(1917) 07 CAL CK 0043

Calcutta High Court

Case No: Appeals firm Original Decrees Nos. 364, 413 and 414 of 1914 and Nos. 153 to 167 of 1915

Sudhir Chandra Das		APPELLANT
	Vs	
Gobinda Chandra Roy		RESPONDENT

Date of Decision: July 5, 1917

Final Decision: Allowed

Judgement

Chitty, J.

These are eighteen appeals filed by Sudhir Chandra Das, the infant adopted son of Srish Chandra Das, through his guardian ad litem Mr. A.C. Banerjee and by Mr. K.B. Dutt, Receiver of the estate of Srish Chandra Das, against as many decrees of the First Subordinate Judge of Dacca. The eighteen suits were heard by the Subordinate Judge and disposed of by him in one judgment. The main questions are common to all these suits but there are points peculiar to some of them which must be separately dealt with. The Subordinate Judge has held the estate of Srish Chandra Das responsible for the debts claimed in these eighteen suits absolving the executor from personal liability. It will be convenient to deal first with the questions which are common to all the suits and then to deal with any points peculiar to any one or more of them.

2. The facts are not seriously disputed. Srish Chandra Das was a zemindar and banker carrying on business at Dacca and elsewhere. He had inherited the business from his grandfather Raj Chandra and his father Pratap Chandra. The business was carried on in the name of Issur Raj Chandra Pratap Chandra Das. It is with this banking business that we are concerned in these appeals. The method of business appears to have been to take deposits from the public and pay them interest at the bank rate, while presumably out of those deposits, loans were made to other persons at a higher rate of interest. The business undoubtedly had a good name in the district and many people were found willing to entrust their moneys to Srish Chandra Das. The method of taking deposits was on receiving money from a person to pass to him a hundi payable at 90 days'' sight or a promissory note or even a

plain hatchitta. These documents appear to have been given rather as evidence of the deposits than as negotiable instruments; that is to say the depositor was often willing to leave his money with Srish Chandra Das, long after the due date of the hundi or promissory note had expired. But we understand that the hundis and promissory notes were, as a matter of form, renewed from time to time. Srish Chandra Das died on 12th December. 1904, having the day previous made his will, of which he appointed his wife, Rajeswari Chaudhuraui, Defendant No. 1, executrix and his cousin and servant, Rajani Mohan Das, Defendant No. 2, executor. The will is very short and simple and no question turns upon its construction. He empowered his wife to adopt Nirmal Chandra Das, the son of his daughter Sarojini or failing him, any other person. To the son so to be adopted the testator left the whole of his estate, subject to an allowance of Rs. 100 a month to be paid to his two eldest daughters and two houses to be given to them. The testator left him surviving, besides his wife Rajeswari, four daughters : Sarojini, who married Bankim Chandra Chaudhury and whose son Nirmal Chandra was to be adopted; Indumati, who married Bepin Behari Biswas; Promila, who married Gnanoda Roy Chowdhury (known as Raja of Dubalhati); and Sukumari. On the 22nd February, 1905, an application was made to the District Judge of Dacca for probate of the will by the executors. The testator''s daughter Indumati filed a caveat and on 4th April, 1905, Babu Chandra Kumar Dutt was appointed administrator pedente lite. The probate case was soon afterwards settled. Indumati was paid Rs. 30,000 out of the estate and withdrew her caveat. Probate was accordingly issued to the executrix and executor on 22nd May 1905. On 26th April, 1906, Rajeswari adopted the boy Nirmal Chandra Das, who was then given the name of Sudhir Chandra and who is one of the Appellants before us. The executors continued to carry on the business of the testator and for that purpose appear to have borrowed very large sums of money. Their management was not successful and the estate became more and more heavily involved.

3. On 26th April, 1912, a suit was filed on the Original Side of this Court (suit No. 415 of 1912) by Sudhir Chandra Das, through his adoptive sister and next friend Promila against the executrix and executor. In that case after contest a preliminary decree was passed by Chaudhuri J. on 6th May, 1913. Notices were issued in that suit to all the 107 creditors of the estate and we are told that among the creditors all the Plaintiffs now before us preferred their claims. The business had gone from bad to worse and in 1912, it was finally closed. In that year and in 1913, 75 suits were filed against the executors of the estate by various creditors--6 in the High Court and 69 in the mofussil. Of these the High Court suits and 51 mofussil suits were stayed. The 18 suits now before us were not stayed and have gone to decree. We think that the Subordinate Judge did not exercise a wise discretion in declining to postpone the hearing of these 18 suits also and allow these Plaintiffs to prove in the administration suit along with the rest of the creditors of the estate. The matter was brought to his notice but he appears to have declined to act without a specific order

of this Court upon himself. If his decrees against the estate were in other respects proper and could be supported even then it would give the present Plaintiffs a somewhat unfair advantage over the other creditors of the estate because they would come in with their claims already decided and increased by the costs of hearing in their several suits. It should be stated that in the administration suit Gnanoda Nath Roy Chowdhury was appointed Receiver. His place is now held by Mr. K.B. Dutt. In the administration suit, Promila was removed from the position of next friend and Mr. S.P. Bose was appointed on 27th July, 1912. Later his place was taken by Mr. A.C. Banerjee. On the 12th August, 1912, Gnanoda Nath Roy Chowdhury as Receiver took possession of the estate and it was at or about that time that the business was closed.

4. For the most part, the debts now in question in these 18 suits were incurred by the executors between the years 1909 and 1912. In two cases (suits 21 and 215) it is alleged that the hundis were in renewal of former hundis and that those debts were actually incurred in the life-time of Srish Chandra Das. In another suit (No. 51) it is said that the hundis were in renewal of debts incurred by Rajeswari when she was heiress of the estate before the adoption of Sudhir Chandra Das. The main question in these appeals is whether the decrees should have been passed, as they have been passed, against the minor and the Receiver, that is to say, against the estate of Srish Chandra Das and not against the executrix and the executor personally. It is admitted that the claims in all these 18 suits are based on hundis written by an employee of the firm and accepted by Rajani Mohan Das as executor. Rajani Mohan Das died pending the appeals and his sons have been brought on the record as his legal representatives.

5. It was argued by the Learned Counsel for the Plaintiff in Appeal No. 364 which is the main appeal before us, that the executors had power to carry on the business, to borrow money for that purpose and to bind the estate by those borrowings. A long and elaborate argument was addressed to us as to the position of an executor under the Hindu Law. It was said--and rightly said--that before the passing of the Hindu Wills Act (XXI of 1870) he was a manager. It was not until the Hindu Wills Act incorporated Section 179 of the Succession Act that the executor acquired a statutory position and that the estate of his testator vested in him. It was conceded that the powers of an executor under the statute were, if anything, larger than those which he possessed before and it was said that no powers which he possessed before had been taken away. It was argued that, widow or a guardian of a minor or a (sic) was a manager, therefore an executor, who was also a manager stood in the same position. The argument is obviously fallacious. The analogy is in no sense complete and the cases which deal with the peculiar powers of widows, guardians or shebaits have really no bearing upon the present question. A very large number of cases dealing with such persons and their powers were cited before us and I have been at some pains to examine those decisions. I am, however, entirely unable to see that they afford any assistance for the decision of these

appeals. We have to deal with executors and their powers and duties as such. An executor under statute is the legal representative of a deceased person for all purposes and all the property of the deceased person vests in him as such. Section 4 of the Probate and Administration Act (V of 1881) is a reproduction verbatim of Section 179 of the Succession Act (X of 1865), which was made applicable to Hindus by Section 2 of the Hindu Wills Act. The executor is therefore in many respects in a different position from a Hindu widow succeeding to her husband''s estate, a guardian of a minor, or a shebait of an idol. The estate of the testator is absolutely vested in the executor for the purpose of administration and he can deal with it as he pleases, subject, of course, to his responsibility as executor for the due administration of the estate. His powers are defined in Chapter VI of the Probate and Administration Act while his duties are dealt with in Chapter VII. One of the duties of an executor is to collect with reasonable diligence the property of the deceased and the debt., that were due to him at the time of his death (Section 100). By Section 105 debts of every description must be paid before any legacy. It has been held in several cases in this Court that the executor who borrows money in the course of the administration for the purposes of the estate is personally responsible for the in-payment of such debts, though he is (sic) of the estate for such borrowing, if he shows that it was reasonably and properly much. This principle was laid down in England in the cases of Labouchere v. Tupper (1857) 11 Moo. P.C. 198 and Farhall v. Farhall (1871) L.R. 7 Ch. 123. It has been applied to the case of Hindus in at least three cases decided by the Court : Romanath Paul v. Kanai Lal Dey (1894) 7 C.W.N. 104, Debendra Nath Biswas v. Hem Chandra Roy (1903) ILR 31 Calc. 253 and Satya Prashad Pal Chowdhry v. Matilal Pal Chowdhry (1900) ILR 27 Calc. 683. It is true that in the last-mentioned case the Court held the estate liable on hatchittas executed by the executrix but that decision was based on the peculiar facts of that case. Farhall v. Farhall (1871) L.R. 7 Ch. 123 was referred to and the remarks of Mellish L.J. were applied. The English law as stated in various passages in Williams on Executors was also accepted. I do not think that the principle of an executor''s personal liability, as laid down in England and accepted by this Court as applicable to Hindu executors, can now be disputed. But it was said that those cases are distinguishable from the present inasmuch as the debts there dealt with were ordinary debts on contract and not obligations undertaken in the conduct and for the purposes of business. It was argued that a business in India is on a different footing from a business in England--that it is here an heritable asset, which passes on the owner''s death to his heirs. There is no doubt some distinction between the two but it is not a very real one. In England executors do and must, carry on their testator''s business for the purpose at any rate, of winding it up. As to how long they can do so is a matter to be considered in every case. Sometimes the conduct of a business by executors in England has been prolonged over a large number of years as for instance, where a testator has directed in general terms that the sale and conversion to his property might be postponed for such period as to the executor should seem expedient : see In re Crowther Midgley v. Crowther (1895) 2 Ch. 56. In India a business such as this,

is undoubtedly a heritable asset : see Sakrabhai Nathubhai v. Maganlal Mulchand (1901) ILR 26 Bom. 206, 215. It will pass to the owner''s heirs, and in the case of a will, will vest in his executor. In respect of the duties of the executor in carrying on that business--whether he does so for the purpose of winding it up, or of making it over as a going concern to the person or persons entitled to inherit it, there does not appear to be any difference between his duties in so doing and his duties in dealing with any other part of the testator''s estate. An executor may pledge any portion of his testator''s estate in order to raise money for the purpose of administration e.g. mortgaging a zamindari for the payment of Government revenue. I am unable to see any distinction between his borrowing money for other purposes of the estate and his borrowing money in order to carry on a business. In either case he can only do so for the benefit of the estate; and in so borrowing the responsibility rests entirely upon him subject only to his ultimate right to be indemnified out of the estate.

6. It appears to me, therefore, that in these cases the decrees ought undoubtedly to have been passed against the executrix and the executor personally subject to their right of indemnity against the estate if in the administration suit they showed that the borrowing was in all respects proper and for the benefit of the estate : I must of course assume that they might be able to show that the borrowing was for the benefit of the estate. Here the facts, so far as they have been investigated, point rather in the other direction.

7. The learned Subordinate Judge has, I think, fallen into a serious error in shutting out evidence of anything like mismanagement on the part of the executrix and executor. He has also held that the question of indemnity cannot be gone into in this case. The latter would be a correct decision, if he were making the executors liable; but it is clearly wrong if he is making the estate liable because in that case he has shut out any question of the propriety or impropriety of the executor''s conduct in borrowing these moneys. Even on the present imperfect elucidation of the facts, it would appear that the executors acted recklessly in carrying on this business. The debts of the business at the time of the testator''s death, we are told, amounted to about six lakhs of rupees. The executors continued to add to that liability and only succeeded in paying off a portion of it. The result was that the business after 6 or 7 years of such management was found to be insolvent and had to be closed. Rajani Mohan Das himself stated, that, had it been closed at Srish''s death, the whole estate would have been ruined. This was probably an exaggeration, but it shows that the liabilities of the business as distinct from the rest of the estate, were far in excess of its assets, for I do not think that the whole estate including the zamindaris can properly be regarded as assets of the business. No doubt looking at the testator''s estate as an entire whole, they might in a sense be so regarded. Rajani Mohan Das also admitted that the executors incurred a liability of some Rs. 50,000 in order to invest in immovable property worth Rs. 70,000 the balance presumably being met from other portions of the estate. If the business was in that condition at

the date of Srish''s death it is difficult to see how the executors were justified in borrowing for such a purpose. Nor could they be justified in incurring further debts in the vain hope of saving the business as a going concern.

8. As to the liability of Rajani Mohan Das, or rather (as he is dead) of his estate there can be no question. It was argued on behalf of Rajeswari, Defendant No. 1, that she had nothing to do with the business and that she was not accountable for the acts or defaults of her co-executor. The evidence, however, shows that this contention is not correct. It was she who decided to carry on the business after her husband''s death and did in fact carry it on. She appointed the manager Babu Chandra Kumar Dutt and the evidence shows that to some extent she looked into the details of the business. She was at that time in the position of heiress to her husband''s estate because until the adoption took place, there was a partial intestacy. She was therefore in the dual capacity of executrix and heiress. She cannot, however, escape her responsibility as executrix by pleading that she gave orders in the other capacity. The arguments addressed to us for the Plaintiffs Respondents appear to me to be somewhat inconsistent, because it was conceded that the executors could not charge the estate except for moneys properly borrowed and that the creditors were bound to make enquiries to see whether they were justified in lending to the estate and yet the Plaintiff''s seek to make the estate liable without any investigation of those matters. That the Plaintiffs made no such enquiries is clear. There is no evidence of anything of the kind and it does not appear to have been contended before the Subordinate Judge that they made any such enquiries at all.

9. It was argued for the Plaintiffs that, as the estate had vested in the widow as heiress on the testator''s death and in the adopted son from the date of adoption he being under the guardianship of his mother Rajeswari, the estate would be bound as she could assent to the borrowing of these moneys, first in her capacity as beneficiary and then in her capacity as guardian of the minor beneficiary. This is also fallacious because the estate was wholly vested in the executors as such and they were responsible till such time as the administration was complete. Admittedly, it is not yet complete and the propriety of their borrowing may yet be investigated in the administration suit. It should perhaps be stated that there is no provision in the will authorising the executors to carry on the business. So far as they did so, they did it subject to the general law in such matters. In suits Nos. 21 and 218 (Appeals Nos. 758 and 163) it was stated that the hundis were in renewal of former hundis and that the original deposits had been made in the life time of Srish Chandra Das. It was urged that in these suits at any rate the decrees should be against the estate. No doubt, if the facts are as stated, these cases stand on a somewhat different footing to the rest. It may well be that in those cases the executors would have but little difficulty in establishing their right to indemnity and these creditors would get the benefit of that in the administration suit. There are, however, substantial objections to passing decrees at once against the estate in these cases. In the first place, the evidence that the deposits were made in Srish Chandra''s life time is by no

means complete. It is at present rather a matter of inference than of proof. Secondly, all evidence of mismanagement has been shut out, so that it is impossible to decide one way or another as to the propriety of the executor''s conduct in renewing these loans. Thirdly, the question of indemnity has not been and cannot be, gone into here and that must be determined before the estate can be charged. I think, therefore, that these claims should stand over with the others for investigation in the administration suit. On the whole, I am of opinion that these 18 decrees against the estate cannot stand but that they must be entered up against the executors in their personal capacity, subject to their right of indemnity, if any, in the administration proceedings.

10. This disposes of the main question which is common to all the appeals.

11. With regard to Appeals Nos. 157, 159, 161, 165, 413 and 414, it appears that the hundis in these suits were insufficiently stamped. In Appeals Nos. 161 and 414, the question cannot be gone into as the Subordinate Judge points out that the objection was not taken until after the admission of those hundis in evidence As to the other four appeals I think that the Subordinate Judge is right in holding that the Plaintiffs were at liberty to give the go-by to the hundis which were inadmissible in evidence and sue for the consideration. That appears to be settled law, so far as this Court is concerned : see Golap Chand Marwaree v. Thakurani Mohokoom Kooaree (1878) ILR 3 Calc. 314 and Pramatha Nath Sandal v. Dwarka Nath Dey (1896) ILR 23 Calc. 851. In the administration suit these creditors could certainly come in and claim the executors'' indemnity, if they had any, against the estate.

12. In appeal No. 156, the Plaintiff challenged the validity of the adoption of Sudhir Chandra Das. The learned Subordinate Judge held that the point was beyond the scope of that suit and declined to go into it. In this he was, I think, in error. If Sudhir Chandra Das was on the record as the beneficiary representing the estate, it is clear that the estate could only be represented by him if he was in fact such beneficiary. That would depend on the validity of his adoption. If the point was raised, as in this case, it undoubtedly was, the lower Court ought, I think, to have gone into it. In the view that I take of the liability of the executrix and the executor, the matter becomes of little importance as the suits must fail against Sudhir Chandra Das. In all the other cases the validity of adoption, though at one time in question, was not seriously disputed either in the lower Court or before us on appeal.

13. This is sufficient to dispose of the 18 appeals.

14. There is, however, another and equally substantial ground on which the decrees of the Subordinate Judge against Sudhir Chandra Das must necessarily be set aside. It is clear from the record in these various suits that the minor Sudhir Chandra Das was not properly represented in the Court below. In suit 91 of 1913 (Appeal No. 162), the minor Sudhir Chandra Das was never made a party at all. The Receiver, Kumar Gnanoda Nath Roy, was a party Defendant No. 5 and his place was taken by

Mr. K.B. Dutt on 22nd January 1914. The learned Subordinate Judge says that the absence of the minor was immaterial, as the estate was fully represented by the executors. Ordinarily speaking, no doubt, the executors could fully represent the estate but not in a case like this where their personal interests as executors were diametrically opposed to those of the minor beneficiary and the estate. The minor is spoken of throughout in all the suits [except suit No. 91 (Appeal No. 162) just mentioned] as represented by his guardian ad litem, Janaki Nath Roy. We have been at some pains to investigate the facts which led up to the appointment of Janaki Nath Roy in each and every one of these cases. It is not necessary to go through them in detail at this stage. It is sufficient to say that in most cases the Plaintiffs proposed, as was not unnatural, the appointment of Rajeswari as guardian ad litem of her minor son. In most cases the notices required by Order XXXII, Rule 3 of the Code of Civil Procedure, were issued on the minor and Rajeswari. In some cases no notice at all was issued. In many cases the service of the notice is left in doubt. In several cases there was no formal appointment of a guardian at all. In all the cases, however, it appears that Janaki Nath Roy who is a cousin of Rajeswari came forward of his own motion and asked to be appointed guardian ad litem. It is certain that he did so as the nominee of Rajeswari. Now it cannot be disputed for a moment that the interests of Rajeswari were wholly antagonistic to the interest of her minor son. It was, therefore, impossible that she could act as his guardian ad litem, nor was it right that her nominee should be appointed to that post. Another extraordinary circumstance is that one at least of the pleaders for the parties, namely Babu Birendra Chandra Sircar, was appearing both for the minor and his mother. In other cases we find that the pleaders in the Court below were occasionally to be found first on one side and then on the other. Thus Babu Peary Lal Das, who appears throughout as the pleader of the minor or of the Receiver, appears in one case to have made an application for the mother. He- appears in one case at least to have held a vakalatnama for Rajani Mohan Das (see the decree in suit 91 of 1913). On 29th May, 1914, directly the hearing was over, Janaki Nath Roy put in a petition in all the suits (except No. 91 of 1913) praying to be relieved of his guardianship. This was granted on the 20th June, 1914, when Mr A.C. Banerjee was appointed in his place. I should not be disposed to lay such stress on the absence in some cases of a formal order of appointment, in view of the fact that the cases were all tried together and Janaki Nath Roy was formally appointed in most of them. The substance, however, of the objection is that the minor was not properly represented or his case, which was diametrically opposed to that of the executors, properly put before the Court by Janaki Nath Roy. This is shown by the fact that no evidence was called on his behalf, the only witness nominally called by him being a pleader who was called to prove the affidavit in the petition for probate, in other words to give evidence in favour of the executors. The cases were, except for some desultory cross-examination, conducted practically without opposition on behalf of the minor. As I have before observed the learned Subordinate Judge (in my opinion erroneously) shut out the evidence of mismanagement on the part of the executors which the pleader for the

minor wished to elicit by cross-examination. It may be said that in most of the cases the Receiver was also a party and that he could and did, properly represent the estate. He was made a party simply in his capacity as Receiver. He does not appear to have taken any active part in the proceeding. It may be that he had no funds in his hands to enable him to conduct the defence in a more strenuous manner. The fact remains that the real Defendant brought on the record to represent the estate was the minor Sudhir Chandra Das and his interests, which were at stake, have not been properly safeguarded in the trial in the Court below. The learned Subordinate Judge appears to have taken a somewhat one-sided view of the case throughout and instead of endeavouring to protect the minor and his interests, has been too ready to protect the executors at the expense of the minor and his estate. There appears to be no foundation in fact for the suggestion that in the Court below the executors and the guardian ad litem of the minor were combining to defeat the claims of the creditors. The impression left on my mind, after a full consideration of the whole case, is rather that the executors were playing into the hands of the creditors in order to relieve themselves of liability by throwing it on the estate.

15. I would accordingly set aside all these 18 decrees of the Subordinate Judge and enter up decrees for the several amounts against the executrix and the executor personally (the executor now being represented by his sons) with liberty to the Plaintiffs to claim the executor''s indemnity, if any, against the estate in the administration proceedings.

16. The appeals must be allowed with costs, that is to say, the suits will be dismissed against the present Appellants with costs, one set only in both the Courts. The Plaintiffs will have their decrees against the executrix and the executor personally with costs in both the Courts. The executrix and the estate of the executor will also be responsible jointly with the several Plaintiffs to the Appellants for their costs of these appeals.

Beachcroft, J.

17. I agree.