APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

ESSAFALLY ALIBHAI, HEIR OF ALIBHAI TYEBJI AND OF MARIAMBOO, WIFE OF ALIBHAI TYEBJI (ORIGINAL PLAINTIFF), APPELLANT *v.* ABDEALI GULAM HUSSAIN AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS*.

1920. *February* 26.

Administration suit—A Mahomedan dying intestate—Heir entitled to bring a suit for account and administration of the estate—Heir not bound to file a suit for partition—Mahomedan law.

One Gulam Hussain, a Mahomedan, died leaving among other heirs, his father and mother. They having died their shares passed to their son the plaintiff. The plaintiff filed a suit for an account and administration of the estate of Gulam Hussein. Both the lower Courts dismissed the suit on the ground that an administration suit did not lie and that the only suit that could lie was for partition. On appeal to the High Court,

Held, that the plaintiff having an interest in the estate of Gulam Hussein he was entitled to come to Court and ask for a preliminary decree for the administration of that estate and that he was not bound to file a suit for partition.

SECOND appeal against the decision of M. M. Bhatt, Assistant Judge of Surat, confirming the decree passed by M. A. Wagle, First Class Subordinate Judge at Surat.

Suit for administration of an estate.

Plaintiff was the brother of one Gulam Hussein. Gulam Hussein died on the 26th August 1904 without making any will and leaving as his heirs his father and mother who were each entitled to one-sixth, and also his widow (defendant 2), son (defendant 1) and two daughters Safiabu and Sakinabu who were represented on the record by their heirs defendants Nos. 3 to 7. The mother Mariambu died on 21st March 1905 and the father Alibhai died on the 13th May 1911. In 1915, the

* Second Appeal No. 293 of 1919.

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plaintiff as the heir of his father and mother sued for on account and administration of the estate of Gulam Hussein.

The defendants contended, *inter alia*, that the suit was not maintainable in the form in which it was brought.

The Subordinate Judge held that the plaintiff was not entitled to bring the suit for administration of the estate of Gulam Hussein; that his proper remedy was to bring a suit for partition. He, therefore, dismissed the suit.

On the appeal, the Assistant Judge confirmed the decree.

The plaintiff appealed to the High Court.

N. K. Mehta, for the appellant.

G. N. Thakor, for the respondent.

The following authorities were relied on: *Khatija* v. *Shekh Adam*[1]; *Kurban Hussein Tyabali* v. *Sakinabu*[2] and *Abdul* v. *Mahomed*[3].

MACLEOD, C. J.:—The plaintiff filed this suit as the heir of his father Alibhai Tyabji and his mother Mariambu wife of Alibhai Tyabji for an account and administration of the estate of one Gulam Hussein. Gulam Hussein died in 1904 leaving as his heirs according to Shia Mahomedan Law his father and mother, who are each entitled to 1/6th and also his widow and his son and two daughters. The son is defendant No. 1 in the suit. The other defendants are descendants of the daughters.

The suit has been dismissed in both Courts on the ground that an administration suit in reference to

(1) (1915) 17 Bom. L. R. 574.

(2) (1915) F. A. No. 66 of 1914, decided on 31st March 1915.

(3) (1903) 5 Bom. L. R. 355 at p. 365.

Gulam Hussein's estate did not lie ; that the only suit that could lie was for partition on payment of proper Court-fees ; and that the suit was not brought in time. I must confess I cannot follow the reasoning of the learned Judges in the Courts below in support of those findings. I cannot myself see why an administration suit in this case cannot lie, considering that Gulam Hussein died in 1904 ; that his estate has never been distributed ; and that his estate has never been administered. It is impossible for any one who could prove he was entitled to an interest in the estate to get that interest until the estate has been ascertained by proper administration. It is perfectly true that under the law there is no need on the death of a Mahomedan for Letters of Administration to be taken out to his estate, and the result, as I have often pointed out, is that frequently the heirs live in harmony after his death without distributing the estate. Some of them may die leaving their heirs, and it is only when disputes arise in the family that the trouble begins. The point is abundantly clear that if there is an estate it can be administered, and if a party who has an interest in that estate has asked the Court to administer that estate, even if he knows exactly what it consists of, he is entitled to come to Court and ask for a preliminary decree for the administration of that estate. He is not bound, even although he knows what the estate consists of, to file a suit for partition. He may do so or he may not. That is no reason why if he wishes to file an administration suit to get the estate administered in the proper way, he should not do so. It does not follow that because A dies leaving certain definite property that that property will be divided amongst all the heirs. He may have left debts and charges on the estate, and it is only when the estate has been administered, and the usual administration accounts have been taken that

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the interests of those entitled to shares as heirs can be ascertained. The plaintiff in this case stands in the shoes of Alibhai and Mariambu, and he is entitled to come to Court and ask the Court to decide what was the estate of Gulam Hussein, and to decide what was the interest of Alibhai and Mariambu in that estate. It may be discovered when the suit is heard on the merits that Alibhai and Mariambu have no interest in Gulam Hussein's estate. But that has nothing to do with the preliminary point which has been decided against the plaintiff. In my opinion the decree of the lower appellate Court must be set aside, and I find that the suit as framed is perfectly correct, and that, therefore, the suit should proceed to be tried on the merits on the remaining issues which were framed in the trial Court, but not decided. The plaintiff will have the costs in this Court and in the lower appellate Court. Costs in the trial Court to be costs in the cause. Proper Court-fees must be paid as on an administration suit. I may add that no question of limitation arises.

HEATON, J. :—I concur that the suit is not bad merely because the plaintiff sues for an account and administration of the estate of the deceased Gulam Hussein. From the circumstances which appear such a suit is perfectly proper, and it may turn out to be an absolutely necessary thing for the plaintiff to sue for. Gulam Hussein died in 1904 leaving amongst other heirs his father and mother. They have since died, and their shares have passed to the plaintiff. He claims, therefore, that he is a sharer to the extent of 1/3 in the estate of Gulam Hussein, and I understand that what he claims is either to get 1/3 of the estate of Gulam Hussein as it was when he died; or else to get 1/3 of the estate as it was when the suit was brought. Which of the two he really sues for and many other matters can only be determined by going into the case on its

merits. Unfortunately instead of doing this, the lower Courts dealt with the matter on a preliminary issue, and I am afraid they were somewhat influenced by the fact that an administration suit is a very cheap suit to bring. The Court-fees on such a suit are small, whereas the Court-fees on a partition suit vary with the value of the property to be partitioned. But it does not in the least matter to a Judge whether a suit is a cheap suit or a dear suit. The plaintiff could bring his suit in any form which the law allows. Seeing that he wants an inquiry into what is the estate of Gulam Hussein, and also apparently wants an inquiry into what that estate was when Gulam Hussein died, and what has become of it since, that is to say, seeing that he wants to trace the successive development of the estate from Gulam Hussein's death up to the present moment, it seems to me quite impossible to say that he is not entitled to bring an administration suit. Possibly his claim may be successfully met in a variety of ways, but it cannot be defeated on the bare ground that the suit is bad in form. I think, therefore, that this suit was wrongly dismissed on a preliminary point, and that we must set aside the decrees of the lower Courts dismissing the suit, and remand it to be disposed of on its merits. The plaintiff will have the costs in this Court and in the lower Appellate Court. Costs in the trial Court to be costs in the cause.

Decree reversed and case remanded

J. G. R.