

1904.

LAKHMI-
CHAND
v.
JAIKUMAR-
BAI.

It is ordered that the above inquiries be made and certified to this Court within three months from this date.

In the meantime it is ordered that this suit do stand adjourned for making the final decree and that there be liberty to apply.

In the investigation of these inquiries it must be borne in mind that the defendants are the accounting parties.

Order accordingly.

G. B. R.

ORIGINAL CIVIL.

Before Mr. Justice Tyabji.

Ex parte AMERCHAND MADHOWJI.

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January 21.

Administrator General's Act (V of 1902), section 4, clause 2—Indian Trusts Act (II of 1882), section 72—Discharge by Court of an executor—Vesting of property in the continuing executor.

The Court has power to discharge an executor on his own application if a proper case be made out. An executor so discharged remains liable for anything he has done or left undone while an executor—it only relieves him from the duties of his office from the date of the discharge.

THIS was a petition by Amerchand Madhowji, one of the executors and trustees of the will of one Mowji Madhowji, who died in 1897. He discharged his duties as such executor and trustee for several years. Owing to ill health which obliged him to give up all business and to live out of Bombay, the petitioner applied to the Court by a notice dated 6th December, 1904, for his discharge from his office of executor and trustee.

Raikes, for petitioner :—The Court has power under section 4, clause 2, of Act V of 1902, to discharge the petitioner; the funeral and testamentary expenses, debts and legacies having been satisfied and the surplus invested upon the trusts of the will, the Court had power to “discharge” the petitioner under

section 72 of the Indian Trusts Act (II of 1882): Lewin on Trusts, 10th Edition, p. 795. He also relied on the 7th clause of the will of the testator which provided that if any one of his executors should be unable to administer another person might be appointed in his stead. Mere discharge would only have effect as to the future. The petitioner must of course pass his accounts up to date of discharge.

Robertson, for Morarji Mulji, a residuary legatee.

Inverarity, for the other surviving executrix and for minor grandchildren of the testator:—Section 4, clause 2, of Act V of 1902 does not apply to an application by the executor himself. It is an unheard of thing for a discharge to be granted to an executor who has not passed his accounts and who is now being sued as an executor in suit 153 of 1901. Even if discharge is granted, the petitioner would still be liable for past acts and omissions. Cases like the present have always been dealt with under section 31 of Act II of 1874. In any event the Court should consider whether the circumstances of this case justify the grant of the petitioner's discharge.

TYABJI, J.:—This is an application made to me in Chambers by Amerchand Madhowji to be discharged from his office of executor and trustee of the will of Mowji Madhowji.

Two questions were argued before me.

First, whether the Court could discharge Amerchand at all?

Secondly, whether the circumstances of this case would justify the Court in discharging him?

The application is made under the Administrator General and Official Trustees Act (Act V of 1902), and of the Trusts Act.

As regards the power of the Court, Act V of 1902, called the Administrator General and Official Trustees Act, provides in section 4, clause 2, as follows:—

“The High Court of the Province may, on application made to it, suspend, remove or discharge any private executor or administrator and provide for the succession of another person to the office of any such executor or administrator who may cease to hold office, and the vesting in such successor of any property belonging to the estate.”

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It was argued by Mr. Inverarity that this power does not extend to any executor who himself applies. That the clause in fact amounts to nothing more than giving power to remove an executor from office on the application of someone else. That however does not seem to my mind the right construction of the clause. It does seem to me that the clause was intended to enable the Court to discharge an executor even on the executor's own application. The question whether the Court will exercise that power must depend on the merits of each case. It seems to me to read the section in the way Mr. Inverarity asked me to read, would be to ignore altogether the word "discharge." I have therefore come to the conclusion that I have power to discharge the executor if the circumstances justify me in doing so.

The next question argued was whether if I discharge the executor, I must discharge him *in toto*, irrespective of any liabilities incurred by him up to the time of his discharge. In other words Mr. Inverarity argued there could be no such thing as discharging an executor in regard to future transactions, and yet keeping him liable to the extent of any liabilities he may have already incurred. I cannot agree with this contention. I think it is quite open to this Court, if it so pleases, to discharge the executor in regard to future liability and future acts and not in the least affect his liability in regard to his past transactions.

As regards the question, whether Amerchand is now an Executor, or whether he has become simply a trustee, that does not seem to me to be a matter of very much importance in this case—whether he is a trustee or an executor—I am clearly of opinion that I have the power to discharge him, if I think it right to do so. He can be discharged under the Trustees Act, section 72, as a trustee, and he can be discharged under the Administrator General and Official Trustees Act, section 5, as an executor. As I said, it does not matter whether he is now an executor or merely a trustee. As a general rule an executor ceases to be executor as soon as he has discharged the debts of the testator and pays the legacies and funeral and testamentary expenses and has invested any surplus that may have remained. This is clearly laid down in Lewin on Trusts, page 795, paragraph 8, where it is said "An *executor* is regarded in some sense

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as a trustee, but he cannot, like a trustee, be discharged, even by the Court from his *executorship*. When the funeral and testamentary expenses, debts, and legacies have been satisfied, and the surplus has been invested upon the trusts of the will, the executor then drops that character and *becomes a trustee* in the proper sense, and may then be discharged from the office like any other trustee." In this case the estate has been in fact fully administered and testamentary and funeral expenses have been paid and the legacies have been satisfied and the moneys are deposited in the Bank of Bombay. It may be that there are some matters still remaining to be done by the executors, and it may be possible that he has not quite ceased to be an executor, but he has I think done substantially all that is necessary to be done by the executor. I look upon him more as a trustee than as an executor. The view I take is, that whether as a trustee or as an executor he can be discharged, if the Court thinks it right to do so.

Then it becomes necessary to consider the merits of the case, *i. e.*, whether he deserves to be discharged? Amerchand has been an executor for many years and has taken hitherto a leading part in the winding up of the affairs of the estate. He is now 58 years old and shattered in health and his doctors have recommended him to go away from Bombay, and he adds that now he is not able to undertake any longer the responsibilities of his office either as executor or as trustee. These facts, to which he swears, I take to be substantially correct. I think, moreover, it must be gathered from the affidavits filed in the matter that he is not willing to act as he is not able to pull on in perfect harmony with the other parties interested in the estate and with his co-executrix Devkabai.

As regards the estate there is not very much to be done. Moneys are lying in the Bank invested to meet certain contingencies. The money can be drawn and applied for the purposes for which they have been put there. It therefore seems to me that this is a proper case in which to discharge this gentleman, who is no longer willing to continue the labours of his thankless office as executor.

As to his liability for the past, he must continue to be liable for anything he has done or left undone. This discharge will not

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in the least affect his liability as to anything done or omitted to be done—it only relieves him from his duties in the future.

The order I propose to make is:—

That on Amerchand Madhowji undertaking to file and pass his accounts from the 23rd August, 1903, up to date, and on his undertaking to transfer and to hand over the whole of the remaining estate to the continuing and new executor, he should be discharged from his office of executor and trustee from this date. That this order of discharge is without prejudice and does not affect any liability of Amerchand in respect of anything he may have done or left undone as executor or trustee up to date. I propose to order that costs of all parties should come out of the estate. Those of the executors as between attorney and client. Under this order Amerchand would remain a partner but would cease to be executor.

This order simply discharges Amerchand. _____

On a subsequent date an order was made appointing Morarji Canji to be the trustee and executor to the estate of the deceased Mowji Madhowji in place of the retiring trustee and executor Amerchand Madhowji.

Attorneys for the petitioner:—Messrs. *Mansukhlal Jamselji and Hiralal.*

Attorneys for the executrix:—Messrs. *Little & Co.*

Attorneys for the reversioners:—Messrs. *Captain and Vaidia* and Messrs. *Thakoredas & Co.*

W. L. W.