Mahomed Hussein Haji Gulam Mahomed Ajam Vs Aishabai

Court: Bombay High Court

Date of Decision: July 5, 1934

Citation: AIR 1935 Bom 84 : (1934) 36 BOMLR 1155 : 155 Ind. Cas. 334

Hon'ble Judges: B.J. Wadia, J

Bench: Single Bench

Judgement

B.J. Wadia, J.
This is a suit for the administration of the estate of one Haji Gulam Mahomed Ajam, who died in Bombay, on or about

March 1, 1928, leaving him surviving as his only heirs, according to the Sunni Muhammadan law by which he was governed, a widow, two sons

and three daughters. He left a will in the Gujarati writing dated January 9, 1928, of which he appointed his widow and one of his daughters, being

defendants Nos. 1 and 2, executrices. Defendants Nos. 1 and 2, however, have not obtained probate of the will. The plaintiff and defendant No. 3

are the sons, and defendants Nos. 4 and 5 are the two other daughters, of the deceased. He died possessed of properties, moveable and

immovable, of large value in Bombay, Rangoon, and other places in India. Some of his properties were equitably mortgaged to Mr. F. E. Dinshaw

during his lifetime, and other properties were mortgaged in favour of the Central Bank of India, Ltd.

2. The suit was filed on June 19, 1928. On November 26, 1928, plaintiff took out a notice of motion for appointment of a receiver of the estate,

and lengthy affidavits were filed on either side. The notice of motion was dismissed, and defendants Nos. 1 and 2 were allowed to continue in

management of the estate as the executrices of the will of the deceased. Thereafter, none of the defendants filed their written statements. Defendant

No. 4 and her husband were residing at Mauritius. She came to Bombay with her husband some time about the end of 1929, and inspection of the

books of account relating to the estate of the deceased was given to her. It is alleged that full inspection has not been given, whereas defendants

Nos. 1 and 2 have stated that defendant No. 4"s "Mehta" attended at their attorneys" office from June 1, 1931, till February 27, 1932, for one

hundred and ninety-eight days in all, and three to four hours per day, and full and free inspection was given of every book and paper that was

asked for. The inspection was not completed, as the "Mehta" was dismissed. She filed her written statement in February, 1933, and has charged

defendants Nos. 1 and 2 with diverse breaches of trust, alleging that they have misapplied and wasted the estate of the deceased and made

unauthorized investments and payments. A schedule giving the particulars of the alleged maladministration is annexed to the written statement. She

accordingly prays for an account against defendants Nos. 1 and 2 on the footing of wilful default, and for the appointment of a receiver of the

estate of the deceased, except such portion thereof as is in the possession of the Central Bank of India, Ltd., with power to recover the income

and profits thereof. Defendants Nos. 1 and 2 put in their written statement only recently, as it was alleged on their behalf that certain negotiations

were going on for an amicable settlement between the parties. An objection was taken to their written statement being taken on the file at this

stage, but I thought that the executrices should be heard in their defence, and I ordered the written statement to be taken on the file. They allege

that on March 31, 1926, the deceased made a gift of certain sums of money in favour of defendant No. 1 together aggregating Rs. 1,20,618-11-3.

They further allege that he also made a gift of a sum of Rs. 21,487 onÃ¯Â¿Â½ the same day in favour of two of his daughters, viz. defendants Nos. 2

and 5. They, therefore, contend that they and defendant No. 5 are creditors of the estate for the said sums. Defendants Nos. 1 and 2 admittedly

took possession of the properties after the death of the deceased. They made no inventory of the properties, but are willing to render an account of

their management of the estate since the death of the deceased.

Some time after the death of the deceased suits were filed in this Court against defendants Nos. 1 and 2 as executrices and other heirs of the

deceased both by Mr. F. E. Dinshaw and the Central Bank of India, Ltd., to realize their mortgage securities. Mr. Dinshaw"s claim has since been

entirely paid off, and by an order of the Court dated July 27, 1931, defendants Nos. 1 and 2 were allowed to enter into a fresh mortgage in favour

of the Bank. Pursuant to the order they created an equitable mortgage giving a first charge to the Bank on the Immovable properties of the

deceased in Bombay and two Immovable properties in Mahableshwar to secure the repayment of the sum of Rs. 42,00,000 with interest at six

and a half per cent. The mortgage is dated February 1, 1932, but even before that date, i.e., in or about September, 1930, defendants Nos. 1 and

2 had handed over the management of all the Bombay properties to the Bank. It is alleged in their written statement that this was done with the

consent of all the heirs. They continued to live in the family house known as "Chateau Ajam" at Narayan Dabholkar Road, Malabar Hill, but they

offered to vacate after the Bank took over the management. Defendant No. 2, Havabai, left the house about two years ago and went to live with

her husband at Chakla. Defendant No. 1 continued to reside in that house, but vacated in or about July-August, 1933. Thereafter, the Central

Bank of India, Ltd., filed suit No. 1914 of 1932 on the equitable mortgage in their favour, and by a consent order dated December 20, 1932, Mr.

H. C. Captain, the Secretary of the Bank, was appointed receiver of the shares belonging to the estate and lying with the Bank with the powers

mentioned therein, and the Bank agreed to pay to defendants Nos. 1 and 2 the sum of Rs. 400 per month for a period of three years beginning

from July 1, 1932, in consideration of their assisting the Bank in the realization of the mortgaged properties, and so long as they continued to act as

executrices and observed the terms of the order. It is also provided in the will of the deceased that defendants Nos. 1 and 2 should get Rs. 400

per month each after the death of the deceased, the words being ""in lieu of their services as long as my property is administered"". The will has not

been admitted to probate, but there is no statutory obligation on a Muhammadan executor to take out probate of the testator"s will. A

Muhammadan executor can establish his right in a Court without taking such probate : see Sir Mahomed Yusuf v. Hargovandas Jivan ILR (1922)

47 Bom. 231: S.C. 24 Bom. L.R. 753 following Shaik Moosa v. Shaik Essa I.L.R (1884) 8 Bom. 241. The will was not admitted by the plaintiff.

He refers to it in paragraph 3 of the plaint as an alleged writing purporting to be the will of the deceased, and evidence was led on behalf of the

executrices to prove the will in Court, and the will has been proved. There is, however, no dispute about its contents or its validity, as the testator

has directed that his estate should be distributed according to the principles of the Sunni Muhammadan Law.

3. The main issues for the Court in this suit are, whether defendants Nos. 1 and 2 should be ordered to account on the footing of wilful default,

whether the deceased made the gifts as alleged by defendants Nos. 1 and 2, and, if so, whether the same are valid and binding. The onus of

proving the gifts is on the alleged donees. The burden of proof of wilful default is, in the first place, always on the party who alleges the default. It is

for defendant No. 4, not merely to give proof of such default, but to prove clearly and affirmatively at least one act of wilful default to the

satisfaction of the Court before the Court can make a reference for taking accounts on that footing. It must also be shown that the estate has

suffered loss or damage, and that such loss or damage is due to circumstances of wilful neglect or default on the part of the executrices. It has,

however, been held that a debt is really the foundation of a decree on the footing of wilful default, and, if the debt is proved or admitted, the burden

shifts to the executors to show why they have not got in it : see Stevens, In re: Cooke v. Stevens [1898] 1 Ch. 162. Wilful default can, therefore,

only be decreed against executors in respect of something which the executors could have received but for their wilful default or neglect, and such

default or neglect must be proved by the party alleging it.

4. Defendant No. 4 has given a list of the particulars of amounts misapplied by the executrices or taken for their own use and wrongly debited to

the estate. It is annexed to her written statement. Before dealing with the same I may here mention that neither defendant No. 4 nor her husband

nor anyone on her behalf has given evidence in this case. The plaintiff has also not given any evidence, and though he does not allege any wilful

default in his plaint, he seemed to make common cause with defendant No. 4 at the hearing. Counsel for defendant No. 4 has selected two items

out of the particulars annexed to the written statement, one being a sum of about Rs. 30,000 which is described as ""amount due by Ahmed

Mahomed Saley Aloo of Rangoon in respect of outstandings of the deceased and rents and dividends recovered by him as the agent of the

executrices at Rangoon and not accounted for."" The other item is a sum of Rs. 25,000 which is described as ""amount advanced to Husseinbhoy A.

Lalji a friend of the executrices on personal security."" With regard to the first item of Rs. 30,000 it appears that Ahmed Mahomed Saley Aloo is

the brother of defendant No. 2''s husband, and as he was doing his own business at Rangoon he was employed by the deceased to look after his

Immovable properties at Rangoon during his lifetime. He continued to manage for six or eight months after the death of the deceased, but as the

executrices were not satisfied with his management, he was removed. The estate claimed from him a sum of about Rs. 28,000, but according to

him the amount due was much less. His indebtedness was settled on his return from Rangoon to Rander (near Surat) in 1929 or 1930, and on

September 8, 1930, he passed a promissory note for Rs. 25,000 in favour5 of defendants Nos. 1 and 2. According to his brother''s evidence he

suffered great loss in his business, and has since been unable to repay the amount of the promissory note. Defendant No. 1 also stated that Ahmed

Mahomed was living in very straitened circumstances at Rander. She said that she pressed him for repayment, but he was unable to pay, and he

wrote a letter to her and defendant No. 2 by post on September 10, 1931, acknowledging his liability for the said amount but praying that no suit

may be filed against him in view of his present financial condition. It was argued that that letter was written on September 10, 1930, and the date

was subsequently altered at the instance of the executrices in 1931 in order to show that the claim was not time-barred. There would, in my

opinion, be no meaning in passing a promissory note on September 8, and writing the letter immediately on the 10th. Further, for the purpose of

saving limitation, there was nothing to prevent the executrices from taking another letter in order to extend the period of limitation. It is true that the

debtor has not been called to give evidence, but I am not satisfied that the change in the date which is apparent was deliberately made for the

purpose alleged. If the executors have a well-founded belief that any action taken against the debtor to the estate will be fruitless, they are entitled

to withhold action, but the onus is on them to prove the grounds of their belief. Such grounds have been given both by defendant No. 1 as well as

by defendant No. 2"s husband who is the brother of the debtor, and I see no reason to disbelieve their testimony. Moreover, an executor has

always a right to settle a debt due to the estate. It has, therefore, not been shown to my satisfaction that this sum has been lost under circumstances

which make defendants Nos. 1 and 2 liable for wilful default. In any event the claim is not yet time-barred.

5. With regard to the second sum of Rs. 25,000, the promissory note that was passed in favour of defendants Nos. 1 and 2 was not executed by

Husseinbhoy A. Lalji, a friend of defendants Nos. 1 and 2 as alleged, but by the firm of Abdullabhoy Lalji & Co., of which presumably

Husseinbhoy A. Lalji is a partner. Moneys were advanced to their firm at six per cent, interest. Counsel for defendants Nos. 1 and 2 said that the

whole amount has been recovered, the only outstanding dispute being over a small sum of about Rs. 50 for interest. No evidence was led as to any

loss sustained by the estate, as there was some misunderstanding by which counsel for defendants Nos. 1 and 2 was led to believe that there was

no dispute between the parties, about the principal amount having been recovered, and that the only dispute was as to the rate of interest charged

to the debtors. Counsel for defendants Nos. 1 and 2 informed the Court that all the items of the sums recovered appeared either in the books of

their solicitors, or in the books of the firm of Abdullabhoy Lalji & Co., and that they were willing to produce the same whenever required. With

regard to the rate of interest it was argued on behalf of defendant No. 4 that the interest charged by Mr. F. E. Dinshaw as mortgagee was at first

seven per cent, per annum and subsequently was raised to seven and a half per cent. The interest on the mortgage in favour of the Bank is also six

and a half per cent. In either case the debt was secured. In this case the amount was lent on personal security at six per cent, per annum. The

deceased, however, had several accounts with the Central Bank of India, Ltd., and in his overdraft account he only paid five and a half per cent, to

the Bank up to his drawings to the extent of Rs. 20,00,000, and over that six per cent, per annum. I agree with counsel for defendant No. 4 that

the moneys of the estate should not have been lent by the executrices on personal security. Any executor who invests the moneys belonging to the

estate in an unauthorized or hazardous investment is liable for the loss arising therefrom, however prudent such an investment of his own moneys he

might think it to be. There is, however, no loss to the estate in respect of this debt, and defendant No. 4 has not succeeded in proving that there

was wilful default on the part of the executrices. All the other items in the list of particulars are generally instances of alleged acts of devastavit, and

the executrices will have to render accounts of their management. In my opinion, wilful default has not been proved, and if sufficient proof is not

given, the Court cannot order an inquiry as to liability based upon a supposed breach of default. It is of course open to the Court at any

subsequent stage of the proceedings upon application by a party and on his showing that there is sufficient evidence of wilful default to direct that

accounts may be taken on that footing. For the present there will be an order only for the usual and common accounts in an ordinary administration

suit.

6. The next question relates to the gift in favour of defendants Nos. 1, 2 and 5, referred to in paragraph 11 of the written statement of defendants

Nos. 1 and 2. It is alleged that on March 31, 1926, the deceased gave as a gift to his wife, defendant No. 1, a sum of Rs. 1,20, 618-11-3 made

up of three different sums which are entered in the Journal for 1925-1926. These three sums have also been credited to her account in the Ledger

for 1925-1926. On the same day a sum of Rs. 21,487 was given as a gift to defendants Nos. 2 and 5. Defendants Nos. 1 and 2 have given

evidence in relation to the gifts set up by them. Defendant No. 1 stated that her husband told her that he had given to her as a gift a sum of about

Rs. 1, 20,000 which was credited to her in his books. He said this about two years before he died, and also several times before that. The only

person present at that interview was defendant No. 2. About the gift to the daughters both defendants Nos. 1 and 2 stated that rupees two lakhs

were set apart for the marriage expenses of defendants Nos. 2 and 5, that the two daughters were both married at the same time in April, 1922,

and a balance of about Rs. 22,000 was left over. This balance was credited to the account of defendants Nos. 2 and 5. Defendants Nos. 1 and 2

also stated that the deceased asked them to withdraw the amount or any portion thereof as and when they liked, but that nothing was withdrawn

by the daughters as they did not need any amount, and defendant No. 1 stated that she withdrew about Rs. 10,000 in all after her husband''s

death. According to defendant No. 2 the conversation about the gift to the two daughters was after the conversation with defendant No. 1 about

the gift B to her, whereas according to defendant No. 1 the conversation about the gift to the two daughters was before the conversation about the

gift to her. In the written statement it is alleged that the gift was made to defendant No. 1 and defendants Nos. 2 and 5 on the same date. There is

no other oral evidence as to the gifts except the evidence of defendants Nos. 1 and 2. Defendant No. 5 has not been called. No other member of

the family nor any relation nor friend has been called to prove the alleged gifts.

7. Defendants Nos. 1 and 2, however, rely on certain entries in the books of account kept by the deceased for the purpose of proving the gifts.

His Lordship after discussing the evidence relating to these entries in the account books proceeded:

8. In my opinion these book entries, even apart from their genuineness which is challenged and which is not altogether free from doubt, are not

sufficient to support the alleged gift. The gift has nowhere been mentioned before, and is for the first time referred to in the written statement of

defendants Nos. 1 and 2. The deceased himself has not referred to it in his will. There is not sufficient evidence to show that the deceased intended

to make a gift. Book entries do not by themselves confer or determine the rights of parties: see Hariram Serowagee v. Madan Gopal Bagla (1928)

31 Bom. L.R. 710 There is nothing before me in the evidence to show that the deceased relinquished his control over these moneys and divested

himself completely of his beneficial interest therein, so that he could not have operated upon these sums if he wanted to. The mere fact that he did

not do so for a couple of years does not by itself prove any relinquishment. In any event the entries do not show that even if a gift was intended it

was completed by the deceased. The effect of these entries does not give to defendant No. 1 and defendants Nos. 2 and 5 a complete dominion

or right of property over the moneys or the right to use the same as and when they liked. They have no doubt deposed to certain statements

alleged to have been made to them by the deceased, and these are relied on as a declaration of his intention. But the statements are vague and

hazy, and I do not accept them. They are not supported by any other independent evidence. Under the Muhammadan law there must not only be a

declaration by the donor of his intention to make the gift, but the subject of the gift must be accepted by and on behalf of the donee, and delivery of

possession must be given to the donee in the manner which the subject of the gift is capable of. A relinquishment of control over the subject is

necessary to complete the gift : see Musa Miya v. Kadar Bax (1928) L.R. 55 IndAp 171 : 30 Bom.L.R.766. Delivery of possession is also

necessary, though, the delivery may be constructive in some cases, and manual delivery,, especially in the case of husband and wife, is not always

necessary. There is no evidence, however, of any possession, actual or constructive,, given to defendant No. 1 and defendants Nos. 2 and 5, and

the book entries in themselves do not amount to delivery of possession. It was argued that at any rate defendant No. 1 withdrew large sums of

money aggregating to Rs. 49,000 odd from the amount gifted to her, but I have already held that there is no evidence that she withdrew the sums

as against the gift. Defendants Nos. 2 and 5 admittedly never withdrew any amount at all. Defendants Nos. 1 and 2 tried to get over this difficulty

by alleging that they had no need. Further, no interest is credited either to defendant No. 1 or to defendants Nos. 2 and 5 in their account. The

''Mehta'' said that the parties were Musalmans who are against taking and giving interest, but in the same breath he admitted that there was an

interest account or Vyaj Vahi in the books of the deceased in which there are entries, both for interest received and interest paid. The ''Mehta'' in

his long examination has not even mentioned that these sums were gifted to defendant No. 1 and defendants Nos. 2 and 5, nor that his master had

told him that he had made the gifts. A gift of such large amounts would be generally known in the family and amongst relations. No evidence has

been called. It was also argued by counsel for the plaintiff that the gift to* the two daughters is a gift of money which is capable of division, and not

having been divided either by the donor or at any time after his death,, there is, strictly speaking, no gift under the doctrine of Mushaa known to the

Muhammadan law. It is not necessary for me to discuss that portion of the argument, for it has been held that this doctrine must be applied within

very strict limits. I am content to rest my decision on the evidence of defendants Nos. 1 and 2 and on the book entries relied on by them, and

considering both together I cannot say that the case of the alleged gifts has been made out. Why these sums were credited to defendant No. 1 and

defendants Nos. 2 and 5, and why these book entries were made, is not for the other side to explain. The onus lay on defendants Nos. 1, 2 and 5

to prove the gifts, and they have failed to discharge the onus. The gifts, if at all intended, were never completed, and not being completed are not

valid under the Muhammadan Law. Under the-circumstances no legal effect can be given to them.

9. The last issue is, whether each of defendants Nos. 1 and 2 is entitled to the remuneration of Rs. 400 per month as provided by the will or

otherwise. Under Clause 6 of the will, which has now been proved, each of the two executrices was to be paid out of the property of the

deceased Rs. 400 per month after the death of the deceased in lieu of their services as long as the property is administered,, that is, I take it,

administered by the executrices. It was argued that this provision was not binding upon the other heirs of the deceased, unless they consented

expressly or impliedly to this payment. The payment is a sort of commission payable to the executrices by way of remuneration. It is a gratuitous

bequest and not a debt: see Aga Mahomed Jaffer Bindanim v. Koolsom Beebee I.L.R (1897) Cal. 9 Cal. 9 and A. E. Salayjee v. Fatima Bibi

I.L.R (1922) Ran. 60 : 25 Bom. L.R. 301. Being payable to defendants Nos. 1 and 2, it is a bequest to heirs, and can only be rendered valid by

consent of the other heirs. Such consent need not be express. It may be implied by the unequivocal conduct of the other heirs. All the heirs of the

deceased are sui juris. He died in March, 1928, and the plaintiff filed the suit in June, 1928. In para. 4 of the plaint it is alleged that defendants

Nos. 1 and 2 were expending a larger sum than Rs. 400 per month allowed under the alleged will of the deceased. All the parties were presumably

aware of this provision, and defendant No. 4 has stated in para. 8 of her written statement that she will contend that by reason of the neglect,

default and breaches of duty on the part of the executrices they were not entitled to the commission of Rs. 400 a month as provided for by the will

of the deceased. Except defendant No. 4 none of the other parties has raised this contention. Inspection of the books has been taken by all the

parties. No protest was ever made by anyone of them, and they must be deemed to have impliedly consented to this payment of Rs. 400 per

month. It was further argued that every recurring payment of Rs. 400 per month is a gift in futuro, and, therefore, ineffective in Muhammadan law.

This, however, is not a gift out of the future income of the estate, for the testator has clearly provided that the remuneration must be paid out of his

property, meaning out of the corpus of the estate, and is, therefore, not, in my opinion, a gift in futuro.

10. I have, however, stated before that the Central Bank of India, Ltd., took over the management of the properties in Bombay in or about

September, 1930. In 1932 an equitable mortgage was created in favour of the Bank to secure repayment of Rs. 42,00,000. The Bank filed their

suit No. 1914 of 1932 against defendants Nos. 1 and 2 alone, and on the notice of motion for receiver an order was taken by consent on

December 20, 1932, in which the payment of Rs. 400 per month has been provided for. It was argued that this notice of motion was not served

upon the other heirs, and as they had no notice, the sum of Rs. 400 should be debited only to the shares of defendants Nos. 1 and 2 from and after

the date of the order, viz., December 20, 1932. Counsel for defendants Nos. 1 and 2 contended that this payment should be debited as against the

whole estate, for the order merely continued the provision made in the will. It is, however, only the figure of Rs. 400 mentioned in the will that the

Bank took for its guidance. The estate is not now administered by defendants Nos. 1 and 2. At least, such part of the estate as is still with them has

dwindled considerably. There is no question of any acquiescence or consent, express or implied, on the part of defendant No. 4, for in her written

statement filed in February, 1933, she has protested against this payment. None of the other heirs of the deceased made any protest. I would,

therefore, order that a separate account should be taken of the sum of Rs. 400 per month paid to defendants Nos. 1 and 2 from and after July 1,

1932, and that in taking the accounts of the estate the share coming to defendant No. 4 should not in any way be affected by payment of this sum

of Rs. 400 to defendants Nos. 1 and 2 after July 1, 1932.

11. Counsel for defendant No. 4 lastly applied for the appointment of a receiver. He said that notice had been served on defendants Nos. 1 and 2

on December 21, 1933, that she would press for the appointment of a receiver on the grounds of the alleged negligence on the part of defendants

Nos. 1 and 2. All the properties of the deceased, however, are now managed by the Central Bank of India, Ltd., except the Dumas house which,

it is alleged, is in the occupation of the plaintiff and the other heirs of the deceased, and certain houses at Rander which are in the occupation of the

heirs of the deceased. Counsel said that there were also certain ornaments belonging to the estate. Defendant No. 4 wrote to the attorneys for

defendants Nos. 1 and 2 alleging that defendant No. 1 had taken out certain ornaments from one of the safes at Rander, but in her attorneys'' reply

of January 21, 1931, she pointed out that it was only the ornaments of defendant No. 5 that were taken out to be given to her when she was sent

to live in her father-in-law''s house. It is provided by paragraph 4 of the will that the ornaments which remained in the possession of defendant No.

1 and the children and grand-children of the deceased had all been gifted to them during his lifetime, and none of his heirs and creditors were

entitled to the same. The only other property is the family house, and I have already stated before that defendants Nos. 1 and 2 offered to vacate

the same when the Bank took over the management in September, 1930, and have since vacated it. It is now lying vacant. No ground has been

made out for the appointment of a receiver.

12. After finding on the issues, his Lordship referred the matter to the Commissioner with certain directions to take the usual administration

accounts.

13. The only other question is one of the costs of this hearing. Several issues were raised, and on some of them defendant No. 4 has failed. On the

issue of the alleged gifts defendants Nos. 1 and 2 have also completely failed. I do not agree with counsel for defendants Nos. 1 and 2 that the

costs of proving those gifts should be considered part of the costs of administration of the estate. This was an inquiry about an adverse claim made

against the estate. On the issue of wilful default it is still open to the parties to apply to the Court on further evidence for a direction that accounts

should be taken on that footing, but until then it will be difficult to ascertain what exactly will be the costs of and incidental to that issue. It may be

that no wilful default is proved, and such costs may have to be set off against the costs which defendants Nos. 1 and 2 may be ordered to pay in

respect of the issues relating to the gift. Taking all these facts into consideration, the only order I propose to make at present is that all costs and

further directions be reserved until the Commissioner has made his report.