1962 *Present* : **Sansoni, J., and Sinnetamby, J.**

A. C. JUNAID, Appellant, *and* COMMISSIONER OF INLAND REVENUE, Respondent

S. C. 2/61—Income Tax Case, BRA 285

Income Tax Ordinance (Cap. 242)—Section 2—Liability of executor de son tort as " executor "—Meaning of term " executor de son tort ".

An executor de son tort falls within the definition of " executor " in section 2 of the Income Tax Ordinance.

When a person without just authority takes upon himself to act as executor, as by intermeddling with the goods of a deceased person, he becomes liable because he has done acts which only a lawful executor is entitled to do.

Even one act of intermeddling is sufficient to render a person liable as executor de son tort, though mere acts of kindness or charity would not render a person so liable.

APPEAL by way of a case stated under section 78 of the Income Tax Ordinance.

G. E. Chitty, Q.C., with *K. Sivagurunathan* and *Desmond Fernando*, for the Appellant.

Mervyn Fernando, Crown Counsel, with *M. Kanagasunderam*, for the Respondent.

Cur. adv. vult.

March 6, 1962. SANSONI, J.—

This is an appeal by way of a case stated under section 78 of the Income Tax Ordinance, Cap. 242.

The appellant was required by the Commissioner of Inland Revenue to pay, as an executor of the estate of A. C. Abdeen, a sum of Rs. 164,000 as income tax on an additional assessment made in respect of the year 1958/59. He appealed against that assessment, but both the authorised adjudicator and the Board of Review held against him.

A. C. Abdeen died on the night of 4th December, 1958, and the additional assessment and the notice served on the appellant arose out of certain incidents which are said to have occurred that night. The Board of Review, affirming the authorised adjudicator's findings, decided that a sum of over 12 lakhs of rupees in cash, which was in three safes in the deceased's house, was divided among certain persons who were there, and the appellant took a sum of Rs. 164,000. It is this sum of Rs. 164,000 that was claimed from him as tax, the liability being limited to the amount in cash which, according to the evidence, he received from the assets of the deceased.

Mr. Chitty urged as his first point that there was no evidence that the appellant received such a sum of money. We were taken through the relevant portions of the evidence recorded by the authorised adjudicator and I am unable to agree with Mr. Chitty.

The witness Jamaldeen, who is the father of the deceased's widow Noor Zareena, described how he found the appellant and several other persons at the residence of the deceased on the night in question. There was money on a table in the office room, and while it was being counted there was a discussion as to how it should be divided. That money came from three safes which were opened by the deceased's son Zareen Abdeen. One Idroos, a friend of the deceased who was there, was asked to divide the money and seven lots of Rs. 160,000 each were separated to represent seven shares. Those who received those shares were :

(1) his first wife's children who received 3 shares jointly

(2) his brothers Mazahir and Junaid (the appellant) who each received one share

(3) his widow, Noor Zareena, who received one share and

(4) his brother-in-law Saleem who received one share on behalf of his wife, a sister of the deceased.

In addition to the sum of Rs. 160,000 representing one share, the appellant received, according to the evidence, a further sum of Rs. 4,000 on behalf of his son Faleel. The witness said that he received Rs. 160,000 on behalf of his daughter ; the appellant received one lot of Rs. 160,000 and another sum of Rs. 4,000 on behalf of his son, and in that way all the money was taken away. Under cross-examination he repeated what he had said in examination in chief. At the close of his re-examination the following passage occurs in the evidence :

Q. Now in this discussion for the division, did Mr. Junaid ask for a share ?

A. Not that he asked.

Q. What did Junaid say in the discussion ?

A. I cannot remember what he said.

Q. But did he take the money allocated ?

A. That I did not see, Sir.

Mr. Chitty argued that the last answer given nullifies the evidence given previously by the witness. I do not take that view. The witness had repeatedly said that the appellant Junaid had received one lot of Rs. 160,000 plus a further Rs. 4,000 and it was for the authorised adjudicator to say what view he took of the witness's evidence as a whole.

The next witness called was the widow. She did not see the actual division, because she was in her bedroom as required by custom, but she said that at about 1 a.m. her father brought her a sum of Rs. 160,000 saying that it was her share. That money was later removed from her house by her father to his house.

The next witness was Noordeen, who had been a friend of the deceased for about 15 years. He was in the house when the deceased's body was brought there from the hospital. He spoke to having seen a lot of money on a table in the office room after some safes had been opened. It was in currency notes of Rs. 50 and Rs. 100. It was divided, and he saw persons taking it away in pillow cases. He saw the appellant taking one pillow case, Mazahir taking another, the first wife's children taking another, the widow's father taking another. In all he saw five persons taking away pillow cases containing money, and there was no money left on the table thereafter. The witness has, however, denied that he distributed the money although he admitted that he was asked to do so by those present.

The appellant was himself called as a witness by the Assistant Commissioner. He admitted his presence in the house that night from about 11 p.m. till about 5.30 a.m. All he admitted having received was about Rs. 2,500 or Rs. 3,000 at about 12.30 or 1 a.m. but he could not remember who gave it to him. He denied that there was any distribution of cash or that he received Rs. 164,000. I do not agree with the submission that because the appellant was called by the Assistant Commissioner his evidence had to be accepted as true. That was a matter for the authorised adjudicator, who was the judge of questions of fact and the credibility of witnesses. Viewing all the evidence in the light of the circumstances spoken to, he was entitled to hold that there was a distribution of money that night, and that the appellant received a sum of Rs. 164,000.

The next point that arises for consideration is whether, on that view of the facts, the appellant fell within the definition of "executor". That term has been defined in section 2 of the Ordinance as follows : "Executor" means any executor, administrator, or other person administering the estate of a deceased person, and includes a trustee acting under a trust created by the last will of the author of the trust. We have heard interesting arguments on whether this definition is wide enough to cover the case of the appellant who is said to have taken a sum of Rs. 164,000 out of the assets which had been in the possession of the deceased at the time of his death. The question, in short, is whether such an act of intermeddling would make the appellant an executor de son tort (as a lawyer would

term it) and whether he would come within the definition. This is a mixed question of fact and law, and I think it may be broken up into two parts :

(1) Is an executor de son tort an executor within the definition?

(2) Is the appellant an executor de son tort?

By the words "any executor, administrator or other person administering the estate" it is obvious that the legislature intended to cast as wide a net as possible, and to include all persons who may have taken part in the administration of the estate whether they had a legal title to do so or not. The term "executor" itself does not necessarily mean a rightful executor, that is to say, a person who has been appointed an executor by the deceased. It could also include one who has acted as an executor of an estate without a legal right to the position. Thus it has been held that if a man is sued as the executor of an executor for a debt of the original testator, it is no answer to that action that he is only executor de son tort to the original rightful executor—see *Meyrick v. Anderson* [1]. This case was followed in *Rahman Dole v. Abesiriwardene* [2] where it was held that a plaint describing the defendant as executor imports that he is executor either by right or by wrong, and a mere denial that the defendant has clothed himself with probate is no answer to the plaint.

It is instructive to turn back to a very early case dealing with the question : Who is an executor de son tort? In *Read's case* [3] the court had to deal with an action of debt brought by one Read against Carter, executor of Yong. Yong, who had made his last will appointing A as his executor, died leaving goods above the value of the debt. Before the will was proved the defendant Carter took the testator's goods into his possession and intermeddled with them. The will was proved later. The question for the court was whether the defendant, Carter, should be charged as executor of his own wrong. Judgment was given for the plaintiff and the following three points were resolved :

(1) When a man dies intestate, and a stranger takes the intestate's goods and uses them, or sells them, in that case it makes him executor of his own wrong. For although the pleading in such case be, that he was never executor, nor ever administered as an executor ; and therefore it was objected, that he ought to pay debt or legacy, or do something as executor : yet it was resolved, and well agreed, that when no one takes upon him to be executor, nor any hath taken letters of administration there, the using of the goods of the deceased by any one, or the taking of them into his possession, which is the office of an executor or administrator, is a good administration to charge them as executors of their wrong ; for those to whom the deceased was indebted in such case have not any other against whom they can have an action for recovery of their debts.

[1] *14 Q. B. 719.*

[2] *(1906) 2 Weer. 49.*

[3] *5 Co. Rep. 33 b.*

(2) When an executor is made, and he proves the will, or takes upon him the charge of the will, and administers in that case, if a stranger takes any of the goods, and, claiming them for his proper goods, uses and disposes of them as his own goods, that doth not make him in construction of law an executor of his wrong, because there is another executor of right whom he may charge, and these goods which are in such case taken out of his possession after that he hath administered, are assets in his hand; but although there be an executor who administers, yet if the stranger takes the goods, and claiming to be executor, pays debts, and receives debts or pays legacies, and intermeddles as executor, there, for such express administration as executor, he may be charged as executor of his own wrong, although there be another of right:

(3) In the case at Bar, when the defendant takes the goods before the rightful executor hath taken upon him, or proved the will, in this case he may be charged as executor of his own wrong, for the rightful executor shall not be charged but with the goods which come to his hands after he takes upon him the charge of the will.

I draw attention to the intermeddling with the goods of the deceased being described as an administration which renders the person liable as the executor of his wrong. More than once in this judgment such intermeddling is so described. It is on this basis that the liability accrues, for when a person without just authority takes upon himself to act as executor, as by intermeddling with the goods of the deceased, he becomes liable because he has done acts which only a lawful executor is entitled to do. He incurs the liabilities of his usurped office without any of the profits or advantages. It is well settled that even one act of intermeddling is sufficient to render a person liable as executor de son tort, though mere acts of kindness or charity would not render a person so liable.

In the case before us, the question of fact as to whether there had been an intermeddling by the appellant has been decided against him. The conclusion to be drawn from that fact is a question of law. There can be no doubt that he acted as an executor de son tort, and brought himself within the meaning of " executor " as defined in section 2. This is not a case where it can be said that there was no evidence that he intermeddled, or that the proper inference from such intermeddling was that he did not render himself liable as an executor.

I would dismiss the appeal with costs.

SINNETAMBY, J.—I agree.

Appeal dismissed.