

Mathuradas Vassanji Vs. Raimal Hirji

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Court : Mumbai

Decided On : Mar-04-1935

Reported in : AIR1935Bom385; (1935)37BOMLR642; 159Ind.Cas.533

Judge : Tyabji, J.

Appeal No. : O.C.J. Suit No. 649 of 1930

Appellant : Mathuradas Vassanji

Respondent : Raimal Hirji

Judgement :

Tyabji, J.

1. One Khetsey Khiasey died at Limbdi in Kathiawar on March 6, 1922. He left a will appointing his widow Bai Vejbai as executrix. Probate was obtained by Bai Vejbai on a petition dated June 13, 1922. In the schedule to the petition the assets were shown as Rs. 55,82,521-5-4 and the debts as Rs. 36,18,567-2-0, leaving a net estate of Rs. 19,63,954-3-4. The assets were not completely administered by Bai Vejbai, and on her death a petition for double probate was filed on January 6, 1926. The total assets as therein stated were Rs. 27,01,756-10-3 and the debts Rs. 23,82,153-1-0 leaving the net assets of Rs. 3,19,603-9-3.

2. During the time that Bai Vej bai was administering the estate, defendant No. 1, Raimal Hirji, applied to her for payment of a sum due to himself as trustee of an institution (a Jain Boarding School at Palitana) established by the deceased on October 23, 1905. Under the trust deed the trustees were authorised to retain the sum dedicated by the deceased Khetsey Khiasey in the firm of Hirji Khetsey and Co., of which the deceased was the proprietor, and it was so retained up to the time of his death. It, therefore, became a debt due from the firm and consequently from the estate of Khetsey Khiasey on his death. When defendant No. 1 demanded payment of this sum from the executrix he was told that the sum would be paid within six months and requested to wait for that time. In the meantime she pledged the documents of three immoveable properties belonging to the estate by way of equitable mortgage for securing his claim. I believe the plaintiffs' evidence as to the circumstances in which the demand for payment was made. I think defendant No. 1 had come to know at that time of the decree for four lakhs (exhibit G) against the estate, and was aware of its having become problematical whether the estate would be able to pay all its creditors in full.

3. Subsequently on June 21, 1926, defendant No. 1 brought a suit (No. 1417 of 1926) on this equitable mortgage. A preliminary decree was passed dated July 13, 1926. The decree was made absolute on March 31, 1927.

4. In substance the present suit is to prevent that decree from being executed so as to infringe the rights of the other creditors of the deceased. Declarations are accordingly sought that the mortgage in favour of defendant No. 1 was , unauthorised and not binding upon the other creditors of the estate and that the decree is not binding on the other creditors ; and it is prayed that the properties purported to be mortgaged should, if necessary, be followed in the hands of defendant No. 1, for the purpose of having the debts of all the creditors liquidated therefrom without priority, and equally and rateably as far as the assets of the deceased extend : Indian Succession Act, Section 323 and Section 360, proviso.

5. It is admitted that the executrix committed a breach of the duty of equal and rateable payment of debts. The personal liability of the executrix to make good the loss to the other creditors (Indian Succession Act, Section 368) is also admitted.

The real question that I have to decide is whether the other creditors, who will suffer by the breach, have a right to follow the property purported to have been transferred by this breach,--or rather to prevent the decree being executed in enforcement of the mortgage purported to have been made in disregard of their rights.

6. The question becomes acute because although the petitions and schedules to which I have referred indicate that the net estate was very large, yet subsequent events have proved it to be, insolvent and extremely difficult of administration. ,

7. These subsequent events may be very shortly stated.

8. The estate consisted in the first instance of certain realisable securities pledged with the Central Bank of India and the Bank of India to secure claims amounting in the aggregate to about eighteen lakhs. The little balance that was left after satisfying the Banks has been duly administered. Secondly, the estate consisted of large claims against individuals. A few of such claims were secured on mortgages of immoveable property. The claims of the estate secured by mortgages have been enforced and have generally resulted in great loss to the estate, without any appreciable chance of the balance due to the estate being recovered from the mortgagors personally. Thirdly, there were large unsecured claims against individual debtors of the deceased. These have almost in every case proved to be incapable of recovery. The large assets attributed to the estate as debts due from individual debtors have proved of very little value. The estate has suffered because of the unsubstantial character of the debtors as well as the disappointing values realised by the securities on which the debts had been advanced.

9. Finally, in regard to the tangible assets possessed by the deceased, an inflated value was put on the village of Ara. In accordance with the first petition it was worth over twelve lacs of rupees. In the second petition it was valued at five lakhs. It had cost to the testator something like nineteen lakhs. It was sold in December, 1931, by the Commissioner of this Court under the final decree for administration. It realised only Rs. 1,95,000. Moreover, the Ara village was the cause of direct loss to the estate. It gave rise to litigation out of a proposed sale. Thence resulted

a decree for refunding three lakhs of rupees which had been paid to the estate as earnest money : interest and costs amounted to another lakh (exhibits G and H).

10. Three other immoveable properties were mentioned in the schedule. These are the properties that were equitably mortgaged to defendant No. 1. They have also greatly diminished in value, or proved to be far less valuable than they were supposed to be.

11. The assets of the estate have thus been gradually depreciating, and its liabilities have been gathering force by accumulations of interest and other charges. The Indian Succession Act, Section 323 (to which I shall refer more fully), provides for an equal and rateable payment of the creditors : no creditor who has been paid off can therefore contend that when he was paid the estate had depreciated to a less extent, and that if all the creditors had been paid at the same time as himself, they would have been in as favourable a position as himself. And no such argument has been addressed to me.

12. I will consider first the substantial rights of the parties, dependent mainly upon the legislative directions in the Indian Succession Act, laying down the manner in which the estates of deceased persons shall be administered. It will then be necessary to consider certain adjectival difficulties.

13. The central position amongst the sections relevant to the present case is occupied by Section 323 of the Indian Succession Act (XXXIX of 1925) which reproduces Section 282 of Act X of 1865. Section 323 runs : ' Save as aforesaid,'- viz., save as to the payment first of funeral and death-bed expenses under Section 320, secondly, of the expenses of obtaining forensic recognition and other judicial proceedings under Section 321, and, thirdly, the payment of wages under Section 322,- ' no creditor shall have a right of priority over another; but the executor or Administrator shall pay all such debts as he knows of, including his own, equally and rateably as far as the assets of the deceased will extend.' But for this section the executor would be under no duty to pay the creditors equally and rateably. He would have the option to prefer one creditor to another just as the deceased in his lifetime may do. The hands of executors in England are on the other hand free so far as preferring one creditor over another is concerned. In this respect Section

323 is an innovation.

14. In regard, however, to equal and rateable distribution amongst the legatees after payment of the creditors, the law in India agrees with that in England. So far as equal and rateable distribution amongst legatees is concerned, specific methods are laid down in the Act so that effect may be given to the law. Appropriate remedies are given (a) to ensure to creditors, the satisfaction of their debts in priority to the distribution of the assets amongst the legatees ; and (b) to ensure to legatees equal and rateable distribution amongst themselves within the limits prescribed. The provisions with regard to such priority and equality as the law in England recognizes in the case of creditors and legatees, appear in effect to be reproduced in India in Chapter XII of the Indian Succession Act, Sections 356-367.

15. Under Section 323, however, the rights of all creditors in India become interdependent : the rights of each creditor are brought into relation with the rights of all others : that is not the case in England. These new relations required provisions dealing with circumstances similar to those contemplated with reference to legatees in Sections 361-365 ; e.g., it might have been specifically provided whether or not a creditor who had not received equal and rateable payment had any rights against another creditor who had received more than his due on an equal and rateable basis,-in a manner analogous to that in which legatees are given appropriate rights amongst themselves. But this has not been done. The Act is silent in respect of such questions. So that the case that arises in regard to the present estate has not been expressly legislated upon ; and the question, whether, where the executor has committed a breach of Section 323, there is (apart from the liability of the executor under Section 368) any remedy open to the general body of creditors whose rights have been frustrated,-has to be determined by reference to the indications of what the Legislature must be deemed to have intended.

16. The executrix in this case is dead. I must here refer to a point that has not been taken. It might have been argued that the principle underlying Section 363-under which an unsatisfied legatee cannot oblige a satisfied legatee to refund

without resort in the first instance to the executor who has misapplied the estate-must (with the necessary mutations) govern the present claim. But that has not been argued, because it is admitted that in the present case that principle would not come in the way of the plaintiffs, if they have otherwise any remedy against a creditor who has been overpaid or has received undue priority. At any rate as I felt pressed by the question I drew the attention of counsel to *Hunter v. Young* (1879) 4 Ex. D. 256, where Bramwell and Baggallay L. JJ. doubtingly agreed with Thesiger L. J. in holding that the executor was not a necessary party to the action. That action was brought by the creditor of a deceased solicitor, Witley. The defendants to the action were the assignees of the residuary legatee of the residuary legatee of Witley (the two intermediate residuary legatees being dead). It was held that the surviving executor of the original debtor (Witley) was not a necessary party to the action against the assignees ; that if the defendants wished to bring the executor before the Court, their proper course was to apply to have him made a party. In spite of my drawing-counsel's attention to this case, no similar point was made before me. I think the defendants' counsel was right in not doing so, as not only is Hunter's case against him, but also the facts (1) that the suit is brought on behalf of all the creditors, (2) that there is a decree against the executrix, and (3) that the executrix is dead. At the same time in the case before me there are no circumstances corresponding to those that seem to have been chiefly responsible for the doubts that two of the learned Lord Justices felt. Thus in the first place Bramwell L. J. remarks (p. 261):-suppose that the executor was dead, intestate and insolvent, would the creditor be bound to get some persons appointed administrator de bonis non before he could sue the residuary legatee I think not.

Secondly, Baggallay L. J.'s remarks on p. 263 indicate that though the executor might still be liable-and the reporter's footnote on p. 263 shows that he clearly was-yet as the view of Thesiger L. J. laid down a convenient rule of practice, he was willing to adopt it. Thirdly, the last paragraph of Thesiger L. J.'s judgment is to this effect (p. 264):-

It seems unreasonable that the plaintiff in cases like the present should be bound to make the executor a party, when the plaintiff's case is that she has no ground of

claim against the executor, and might have to pay his costs if she 'did join him as a defendant.

17. The Legislature not having completely worked out the scheme by which the provision of equal and rateable distribution amongst creditors shall be enforced, the arguments on behalf of the plaintiffs were directed to enhance and of the defendant to minimise the effect of Section 323. In order that the relative powers and duties of the executor and the rights and dues of the creditor may be determined all the relevant provisions of the law must be considered together.

18. Mr. Taraporewala for the plaintiff strenuously pressed that Section 323 has the effect of creating a charge or trust in favour of all creditors, so that each creditor must be deemed to have a charge on each item of the assets of the estate, or a beneficial interest in it : just as the cestui que trust has in trust property ; and that each creditor may assert his right in the same manner as a charge-holder or beneficiary under a trust may do : in particular that the assets may be followed just as trust property may be followed. It may be conceded that in some respects the result under Section 323 is similar to that where a trust is created, and no doubt the 'representative is considered a trustee for the persons interested in the estate, and must account for any advantage made by him : 'Williams on Executors and Administrators, 12th Edn., 1930, Vol. I, p, 567. But the language of Section 323 is very different from that, for instance, of the Indian Trusts Act, Section 6. No advantage seems to result from paraphrasing the language of the Legislature into different terms, which may or may not have the same legal effect. For further light on Section 323, it is preferable to turn to the other sections of the Indian Succession Act, and not to call in the aid of the law of trusts or charges, unless the Act itself contains some indication that this should be done.

19. Much reliance was placed for the defendants on the fact that, under Section 211 the whole of the estate vests in the executor, and he is empowered under Section 307 to dispose of the property of the deceased in such manner as he may think fit. The decisions of Lord Mansfield C. J. in *Whale v. Sir Charles Booth* (1792) 4 T.R. 625 f.n. and of Lord Thurlow in *Scott v. Tyler* (1788) Dick. 712 were relied upon. It seems to me that these sections and decisions as to the executor's

powers of disposition are not to be taken as guides for deciding the questions that arise. They refer primarily to the powers of the executors when dealing with outsiders or strangers to the estate. Their substratum is that if a stranger to the estate has paid consideration to the executor, so far as the estate is concerned, it is merely one form of asset taking the place of another. And, on the other hand, there is no duty on the stranger to see that the price or consideration given by him is put to any particular use, or is duly administered by the executor. The powers of the executor to effect such a change in the form of the estate cannot throw light on the manner in which he must fulfil his duties to the creditors under Section 323.

20. Section 323 lays down the duty of the executor to pay equally and rateably, and to pay neither more nor less. This provision comes as a sequel to the provision that no creditor shall have a right to priority over another : it seems to be the intention of the Legislature to cut down each creditor's claim : he is not to be entitled to his full debt, but merely to an equal and rateable payment out of the assets : each creditor can merely require the executor to perform his duty, viz., to pay debts out of the assets equally and rateably : the executor's duty excludes from his competence the power to pay one creditor with the possible result of disproportionate reduction in, or loss of, the claims of the others. The words that no creditor shall have priority over another, seem to have the same effect in regard to debts as is stated in greater detail in Section 359, in regard to legacies. The creditor cannot require the executor to act contrary to Section 323. He cannot demand payment to himself, an individual creditor, without payment to the rest.

21. The question may be considered from two aspects : (1) The duty cast upon the executor to discharge the liabilities of the deceased, and to pay the legacies bequeathed by him ; and (2) the right of the creditors and legatees to receive their dues from the estate. The latter right does not in all respects correspond with the former duty, the latter is in excess of the former in that the executor may be exonerated (Section 358) or may lose his right to call upon a legatee to-refund (Section 357) and yet the creditor or legatee may be entitled to ' follow the property,' or to ask for a refund : the Indian Succession Act, Sections 356, 360 ; *Knatchbull v. Fearnhead* (1837) 3 My. & Cr. 122. Moreover, Section 359 deals with the discharge of a debt of which the executor had no previous notice. Section 323

deals only with such debts as the executor knows of. Section 323 is so worded as to present the law primarily from the former aspect, -of the creditors' rights ; the executor's duty being to render to them their rights. In so far as Section 323 places a limit on the powers of the executor to pay one creditor in preference to another, and distinguishes the executor's rights from the rights of the testator, it may be contrasted with Section 220 which generally entitles the administrator to all the rights belonging to the intestate.

22. If the executor may not pay any creditor except on an equal and rateable' basis, he may not mortgage the assets for making any payment in excess of the rateable and equal payment due to the creditor.

23. For the purpose of determining the full effect to be given to Section 323, the section that was most canvassed was Section 360. This section lays down a course of procedure by following which the executor may protect himself from any liability in regard to the assets he distributes, as against a person of whose claim he has had no notice. The procedure that the executor must follow to clothe himself with the protection under Section 360 is to give notice to creditors and others to send him their claims against the estate of the deceased. After the expiration of the time named for sending in claims, the executor may distribute the assets in discharge of such claims as he knows of, without being liable for the assets so distributed to any person of whose claim he had no notice at the time of such distribution. Then follows a proviso on which much reliance is placed on behalf of the plaintiffs. I will deal with it presently.

24. It was strenuously argued by Mr. Chagla (who throughout argued with great ability and care) that Section 360 throws no light on the question : (1) In the first place, it was argued that the expression ' distribution ' in Section 360 must be understood in the restricted sense in which it was stated to be understood in English law, viz., as the application of the estate to payment of the legacies ; so that ' distribution ' cannot apply to payments of debts due to creditors. . The construction of Section 360 that this would lead to, however, seems not possible in view of the position brought about by Section 323. Section 360 is based on Lord St. Leonard's Act, 22 & 23 Vic. c. 35, Section 29, which has now been replaced in

England by the more comprehensive 115 Geo. V., c. 19, Section 27 (the latter applies to trustees' as well as to personal representatives). The section on which Section 360 is based is set out in *Hunter v. Young* (1879) 4 Ex. D. 256, to which I referred before. If no creditor could have complained that another creditor had been paid without an equal and rateable payment to himself-if there had been no duty on the executor to pay all debts equally and rateably the expression 'distribution' in Section 360 might have been restricted to payments of legacies, and the section might have been construed on the footing that making payments to creditors is not 'distribution.' But the effect of reading Section 360 in that restricted manner in India would, in view of Section 323, be that if the executor after due notice under Section 360 applied the assets in discharge of the claims of creditors known to him, and then distributed the assets to the legatees, then he would be free from liability for the assets so applied only in regard to the distribution to the legatees ; but he would continue to be liable in regard to the assets applied in discharge of the claims of the creditors, which would reduce the section to absurdity. The situation cannot arise under the law in England. The expression 'distribution' in Section 360 must therefore be deemed to cover payments in discharge of the claims of creditors, as well as payments of legacies.

(2) Secondly, it was argued that since no such notices were given as Section 360 requires, the section never came into operation, and so the proviso cannot affect the question. But this argument does not withstand examination. The proviso to Section 360 is in these terms : 'nothing herein contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, in the hands of the persons who may have received the same respectively.' Its effect is that even where the executor is protected from liability by reason of his having given the appropriate notices, the right of a creditor or claimant to follow the assets is not prejudiced. Much less therefore can the right to follow the assets-whatever that might be-be prejudiced where no notices have been given. It follows that the significance of the proviso cannot be lessened by there being no notices. It restricts the effect of the notices to the liability of the executor alone; it leaves the other rights untouched.

(3) It cannot be denied, on the other hand, that the proviso by itself does not create any new right. It assumes the existence of a right to follow the assets. But the Legislature cannot lightly be taken to assume the existence of rights which do not exist; and it seems to me that in giving effect to the series of sections, the proviso cannot be brushed aside. Its weight is, no doubt, considerably lessened by the fact that the rights of the creditors to receive only a rateable payment are not worked out in the Act in the same manner as the law in respect of the analogous rights of the legatees. Thus under Sections 356 and 359 the executor is expressly empowered to call upon legatees who have been paid under the order of a Court to refund, if the assets are insufficient to pay all the legacies (Section 356), or to discharge a debt of which he had no notice (Section 359), and a creditor may under Section 361 call upon a legatee to refund, but the creditor is given no such right expressly as against another creditor. ' The absence of such provisions was the strongest argument in favour of the defendants and the greatest obstacle against the plaintiffs.

25. I have carefully considered the two alternatives : The first is : (a) that the Legislature deliberately omitted to make provisions against an unduly favoured creditor : that it deliberately refused to safeguard the rights of the creditor who had not received rateable payment. The consequence of this view would be to give to Section 323 only such effect as its express terms necessarily demand and to draw no consequential rights from Section 323 ; not even a right to prevent the executor from infringing his duty. The second alternative (b) is to give play to the intention of the Legislature as expressed in Section 323, and to take guidance from the analogy of the provisions in favour of legatees. This, in a way, assumes that the omission by the Legislature to work out its intention in appropriate enactments was a mere oversight.

26. Of these two alternatives the latter seems more acceptable. An oversight on the part of the Legislature must, it is true, be accepted as a basis for interpreting an enactment, with the utmost caution. But the explanations of the oversight seem to be adequate. (1) Sections 356 to 365 are taken directly from English decisions. There would be no corresponding decisions by the Courts in England dealing with the questions that arise out of the change in the law introduced by Section 323. (2)

Moreover,-and this goes to the root of the matter,-the outstanding instances, in which the rule replaced by Section 323 comes into operation in England, are those in which the executor, being a creditor of the deceased, pays himself in priority to other creditors. This particular application of the rule, I believe, s\$ overshadows all others, that for practical purposes the alteration in the law introduced by Section 323 may well have been considered as being no more than withdrawing this privilege from the executor : (The section specifically refers to a debt of the executor or administrator himself). A payment to a creditor, who is not the executor himself, may therefore be very easily overlooked. (3) Then again, the indications contained in the sections as they stand, support the second alternative. If the relevant provisions of the Act, Sections 323, 325, 327, 358, 359, 360 (proviso), 361, 362-are considered, it appears that the adoption of the first alternative would in some cases reduce the imperative terms of Section 323 to a mere recommendation ; in other cases the relative rights and liabilities of the executor, the injured and the unduly favoured creditor, and the legatee, are rendered perplexingly unequal.

27. Apart from other principles which may or may not be introduced, Section 323 does lay down what the rights of the creditors in India are. Ordinarily it would be the duty of the Court to assist parties in obtaining what the Legislature confers upon them as their rights, and to resist the attempts of other parties to secure for themselves more than what has been laid down as their due. As a matter of substance-apart from the difficulties of procedure to which I shall presently address myself-the creditors of the estate must be entitled to protection of their rights under Section 323 to receive equal rateable payment.

28. In so far as such section as Sections 356, 359 and 361 are ancillary to an equal and rateable distribution amongst legatees, they partake of an adjectival character. In that sense the entire question before me may be considered to be one of procedure-whether the precise reliefs that the plaintiffs seek-intervention at this stage to prevent a breach of the executrix's duties being consummated- are available to them in the circumstances of the present case, particularly in view of the proceedings already taken in the mortgage suit.

29. The decision cited in this connection must be taken as determinative of the presence or absence of the specific remedies then under consideration. A particular remedy may not have been available in the particular circumstances. From that it does not follow that the plaintiff would not have had open to him the same or other remedy in different circumstances.

30. The earliest case cited in this connection was Nilkomul Shaw v. Reed (1872) 12 Beiijs L.R. 287. The case refers to Section 203 of the Act VIII of 1859 and to Sections 279-282 of the Indian Succession Act, 1865. These sections correspond to Section 52 of the present Civil Procedure Code and Sections 320-323 of the Indian Succession Act, XXXIX of 1925. In citing the judgment I shall for convenience refer to the sections now in operation. In Nilkomul's case one Mrs. Reed, the representative of a deceased debtor, was the defendant. She was entitled as such representative to a certain fund which had been attached before execution. She objected to the whole of the plaintiff's claim being satisfied out of the fund. This question was considered by the Court, the whole amount of the assets left by the deceased was ascertained, and it was held that the plaintiff was entitled to what remained after deductions under Sections 320-322 of the Indian Succession Act. Mrs. Reed as the representative applied for a review of this order, on the ground that, in so determining, the Court had wrongly excluded from equal and rateable payment out of the funds, the other admitted creditors of the estate who had not obtained decrees. Couch C. J. and Ainslie J. held that the Civil Procedure Code, Section 52, entitled the decree-holder to have his 3 decree Satisfied out of assets not duly applied; that Section 323 of the Indian Succession Act did not interfere with that right; but that all that Section 323 did was to point out the mode in which the executor was to administer the estate ; that it did not enable the executor where a decree had been obtained against him to say that no portion of the assets was to be paid in, satisfaction of the decree ; and that the executor was not enabled by Section 323 to deal with the assets as if no decree had been passed. The fact that distinguishes the present case is that there the other creditors were not before the Court. The question whether they could object to the assets being applied in disregard of their rights under Section 323 was not under consideration.

31. In *Bai Meherbai v. Maganchand* I.L.R.(1904. 29 Bom. 96, 101 : S.C. 6 Bom. L.R. 853 there was 'a question of res judicata; the Court could not go against a previous decision by which the parties before it were bound. In the case before me there is no question of res judicata. There a decree had been passed on a debt of the deceased against his administrator ; in execution of that decree part of the assets had been sold ; the execution proceedings had been completed ; and a sale-deed executed on September 16, 1898. Then, three years later, the widow of the deceased had the previous certificate of administration cancelled, and obtained a fresh certificate of administration. She then brought the suit questioning the validity of the debt as well as all the proceedings based on the debt-of the suit, of the decree and of the execution sale. The Court found itself unable to ignore the previous decree and the proceedings in execution of the decree. Chandavarkar J., however, took the opportunity of (p. 101)

impressing upon the Mofussil Courts the necessity of treating a creditor's action against a deceased person's estate as an administration suit and insisting upon the amendment of the plaint in such a suit on that basis. Where the plaintiff is not willing to amend, the Court if it finds the claim proved, should pass a decree simply giving him a declaration of the debt due and a declaration besides that he is entitled to satisfaction of the decree according to law in due course of administration, and not otherwise. It is the duty of the Court to see in such actions that one creditor is not. enabled to gain advantage over other creditors by getting an unconditional decree for full payment and executing it against the deceased's estate to the prejudice of those creditors.

32. In *Gulamali v. Moos* : (1930)32BOMLR1315 , an earlier decree in an administration suit provided (in consonance with Chandavarkar J's judgment) for payment in due administration of the amount subsequently decreed. There was room, therefore, for the application of Section 323.

33. There are no decisions as to the procedure to be followed in a case such as is before me. It must, therefore, be considered on its own facts. To allow a decree to be obtained in contravention of the principle mentioned by Chandavarkar J. and to permit it to be executed so that the whole of the property purported to be

mortgaged to the first defendant should be utilised for the payment of his debt would manifestly be to set at naught the provisions of Section 323. To prevent this being done, is merely to take steps in time for preventing property being transferred which the proviso to Section 360 contemplates being followed even if it has already reached the hands of the transferee. On general principles, apart from any specific provisions, and without any reliance upon the proviso to Section 360, it was in *Bai Meherbai v. Maganchand* laid down that it is the duty of the Court to see that such a decree as was obtained by the first defendant is in terms enforceable only in the due course of administration : that the duty is in the Court to see that decrees are not obtained nor executed in excess of the just rights of all creditors. The other creditors' rights are involved in and are both protected and cut down by Section 323. One of the creditors is defendant No. 1. His original right of being paid his debt in full is cut down to a right to receive merely an equal and rateable payment. -

34. With all these provisions taken together, it must follow that the Court ought to intervene so long as the situation is not beyond its control, or irremediably altered, and so long as no injustice is done to any innocent party. These provisions cannot be nullified by the action of one of the creditors in the absence and without the knowledge of the other creditors. The decree on which defendant No. 1 relies was passed in proceedings to which the other creditors were not parties, and it cannot be that by such a decree being obtained without the knowledge or participation of the other creditors, their rights should be forfeited and Section 323 in effect be rendered nugatory.

35. The proviso to Section 360 obviously reproduces the English law. The right to follow the property is tacitly recognised by the proviso. I have already referred to the case of *Hunter v. Young* (1879) L.R. 4 Ex. 256, in which the creditor was allowed to follow the property into the hands of the assignees of the residuary legatee of the residuary legatee of the debtor. In *March v. Russell* (1837) 3 My. & Cr. 31 the decree of the Master of the Rolls which was confirmed on appeal is given on p. 37 of the report. It shows how assets may be followed from hand to hand. The defendant in the present case must be deemed to be a transferee for consideration only so far as his claim was enforceable under Section 323. In

regard to any assets come to his hands in excess of what he was entitled to receive he was a volunteer. To that extent the assets may be followed in his hands. Cf. *Whale v. Sir Charles Booth* (1792) 4 T.R 625, f.n. and *Williams on Executors*, Vol. 1, 12th Edn. (1930), p. 576.

36. Here the creditors intervene before the injustice to them has been effectuated, and before any such steps taken as would create new equities.

37. In these circumstances the proper course seems to declare that the decree in the mortgage suit is not binding on the plaintiffs who were not parties thereto ; that the previous action of the executrix purporting to give to one of the creditors security of the property in which all the creditors of the estate had such an interest as Section 323 contemplates, was unauthorised ; that the proceedings based on that equitable mortgage did not bind the other creditors ; that in any case the decree cannot be satisfied except in accordance with Section 323 and in due course of administration. There will be an injunction restraining defendant No. 1 from executing the decree in so far as it goes beyond a declaration of the debt, and a declaration that he is entitled to satisfaction of the decree according to law in due course of administration. He will be restrained from executing the decree so as to affect the other creditors' rights to have the property equally and rateably applied towards the payment of ^their debts. The present suit being by one of the creditors for himself and on behalf of all the other creditors, the sale proceeds of the portion of the Vadala property which has been sold will be available for rateable distribution. Defendant No. 1 will account for the payment he has already received out of the sale proceeds of the Vadala property. There will also be declarations in accordance with prayers (c) and (d) to the plaint.

38. The question is novel and uncovered by authority. There is no averment still less any evidence that defendant No. 1 received the title deeds from the executrix by any improper conduct. It would be unfair to make defendant No. 1 pay the costs of placing before me the materials for this decision. The title deeds are with defendant No. 1. I will order him to deliver them back, but only on the condition that he be paid his costs out of the sale proceeds. The costs of both sides will be paid out of the sale proceeds of the property before it is distributed amongst the

creditors. The costs will include the costs of the chamber summons dated April 10, 1930.

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