A.E. Salayjee Vs. Fatima Bibi

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SooperKanoon Citation : sooperkanoon.com/345772

Court : Mumbai

Decided On : Nov-16-1922

Reported in : (1923)25BOMLR301

Judge : Ameer Ali, ;Phillimore, ; Salveson and ;Lawrence Jenkins, JJ.

Appellant : A.E. Salayjee

Respondent : Fatima Bibi

Disposition : Appeal dismissed

Judgement :

Phillimore, J.

1. The dispute in this case arises in the course of the administration of the estate of a wealthy Mahomedan who died on February 25, 1907, having left a will dated June 15, 1903, which was admitted to probate on March 18, 1908. By that will he left his only son, the defendant in this suit and the present appellant, his executor, and he gave him certain powers and professed to entitle him to a commission of ten per cent, on the proceeds of the sale of all his estate. That provision is twice over expressed, but substantially the effect is the same on the two occasions. He also, instead of reserving, as by Mahomedan law he could, one-third of his estate for his general disposition, reserved somewhat less-one fourth, and with regard to that fourth he directed the executor, whom he described also as 'executor and

trustee' to pay certain charitable legacies amounting to Rs. 13,700, directing at the same time that none of his heirs or any other persons should be entitled to have any right to claim an account of his disbursements from the executor, and, with regard to the balance of the fourth share he gave it to the executor to spend or to dispose of in such manner as to him should seem fit and proper. This has been treated in both Courts as a legacy of the residue of the fourth share to the defendant the present appellant.

2. There were various heirs, widows and children, by various families. The plaintiff and respondent now a widow lady was the eldest sister and of the same full blood as the defendant, appellant. In 1917 she instituted this suit alleging that the two provisions for the benefit of her brother, namely, that giving him ten per cent., and that giving him the balance of the fourth share, were contrary to Mahomedan law. It appeared in the course of the suit, if it had not appeared before, that several of the heirs had agreed nevertheless to the appellant retaining his interest, as, according to Mahomedan law, they could, but there remained the plaintiff, and there remained three minor children, and the contest in the suit was with regard to the plaintiff. The Mahomedan law does not allow a testator to leave a legacy to any of his heirs unless the other heirs agree, but any single heir may so agree as to bind his own share, and, therefore, when it appeared in the course of the suit that the other heirs had agreed, the only contest was as regards the plaintiff and the three minors. As regards the three minors there could be no question of their consent and the dispute therefore turned on the question whether the plaintiff had consented or not.

3. Now the burden of proving that consent was on the appellant, the defendant in the suit. Both parties tendered oral evidence, each putting his or her case more strongly than the trial Judge thought was correct; the plaintiff averring that she had protested from the first and had been put off by a promise that she should have her proper share (this the trial Judge did not accept); the defendant averring on the contrary that he had made quite clear to the plaintiff what the provisions of the will were, and the plaintiff, regarding him as the only male in the house, had expressed not only her consent but her pleasure that he should have this benefit. With regard to that the trial judge found that there was oath against oath; that there was no

corroboration, the only other person present being the husband of the plaintiff, who was by this time dead, and, in the end, he was not satisfied that this consent was proved. He, thereupon, said that there was no direct evidence of explicit consent and the question turned upon whether there was implied consent, and the only two grounds of implied consent that he relied upon were delay and a certain transaction with regard to a loan and the interest upon it. On those materials he found in favour of the defendant that there was an implied consent.

4. The plaintiff appealed to the Chief Court, and the Chief Court, reversing the decision of the primary Judge, found that there was not sufficient evidence of an implied consent, and the learned judges agreed with the trial judge that there was no proof of an explicit consent.

5. Thereupon this appeal was brought; but, in their Lordships' opinion, unsuccessfully. The burden of proof was, as already stated, upon the defendant, and the only two elements to be considered were the question of time and the question of the loan. As to the first the delay is explained because the estate was not in fact realized until after the suit-by general Consent only realized in parts from time to time-and there was no such realization and no such stating of accounts, even temporary or provisional stating of accounts, as could be suggested to have shown to the plaintiff that the estate was being divided upon the footing that the defendant was to be entitled to retain these advantages, for both Courts decided that both these advantages were legacies which had to be justified.

6. With regard to the loan it appears that in 1908 the lady's husband wanted some money to release a mortgage on his house, and the lady, not unnaturally, went to her brother, who was collecting money from time to time and asked for some money-it was not a very large sum-to enable her to pay off this mortgage. He, thereupon, appears to have said that he had no money, but as the lady was pressing him and he probably felt that he was an accounting party, he offered to borrow it, but said that she would have to be surety for the loan. She was prepared to do this but demurred to paying interest. Up to that point the parties are in substantial agreement. He did borrow money ; she did, jointly with him, execute

the promissory note to a Chetty, and she took from her brother a letter promising her that she should not have to pay the interest. Now what was the reason of this transaction? It is suggested for the defendant that she said to him that he was taking great advantages under their father's will-more than the Mahomedan law allows-and therefore the least he could do was to pay this interest. She denies this and says that she was asking for some of the money which was coming to her, and therefore it was quite right that he should relieve her from paying this interest. Now, if it had appeared that he had really relieved her from paying the interest, there would be some substance in the contention, although their Lordships do not say there would be very much substance in it then. But, it appears that he has now debited this lady, as part of her share, with the interest on this loan. After that it becomes of less importance to consider this transaction, but even apart from that, the transaction is far from sufficient by itself to support an implied consent. That is the view the Chief Court took, and their Lordships think, quite rightly, and, therefore, they will humbly recommend His Majesty that this appeal should be dismissed with costs.