

Privy Council Appeal No. 123 of 1919.

Bhaidas Shivdas - - - - - *Appellant*

v.

Bai Gulab and another - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 11TH FEBRUARY, 1921.

Present at the Hearing :

LORD BUCKMASTER.

LORD DUNEDIN.

LORD SHAW.

SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by* LORD BUCKMASTER.]

The real question involved in the dispute giving rise to this appeal was a question as to the construction of the will of one Nathoo Moolji, who died on the 8th December, 1894, affecting the respective estates and interests that were taken by the testator's widow and his two daughters. One of the daughters died in the lifetime of the widow, and her heir, who is the present appellant, instituted, on the widow's death, in the High Court of Judicature in Bombay, ordinary original civil jurisdiction, the proceedings out of which this appeal has arisen, claiming that, according to the true construction of the will, he was entitled to a vested one-half share in the testator's property.

The learned Judge before whom the suit was first heard dismissed the application and held that there was an intestacy after the widow's death.

An appeal was taken from that judgment and heard before Chief Justice Scott and Mr. Justice Heaton. They differed in

their opinion. Chief Justice Scott thought that the plaintiff was entitled to the relief he claimed ; Mr. Justice Heaton, on the other hand, agreed with the Judge who had first tried the suit. The course then taken was to refer the matter to two other Judges, Mr. Justice Batchelor and Mr. Justice Shah, who also decided adversely to the plaintiff's contention.

The plaintiff has now brought an appeal before His Majesty in Council, and the first point that he has raised is this : that the order made referring the case to the decision of Mr. Justice Batchelor and Mr. Justice Shah was *ultra vires* and void ; that there was no jurisdiction in these two Judges to entertain the dispute ; and that he is entitled, as of right, to a decree in accordance with the opinion of Chief Justice Scott, the senior of the two Judges before whom the appeal was first heard.

That contention depends upon the construction of the Letters Patent of Bombay, under which the Court was constituted, and the Code of Civil Procedure, 1908. By Section 36 of the Letters Patent it is provided that if the High Court is sitting in a division composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, the decision shall agree with the opinion of the majority of the Judges ; but if the Judges are equally divided, the opinion of the senior Judge shall prevail.

In this case it is quite clear. There were two Judges sitting ; the senior Judge was the Chief Justice ; there was an equal division of opinion ; and under Section 36, in consequence, the plaintiff was entitled to a decree in his favour.

It is, however, urged on behalf of the respondents that the procedure in Section 36 is modified by the Code of Civil Procedure, 1908, and it is pointed out that by Section 44 of the Letters Patent there is an express provision which makes those Letters Patent subject to the legislative powers of the Governor General in Council.

There are two sections in the Code of Civil Procedure which are relevant to this dispute. The one is Section 4 and the other is Section 98. Section 98 appears to have been the section under which the Judges acted. That section provides :—

“ That where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ, and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.”

It is quite plain that those provisions create a totally distinct method of procedure in the event of difference between two Judges from that which was laid down by Section 36. Under Section 36 of the Letters Patent the judgment of the Judge who was the senior Judge would be the judgment which the parties before the Court would have a right to obtain ; under Section 98, the judgment to which they are entitled is the judg-

ment of the majority of all the Judges who have heard the appeal ; and this case shows that those two provisions might produce a totally different result. If, therefore, Section 98 controls Section 36 the respondents would be entitled to say that the proper procedure had been followed, and that the appellant had no cause of complaint. But by Section 4 of the Code of Civil Procedure it is also provided that :—

“ In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed by or under any other law for the time being in force.”

There is no specific provision in Section 98, and there is a special form of procedure which was already prescribed. That form of procedure Section 98 does not, in their Lordships' opinion, affect. The consequence is that the appellant is right in saying that in this instance a wrong course was taken when this case was referred to other Judges for decision, and he is technically entitled to a decree in accordance with the judgment of the Chief Justice. This view of the section is not novel, for it has been supported by judgments in Madras, in Allahabad and in Calcutta. (See 29 Madras, p. 1 at p. 24 ; 26 Allahabad, p. 10 ; 13 W.R., p. 209.)

There only remains for their Lordships' consideration the question as to how they ought to deal with the costs of these proceedings.

As has been already pointed out, the real matter is the question of the construction of a will. The record has been prepared, the will is before their Lordships, and they are perfectly ready to undertake the duty of determining what the meaning of that will may be ; but the appellant's counsel, acting under the strictest instructions from his client in India, is unable to consent to their Lordships taking that course, and is compelled to insist upon the determination of this dispute simply upon the question of procedure. The result, therefore, is this : that although it may be by a wrong path, this appeal has reached their Lordships by whom it could be ultimately decided. but they are not permitted to decide it ; they are obliged to send the case back for further consideration and then, after a prolonged and tedious journey, it may find its way back again to the Board for ultimate decision.

Their Lordships are unable in these circumstances to advise His Majesty to follow the usual rule and give the successful appellant the costs of his successful appeal. They think that the whole of the costs from the 13th March, 1917, when the mistake was first made, should await determination until the ultimate decision of this matter when the strict procedure has been followed, and they will reserve the power of awarding those costs as seems right when that course has been taken. If the appellant fails these costs may be regarded as costs in the cause ; their Lordships make this intimation for the

assistance of the Board before whom the matter may ultimately come ; but this will in no way fetter their discretion if they think that even if the appellant ultimately were to succeed he ought not to be recouped and indeed ought to pay the wasted expense of this barren victory. They only desire to add that the original judgment of the 13th March, 1917, appears not to have dealt with costs at all ; but before any decree is drawn up under that order, it would be desirable that some proper application should be made to the Court for the purpose of seeing that the order is correct in that respect.

For the rest, they will humbly advise His Majesty that the decree of the Appellate Court should be set aside, and they will remit the case to the High Court to be dealt with according to law, their Lordships having already pointed out the way in which they think that direction should be obeyed. The costs of this appeal and all costs subsequent to the 13th March, 1917, are to be reserved to be dealt with by this Board.

In the Privy Council.

BHAIDAS SHIVDAS

v.

BAI QULAB AND ANOTHER.

DELIVERED BY LORD BUCKMASTER.

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