F.J. Eugster Vs. E.O. Gammeter

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Court : Kolkata

Decided On : Jan-11-1933

Reported in : AIR1933Cal820,147Ind.Cas.484

Appellant : F.J. Eugster

Respondent : E.O. Gammeter

Judgement :

Buckland, J.

1. In this case the plaintiff sues for an account to be taken of the amount; due from the defendant to the estate of Adolph Meyer deceased and for a decree for the amount found to be due on an account being taken.

2. Adolph Meyer, a gentleman who I understand had business in India and interests in Switzerland, died on 1st December 1929, leaving a will dated 26th October 1927. In respect of his estate in Europe by his will he appointed two gentlemen of the name of Wegmann and Pfister as his executors, and, as his executors to administer his estate in this country, he appointed the plaintiff and defendant. On 19th March 1930 probate of the will was granted to the Indian executors.

3. On 22nd March 1922 the defendant had borrowed from the testator the sum of 8000 which by his promissory note bearing that date and made at Calcutta he

promised to repay to the testator with interest at the rate of 7 per cent per annum. The interest, it has not been disputed, was paid up until 31st December 1930.

4. On 12th November 1930 there was executed by the widow and daughters of the testator in favour of the Indian executors a release to which Wegmann, the executor for Europe, was also a party. The plaintiff now sues the defendant to recover the amount due to the estate on the promissory note of 22nd March 1922.

5. The defences preferred appear from the following issues submitted by learned Counsel for the defendant and accepted:

(1) Did the plaintiff cease to function as executor prior to suit, and if so, is he entitled to sue? (2) Was not the promissory note a part of the European assets of the testator and not of the Indian assets of the testator? (3) If the promissory note was part of the Indian assets, has it by the deed of release been transferred to the beneficiaries, and has the function of both the Indian executors ceased? (4) Is the present suit barred by the release? (5) To what relief, if any, is the plaintiff entitled?

6. There are no facts in dispute nor do I understand can there be any question as to the amount due, though it may be necessary to order an account. Correspondence which passed between the parties or their solicitors prior to the suit has been read with the object of showing that the Indian executors were function officio and that only the beneficiaries or Wegmann, the European executor, are entitled to sue, but that cannot be the case if, as is submitted, the debt is an Indian asset due to the estate, for to recover such an asset the Indian executor would be the proper person entitled to institute proceedings. It is contended that there is no question of the executor being functus officio upon the authority of Solomon v. Attenborough (1912) 1 Ch 451 (at p. 458), in which Fletcher Moulton, L.J., observed:

I perfectly agree with the learned Judge that one can put no limit of time to the office of executor; nor do I think it can be said that an executor has ceased to be an executor because he has passed his accounts. Some claim might turn up and it would find him an executor not to recreate him an executor.

7. I conceive that an asset might turn up and it would also find him an executor who should institute proceedings on behalf of the estate.

8. I have also been referred to Nixon v. Smith (1902) 1 Ch 176 at 183 in which Kekewich, J., observed:

Of course, in the strict sense of the word, they never cease to be executors. Having accepted probate, they are, during the rest of their lives, the legal representatives of the testator; but after a certain time they have no duties as executors to perform, and can no longer be said to be doing anything virtue officio.

9. An executor may be functus officio in that sense, once the estate has been made over to beneficiaries, but it is clear upon the authorities that he has not thereby divested himself of that office, so that if occasion arises for him again to assume the role of executor he cannot do so.

10. The debt appears to have been originally a European asset in that it was entered in the testator's books in Zurich, and the promissory note was held in Europe; but on the death of the testator the debt was discharged by the appointment of the debtor as executor under the will and his acceptance of the office: Freakley v. Fox (1829) 9 B & C 130. That being so, it was contended, and in my view rightly, that as a debt due from a person resident in India on a promissory note made in Calcutta, the debt became and was an Indian asset forming part of the estate of the deceased.

11. It has not been contested that one executor may sue another, but if authority for the proposition is wanted, I have been referred to Peake v. Ledger (1849)8 Hare 313. The real difficulty in the case arises out of the deed of release. Does it completely and effectually bar this claim or was it limited to that which was comprised in the grant to the Indian executors? This debt finds no place in the affidavit of assets filed in this Court, Where assets come into the hands of an executor, after probate has been granted, which are not included in the affidavit of assets, a further sum is payable by way of duty, and were such assets deemed to be comprised in the grant of administration that would not be the case. For fiscal purposes at all events this debt cannot be said to have been comprised in the

grant.

12. Now, the release states, omitting superfluous words, that:

in consideration of the premises, the beneficiaries with the consent, privity and knowledge of the said Carl Wegmann as such executor for Europe, do and each of them both hereby release the said Ernest Otto Gammeter and Fred Eugster from all action, suits, accounts, duties, debts, reckoninings, claims and demands whatsoever which the beneficiaries have or any of them hath or might at any time hereafter have claimed, challenge or demand upon or against the said Ernest Otto Gammeter and Fred Eugster as such executors for India for or in respect of the administration, disposition of application by the said Ernest Otto Gammeter and Fred Eugster of the estate and effects of the said Adolph Meyer deceased comprised in the grant of administration made to them.

13. Later there follows an indemnity clause, but that is not relied upon on behalf of the defendant.

14. It is contended that it was not intended to release the defendant from this debt, and in that connexion the circumstances have been referred to. But I must ignore them and confine myself to the words of the instrument. It has not been put forward, but it occurs to me that it may be an argument in favour of the plaintiff that the defendant in his capacity of debtor to the estate cannot rely upon the release executed in his favour as executor. Be that as it may, the words of the instrument itself limit it to claims in respect of the estate and effects of the testator comprised in the grant, and as I take the view that this asset was not comprised in the grant, the plaintiff is entitled to judgment.

15. The prayer is for an account, but an account should be unnecessary as the amount is admitted and interest has been paid up to 3lst December 1930, and the only questions to be determined are as to the amount of interest now due and the rate at which the total amount due should be converted into Indian currency for the purpose of the decree. This should be further considered, for to order an account would only put the defendant to unnecessary expense. The matter may be again mentioned on Friday morning when I will consider the form the decree should take.

16. This suit was again mentioned to me on Friday 13th January last, when the parties had not come to any agreement as to the figures. I accordingly directed that the suit should again be put into the list for hearing when, if necessary, evidence could be taken as to the rates of exchange and I would hear argument as to the date at which the rate was to be taken for the purpose of converting the amount due into Indian currency. The case has now come on again and I am glad to find that the parties have agreed as to the figures. It has been agreed that the sum of Rs. 1,05,748-11-4 shall be taken as the equivalent of 8,000, the amount of the promissory note. Interest has been paid up to 31st December 1930. Interest must be calculated upon Rs. 1,057,48-11-4 at the rate of 7 per cent per annum, the rate mentioned in the promissory note, from 1st January 1931 until 18th March 1932 and the plaintiff is entitled to judgment for that amount. As against these sums the plaintiff will give credit to the defendant for Rs 582.7-0 in respect of payments made on account of income-tax. The plaintiff will also have interest on the principal amount at the rate of 6 per cent pending suit. Costs and interest on judgment at 6 per cent. There will be no order as regards the costs of today.