

Mahomedally Tyebally and others - - - - *Appellants*

v.

Safiabai and others - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 8TH JULY, 1940

Present at the Hearing:

VISCOUNT MAUGHAM

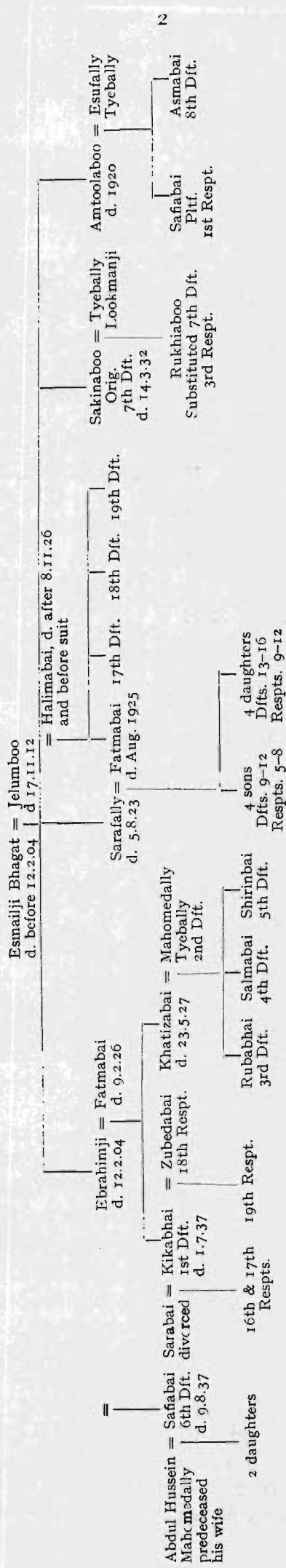
LORD WRIGHT

SIR GEORGE RANKIN

[*Delivered by* SIR GEORGE RANKIN]

This case concerns the administration of the estate left by one Ebrahimji who died in 1904. He was a Dawoodi Borah governed by the Shia school of Mahomedan law and had carried on business in Bombay with his only brother Sarafally as merchants and commission agents. A pedigree table of the family is given hereunder. They belonged to Kapadvanj in the Kaira district of the Bombay Presidency, and the brothers were co-owners of certain immoveable properties there in addition to their interests in their ancestral home. Their Bombay business was a profitable one and a house in Samuel Street in Bombay had been acquired out of the profits.

The heirs of Ebrahimji, according to the Shia system of "sharers" and "residuaries" were (1) his mother Jelumboo entitled to a sixth share, (2) his widow Fatmabai entitled to an eighth share, (3) his son Kikabhai, and his two daughters by different wives (4) Safiabai and (5) Khatizabai. These children took shares in the residue left after deduction of the mother's and widow's shares, the son taking twice as much as a daughter. His brother Safarally and his two sisters Sakinaboo and Amtoolaboo were not heirs. The business was continued by Sarafally, the share of Ebrahimji being left in the business. Jelumboo lived with her son Safarally until her death in 1912. Another Bombay house—in Abdul Rehman Street—was acquired out of the profits in or about 1917. Amtoolaboo died in 1920 leaving as her heirs two daughters, the plaintiff Safiabai and Asmabai (defendant No. 8).



In 1923 Sarafally was ill: he died in August of that year. On the 13th July before his death he entered into an agreement in writing intended to regulate and define the respective interests of himself and Ebrahimji's estate in the business and in the various properties at Bombay and Kapadvanj. The other parties to this agreement were Ebrahimji's son Kikabhai, his daughter Safiabai and his widow Fatmabai. Provision was made for the other daughter Khatizabai joining therein, which she afterwards did. The agreement treated the widow, son and daughters of Ebrahimji as his only heirs, ignoring the facts that his mother Jelumboo had inherited from him a sixth share of his estate, and that of her interest only a half had devolved on Sarafally, the other half belonging to his sister Sakinaboo and the two daughters of his deceased sister Amtoolaboo—namely, the plaintiff and Asmabai.

On this footing the agreement provided that the respective shares of Sarafally and Ebrahimji's estate should as to two plots of land in Kapadvanj be equal, but as to the business and the houses in Abdul Rehman Street and Samuel Street should be as follows: 10 annas to Sarafally and 6 annas to Ebrahimji's estate. The ancestral house at Kapadvanj had already been partitioned by metes and bounds.

On Sarafally's death (5th August, 1923), his estate devolved on his widow, his four sons and his four daughters. On the 24th September, 1924, an agreement in writing was made between them as Sarafally's heirs of the one part and the widow and three children of Ebrahimji as representing Ebrahimji's estate of the other part. No notice was taken in this agreement of Jelumboo or her heirs as having any interest in the estate of Ebrahimji. The agreement of 13th July, 1923, was approved. The house at Abdul Rehman Street and its contents and two immoveable properties at Kapadvanj were to be taken by Ebrahimji's heirs, and Sarafally's heirs were to get the Samuel Street house and the business. These assets were to be taken at certain valuations: the figure for the business to be fixed by one Metaji Chaturbhuji Motichand who was to make up the final account. Some properties at Kapadvanj were not included in this arrangement but it was recited that these had already been divided.

On the 11th December, 1924, the widow and son of Ebrahimji together with one daughter (Khatizabai) sued for partition in accordance with the agreement of 24th September, 1924. The other daughter (Safiabai) was made a defendant but the suit was brought against Sarafally's eight children and widow as representing his estate: a preliminary decree for partition and accounts was obtained on 5th May, 1925, and a final decree on 11th June, 1926. The widow of Ebrahimji died meanwhile in 1925 and her interest passed to her children. The widow of Sarafally died in 1926: this produced certain changes in the representation of Sarafally's estate which will be taken account of in due course.

On 17th July, 1926, Ebrahimji's son Kikabhai sued his sister Khatizabai and his half-sister Safiabai for sale and division of the property which had come to them under the decree in the previous suit. Safiabai by her written statement filed on 8th November, 1926, set up that Jelumboo, her father's mother, was one of his heirs, and that the present plaintiff together with her sister Asmabai and her aunt Sakinaboo and other persons should be brought before the Court as necessary parties. Khatizabai having died in 1926, her husband and children were substituted in her stead. On 21st February, 1929, a decree was passed by consent directing that Safiabai should take a sum of Rs.51,500 with certain interest in full satisfaction of her share in her father Ebrahimji's estate. This was paid to her and a release was executed by her on 31st January, 1930. Their Lordships do not stop to consider the propriety of these proceedings having regard to the facts brought to notice by the lady's own written statement as already mentioned.

On 23rd July, 1930, the present suit was filed. At some date before that but after 1926 the death of Halimabai occurred. She was the mother of Sarafally's wife and had been one of her heirs. The result of Halimabai's death was that the persons entitled to the estate of Sarafally were now his four sons, his four daughters and three sisters of his wife. These eleven persons may be described as the second set of defendants to the present suit—namely defendants 9-19 inclusive. The plaintiff was Safiabai, one of the two daughters of Amtoolaboo, sister to Ebrahimji. The first set of defendants (so to call them) were Kikabhai and Khatizabai's representatives; these were defendants 1-5. Among other defendants was Kikabhai's half sister Safiabai (defendant 6) who has been paid out as already mentioned. The plaintiff's sister, Asmabai, was defendant 8 and the plaintiff's aunt, Sakinaboo, was defendant 7. These two ladies were in the same position as the plaintiff, being persons entitled along with the plaintiff to a half of the one-sixth interest which Jelumboo had in her son Ebrahimji's estate. The other half of that one-sixth interest belonged at the date of the suit to Sarafally's representatives—that is defendants 9-19—unless by the agreements of 1923 and 1924 they had lost their interest.

It is necessary to direct attention to the frame and scope of the suit. It was brought on the Original Side of the High Court at Bombay. The plaint set forth the various relationships of the parties and the devolution of interests in the respective estates of Ebrahimji and Sarafally. It recited the agreements of 13th July, 1923, and 23rd September, 1924, and the two previous suits brought thereupon; it stated that the plaintiff had had no knowledge thereof and had not consented thereto; but it did not claim that the plaintiff's interest in the estate of Ebrahimji should be ascertained as between herself and the estate of Sarafally as though these agreements had never been made. In effect, as their Lordships read the plaint, it merely asked that

Jelumboo's one-sixth share in what Ebrahimji's widow and children had received as representing his estate should be given to the persons entitled thereto. Defendants 9-19, Sarafally's representatives, supported the plaintiff: the contesting defendants were the defendants 1-5.

The suit having been filed on 23rd July, 1930, Sakinaboo (sister of Ebrahimji), who was defendant No. 7, died on 14th March, 1932, leaving her daughter Rukhiaboo as her heir. No application to make the daughter a party to the suit having been made within 90 days, the suit abated as against Sakinaboo under Order 22, rule 4, clause 3, of the Civil Procedure Code. No application was made within 60 days thereafter to set aside the abatement under rule 9 of the same Order. But on 10th May, 1936, Rukhiaboo herself applied to be brought on the record in her mother's stead and claimed to share in the relief asked by the plaintiff. Acting under rule 10 of Order 1 of the Code, Barlee J. on 22nd January, 1936, added her as 7th defendant to the suit. At the trial the learned Judge on 17th February, 1936, dismissed the suit, holding that the plaintiff's claim was within article 106 of the schedule to the Limitation Act, 1908, which prescribes a period of three years from the date of dissolution for a suit for an account and a share of the profits of a dissolved partnership. On appeal this decree was set aside by a Division Bench (Beaumont C.J. and Rangnekar J.) who directed an account to be taken of the estate of Ebrahimji come to the hands of Kikabhai and the heirs of Khatizabai and ordered that the estate of Ebrahimji be applied in due course of administration. This decree was dated the 8th September, 1936, and is the decree from which the present appeal is brought by the heirs of Khatizabai.

It is not contended that the plaintiff's claim is for anything more than her *prima facie* rights in Ebrahimji's estate, but three points are taken for the appellants. It is said (1) that the suit had come to an end by reason that it had abated as against Sakinaboo, (2) that it is barred by limitation, and (3) that defendants 9-19 can make no claim against the appellants in respect of Safarally's interest in Jelumboo's estate as this would be contrary to the agreements of 13th July, 1923, and 23rd September, 1924, and to the decree of the Court made (11th June, 1926) in the suit of 1924 which gave effect to these agreements.

On the first point their Lordships are of opinion that it is impossible to hold that the suit for administration of Ebrahimji's estate came to an end by reason of abatement as against Sakinaboo. Sakinaboo and her daughter Rukhiaboo are persons having the same interest as the plaintiff and though the plaintiff by reason of laches may be supposed in certain circumstances to lose her rights as against them, it is paradoxical to suppose that the plaintiff's laches have deprived them of rights. There is nothing in Order 22 to take away their interest in the estate of Ebrahimji and they could (so

far as that Order is concerned) have brought an administration suit of their own, notwithstanding any abatement of the plaintiff's suit. The presence of someone to represent Sakinaboo's interest was very proper and highly desirable in the interest of every other party, but it is putting it too high to say that the suit could not possibly go on without her. It not uncommonly happens, in a suit for administration, that for one reason or another a particular interest is not represented before decree, but is either provided for by the decree, or is asserted at a later stage under the decree, or is given effect by a party being permitted to attend certain accounts and enquiries so as to be bound by the result. Still, it would have been very bad practice if in the present case Rukhiaboo had not been joined as a party and this was properly done by Barlee J. on her own application under Order 1, rule 10. Their Lordships are of opinion that it is open to the judge in his discretion under Order 1, rule 10, to add as a party to the suit the representative of a person against whom the suit has abated for the purpose of giving effect to the rights of the parties. The contention that the plaintiff's suit had abated as a whole is fundamentally mistaken. It involves that the plaintiff was claiming relief against Sakinaboo, that because Sakinaboo's heirs were entitled to resist the grant of this relief in the present suit by reason of the plaintiff's laches, the plaintiff could not be given relief against the present appellants. No step in this reasoning can be justified.

It was not contended before the Board that the plaintiff's suit is of the character mentioned in article 106 of the Limitation Act. It is a suit against certain Mahomedan co-heirs by a person entitled to part of the interest of an heir and the High Court on appeal rightly held that to such a suit neither article 106 nor article 123 is applicable. The heirs of a Mahomedan succeed to his estate in specific shares as tenants in common and the plaintiff's suit against the son and daughters of Ebrahimji for due administration of what came to their hands as property left by their father is governed as regards immovable property by article 144 and as regards moveables by article 120 (*Mahomed Riasat Ali v. Hasin Banu*, 1893, L.R. 20 I.A. 155, *Ghulam Muhammad v. Ghulam Husain*, 1931, L.R. 59 I.A. 74). Upon the proper application of article 120 as between tenants in common it will be sufficient to refer to *Musammat Bolo v. Musammat Koklan*, 1930 L.R. 57 I.A. 325 and *Yerukola v. Yerukola*, 1922, I.L.R. 45 Madras 648. It does not appear that the widow son or daughters of Ebrahimji received what was to come to them under the agreement of 24th September 1924 until the suit of 1924 had been decreed in 1926 which is well within 6 years of the filing of the present suit on 23rd July 1930. But their Lordships think it right to add that on the evidence they find no reason for holding that there had been an ouster or exclusion of the plaintiffs prior to 23rd July 1924: indeed there are concurrent findings of the courts in India which are inconsistent with any such contention.

The third point taken by the appellants is in their Lordships' opinion good against those claiming under Safarally an interest in Jelumboo's one-sixth share of Ebrahimji's estate. As the suit of 1924 resulted in a decree there is an element of estoppel by record but the matter may be put sufficiently as resting on agreements made in 1923 and 1924 between Sarafally and Sarafally's heirs on the one part and the widow and children of Ebrahimji on the other. Defendants 9-19 cannot claim to make the present appellants liable on the footing that Sarafally was entitled to more than these agreements gave him, though it be true enough that since 1912 he had been entitled to a half of his mother's one-sixth share. If the plaintiff by her suit had challenged the rights of Sarafally's heirs under the agreements of 1923 and 1924 it may well be that she could have required Sarafally's heirs to account upon a footing which would have made it impossible to give any effect to these agreements even as between the parties to them. But the plaintiff by her suit has not sought relief upon any such basis and the agreements have their effect between Sarafally (and his representatives) and the children of his brother.

Their Lordships are of opinion that on this point the appeal succeeds but only as against defendants 9-19 (respondents 5-15). The decree of the High Court dated 8th September, 1936, should be varied (*a*) by limiting the second of the declarations therein made to a declaration that the plaintiff and the 7th and 8th defendants are entitled to a one-twelfth share in the estate of Ebrahimji Esmailji Bhagat, the plaintiff and the 8th defendant being each entitled to one-quarter of the said one-twelfth share and the 7th defendant being entitled to the remaining half thereof; (*b*) by adding to the order for administration the words "so far as regards the one-twelfth share to which the plaintiff and the 7th and 8th defendants are entitled as aforesaid."

Their Lordships will humbly advise His Majesty accordingly. They see no need to disturb the High Court's order as to costs. As regards the costs of this appeal the appellants must pay one-half of one set of costs to the contesting respondents—that is, respondents 1, 3 and 5-12 who have joined in resisting the appeal.

In the Privy Council.

MAHOMEDALLY TYEBALLY AND
OTHERS

v.

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DELIVERED BY SIR GEORGE RANKIN

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