue of the property; that, from the accounts filed, it appeared that the greater portion of the assets had come into the hands of, and had been disposed of by, Nga Tha Ya, as agent for Mi Kho Oo.

2. The Recorder ordered that Nga Tha Ya should be made a co-defendant. Nga Tha Ya appeared, and, by his advocate, contended that he ought not to be made accountable to any body but the defendant. Mi Kho Oo, whose agent he was. The Recorder overruled the objection. The case proceeded, and eventually the Recorder came to the conclusion that Nga Tha Ya was liable, as an accounting party to the estate, in rupees 10,128 actually realized by the sale of the timber by one Nga Mazin, or MOUNG SHOAY NYI, to Mr. Hannay. From this amount he deducted rupees 4,033-5, which he allowed as having been properly expended on account of the estate by Nga Tha Ya, and rupees 2,443 paid by him to Mi Kho Oo, on the like account; and directed that Nga Tha Ya should pay the balance, rupees 3,651-11, into Court.

3. Nga Tha Ya appeals from the decree so far as it affects him.

4. The first objection taken by Mr. Montriou was that the Recorder ought not to have made Nga Tha Ya a party to the suit, inasmuch as he was a mere agent accountable only to his principal, Mi Kho Oo, the holder of the certificate under Act XXVII of 1860, and that

he had, in fact, rendered a full account to her.

5. But the defendant, Nga Tha Ya, is not a mere agent. He is not charged as an agent. The plaintiff does not seek to render him responsible as an agent. He got into his possession a large quantity of timber, which forms almost the whole of the estate of the deceased. If the Recorder is right in his findings, he has abused the confidence reposed in him by his employer, Mi Kho Oo, the holder of the certificate, and fraudulently misappropriated timber belonging to the estate of the deceased by a fictitious sale in the name of Moungh Shoay Nyi.

6. Mr. Montriou then contended that, in a suit against an executor or administrator for the administration of an estate, persons who have improperly possessed themselves of, or have been allowed by the executor to retain in their hands, assets belonging to the estate of the deceased, cannot be joined as co-defendants, except in cases where the personal representative is shown to be colluding with them, or to be insolvent. He said that it would be very hard if any agent employed by an executor was liable to have his transactions with the executor called into question in suits by creditors or legatees for the administration of the estate of the deceased; that the present suit contains no charge; and that it is not found that Mi Kho Oo, in her dealings with Nga Tha Ya, has not acted in good faith.

7. Now, we may observe, in the first place, that one of the several co-heirs who has obtained a certificate, and is empowered to collect debts, under Act XXVII of 1860, is in a very different position from that of an executor or administrator under English law. The executor fully represents the testator and his estate. The executor has a legal title to the personal estate. But the certificate does not vest in the holder of it any property or interest in the assets beyond what he may be previously possessed of as an heir of the deceased. The grant of a certificate does not clothe the holder of it with the character of personal representative of the deceased, further than to enable him to collect and give receipts for the debts due to the deceased. There is nothing, therefore, in the position of the holder of a certificate which would make it necessary for a creditor, or other heir of the deceased, to have recourse to him in the first instance, or which would prevent such creditor or heir from following the property which belonged to the deceased into the hands of any person other than the holder of the certificate in which he might find it.

8. So far as English cases go, the case of *Consett v. Bell* 1 Y. & C., 569 is a decision by the then Vice-Chancellor Knight Bruce that a person who prevailed upon executors to hand over some part of the testator's assets, under circumstances from which he must have known that the executors were acting hastily, improvidently, and contrary to their duty as executors, was properly made a party in a suit against the executors for the administration of the estate, though the bill contained no charge that the executors had colluded with him, or were insolvent.

9. We think that, in such a suit as the present, which is one for the administration and division of the estate of the deceased, the plaintiff is entitled to have an account of the entire personal estate; secondly, that a co-heir of the deceased is entitled to follow property into the hands of any person who has misappropriated it, and such right is not taken away by the certificate, which by section 4 is made conclusive only as against a debtor to the deceased, and in favor of debtors paying their debts to the person in whose favor it has been granted. Such right cannot be affected by any act done in excess of his authority of the holder of the certificate. It follows therefore that, in such a suit as above mentioned brought against the holder of a certificate, under Act XXVII of 1860, the plaintiff is entitled to join as a co-defendant any person who, with the consent of the person holding such certificate, has improperly possessed himself of property belonging to the deceased, and misappropriated it.

10. The next point made by Mr. Montriou was that section 73 of Act VIII of 1859 gives no power to the Court to introduce, as a co-defendant upon the record, a new accounting party.

11. I am strongly disposed to think that a very liberal construction should be put upon the words "persons who may be entitled" to, or who claim, some share or interest in the subject-matter of the suit, and who may be likely to be affected by the "result." I would construe them as enabling the Court to add any persons to the list of plaintiffs or defendants, in whose absence the subject-matter of the suit, or the claim of the plaintiff in the suit, cannot be fully investigated and disposed of. I am inclined to think that the words who may be likely to be affected "by the result," may be construed as likely, if added as parties, to be affected by the result of the investigation and determination of the question in the cause. This will shut out cases like Joy Gobind Doss v. Gouree Proshad Shaha 7 W.R., 202, where the added defendant claimed adversely, both to the plaintiff and the original defendant, and consequently his interest could not be affected by the result of the decision of any question between them.

12. In one sense it may be said that a person who is not a party to a suit cannot be affected by a decree pronounced in it. In the present case, the subject of the suit is for an account and partition of the estate of Nga Tha. The defendant says that, as to certain timber, part of that estate, he has sold and duly accounted for it. The plaintiff says that he has misappropriated this timber, and is bound to account for its value. I think that the possession of the timber, and the claim to have accounted for it, constitute a sufficient interest in the subject-matter of the suit to justify the Recorder in adding him as a party u/s 73.

13. But even if that were not so, if the 73rd section is not to receive the construction which I would put upon it, the result is this:--The defendant by an irregular order has been made a party to the suit; he has been summoned, made his answer, and after full trial, a decision has been pronounced against him. If there was any error in making him a party to the suit at the stage in which he came into it, section 350 would probably prevent us

from saying that the decree should be reversed on the ground of such irregularity.

(¹) Act VIII of 1859, section 73.--"If it appear to the Court, at any hearing of a suit, that all the persons who may be entitled to, or who claim, some share or interest in the subject-matter of the suit, and who may be likely to be affected by the result, have not been made parties to the suit, the Court may adjourn the hearing of the suit to a future day to be fixed by the Court, and direct that such persons shall be made either plaintiffs or defendants in the suit as the case may be. In such case, the Court shall issue a notice to such persons in the manner provided in this Act for the service of a summons on a defendant."