

*Privy Council Appeal No. 64 of 1918.*

Soolema Bee Bee - - - - - *Appellant*

*v.*

S. S. A. O. Chetty Firm - - - - - *Respondent*

FROM

THE CHIEF COURT OF LOWER BURMA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 23RD MAY, 1919.

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*Present at the Hearing :*

VISCOUNT CAVE.

LORD PHILLIMORE.

SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by* VISCOUNT CAVE.]

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This is an appeal against a decree of the Chief Court of Lower Burma in its Appellate Jurisdiction, reversing a decree of the same Court in its Original Jurisdiction.

The case turns on the construction of a particular clause in an agreement, and as their Lordships feel no doubt as to the construction of the clause they do not think it necessary to postpone giving their opinion.

The facts are short. One Munshi Ashan Ally, who was a Director of the Bengal Steam Navigation Co., Ltd., had a claim against the Company for 5½ lakhs of rupees; and shortly before his death he took security from the Company for that sum in the form of two mortgages, one for 3 lakhs, and the other for 2½ lakhs of rupees upon certain steamers belonging to the Company. These mortgages were taken in the name of the son of Munshi Ashan Ally, whose name was Abdul Kader. Munshi Ashan Ally died on the 18th December, 1908. After his death Abdul Kader claimed to be beneficially entitled to the two mortgages, and thereupon litigation arose, and proceedings for the administration

of the father's estate were commenced. Ultimately Abdul Kader and the other heirs of the father came to an agreement which was embodied in a deed dated the 11th June, 1910, and made between Abdul Kader, who is therein referred to as the claimant, of the one part, and the widow, and children of Munshi Ashan Ally (other than Abdul Kader), who are therein referred to as the heirs, of the other part. In that agreement the facts were shortly recited, and by clause 1 of the agreement the claimant "in consideration of Rs. 25,000, and in manner hereinafter appearing, and of the covenants on the part of the said heirs hereinafter contained," agreed to forego all interest in the mortgages, and to assign the mortgages to the receiver of the estate of the deceased, who had been appointed in the proceedings. Clause 2 of the agreement, which is the important clause, was in these terms:—

"The said heirs jointly and severally covenant with the said claimant that in consideration of the aforesaid release by him, and of the covenants on his part, that they shall pay to the said claimant or allow him to withdraw out of the amounts realised on the said mortgages, the sum of Rs. 25,000, which sum shall be payable to the said claimant out of the moneys realised on the said mortgages, which sum and the costs and expenses of realisation to be first paid out of all such realisations. And that in the event of the said sum of Rs. 25,000 not being sanctioned by the Court in the said suit No. 44 of 1909"—that was the suit for administration—"as fair compromise of all disputes and differences between the said claimant on the one part and the said heirs and all the creditors of the said deceased of the other part, then the said heirs shall out of their shares of inheritance in the estate of the said deceased pay to the said claimant the sum of Rs. 25,000, which sum the said heirs shall contribute amongst themselves in the proportion in which they inherit in the estate of the said deceased."

Then there are other words in the clause which are not material, and nothing turns upon the later clauses of the agreement. At or about the same date an agreement was entered into between all the heirs of the deceased, including Abdul Kader, and the creditors of the deceased, which will be referred to later.

The agreement of the 11th June was not sanctioned by the Court in the administration suit. The estate turned out, so far as is at present known, to be insolvent, and the creditors have not received their debts in full. The sum of Rs. 25,000, or such interest therein as belonged to Abdul Kader under the agreement, was assigned by him to the respondents, a Chetty Firm, and they brought this suit against the heirs of the deceased other than Abdul Kader for the payment of the Rs. 25,000. It was contended by the respondents that under clause 2 of the agreement of compromise the heirs bound themselves in any event to pay Rs. 25,000 to Abdul Kader, and accordingly that they, the respondents, were entitled to that sum. The appellants, on the other hand, contended that on the true construction of the agreement they were bound only to pay that sum out of their shares in the inheritance of the deceased, and that as, in the events which had happened, they were entitled to no such

shares, the action was misconceived, or was at least premature. Mr. Justice Young on the first hearing took the latter view, and dismissed the suit, but on appeal the Appellate Court took the opposite view, and made a decree in favour of the respondents. Against this decree the appeal is brought.

Turning to the agreement in question it appears to their Lordships that the construction of that agreement is clear. By the agreement the heirs bound themselves in the event (which happened) of the agreement not being sanctioned by the Court to pay this sum of Rs. 25,000 out of their shares of the inheritance, and it was provided that they should contribute the sum as among themselves in the proportions in which they inherited in the estate. As matters have turned out they have no shares in the inheritance, and they inherit nothing from the estate. The fund out of which they were to make payment is therefore non-existent, and their liability has not arisen. It is alleged on behalf of the respondents that on the true reading of the agreement there is a personal covenant to pay, coupled with a charge in one alternative upon the amounts realised from the mortgages, and in the other alternative (which happened) on the beneficial interest of the heirs in the estate. But their Lordships cannot so read the document. It appears to them that in the events which have happened the only obligation to pay is an obligation to pay out of the inheritance, and not otherwise, and accordingly that the obligation has not matured.

Reference was also made on behalf of the respondents to the agreement with the creditors, which, although executed contemporaneously with the agreement of compromise referred to above, is in fact dated the 10th June, 1910. It appears doubtful whether the terms of the agreement with the creditors can be used for the purpose of affecting the construction of the agreement of compromise; but however that may be, it appears to their Lordships that the agreement with the creditors when carefully read contains nothing which conflicts with the construction which they have already put upon the other agreement.

Upon the whole it appears to their Lordships that the appeal must succeed; that the decree of Mr. Justice Young should be restored, and that the respondents should pay the costs of this appeal and of both hearings in the Chief Court of Lower Burma; and they will humbly advise His Majesty accordingly.

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In the Privy Council.

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SOOLEMA BEE BEE

o.

S. S. A. O. CHETTY FIRM.

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DELIVERED BY VISCOUNT CAVE

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