
AIR 1921 Bom 424 : (1921) ILR (Bom) 75

Bombay High Court

Case No: None

Essafally Alibhai heir of
Alibhai Tyebji and of
Mariambo Tyebji

APPELLANT

Vs

Abdeali Gulam Hussain
and Others

RESPONDENT

Date of Decision: Feb. 26, 1920

Citation: AIR 1921 Bom 424 : (1921) ILR (Bom) 75

Hon'ble Judges: Norman Macleod, J; Heaton, J

Bench: Division Bench

Judgement

Norman Macleod, Kt., C.J.

The plaintiff filed this suites the heir of his father Alibhai Tyabji and his mother Mariam bu wife of Alibhai

Tyabji for an account and administration of the estate of one Gulam Hussein. Gulam Hussein died in 1904 leaving as his heirs according to Shia

Mahomedan Law his father and mother, who are each entitled to 1/6th and also his widow and his son and two daughters. The son is defendant

No. 1 in the suit. The other defendants are descendants of the daughters.

2. The suit has been dismissed in both Courts on the ground that an administration suit in reference to Gulam Hussein"s estate did not lie; that the

only suit that could lie was for partition on payment of proper Court-fees; and that the suit was not brought in time. I must confess I cannot follow

the reasoning of the learned Judges in the Courts below in support of those findings. I cannot myself see why an administration suit in this case

cannot lie, considering that Gulam Hussein died, in 1904; that his estate has never been distributed; and that his estate has never been administered.

It is impossible for any one who could prove he was entitled to an interest in the estate to get that interest until the estate has been ascertained by

proper administration. It is perfectly true that under the law there is no need oil the death of a Mahomedan for Letters of Administration to be

taken out to his estate, and the result, as I Lave often pointed out, is that frequently the heirs live in harmony after his death without distributing the

estate. Some of them may die leaving their heirs, and it is only when disputes arise in the family that the trouble begins. The point is abundantly clear

that if there is an estate it can be administered, and if a party who has an interest in ""that estate has asked the Court to administer that estate, even if

he knows exactly what it consists of, he is entitled to come to Court and ask for a preliminary decree for the administration of that estate. He is not

bound, even although he knows what the estate consists of, to file a suit for partition. He may do so or he may not. That is no reason why if he

wishes to file an administration suit to get the estate administered in the proper way, he should not do so. It does not follow that because A dies

leaving certain definite property that that property will be divided amongst all the heirs. He may have left debts and charges on the estate, and it is

only when the estate has been administered, and the usual administration accounts have been taken that the interests of those entitled to shares as

heirs can be ascertained. The plaintiff in this case stands in the shoes of Alibhai and Mariambu, and he is entitled to come to Court and ask the

Court to decide what was the estate of Gulam Hussein, and to decide what was the interest of Alibhai and Mariambu in that estate. It maybe

discovered when the suit is heard on the merits that Alibhai and Mariambu have no interest in Gulam Hussein"s estate. But that has nothing to do

with, the preliminary point which has been decided -against the plaintiff. In my opinion the decree of the lower appellate Court must be set aside,

and I find that the suit as framed is perfectly correct, and that, therefore, the suit should proceed to be tried on the merits on the remaining issues

which were framed in the trial Court, but not decided. The plaintiff will have the costs in this Court and in the lower appellate Court. Costs in the

trial Court to be costs in the cause. Proper Court-fees must be paid as on. an administration suit. I may add that no question of limitation arises.

Heaton, J.

3. I concur that the suit is not bad merely because the plaintiff sues for an account and administration of the estate of the deceased Gulam Hussein.

From the circumstances which appear such a suit is perfectly proper, and it may turn out to be an absolutely necessary thing for the plaintiff to sue

for. Gulam Hussein died in 1904 leaving amongst other heirs his father and mother. They have since died, and their shares have passed to the

plaintiff. He claims, therefore, that he is a sharer to the extent of $\frac{1}{3}$ in the estate of Gulam Hussein, and I understand that what he claims is either

to get $\frac{1}{3}$ of the estate of Gulam Hussein as it was when he died; or else to get $\frac{1}{3}$ of the estate as it was when the suit was brought. Which of the

two he really sues for and many other matters can only be determined by going into the case on its merits. Unfortunately instead of doing this, the

lower Courts dealt with the matter on a preliminary issue, and I am afraid they were somewhat influenced by the-fact that an administration suit is a

very cheap suit to "bring. The Court-fees on such a suit are small, whereas the" Court-fees on a partition suit vary with the value of the property to

be partitioned. But it does not in the least matter to a Judge whether a suit is a cheap suit or a dear suit. The plaintiff could bring his suit in any form

which the law allows. Seeing that lie wants an inquiry into what is the estate of Gulam Hussein, and also apparently wants an inquiry into what that

estate was when Gulam. Hussein died, and. what has become of it since, that is to say, seeing that lie wants to trace the successive development of

the estate from Gulam Hussein"s" death up to the present moment, it seems to me quite impossible to say that lie is not entitled to bring an

administration suit. Possibly his claim may be successfully met in a variety of ways, but it cannot be defeated on the bare ground that the suit is bad

in form. I think, therefore, that this suit was wrongly dismissed on a preliminary point, and that we must set aside the decrees of the lower Courts

dismissing the suit, and remand it to be disposed of on its merits. The plaintiff will have the costs in this Court and in the lower Appellate Court.

Costs in the trial Court to be costs in the cause.