**BOMBAY HIGH COURT**

W.T. Halai

Vs

Chaturbhuj Gopalji

(Basil Scott, Kt., C.J. Davar, J.)

10.08.1915

**JUDGMENT**

**Basil Scott, C.J.**

1. In ray opinion the appellants are entitled to succeed.

2. They are executors under the will of whose testator the plaintiff was entitled when twenty-one to a legacy of Rs. 5,000 payable out of the testator's general estate.

3. In answer to a claim for the legacy the executors replied the plaintiff had removed wrongfully a ring worth Rs. 2,700 belonging to the testator.

4. Correspondence then ensued which ended in the executors saying that they had no alternative but to impound the legacy till the ring and certain other articles were returned or their loss compensated for. In their written statement the defendants contend the plaintiff is not entitled to the legacy before he returns the ring and they bring into Court the value of the legacy less the estimated value of the ring.

5. The suit was tried as a short cause : no issues were raised, but the plaintiff's counsel contended the defendants could not set off, as under Order VIII. Rule 6 of the Civil Procedure Code only a claim in respect of an ascertained sum could be set off. This contention found favour with the learned Judge who notwithstanding that the defendant's counsel said he wished to evidence as to the abstraction of the ring passed a decree for the amount of the legacy and interest with costs.

6. The plaintiff's title to the legacy is not complete against the executors until they have assented to the same: see Section 112 of the Probate and Administration Act, 1881. The plaint contains no allegation of assent by the executors to the plaintiff's legacy : on the contrary, the correspondence filed with it shows they impose as a condition of payment that the plaintiff shall return the ring. This is at most a conditional assent under Section 114. Whether the condition could rightly be

imposed depends upon the question of fact on which the executors' counsel wished to give evidence.

7. Before us the appellants' case was based on the general principle that where a fund is being distributed a party cannot take anything out of the fund until he has made good what he owes to it. " It is immaterial," it has been held in In re *Rhodesia Goldfields, Limited*[1] " whether the amount is actually ascertained or not. If it is not actually ascertained it must be ascertained in order that the rights of the parties may be adjusted." Here the amount claimable from the plaintiff, if the executors' case is true, is the value of the ring, an ascertainable sum, and they are entitled to give evidence on the point. It was argued for the respondent that such a conclusion would be inconsistent with the dictum of Chitty J. in In re *Taylor*[2] It was there held that a specific legacy payable out of a specified and sufficient fund could not be withheld on the ground that a debt might be due by the legatee which if recovered would increase the residuary estate. Here, however, the ring or its value if recovered would increase the general estate out of which the legacy is payable.

8. For these reasons, under Order XLI, Rule 23, Civil Procedure Code, we set aside the decree and remand the case to the learned Judge for trial on the merits. We hope it may be tried as a short cause. Costs reserved to be disposed of by the learned trial Judge.

**Davar J.**

9. I concur in the order of remand which the learned Chief Justice proposes to make in this appeal. I should however like to add that in my opinion the defendants are primarily responsible for the refusal of the learned Judge in the Court below to go into evidence on the question of the ring which the plaintiff respondent is supposed to have clandestinely taken possession of when the testator was on his death bed. The case of Partridge v. Rhodesia Goldfields, Limited [1910] 1 Ch. 289 is very clear authority for the contention that a legatee is bound to make good to the estate of a testator what he owes to that estate before he can claim payment of a legacy out of the same estate.

10. This contention is no doubt specifically raised by para 3 of the defendants' written statement but it appears from the notes of the learned Judge taken at the hearing and from his judgment that when the case was heard by him counsel for the plaintiff assumed that the claim of the plaintiff was resisted on the bare ground of a set-off and the learned Judge rightly held that the value of the ring being unascertained defendants were not entitled to maintain the plea of set-off. No issue was raised and no authority seems to have been cited before the learned Judge below and his attention was not specifically drawn to the contention set forth in para 3 of the defendants' written statement.

11. From the judgment it appears that the learned counsel for the defendants did contend before

him that " the plaintiff was not entitled to the legacy before he returned the ring." The ground on which the contention was based becomes clear further on in the judgment where the learned Judge sets out what happened before him when the case was called on for hearing.

12. It seems to me under the circumstances that the learned Judge, on the materials placed before him and the way the case was presented to him, was justified in assuming that the only question before him was whether the defendants were entitled to a set-off and on this question he came to a correct conclusion.

13. Having regard, however, to the fact that the ground on which the appeal was argued before us was specifically taken in the written statement, I agree in thinking it is in the interest of both parties that the questions in dispute should be disposed of in the present suit.

14. We have left the whole question of costs to be dealt with by the learned Judge to whom the case is remanded. He will, I have no doubt, have regard to what happened before him at the original hearing when dealing with the question of costs.

Cases Referred.

1[1910] 1 Ch. 239, 247
2[1894] 1 Ch. 671