

BOMBAY HIGH COURT

Virbhadrappa Shilvant

Vs.

Shekabai Harun Sayed Ahmed Arab

First Appeal No. 210 of 1935

(N.J. Wadia and Wassoodew, JJ.)

12.08.1938

JUDGMENT

Wassoodew, J.

1. This is an appeal from the decree of the First Class Subordinate Judge of Sholapur allowing a claim of L 12,000 with interest due on loan transactions followed by a settlement of account thereof on November 2, 1929. There was also an alternative claim on a hundi passed contemporaneously with the said settlement, and it is alleged that it was given as security for the major part of the amount found due, viz., L 12,000. The plaintiffs were the four wives of one Sayed Harun Sayed Ahmed to whom the defendants' shop of Virabhadrappa Shilvant at Barsi was indebted to the extent of L 12,295 in or about November, 1929. On the above date accounts were taken and the defendants gave a hundi to the said Sayed Harun for L 12,000. The balance of L 295 was subsequently paid in two sums, one of L 255 and the other L 48 in 1930 or thereabouts. Sayed Harun died in October, 1932, without presenting the hundi for payment and his widows claiming to represent his estate, being according to the plaint his only heirs, instituted this action to recover the debt on June 1, 1933. It was alleged that the hundi was dishonoured in May, 1933, when it was presented for payment to the drawee one Mallaya Ramayya of Bombay, and that it being a collateral security for the debt, the suit was instituted on the original transactions represented by the loan found due when the account was stated. The plaintiffs alleged that there were acknowledgments by the defendants in 1930 and 1931 which saved limitation. The contentions of the defendants were that the plaintiffs did not represent the estate of the deceased Sayed Harun, there being other heirs alive, namely, his daughter and nephews; that as this was an action on a debt, no decree should be passed without a succession certificate or letters of administration to the estate; that the non-presentation of the hundi, for which the only consideration was the debt, within a reasonable time amounted to a discharge of the entire liability; and that the claim was time-barred.

2. It may be noted that during the progress of the suit in February, 1934, the other heirs who had by then compounded their differences with the plaintiffs applied to the lower Court (exhibit 30) for bringing them on the record either as co-plaintiffs or co-defendants. But the lower Court refused to exercise its discretion by adding them as parties. Upon the evidence the learned Judge thought that although there were other heirs of the said Sayed Harun besides the plaintiffs who were entitled to a share in his estate and therefore interested in the suit for the recovery of the debt due to the estate, the defect due to non-joinder could be remedied by passing a decree directing the plaintiffs to furnish satisfactory security for the shares of the absent heirs, the plaintiffs being entitled to only one-fourth share in their husband's property. On the merits the learned Judge found-as I understand his findings-that, although prima facie non-presentment of the hundi within a reasonable time to the drawee would be improper, upon the terms of the agreement between the parties, the defendants had agreed to pay personally the principal and interest, notwithstanding the hundi, that they never intended that the hundi should be presented by their creditor, that the debt was not intended to be satisfied by the hundi in question, and that limitation was saved by the acknowledgments received from the defendants, written under their authority by their gumasta in 1930 and 1931, of their liability to pay the identical debt sued upon. Accordingly he passed a decree in the plaintiffs' favour against which the defendants have filed this appeal.

3. On the record it seems to us that the view taken by the learned Judge of the facts is correct and must be upheld. It is common ground that although contemporaneously with the settlement of accounts of past dealings the hundi was given to Sayed Harun in payment of a major part of the debt, the latter did not present the hundi to the drawee Mallayya in Bombay. There is reason to believe that that omission was deliberate. The conduct is evidently referable to some agreement between the parties. It has been established that the defendants had no surplus to their credit with Mallayya on the date when the hundi was drawn. That is what the servant of Mallayya (exhibit 74) has stated. It is significant that the defendants immediately after drawing the hundi did not, according to their gumasta, inform Mallayya of their having done so in the usual course of business. That omission was certainly not due to inadvertence and was obviously due to the circumstance that they were indebted to Mallayya on the date in question. The suggestion that the hundi was passed with the intention of satisfying a part of the debt is incompatible with the defendants' conduct in subsequently acknowledging the debt and paying interest thereon. In two letters of June 17, 1930, and June 29, 1931, which we hold were written under the defendants' directions, the latter undertook to pay the amount as soon as it was received by them from their other customers and after their business became more steady. Those letters bear no reference to the balance of L 295 after the hundi was passed. The letter of June, 1931, was written after that balance was fully paid. It is unreasonable to assume that Sayed Harun, a businessman, would for no assignable reason keep the hundi in his office unrepresented. The irresistible inference is that that conduct was the result of some arrangement, particularly when till 1932, as admitted by the defendants, the balance of L 12,000 was shown as outstanding against them to the credit of the plaintiffs in their books. What that arrangement was, except the defendants, there is none to say.

Sayed Harun is dead and his widows are not familiar with his transactions. "We are therefore left to judge what the subsequent arrangement was from the conduct of the parties and what the defendants have said. The latter in our opinion are not honest in their explanation. It is a fair conclusion in our opinion that the arrangement was not to treat the hundi as a complete discharge of the debt represented by the sum mentioned in it, and not to present the hundi to Mallayya until further instructions. It seems from the course of their dealings the defendants were in the habit of passing such hundies as securities upon transactions similar to the one in suit. We are therefore fortified in the view, that, presumably, as pointed out in the plaint, the hundi was intended to serve as collateral security merely. Consequently the plaintiffs could notwithstanding the hundi sue on the original consideration represented by the debt.

4. We agree with the lower Court upon the evidence of the plaintiffs' own servant who received the two letters of acknowledgment that they were given by the defendants expressly in reply to a demand from the plaintiffs' husband, and do contain express acknowledgments of the debt and liability to pay. It was said in the evidence of the defendant Bapurao (exhibit 52) that the gumasta was not authorized to write such letters, that important letters of business were entirely written by Bapurao himself and that the letters, exhibits 54 and 55, were not written at his dictation. The defendant could have been corroborated by his gumasta, but he has been kept back. The accounts too have not been produced. It seems to us therefore that prima facie this action to recover the debt due to the estate of Sayed Harun was within time. In the above view of the matter it is clear that non-presentment of the hundi within a reasonable time cannot be urged to defeat the claim on the debt.

5. The question that presents real difficulty is in regard to the frame of the suit. It is obvious that if this action was to recover a debt due to the estate of a deceased Mahomedan, those alone who represent his estate could bring it. The contention of the defendants in that respect was twofold : first, that the estate of the deceased Sayed Harun was not completely and fully represented by his widows in the absence of other heirs of Sayed Harun ; and, secondly, that this being a suit for the recovery of a debt through Court due to the estate of the said Sayed Harun, no decree against the debtor could be passed except on the production, by the person claiming to be entitled to the debt, of a probate or letters of administration or a succession certificate, showing his title to represent the estate.

6. On the first part of the defense, the decisions of our Courts are somewhat inconsistent and not uniform. We were referred to several authorities showing conflict of view in regard to the right to represent the estate of a deceased Mahomedan by some of his heirs. Those authorities dealt with suits instituted by creditors themselves against only some of the heirs of a deceased Mahomedan debtor. The view of the Calcutta High Court as expressed in *Muttyjan v. Ahmed Ally*¹ was that any creditor of a deceased Mahomedan could sue any one of the heirs in possession of the whole or any part of the estate, without joining the other heirs, and that in that suit he could claim not only the defendant's share of the debt but the entire debt due from the estate. The reasoning

underlying the Calcutta case was that the creditor's suit was an administration suit and that an heir of a deceased Mahomedan in possession of his estate could represent the other heirs. That was also the Bombay view as expressed in *Khurshetbibi v. Keso Vinayek*² and *Davalava v. Bhimaji Dhondo*³ In the latter case upon a review of authorities Ranade J. came to the conclusion that the heirs of a deceased Mahomedan, who were not parties to the suit on a mortgage, were bound by the decree for possession passed in favour of the mortgagee against some of the heirs in possession. There a Mahomedan died leaving a widow, a minor son and two daughters. After his death a suit was instituted by the mortgagee from the deceased against the latter's son represented by his guardian mother, claiming possession of the land mortgaged to him as owner under a gahan lahan clause in the mortgage. The widow

¹ I.L.R. (1882) Cal. 370

³ I.L.R. (1895) Bom. 338

² I.L.R. (1887) Bom. 101

was in possession of the estate, and a decree ex parte was passed directing her to deliver possession of the land to the mortgagee, and he was accordingly put in possession. It was held that the decree was binding on the daughters though they were not parties to the suit, and that they were not entitled to redeem the mortgage as against the mortgagee or a purchaser from him. The other cases referred to, such as *Aga Gulam Husain v. A.D. Sassoon*⁴ were cases arising from partnership, and it was held that a decree against some of the heirs bound the entire body of heirs on the principle of implied representation. There is no case of our Court directly bearing upon the point under consideration, namely, the right of some of the heirs to recover the entire debt due to the estate of a deceased Mahomedan.

7. The Madras High Court adopted the above view of the Bombay High Court in the earlier decisions. But in the full bench case of *Abdul Majeeth v. Krishnamachariar*⁵ that Court followed the Allahabad High Court in holding that a sale effected, to pay off a debt due from his estate by some of the heirs of a deceased Mahomedan who may be in possession of the whole or part of the estate was binding on them to the extent of their share only and did not bind the other heirs. The reasoning of that decision proceeds on the ground that under Mahomedan law each heir inherits a separate and distinct share and that the theory of representation is unknown to the Mahomedan law, or in other words one heir does not represent the other heirs-(see *Dallu Mal v. Hari Das*⁶ and *Manni Gir v. Amar Jati*⁷ It is obvious ' that if the estate vested immediately on the death of a Mahomedan in each of his heirs in proportion to his share according to the Mahomedan law on account of several inheritance, the theory of representation can have no place. A third ground in support of that view might be found in some of the cases where the question of representation has come up for decision. In *Ahinsa Bibi v. Abdul Kader Saheb*⁸ the question did not directly arise for the Court was dealing with the question of discharge of the promisor by payment or offer to some of the promisees. The following observations however in regard to the indivisible character of the right or interest acquired upon legal devolution of the estate of the deceased on his heirs are interesting (p. 35):

When a right accruing to a single person from a covenant in his favour devolves, on his death, on two or more of his heirs in several shares, no question can possibly arise as to

whether the covenant was joint or several, and the only difference caused by the death of the covenantee is that the cause of action which resided in one person, is, by operation of law, transferred to a number of parceners, who, as observed by Tindal, C.J., in *Decharms v. Horwood*⁹ constitute one heir.

The earlier view of implied representation was not followed in the later decisions of this Court. In *Sitaram v. Shridhar*¹⁰ the Court was dealing with a payment made by the mortgagor due on the mortgage to one of the heirs of the mortgagee, without the concurrence of the rest, and it was held that it did not amount to a valid discharge. The grounds stated in the judgment of Chandavarkar J. are these (p. 295):

The right which the several heirs jointly get on the mortgagee's death to enforce

⁴ I.L.R. (1897) 21 Bom. 412

⁶ I.L.R. (1901) All. 263

⁸ I.L.R. (1901) Mad. 26

⁵ I.L.R. (1915) 40 Mad. 243

⁷ I.L.R. (1935) All. 594

⁹(1834) 10 Bing. 526

¹⁰ I.L.R. (1903) 27 Bom. 292 : 5 Bom. L.R. 91

the mortgage, is a right created by law in consequence of the devolution upon them of the single and indivisible right which the mortgagee had as the sole promise, and not in consequence of their being ' joint promises The reasoning underlying the decisions of the Allahabad High Court that each of the several heirs in possession of the assets is to the extent to which he is in possession a legal representative of the deceased person, and no one of them represents the entire assets or estate of the deceased person, seems to have been approved in the later decisions of this Court, such as *Bhagirthibai v. Roshanbi : Mirkha v. Bhagirthibai*¹¹ and *Lala Miya v. Manubibi*¹² That view has the merit of being in unison with that of the other High Courts in India and is in my view in accord with the spirit of the Mahomedan law. In *Bhagirthibai v. Roshanbi* the question arose whether a money decree obtained against the estate of a deceased Mahomedan in a suit by a creditor against some of his heirs was binding against the heir who was not a party to the suit in which the creditor's decree was obtained. The Court held that the heir who was not made a party was not bound by the creditor's decree as the other heirs did not represent her interest. There the Court stated that the rule of representation derived from Hindu law was not applicable to Mahomedans as was done in *Khurshetbibi v. Keso Vinayek* where the theory of substantial representation derived from Hindu law was applied to Mahomedans. Such an application the Court thought was opposed to the principle underlying the decision of the full bench in *Isap Ahmed v. Abhramji Ahmadji*¹³ It may be noted that the case of *Davalava v. Bhimaji Dhondo* was expressly referred to and discussed. The theory put forward that creditors' suits against the heirs in possession should be regarded as administration suits binding on all the heirs was expressly discarded on the authority of *Jafri Begam v. Amir Muhammad Khan*¹⁴The case of *Khjarajmal v. Daim*¹⁵Bom was also referred to as showing that the special rule as to representation by managers of joint families of Hindus could not be applied to a case where a creditor of a deceased Mahomedan sought to recover his debt from some of the heirs of the deceased. It is therefore clear upon the recent decisions of this Court, the abstract ratio decidendi of

which binds us, that a creditor of a deceased Mahomedan could himself institute a suit against some of the heirs of a deceased in possession of his property to recover the debt, and succeed only to the extent of the share of the debtor's heirs who are parties to the action.

8. The question here is whether that proposition could be applied to the claim made by only some of the heirs of a creditor to recover the debt due to the estate of a deceased Mahomedan. We are inclined to hold that having regard to the unity of title and unity of interest of the entire body of heirs, some of the latter cannot represent the other heirs, and, therefore, a suit by some heirs to recover a debt due to the estate of the deceased will be defective on the ground of absence of title or lack of representation in the heirs who sue. Such a suit essentially must be on behalf of the entire body of heirs and must conform to the requirements of the law. If there is a devolution of the right to recover one distinct and entire debt upon the death of the deceased Mahomedan who was a single promisee, the right devolved would also be single and indivisible. The law will not enable different sharers to institute different actions on that debt in proportion to their respective interests

¹¹I.L.R. (1918) 43 Bom. 412 : 21 Bom L.R. 329 ¹³I.L.R. (1917) 41 Bom. 588 : S.C. 19 Bom. L.R. 579

¹²I.L.R. (1923) 47 Bom. 712 : 25 Bom. L.R. 408 ¹⁴I.L.R. (1885) All. 882

¹⁵I.L.R. (1904) Cal. 296 : L.R. 32 IndAp 23 7

in the estate of the deceased. The principle of joint action by joint promisees will in our opinion apply by analogy where the owner of a single right dies and is succeeded by several heirs. According to Tindal C.J. in *Decharms v. Horwood*¹⁶ "several co-heirs constitute one heir and are connected together by the unity of interest and unity of title." Some only of the several heirs of a deceased Mahomedan cannot therefore enforce a debt without the concurrence of the rest so as to give a valid discharge to the debtor. The necessity of that concurrence is, as is sufficiently obvious, to avoid multiplicity of actions against the debtor. Therefore we think that in an action to recover a debt the claimants must in the first instance represent the totality of the estate of the deceased and the interests of his heirs.

9. It has been urged that the Court below could have removed the defect upon the application of some of the heirs who had applied to the Court to make ' them parties. Although the powers of the Court under Order 1, Rule 10, of the Civil Procedure Code, are wide enough to add parties to a suit or proceeding, merely because a person claims to be interested in a suit and wants to be added as a party, the Court would not ordinarily without the concurrence of the plaintiff make him a party. We do not find fault with the rejection of the application to add parties in view of the attitude of the plaintiffs. It appears however that after the appeal was filed by the defendants, one of the plaintiffs died and as her legal representatives the remaining heirs of the deceased Sayed Harun have been made co-respondents to this appeal. But even the fact that all the heirs are represented in the appeal does not solve the initial difficulty due to the want of certificate of representation obtained in proper form as required by Section 214 of the Indian Succession Act. That section deals with the recovery of a debt through Court due to a deceased Mahomedan, and according to its provisions such a suit is barred unless the claimant produces a certificate granted

under Section 31 or Section 32 of the Administrator-General's Act, 1913, or a succession certificate granted under Part X of the Indian Succession Act, 1925, or a certificate granted under the Succession Certificate Act of 1889, and having the debt specified therein. Unless it were possible to hold that the plaintiffs represent, upon the production of a proper certificate, the estate of Sayed Harun, it is not possible to pass a decree for the entire debt in their favour.

10. The question is, whether, having regard to the defect in procedure, the claim of the estate to recover the debt should be defeated. Mr. Thakor for the respondents has conceded that upon the claim to recover a debt due to a deceased Mahomedan a civil Court cannot pass a decree without a certificate, and he has urged that that difficulty, as well as the difficulty arising from the provisions of Section 22 of the Indian Limitation Act by reason of bringing the other heirs as parties to the appeal, could be obviated if he was given time to produce the certificate contemplated by Section 214 of the Indian Succession Act. On the other hand it is strenuously contended for the appellants-defendants that the negligence of the plaintiffs or their omission to follow the legal procedure to recover the debt should not be allowed to prejudice the defense even if based upon a technical plea. There is no doubt that the provisions of Section 214 of the Indian Succession Act (XXXIX of 1925) govern the procedure in such cases. Those provisions as interpreted by several decisions merely emphasize that the Court cannot pass a final decree in the absence of a certificate. Merely because a suit is instituted without a certificate, it does not debar the plaintiffs from producing the certificate before the decree

¹⁶(1834) 10 Bing. 526

is passed. There have been instances where a Court has deferred passing a decree pending the production of a proper certificate. It has been argued for the appellants that as there was a defect in the institution of the suit by reason of the omission to produce a certificate along with the plaint the suit could not be regarded as having been properly filed when it was originally registered, and that for the purpose of limitation, the suit could be regarded as properly instituted only when the certificate is produced. No authority has been cited in support of that view. In *Kammathi v. Mangappa*¹⁷ it was held that where the Court considered that a certificate was necessary, it was enough to produce the certificate before the decree-see also *Raichand v. Jivraj*¹⁸ and *Chandra Kishore Roy v. Prasanna Kumari*¹⁹, In *Gulshan Ali v. Zakir Ali I.L.R.*²⁰ the Court observed that there was no provision of law which required that a certificate must be filed along with the plaint, and that an opportunity should be given to the plaintiffs for obtaining and producing one. With respect we agree with that view. In the circumstances of this case, and having regard to the fact that an earlier attempt was made by the other heirs in February, 1934, to be brought on the record when the claim was not barred by time, the plaintiffs we think should be given an opportunity to remove the defect resulting from the omission to produce a certificate. It is manifest that the lower Court in passing a decree upon this action for debt due to the estate of a deceased Mahomedan without a certificate acted without jurisdiction. We therefore set aside that decree and remand this case to the lower Court for passing a fresh decree for the plaintiffs if they produce a certificate of representation to the estate of the deceased Sayed Harun, within six months from the date of the receipt of the papers by the lower Court. On failure to furnish such a

certificate within the time allowed, the suit shall be dismissed. As this result has been brought about by the negligence of the plaintiffs, we think that they should bear the costs of the defendants throughout.

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¹⁷ I.L.R. (1892) Mad. 454 ¹⁹(1910) L.R. 38 I.A.7
¹⁸(1930) 33 Bom. L.R. 1372 ²⁰(1920) All.549