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SooperKanoon Citation : sooperkanoon.com/345730

Court : Mumbai

Decided On : Dec-10-1970

Reported in : (1971)73BOMLR623; 1971MhLJ884

Judge : S.P. Kotval, C.J. and ;Nain, J.

Appeal No. : O.C.J. No. 123 of 1965 and Suit No. 807 of 1947

Appellant : The Union of India (Uoi)

Respondent : The Official Assignee of Bombay

Judgement :

S.P. Kotval, C.J.

1. A rather interesting question arises in this appeal as to the scope and extent of a solicitor's right to his costs and expenses in an administration suit against a rival claim of the State in respect of income-tax dues.

2. On February '24, 1944 Bhagoji Baloji Keer died leaving income-tax liability of approximately Rs. 90,000. He was joint with his wife and two sons respondent No. 5 Anant and one Bhalchandra who subsequently died and whose son, daughters and wife are respondents Nos. 3, 4, 8, and 1 respectively. During his lifetime Bhalchandra was adjudicated an insolvent and his property vested in the Official Assignee, respondent No. 1, on May 21, 194G. In order to separate his share in the joint family property the Official Assignee instituted a suit for the administration

of the property of Bhagoji on the Original Side of this Court, suit No. 807 of 1947. The suit was referred to the Commissioner for Taking Accounts on April 12, 1948 for the purpose of administration of the property. An amount of Rs. 1,17,429.82 recovered by the Commissioner was held by him on account in the suit and on February 27, 1961 all the parties to the administration suit other than the plaintiff through their respective attorneys took a consent order from Mr. Justice S. M. Shah in respect of that amount. The substance of that order was that after the payment of certain specific sums to the several defendants in the suit the learned Judge ordered that the Commissioner for Taking Accounts should pay 'the taxed costs of this suit incurred after 13th October 1950 including the costs of the reference and the sale before the said Commissioner for Taking Accounts and the proceedings before the arbitrator, Town Planning Scheme and the meetings held before the Court Receiver, High Court, Bombay and the Charity Commissioner as between 'attorney and client' to the plaintiff and to the 1st, 2nd and 3rd defendants and to the 4th, 5th, 7th and 8th defendants upon the passing of the order on the said chamber summons'. He also passed further orders as regards the payment of the taxed costs of the attorneys in suit No. 3882 of 1947 and No. 3662 of 1947 which were suits in respect of specific items of property separately litigated. The above orders so far as the payment to all the attorneys except to those of the plaintiff, were made upon consent of the parties. So far as the costs payable to the plaintiff were concerned, the order was in invitum.

3. As a result of this order the following claims of the respective solicitors of the parties for their taxed costs fell to be considered :-

Rs.1. M/s. Zaiwalla & Co. on behalf of defendants Nos. 4 and 7. 10,581.002. M/s. Samant & Co. on behalf of defendants 1, 2 and 3. 12,846.003. M/s. Chimanlal Shah & Co. on behalf of the Official Assignee, the plaintiff. ... 88,895.004. M/s. Chhatrapati & Co., on behalf of defendants 4, 5, 7 and 8. 33,881.00

thus making a total of Rs. 96,203 claimed as taxed costs. It is not in dispute that after the payment of the specific amounts ordered to be paid there was only left with the Official Assignee a balance of Rs. 61,571.60. That obviously was not sufficient to satisfy the claims even of all the attorneys set out above.

4. In the meanwhile the Income Tax Officer, Companies Circle I (1) of Bombay put in his claim with the Official Assignee in respect of the amount of income-tax owed by the estate of Bhagoji Keer amounting to Rs. 90,520.92. A chamber summons was taken out on October 11, 1963 on behalf of the Union of India for an order that the entire amount of Rs. 61,571.00 N.P. be paid to the Union and the balance left over be paid to them after the sale of other properties of Bhagoji Keer. If the entire amount of the balance in the hands of the Official Assignee namely of Rs. 61,571.60 was paid towards that claim, it would for the time being leave nothing for payment to the respective attorneys of the parties under the order of Mr. Justice Shah dated February 27, 1961,

5. On behalf of the Income Tax Department it was claimed that the debt to the State owed by the deceased Bhagoji Keer had priority in payment over the claims of the parties or their solicitors. This was disputed by respondents Nos. 5 and 7 in this appeal, Anant son of Bhagoji and Annapurnabai wife of Bhalchandra (defendants Nos. 1 and 7). Anant Bhagoji supported the claims of his attorneys as well as of the attorneys of the other parties in the suit on the basis of the common law lien of the attorneys for their costs over the said funds in the hands of the Court 'being the proceeds preserved in the said suit through their exertion'. He pointed out that these attorneys were 'entitled to ask for the intervention of the Honourable Court for preservation of the said funds for the payment of their costs'. Thus, the claim of the State to be paid in preference to the ordinary creditors was in direct conflict with the claim of the attorneys of the parties set forth through their respective parties to the payment of their costs and expenses of the administration suit.

6. The chamber summons was heard by Mr. Justice Tulzapurkar on December 6, 1965. He dismissed the chamber summons in view of the two decisions of this Court in *Ved it Sopher v. Wagle & Co.* : AIR1925 Bom351 , and in *Tyabji Dayabhai & Co. v. Jetha Devji & Co.* : (1927)29BOMLR1196 It is that order which is the subject-matter of the appeal before us on behalf of the Union of India.

7. No detailed reasons are to be found in the order of the learned Judge, but elaborate arguments have been advanced before us in the appeal on behalf of

both the parties. Mr. 11. J. Joshi on behalf of the Union has stressed that the State had a priority in respect of the payment of its dues for the arrears of income-tax. This priority was the same priority that the common law in England conceded to the Crown in respect of Crown debts and that Mr. Justice Tulzapurkar did not at all consider the State's right to have its debts satisfied in priority over all unsecured or ordinary creditors. He contended that the State's claim to public dues like income-tax which are debts due to the Crown or the State, is entitled to preference over all other claims to debts due to ordinary or unsecured creditors such as the parties to the litigation in the present case were or their attorneys. So far as solicitors' lien is concerned, in the first place, no solicitor as such has ever claimed it, but it is only a party to the suit who is claiming it on behalf of his solicitor and against his own interest. In the second place, there was no lien in the circumstances of the case arising in favour of the solicitors or any of them, because no charging order had been passed in favour of any solicitor, nor any order at all entitling them to preference over Crown debts. In fact, no such order could be legally passed. As regards the two cases relied upon by the learned Judge he pointed out that they were both cases where a charging order had been made and, therefore, that category of debts due to attorneys stands on a different footing from the case of an attorney who claims his costs, charges and expenses without obtaining any charging order from the Court. Alternatively he referred to Section 226(4) of the Indian Income-tax Act as entitling the Union to receive the entire amount in the hands of the Official Assignee.

8. The reply on behalf of the plaintiff and the other parties has been that this is an administration suit and in such a suit the expenses of administration or testamentary expenses are always to be paid in priority to the debts due to others except funeral expenses and that is so even against the debts due to State or the Crown in England. This is itself a common law right. The amount due to an attorney from an estate which has been preserved or earned by his exertions is by common law a first charge on the estate and it is not necessary to have a charging order at all. It was urged that solicitor's fees and charges were a part of the 'testamentary expenses' by which is meant expenses of administration of an estate which in origin may be both testamentary as well as non-testamentary. By reason of common law the solicitor has a lien for payment of costs of an action on

funds in the custody of the Court preserved or recovered as a result of his exertions irrespective of the fact that he had not obtained a charging order. In any case so far as the present case is concerned, the order passed by Mr. Justice Shah dated February 27, 1961 amounts to a charging order and therefore even upon the contention on behalf of the appellant the solicitors would be entitled to their charges. The solicitor to whom costs are due in an administration suit is in no sense a creditor of the deceased. Alternatively it was contended that Sections 321 read with Section 323 of the Indian Succession Act creates a statutory right to payment of costs of administration in priority to all debts including Crown debts, except funeral expenses and, therefore, to that extent the State's claim would be postponed to this statutory right. In the further alternative it was contended that at any rate till the estate is fully administered and a final decree is passed no creditor should be paid. These contentions undoubtedly give rise to important questions, firstly as to the right of the Crown or the State to preferential payment against unsecured creditors and, secondly, as to the nature and extent of the solicitor's common law lien.

9. The right claimed on behalf of the State is the same as the right of the Crown recognised by the common law of England. It is part of the royal prerogative. In theory the King in England is the repository of all sovereign power and included therein is all judicial, legislative and executive power. From time to time, however, that power came to be whittled down as the people asserted themselves and claimed rights against their Sovereign. The legislative powers passed to Parliament in England, the executive powers to the King in council which in substance is the British cabinet today and the judicial power to the King's Judges but the theory still remains and large and important portions of the royal prerogatives in each case are still recognised by the common law in England. The royal prerogative is thus defined by Halsbury in Vol. 7 at p. 221, articles 463 and 464:

463. The royal prerogative may be defined as being that pre-eminence which the Sovereign enjoys over and above all other persons by virtue of the common law, but out of its ordinary course, in right of her regal dignity; and comprehends all the special dignities, liberties, privileges, powers, and royalties allowed by the

common law to the Crown of England.

464. The prerogative is thus created and limited by the common law, and the Sovereign can claim no prerogatives except such as the law allows, nor such as are contrary to Magna Carta, or any other statute, or to the liberties of the subject.

The Courts in India have jurisdiction to enquire into the existence or extent of any alleged prerogative, unless the inquiry is barred under any law.

10. One aspect of this prerogative is the right of the Crown to preference in respect of the payment of debts due to the Crown. This right first came to be considered in its applicability to India as far back as in 1806 in the case of the Secy. of State for India Bombay Landing & Shipping Co. (1868) 5 B.H.C.R. 23 That was a case where the Secretary of State for India in Council had obtained a decree in a suit against the Bombay Landing and Shipping Company 'to recover moneys due to the plaintiff for work done by the Government artisans at the Government Dockyard (lately the property of the East India Company) for the defendants and for materials, that is to say, Government stores, supplied by the plaintiff to the defendants'. In the meanwhile the company came to be wound up and the question was 'whether the judgment recovered by the Secretary of State was entitled to precedence over the claims of the ordinary creditors, who sought the benefit of the winding-up order; and, accordingly, whether the execution of that judgment was rightly stayed.' In a very elaborate judgment and after considering the entire history of the royal prerogative in this respect and the law in India and other countries on similar rights claimed by the State Sir Michael Westropp held (1) that a judgment debt due to the Crown is entitled to the same precedence in execution as a like judgment debt in England, if there be no special legislative provision affecting that right in the particular case, so far as Bombay is concerned; (2) that right of the Crown could also be claimed by the Secretary of State in Council for India; (3) the reason for so holding is that such a debt is vested in the Crown and when realised falls into the State Treasury; (4) in enforcing this right of the Crown or the State the nature of the cause of action in respect of which the judgment was recovered does not affect the right of the Crown or of the Secretary of State for India in Council to priority. The learned Judge relied upon the following

statement to be found in Lord Coke's Commentary on Littleton (p. 48.): The King, by his prerogative, regularly is to be preferred, in payment of his duty or debt, before any subject, although the King's debt or duty be the latter; and the reason hereof is: for that thesaurus registrar est fundamental belli et firmamental pads.

He pointed out that this right is based upon the Latin maxim *Quando jus domini Regis et subiecti concurrunt, jus registrar preferred debet* (where the title of the King and the title of a subject concur, the King's title must be preferred). This principle was no novelty in India and the question therefore which always should be asked is not, 'In whose name is the debt standing on record' but 'Does the debt, when recovered, fall into the coffers of the State?'. Accordingly it was held in that case that the Secretary of State for India was entitled to priority in recovering his debt as against the ordinary creditors of the company in liquidation.

11. Sir Michael Westropp was only concerned in that case with a judgment debt, but in a later decision of this Court the principle of *Secretary of State for India v. Bombay Landing & Shipping Co.* was extended to all debts due to the State. The decision is to be found reported in *Bank of India v. Bowman* (1954) 57 Bom. L.R. 345. That was also a case where a claim to arrears of income-tax was put forward on behalf of the State. Referring to the decision in the *Bombay Landing & Shipping Co.'s* case Chief Justice Chagla observed (p. 362) : But with respect to the bench that decided the case in *Secy. of State for India v. Bombay Landing & Shipping Co.*, it is clear from English decisions that the priority claimed by the Crown is not confined to judgment-debts. It is sufficient to refer to two judgments on this point.

One is the case reported in *In re Henley & Co.* (1878) 9 Ch. D. 469. It is true that the actual case the Court was considering was the case of a property tax due to the Crown, and what was held was that the Crown had a right to payment in full of a debt due from the company for property tax before the commencement of winding up in priority to the other creditors, but what is of interest is the observation made by the learned Judges. At p. 481 Lord Justice James says: Whenever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition, the Crown's right prevails.

Therefore, the priority given to the Crown is not on the basis of its debts being a judgment-debt or a debt arising out of statute, but the principle is as enunciated by Halsbury that if the debts are of equal degree and the rights of the Crown and the subject are equal, the Crown's right will prevail over that of the subject'. (The reference to Halsbury is to Halsbury's 2nd Ed. Vol. 6, p. 584).

The reason for this principle was also stated to be (p. 364) :...It is not so much because the Crown has any special privileges in England that this principle has been upheld, but it is because the State in England has taken the place of the Crown and the English Courts have continued the privilege which was once the privilege of the King and have afforded the same privilege to the State because they have realised that the State has certain rights and privileges which cannot be overlooked.

This case thus establishes two points: (1) that the State's right to priority in respect of debts due to the State is not confined only to judgment debt but to all debts of equal degree and (2) that the arrears of income-tax constitutes such a debt due to the State.

12. These principles were accepted and approved by the Supreme Court in a recent decision in Builders Supply Corporation v. Union of India : [1965]56ITR91(SC) . It held even after the attainment of independence and after our present Constitution that the Government of India is entitled to claim priority for arrears of income-tax due to it from a citizen over debts due from him to unsecured creditors. The Supreme Court in terms referred to the decision of this Court in Bombay Landing & Shipping Co's case and approved of it. See pages 96 to 98 of 56 I. T. R. 91. They also approved of the decision of this Court in the Bank of India's case. The principle on which the Supreme Court justified the claim to priority of the State is stated as follows (p. 103) :

Similarly, the basic justification for the claim for priority made by respondent No. 1 in the present case rests on the well-recognised principle that the State is entitled to raise money by taxation, because unless adequate revenue is received by the State, it would not be able to function as a sovereign Government at all. It is essential that as a Sovereign, the State should be able to discharge its primary

governmental functions and in order to be able to discharge such functions efficiently, it must be in possession of necessary funds, and this consideration emphasises the necessity and the wisdom of conceding to the State the right to claim priority in respect of its tax dues.

13. No doubt while laying down the principle the Supreme Court was careful to indicate (we say so with respect) the possible limitations of the doctrine, (1) They pointed out that they were limiting their decision only to the case before them namely of recovery of arrears of income-tax and that it must not be extended to debts due to the State 'in relation to commercial activities which, no doubt, may be undertaken by the State for achieving socio-economic good'. (2) Secondly they pointed out that questions may arise as to whether the same common law doctrine would apply to those parts of India which constituted the former Indian States in which the common law in England was not the law in force on the date on which the Constitution came into force having regard to the provisions of Article 372(1) of the Constitution. With neither of these limitations are we concerned in the present case. (3) A third and an obvious limitation which is part of the doctrine itself is where statute expressly provides that the particular prerogative right of the State is not to be exercised or is taken away.

14. These being the principles of priority conceded in favour of the State we turn to consider whether the arrears of income-tax due to the State is a Crown debt and must be paid in priority. On this there is overwhelming authority. The earliest decision is to be found in *Manickam Chettyar v. Inc. Tax Officer, Madura* : [1938]6ITR180(Mad) . This decision was followed in this Court by *Mr. Justice Wasoodew in Governor-General in Council v. Chotalal Shivdas* : [1939]7ITR411(Bom) , where again it was held that

Arrears of unpaid income-tax due by an assessee is a debt due to the Crown and as such the debt must have precedence over all other debts. Consequently, in the competition between the Crown and the subject in respect of payment of their respective debts of equal degree Crown's right must prevail.

The Court can order payment of a Crown debt due by the debtor, on the application of the Crown without a formal attachment being issued, where there

are funds in Court belonging to the debtor.

The learned Judge also pointed out that the prerogatives claimed by the Crown in respect of this right are really two: (1) priority and (2) special procedure for enforcing that priority. Even in the Bombay Landing & Shipping Co's case dealing with the question as to the effect of statutes upon the common law right of the Crown, it was pointed out that there may be some statutes in which the right of the State are statutorily provided for, but 'legislation of that kind is often merely declaratory, and resorted to 'pro majority cautela' and for the purpose of clearly notifying to the public what the law is'. (See page 31). In fact before the learned Judge Sections 185 and 188 of the then operative Income-tax Act XXXII of 1860 An Act for imposing Duties on Profits arising from Property, Professions, Trades, and Offices were referred to and the learned Judge observed (p. 31) :A clear declaration of the priority of income tax over private claims may have been considered especially necessary for the Mofussil, where the extent to which English law should be applied is much less clearly defined than in the Presidency towns.

We have already referred to the decision of Chief Justice Chagla in *Bank of India v. Bowman* which takes the same view, and to the decision of the Supreme Court in *Builders Supply Corporation v. Union of India* at page 98. In *Manikam's case* the Madras High Court clearly held that Section 46 of the Income-tax Act was not exhaustive of the remedies of the Crown to recover arrears of income-tax due to the Crown. There is also a decision in *U Ba Thi v. Administrator-General* A.I.R.[1940] Ran 86 to the same effect. An instance of statutory modification of the Crown's right is to be found in a decision of the Federal Court in *Governor-General in Council v. Shiromani Sugar Mills Ltd. (In Liquidation)* [1946] F.C.R. 40 : [1946] 14 I.T.R. 248 where Section 230 of the Indian Companies Act was referred to. The section while giving the highest priority to all revenue, taxes, cesses and rates, whether payable to Government or to local authority, limited that right to amounts becoming due and payable within 12 months next before winding up of the company. This was a statutory modification of the State's prerogative right of priority in the recovery of debts. We stress this point here because Mr. Chhatrapati had referred to a decision of the Calcutta High Court in *Murli v. Asomal & Co.* :

AIR1955 Cal423 , to suggest that 'there is no universal claim to priority for State debts' vide para. 30 at page 430, with which remark we are not in agreement. We will advert to this decision a little later.

15. Before we leave this question of the nature of the Crown's right to priority in respect of its debts as against unsecured creditors, it is necessary to examine an argument advanced also by Mr. Chhatrapati on the basis of a recent decision of the Supreme Court in *State of W.B. v. Corporation of Calcutta* : 1967 CriLJ950 , That decision was also concerned with a part of the prerogative of the Crown as applicable to the State in India, namely the right recognised by the common law doctrine that the Crown is not bound by statute save where the statute so provides by express provision or necessary implication. The Supreme Court held that this doctrine was not the law in force in India at the time when the Constitution came into force and therefore Courts are not bound by that doctrine after the coming into force of the Constitution especially in view of Article 372 of the Constitution. They held that the doctrine was merely a rule of construction and that a rule of construction was not a law in force and that therefore the doctrine was not saved by Article 372 of the Constitution and had not become the law of the land after the Constitution came into force. In so holding the Supreme Court made the following remarks (in para. 23, at p, 1007):

The next question is whether this Court should adopt the rule of construction accepted by the Privy Council in interpreting statutes vis-a-vis the Crown. There are many reasons why the said rule of construction is inconsistent with and incongruous in the present set-up. We have no Crown: the archaic rule based on the prerogative and perfection of the Crown has no relevance to a democratic republic; it is inconsistent with the rule of law based on the doctrine of equality. It introduces conflicts and discrimination.

Relying upon this passage it was urged that the doctrine as to Crown's right to have its debt satisfied in priority to other ordinary creditors is also a prerogative of the British Crown and no less 'inconsistent with the rule of law based on the doctrine of equality' and that there is no justification for applying that archaic doctrine in India where once the State is treated on a footing of equality with its

subjects in the matter of applicability of all laws to it. Moreover it was urged that having regard to the provisions of the Constitution recognition of this right is no longer appropriate and/or proper.

16. The argument approximates the principle that the Crown is not bound by statute, with the principle that in the realisation of its debts the Crown has priority over ordinary creditors. There is no warrant for treating the two principles on the same footing. On the other hand, it seems to us that there is a marked distinction between the two principles in their very origin as also upon the basis on which each of them is founded. It is one thing to say that a doctrine that the Crown shall not be bound by statute law, is archaic and opposed to the fundamental principles of a democratic Constitution where rights of a subject are recognised as fundamental and a remedy is given for their enforcement even against the State where rule of law prevails between the State and the citizen; and quite another thing to say that in the realisation of its debts of equal degree the Crown may get priority over its subjects. The principle of the Crown's priority in respect of its debts is itself a rule based upon equity and justice and serves an important public purpose. Moreover, the rule is in no way opposed to the Constitution. In *Bank of India v. Bowman*, Chief Justice Chagla answered the self-same contention in the following words (p, 364):..Mr. Seervai says that to uphold the King's prerogative in India after 1950 would be to go counter to the basic structure of our Constitution. It is true that our Constitution sets up a democratic socialist republic and we would be loath to give effect to any principle of law which was inconsistent with the democratic or socialistic principles which we have accepted in our Constitution

But it would be an exaggeration even to suggest that the England of today is not democratic or socialistic, and if the English Courts have upheld this principle, they could not have done so if they had realised that it was no longer consistent with the modern trends of constitutional theory prevailing in England today. Even in a democracy and even under socialism the State must have certain rights and privileges. The State has to govern, the State has to find money to be used for socialistic principles, and the Courts have always given every facility to the State to realise moneys which are not collected for any private purpose but are intended for the public coffer and which are ultimately intended for the public need. This

principle which has been enunciated in the English Courts and which has been accepted by our Courts is not a principle which is peculiar to British jurisprudence.

It must be remembered that this passage occurs in a case where also the Crown claimed priority in respect of a claim for arrears of income-tax, which is also the case here. On the same page Chief Justice Chagla also repelled an argument raised by counsel on behalf of the Bank of India that this part of the common law was incompatible with Article 14 of the Constitution because it is inconsistent with the provisions of Part III relating to fundamental rights. Chief Justice Chagla answered the point by saying. The answer to that submission is that the State here is not claiming as a creditor. It may be a creditor, but the right which it claims is in its capacity as the State and its contention is that as it is the custodian of public welfare, as moneys which it is claiming belong to the coffers of the State and are to be used in public interest, it should be given precedence over private creditors who have not to discharge the duties or responsibilities of the State.

In our opinion, therefore, the doctrine of common law with regard to priority in the payment of debts of equal degree due to the State as against the citizen is not in any way inconsistent with the provisions of the Constitution.

17. A similar view was adopted by the Supreme Court in the Builders Supply Corporation's case. We have already quoted a passage (at p. 103) from that judgment to show what the Supreme Court considered was the correct basis of the principle. The Supreme Court also quoted with approval (see p. 99) the above remarks of Chief Justice Chagla in the Bank of India case. In *Collector of Tiruchirapalli v. Trinity Bank Ltd.* (1962) 44 I.T.R. 180 the Full Bench of the Madras High Court also pointed out that the rule is based upon an important doctrine of public welfare, when they observed at p. 195,

This rule may be said to be the outcome of the maxim *salus populi supreme lex* (regard for the public welfare is the highest law). It is but natural that a debt due to the Crown, as representing the public at large, should be preferred to the debt of a single creditor.

Of course, this right which inheres in the Crown in England and which has been recognised as applicable to the State in India is capable of modification by statute and is always subject to any express provisions of statute. We have already referred to one instance where such modification took place namely by Section 230 of the Indian Companies Act, 1913. As noticed by the Supreme Court in Builders Supply Corporation's case (at p. 105), one thing must be made clear namely that each provision of the statute by which this right which is a common law right, is said to be modified, will have to be examined on its own and a conclusion reached whether it was intended to modify the State's right or the statute merely reiterates the same existing right of the State, because, as we have pointed out, some statutes may merely reiterate the Crown's right by way of abundant caution as Sir Michael Westropp pointed out in Secretary of State for India v. Bombay Landing and Shipping Co. at p. 31. In view of this we do not think that we can extend the principle laid down by the Supreme Court in the case of State of W.B. v. Corpn. of Calcutta, to apply to this right of the State, as urged by counsel. That case merely decided that the doctrine which hitherto prevailed in India that the Crown was not bound by its statute, cannot apply in India under a democratic Constitution. That principle is clearly distinct and separate from the principle that the Crown has priority in respect of its debts as against the other creditors of the same debtor. We have shown that the very basis of the two principles is different. Moreover, the Supreme Court itself distinguished State of W. B. v. Corpn. of Calcutta where it was claimed that that decision had shaken the authority of the Supreme Court's own decision in Builders Supply Corporation's case. In Collector, Aurangabad v. Central Bank : [1967]3SCR855 the Supreme Court held (p. 1836):

In our opinion, there is nothing in this judgment (referring to : 1967 CriLJ950 . There is a mistake in the A.I.R. report at page 1835 column 2 in mentioning the page number of the case. Instead of A.I.R. 1967 S.C. 10 it should be : 1967 CriLJ950) which affects the authority of the previous decisions of this Court in : [1965]56ITR91(SC) . On the other hand, the majority judgment of the learned Chief Justice has referred to the decision in Marshall v. New York (1920) 65 L d. 315, which lays down a similar doctrine, namely, that the State of New York has the common law prerogative right of priority over unsecured creditors, and

distinguished the case on the ground that it had nothing to do with the rule of construction but was based upon the common law prerogative of the Crown.

In that case no doubt the Supreme Court was unable to apply the doctrine of English common law because in that case there was no proof that the doctrine was given judicial recognition in the territory of Hyderabad State prior to January 26, 1950, the date on which the Constitution came into force.

18. Reliance was also placed in this respect on the decision of the Calcutta High Court in *Murli v. Asoomal & Co*, where the learned single Judge held that having regard to the specific provisions of the Bengal Public Demands Recovery Act (III of 1913) no claim to preferential payment to the State of its debt in respect of sales tax out of the moneys in the hands of Receiver appointed by the Court could be allowed because the Court in that case had passed an order directing the payment to the decree-holder prior to any intervention by the State. Before the learned Judge it was argued (vide para. 17 at p. 426) that the right of the State to preference could not be recognised because the terms of the order passed in that case created a right in the nature of a charge in favour of the decree-holder and alternatively that the prior order for payment out of the specific fund when the State had not put in its claim defeated the claim to preference of the State. The learned Judge after considering the several different provisions of the law held (para. 30, p. 430) that it would appear from his survey of the legal situation that there was 'no universal claim to priority for State debts'. He held..I am satisfied that whether in countries where the English law operates or in republican countries like America this much is certain that where a private citizen has sued another to judgment and has in fact got by an order of Court a Receiver appointed of his goods and such goods have been sold by the Receiver under orders of the Court and where there has been a prior direction in the Court's order to pay the sale proceeds to the private judgment-creditor, a subsequent claim by the State cannot defeat the judgment-creditor or deprive him of the fruits of his decree which is regarded as properly.

The reason why the learned Judge took this view is that once an order is passed regarding payment it is as good as the security and would give priority to the

judgment creditor in whose favour the order was passed. In para, 20 at page 427 the decree-holder's contention has been set forth which contention was accepted by the learned Judge. This would be sufficient to distinguish the Calcutta case from the present on the facts. There is no order passed in favour of the solicitors in the present case giving them a charge or a security for their costs.

19. In that view it is not necessary for us to consider the further contentions advanced against acceptance of the Calcutta view. It was argued that the view taken in the Calcutta case is contrary to the reasoning of the Supreme Court in Builders Supply Corporation's case where the Supreme Court categorically held that the State has priority in respect of all debts due to it as against all unsecured creditors and therefore the Calcutta view must be deemed impliedly overruled. It was also urged that a mere order of payment without declaring a charge or a security upon the funds in the custody of the Court in favour of a party to that litigation cannot give rise to any kind of preference in favour of that party. In the present case it was pointed out that a lien is claimed on behalf of the attorneys in whose favour no order was passed. Since upon its special facts that case cannot apply here we need not consider these further arguments against that decision.

20. We hold, therefore, that in India even after the Constitution there does exist a right in favour of the State to have debts owing to it satisfied in priority to debts owing to other unsecured creditors from the same debtor and that this right is in no way in conflict with any provision of the Constitution but is founded upon an important principle of public policy.

21. The doctrine applying in India, the farther question which falls to be considered is whether there is anything in any statute which has modified or abrogated it. In this respect reference was made to the provisions of Sections 320, 321 and 323 of the Indian Succession Act, Section 321 says that the expenses of obtaining probate or letters of administration, including the costs incurred for or in respect of any judicial proceedings that may be necessary for administering the estate, shall be paid next after the funeral expenses and death-bed charges. It was pointed out that the section lays down the priority in which the costs incurred in respect of an administration suit should be satisfied. The first are the funeral expenses and

deathbed charges of a deceased person. The second are the costs 'that may be necessary for administering the estate', which include according to counsel all the costs which are payable to the attorneys of the respective parties. Therefore, to the extent that this section makes the specific provision for priority it is a legislation which affects the State's right of priority in respect of its own debts and since Section 321 gives priority to funeral expenses and death-bed charges and the costs of administering the estate, the State's right must be postponed to these two prior claims. A further indication it is said is given by the statute that the State's rights in this respect have been abrogated or modified by the opening words of Section 323: 'Save as aforesaid, no creditor shall have a right of priority over another;' The argument is that when Section 323 says 'Save as aforesaid' it points to Section 321 and, in essence, therefore, Section 323 prescribes that no other payment can be made save as provided in Section 321. Therefore, the intention of the law was to exclude the Crown's claim of priority is clear.

22. In the first place, we do not think that we can regard the provisions of the Indian Succession Act as in any way affecting, modifying or abrogating the common law right of the Crown in payment of its debts. There is not the slightest reference to that common law right in any of its provisions particularly in Section 321 or Section 323. In fact it appears to us that the Indian Succession Act was only concerned, with making provisions in regard to administering the estate of a deceased person and that it did not intend that any Crown right or State right should be modified by the use of the general words in Section 323 'Save as aforesaid'.

23. Secondly, a more detailed examination of the provisions of the Act would show that in fact the Act has not provided as it is contended it provides. Sections 321 and 328 form part of Part IX of the Act and Part IX opens with a general section- s. 217--which provides for the application of the Part. It says :

Save as otherwise provided by this Act or by any other law for the time being in force, all grants of probate and letters of administration with the will annexed and the administration of the assets of the deceased in cases of intestate succession shall be made or carried out, as the case may be, in accordance with the

provisions of this Part.

The answer on behalf of the respondents has been that Section 217 cannot help the appellant because of the opening words of Section 217 'Save as otherwise provided by this Act'. It is contended that Section 321 read with Section 323 do make provisions otherwise and those provisions are thus saved by Section 217. Therefore they will continue to apply and Section 217 does not carry the matter any further.

24. We do not think that we can place this construction upon the provisions of Section 217. The intention behind Section 217 is to lay down a rule of general application for the whole of Part IX and it says that all grants of probate and letters of administration with the will annexed and the administration of the assets of the deceased in cases of intestate succession shall be made or carried out, as the case may be, 'in accordance with the provisions of this Part,' that is to say the provisions of Part IX, and they shall apply in all the three cases contemplated by Section 217 namely (1) grant of probate, (2) grant of letters of administration with the will annexed and (3) intestate succession. To all such cases the provisions of Part IX must apply, but at the same time the section adds that the provisions of Part IX must apply 'Save as otherwise provided by this Act.' The obvious meaning of these opening words in the context of the provisions of Section 217 must, therefore, be that when the section says 'Save as otherwise provided by this Act' it means 'this Act other than Part IX'. Otherwise we will be rendering nugatory the very intention behind Section 217 and its provisions. It is no use saying on the one hand, (as section does say) that in every case of grant of succession the provisions of this Part shall apply and on the other hand saying that other provisions of this Part may modify the provisions of Part IX (which is what Section 323 implies by its opening words). If the grants have to be in accordance with the provisions of this Part then the saving clause 'Save as otherwise provided by this Act' must mean save as provided by this Act except this Part. If that be the true construction of Section 217, We do not think that Sections 321 and 323 will come in the way of the enforcement of the State's rights of priority in the payment of its debts.

25. Thirdly and what is of greater importance is that the opening words of Section 217 do not merely say 'Save as otherwise provided by this Act', but they also say 'Save as provided...by any other law for the time being in force' and that, in our opinion, brings in whatever law statutory or otherwise which was in force for the time being. We have already pointed out that the equivalent expression 'law in force' in Article 372 of the Constitution includes the rules of common law as applicable in a particular State on the date on which the Constitution came into force. Both in Builders Supply Corporation's case and in Bank of India V. Bowman the Court held that the principles of common law would be covered by the words 'law in force' in Article 372 of the Constitution. It seems to us, therefore, that the expression 'any other law for the time being in force' in Section 217 of the Indian Succession Act would also include the principles of common law which are for the time being in force. Now, all the decisions to which we have referred, including the decision in Secy. of State for India v. Bombay Landing & Shipping Co. and the decision of this Court in Bank of India v. Bowman, clearly laid down that in the State of Bombay at least the doctrine that the State has priority in respect of payment of its debts as against all unsecured creditors of the same debtor does prevail. Therefore, that would be the law in force 'for the time being'. Thus, by the express provisions of Section 217 of the Indian Succession Act the doctrine is saved and is applicable and we have already shown that it cannot be held to be abrogated or modified by the provisions of Section 321 or Section 323. We do not think therefore that there is anything in the Indian Succession Act that has taken away, modified or abrogated any part of the doctrine,

26. Now it is this common law right which is claimed on of the Union in the present case as against which there has been claimed on behalf of the respondents the competing right of lien of a solicitor to stop the payment of the amount of Rs. 61,571/60 to the State in payment of its dues for income-tax. Of course, it is true that this right of the State was not canvassed, before the single Judge in the manner in which it has been canvassed before us. But that is because the learned single Judge was dealing merely with a chamber summons which is usually decided summarily. The learned single Judge merely relied upon two decisions laying down what is the nature of the attorneys' lien for costs and expenses. He does not appear to have considered any question of any competition between the

preferential right of the State to the payment of its debts as against the solicitors' lien claimed on behalf of the respondents.

27. We, therefore, turn to consider the nature of the solicitors' lien. On this point the case was argued before us both by Mr. Mody and by Mr. Chhatrapati as if their contentions cover the claim on behalf of all the four firms of attorneys. Their arguments were common to all the four firms. In fact in the affidavit of respondent No. 5 Anant Keer dated December 2, 1963, that is how the respondents' ease has been put. The total claim of all the four firms comes to Rs. 96,203 whereas the amount left in the- custody of the Official Assignee is only Rs. 61,571/- which will be hardly sufficient to cover the claims of the four firms of attorneys, but as between them it was said there was no contest and that they would agree to take the amount pro rata.

28. In Wharton's Law Lexicon, 14th edn. p. 591 'lien' is defined as a right in one man to retain that which is in his possession belonging to another, until certain demands of the person in possession are satisfied. It is also made clear there that it is neither a *jus in re*, nor a *jus ad rem*-i.e., it is not a right of property in the thing itself or a right of action to the thing itself. It is merely a right of retention. The right of lien which a solicitor has at common law is thus described by Halsbury in Vol. 36 (Simonds edition) at p. 173, article 237:

At common law a solicitor has two rights which are termed liens. The first is a right to retain property already in his possession until he shall have been paid costs due to him in his professional capacity; and the second is a right to ask the court to direct that personal property recovered under a judgment obtained by his exertions stands as security for his costs of such recovery. In addition, a solicitor has by statute a right to apply to the Court for a charging order on property recovered or preserved through his instrumentality in respect of his taxed costs of the suit, matter, or proceeding prosecuted or defended by him.

The first is a retaining lien and it simply extends to all documents and papers or other personal chattel which has come into the solicitor's possession in the course of his employment and in respect of this he has a right to retain possession. That is the solicitor's lien in essence. It is merely the right to retain possession of

articles belonging to his client until he is paid for work done. That lien of course is not claimed in the present case and cannot be claimed in the circumstances. It is with the latter category that we are concerned in the present case. Under this category two rights exist. One is the right to ask the Court that personal property recovered under a judgment obtained by his exertions shall stand as security for his costs. The other is to apply to the Court for a charging order. This latter category is most often referred to as the common law lien on property or funds recovered and as to this again Halsbury explains its scope and extent (see p. 180 of the same volume, article 247) as follows:

A solicitor has at common law, apart from statute, a lien, -which may be actively enforced, over a fund or the proceeds of a judgment recovered for the client in the course of litigation or arbitration by the solicitor's exertions,... This lien, although always referred to as a lien, is only a right to ask for the court's intervention for the solicitor's protection, when, having obtained judgment for his client, he finds that there is a probability of the client depriving him of his costs. It is a right to ask the court to charge the property in favour of the solicitor and until that is done the solicitor has no right to the money.

(The italics are ours.)

It will be noticed from these passages from Halsbury that so far as the right of retention or the retaining lien is concerned, it is not necessary for the solicitor to seek the intervention of the Court. What he has in his possession belonging to his client he can retain so long as he is not paid, but where he has to go against a fund in the custody of a Court, whether it be one to ask the Court to direct that the personal property recovered under a judgment obtained by his exertions stands as security for his costs of such recovery or whether he applies to the Court for a charging order, on property recovered or preserved through his instrumentality, he must seek the intervention of the Court. Without an order from the Court, therefore, no such lien can arise and in every case the solicitor must obtain an order that the particular fund in the custody of the Court stands as security or those costs are charged on it. Unless and until he does that in fact no lien arises in his favour. Nevertheless in many cases this mere right to ask the Court for its

intervention is, by an extension of meaning, called a lien but it is not a lien in the eye of law at all, because a mere right to ask does not in itself create any right in favour of the solicitor. It was precisely this point which was made by Lord Goddard in an English case; see *James Biddy Ltd. v. Woods and Howard* [1949] 2 K. B. 449. In that case two partners of a firm which was dissolved had a litigation between them in respect of the partnership property. The matter was compromised on the terms that partner Thomas Edward Woods should be paid, by partner William Howard 90. A creditor of Thomas Edward Woods obtained a decree against him and sought to attach the debt of 90 owed by William Howard to Thomas Woods. The solicitor for Thomas Woods the judgment-debtor came to learn of this and immediately applied that he should be paid the amount claiming that he had a lien on the debt of 90 for his costs in the proceedings between the judgment-debtor Thomas Woods and William Howard the garnishee. In dealing with the solicitor's lien the learned Chief Justice pointed out first of all that the proceedings before him were (as in the present case) only between the parties to the partnership litigation and the attaching creditor. The solicitor was not a party to the litigation. Then he went on to say in considering the solicitor's lien as follows (p. 453) :...I will assume that, if the solicitor had in the present case applied to the appropriate court, which would have been either the Court of Passage or the Liverpool county court, or to both, for a charging order, he would have got one. But until he got the charging order he only had at the most an inchoate right to apply for one; he had not a lien on the money. That is clear if the nature of his so-called 'lien' is understood. A 'lien', in the strict sense of the word, can only exist where the person claiming the lien has the property which he claims to be subject to the lien in his possession. An artificer has a lien on property on which he has spent time, labour and trouble in making repairs or other work because he has that property in his possession and can refuse to give it up until he is paid....

A solicitor has a lien on papers of his clients which are in his possession; he can refuse to give up those papers so long as his costs are not paid. He is also commonly said to have a lien on a sum of money which comes into existence owing to his exertions, but in that case the term 'lien' is really a misnomer. The solicitor's right in that case is not strictly and accurately a lien because it has not the characteristics of a lien.... It is the solicitor's right to go to the court and to ask

the court to charge property in his favour; until that is done he has no right in it. In the present case, when the application for the garnishee order absolute was before the district registrar no charging order had been made or applied for. There was therefore no lien or charge on the money at that time. There was no lien on it in the strict sense of the term, and there was no charge on it because a charging order had not been applied for.

The learned Chief Justice also quoted with approval the remarks of Cockburn Chief Justice in *Mercer v. Graves* (1872) L.R. 7 Q.B. 499, as follows:

There is no such thing as a lien except upon something of which you have possession.... although we talk of an attorney having a lien upon a judgment, it is in fact only a claim or right to ask for the intervention of the Court for his protection, when, having obtained judgment for his client, he finds there is a probability of the client depriving him of his costs.

29. Therefore, so far as the present case is concerned, a lien rightly so-called is not and cannot be claimed by the solicitors. The lien that is claimed is only that inchoate right to apply to the Court for an order, but in such a case unless an order is obtained from a Court in respect of funds in possession of the Court no lien can possibly arise in favour of the solicitor and it is common ground that except the order dated February 27, 1901 no such order was obtained in this case. This is further clear if we consider the forms of declaration used in England where solicitors claim their lien on funds in Court as reproduced in *Seton's Forms of Judgments and Orders*, 7th edn. at pp. 1044 and 1045. See Forms 6 and 7. In both cases the forms indicate that the Court has to declare that the solicitor is entitled to a charge and that no preferential right arises in favour of a solicitor until an order of the Court is obtained.

30. A passage from *Cordery's Law relating to Solicitors*, 6th edn. as edited by Graham and Green (at p. 433) was relied on on behalf of the respondents. The passage is :

A solicitor has at common law a 'lien' over property recovered or preserved or the proceeds of any judgment obtained by his exertions on his client's behalf.... This

common law lien is in fact not a mere lien but a claim to the equitable interference of the court to have the judgment held as a security for costs.

The first sentence of the passage merely states the right of the solicitor but the second sentence makes it clear that without interference of the Court, that is to say, without obtaining an order, the 'lien' does not arise in favour of the solicitor. While we are at this stage, we may also say that in the same article it has been pointed out that (p. 434),

The lien is a 'particular lien' in that it is not available for any costs other than the costs properly incurred of recovering and preserving the property in question, so that the lien upon a fund recovered in a suit is confined to the costs of those particular proceedings, or those immediately connected therewith, as, for example, the costs of establishing the retainer.

In the present case, it is clear that no such order as is contemplated by the law was obtained by the solicitors in any case, and we therefore do not see how any Lien can arise in their favour in the sense in which a lien at common law is understood. Loosely of course even the right to apply for the debt is called a lien but that is not the sense in which the solicitors are claiming preference in the present case. Any question of preference in their favour can only arise if they had an order from the Court.

31. Some suggestion was made that the consent order passed on February 27, 1961 by Mr. Justice Shah amounts to such an order. Now we have already reproduced the operative part of that order and the first and the most important point which must be noted in regard to that order is that it was not an order invoked by any solicitor at all in his favour, but it was an order passed upon a chamber summons dated February 10, 1961 taken out by defendants Nos. 1, 2 and 3 praying that an order be passed that the attorneys of the parties to the suit may be directed to tax their further bills of costs as between attorney and client and that the Commissioner, High Court, Bombay may be directed to pay the same when taxed. The costs had not even been taxed on that date nor was any prayer made that the amount in the custody of the Court should stand as a security for those costs nor was a charging order applied for. In fact, the question of granting

any lien to any of the solicitors was not even present to the mind of the learned Judge when he passed the order dated February 27, 1961.

32. It was next contended that upon a construction of that order of February 27, 1961 it should be held that it was a charging order or at any rate that it created a charge. The sole basis for this argument is that in the opening part of the order the learned Judge has ordered that the Commissioner 'do pay out of the sum of Rs. 1,37,429.89' the taxed costs of the suit and other costs of the reference and of the sale before the Commissioner for Taking Accounts and the proceedings before the arbitrator etc. It was urged that since the taxed costs were ordered to come out of a fund which was indicated, namely, the amount of Rs. 1,17,429.89, a charge was created in law. Reliance was placed in this respect upon the following decisions: 1. Rustamalli Goharalli v. Aftabhuseinkhan : AIR1943 Bom414 , 2. Nathan Lal v. Durga Das I.L.R.(1980) All. 985, B. Mt. Sahodra v. Badri Prasad A.I.R. [1929] All. 787 and 4. Bank of India v. Rustom Fakirji (1954) 57 Bom. L.R. 850. Each one of these cases was concerned with construction of a document where upon its terms an amount was said to be indicated as being payable out of a particular fund which was also indicated. The facts and circumstances of each of these cases are entirely different and as we have said they were only concerned with the construction of the particular document of charge in that case. None of these cases can even remotely be approximated with the present case. As Mr. Justice S. T. Desai pointed out in Bank of India v. Rustom Fakirji (p. 861):..The main question to be determined in cases of this nature is whether the parties have clearly expressed their intention to create a charge or any other incumbrance on the property in question or have merely used some expressions which are in the nature of personal assurances or undertakings which although of binding effect give no right to the promisee to proceed against the property itself by bringing it to sale.

and each case depends upon its particular facts and/or circumstances. Even before Mr. Justice Desai a number of decisions were cited and he brushed them aside by saying (p. 801)...They were all decided on the construction of the expressions and language used by the parties and the circumstances attaching to the transactions. No useful purpose would be served by a more detailed

examination of those authorities.

The same is the position in the present case.

33. In the present case the order creates no right whatsoever in favour of any solicitor on the face of it. On the contrary, it awards the amount to the plaintiff in invitum and to the defendants upon consent, and of course no question of lien could possibly arise so far as the parties are concerned. In fact the solicitors were nowhere in the picture when the order of February 27, 1961 came to be passed. None of them had applied to the Court and no order in their favour could have been passed. So far as the expression used in that order 'out of the sum of Rs. 1,17,429.82', it could never have been the intention of the learned Judge thereby to create a charge, but the parties to the consent terms having specified an amount out of which the various claims of the parties were to be paid, that amount had to be mentioned and therefore the learned Judge mentioned it in the order that the several legacies and other amounts to be paid should come out of that fund. There was not the slightest intention to make those amounts chargeable upon the fund. The expression was used as part of a direction to pay and not as a part of an order creating charge.

34. It is in this context that we turn to the order of the learned Judge under appeal. He relied upon the decisions of this Court in *Ved & Sopher v. Wagle & Co.* and *Tyabji Dayabhai A Co. v. Jetha Devji & Co.* in order to hold that the State had no preferential right in respect of the payment of its dues for arrears of income-tax and in order to dismiss the chamber summons. Both these cases were cases where a charging order had been passed, or obtained. In *Ved & Sopher v. Wagle & Co.* no doubt the lien of the solicitors was recognised and an amount standing to the credit of the decree-holder which they had realised from their judgment-debtor for whom the solicitors had appeared, was ordered to be paid to them, but it is clear from the facts stated in the judgment of Mr. Justice Taraporewala at page 557 that the solicitors Messrs. Hiralal & Co. had got a charging order in their favour on the decrees in favour of R. P. Wagle & Co. one of which was the decree attached in the execution proceedings before the learned Judge and it was, therefore, that the learned Judge applied the principle stated in *Cordery* that 'the

result of the more recent cases seems to be, that so long as the money is within the jurisdiction of the Court a charging order will have priority over an attachment...' With that principle there can be no quarrel, but the fact remains that in that case a charging order had been obtained by the solicitors and therefore they were entitled to a preference over the attaching creditor. What was really argued in that case was that once a property is attached by others, the lien which a solicitor had obtained by obtaining a charging order comes to an end and it was only that contention which was negatived in that case. In the present case no charging order or any order has been obtained by the solicitors,

35. We may incidentally also point out that the decision in Shippey v. Grey (1880) 49 L.J.C.P. 524 which was relied on by the learned Judge in Ved & Sopher v. Wagle & Co. was distinguished by Lord Goddard in the decision in James Bibby Ltd. v. Woods and Howard, at p. 454 on this very point by saying, 'But in that case (Shippey v. Grey) the solicitor had applied for a charging order and it had been, as the Court of Appeal held, wrongfully refused. The Court of Appeal decided therefore that, since the solicitor ought to have been granted a charging order when he applied for it, he was in the same position for all purposes as if the charging order had been made. His claim could not be defeated because a court had not made the order which it ought to have made. That is the whole explanation, I think, of that case.'

36. In Tyabji Dayabhai & Co. v. Jetha Devji & Co. also a charging order was obtained but it was obtained on September 27, 1926, after the attaching creditor had attached the decree on September 25, 1926, but on the date on which the charging order was passed the fund charged was still in Court and therefore a charging order could be passed. This is clear from the facts stated at page 1198. The case, at the most, establishes that a charging order may be obtained by a solicitor even after a fund is attached in execution by another creditor of his client so long as the fund is still in Court, a position with which we are not concerned in this case. In the present case, however, no order whatsoever has been obtained. We do not think therefore that either of these two cases can apply in the present case. We do not think, therefore, that any lien has arisen in favour of the solicitors in the present case. Therefore, no question of any lien of theirs competing with the

common law right of the State which we have shown has a preferential right, can arise, nor does any question of considering the relative preference between the solicitors and the State arose in this case.

37. A decision in *Basudeo Ramgovind v. Vachha & Co.* (1954) 56 Bom. L. R. 1186 was relied on by Mr. Mody. That was also a case where the plaintiff's attorneys had taken out a chamber summons seeking to have a lien and a charge, In that case there was also a positive finding given that the plaintiff had colluded with the opposite party in order to defeat the rights of his solicitor. Chief Justice Chagla found as follows (p. 1144) : ..He (the plaintiff) wanted to walk away from Bombay with Rs. 14,500 leaving Ills solicitor to whistle for his costs, and that was exactly the arrangement to defraud the plaintiff's solicitors to which the defendant had agreed.

The case itself, however, shows that without an approach to the Court the solicitor cannot obtain a non-possessors lien and that unless a charging order is obtained there is no claim to any such lien.

38. But then it was urged by Mr. Mody that an opportunity should now be given to the solicitors in the present case to try and obtain a charging order in their favour. We cannot understand such a request coming, not from the solicitors but from their clients apparently on their behalf. The respondents cannot ask for a charging order at all. Moreover it seems to us that even if the solicitors were applying it is rather too late in the day to make such a request and that too orally at the time of arguments The position was well-known to both the parties and their solicitors when the chamber summons was argued before Mr. Justice Tulzapurkar, as the reference to cases in *Ved & Sopher v. Wagle & Co* and *Tyabji Dayabhai & Co. v. Jetha Devji & Co.* would show and counsel must have seen that no charging order has been passed in the instant case. Yet the parties went to trial of the chamber summons on that basis. The respondents succeeded and it is only upon a fuller consideration in appeal that we have come to the conclusion that the solicitors would not be entitled to a lien. Even this appeal has been pending in this Court for over five years and no steps were taken in the meanwhile. The Union having put forward its claim has acquired a right to have the moneys paid to it and it would

virtually defeat their rights if the respondents or the solicitors could today be permitted to obtain a charging order and claim a lien over the amount in Court. In that event the State would get nothing against its dues. We do not think it at all just or equitable to allow the respondents now to apply that a charging order in favour of the solicitors should be granted.

39. We also doubt if the parties can so apply. The entire litigation so far has been between the parties to the administration suit. The solicitors are not parties to the litigation which is being fought on their behalf and in their interests, It is the parties in the administration suit who are claiming that the solicitors have a lien and claim that they be paid their dues from the funds in Court. In this respect we are inclined to think that the present case is exactly covered by the remarks of Lord Goddard in *James Bibby Ltd.'s* case as follows (p. 452) :..The Court has had very great doubt whether or not counsel in the present case has any right to be heard in this appeal as representing the judgment debtor, since we do not understand how the judgment debtor is affected by the order. He has the right to a sum of money which he must either pay to his solicitor for his costs or to the judgment creditors. If he pays it to his solicitor he will still owe the money to the judgment creditors, and if he pays it to the judgment creditors he will still owe it to his solicitor. The solicitor is not a party to the present proceedings and, although we have allowed the main question at issue to be argued, it seems to be extremely doubtful whether we really had any right to hear the judgment debtor on that question.

We have also felt the same difficulty in the present case. In the present case also the respondents who opposed the chamber summons were not going to be affected in the slightest degree by the grant of the prayer made in the chamber summons. They owe money to the State for income-tax . They also owe money to their own solicitors. If they pay the Income Tax Department, they will still owe the money to their solicitors. If they pay the money to their solicitors, they will still owe the income-tax to the Union. They, on their own part, are not going to gain a single rupee by all this litigation and particularly this appeal which has gone on for almost eight days before us. In fact it is needless waste of costs on their part. The present is really an appeal by the solicitors through the instrumentality of their clients. In such a case we do not think we can grant the prayer made on behalf of the

respondents that the solicitors should be allowed to obtain a charging order. We will advert to this question again when we come to consider the question of costs.

40. The principles and cases which we have discussed so far establish (1) that a solicitor has a lien in common law in respect of his costs and the expenses of a litigation against funds belonging or payable to his clients and lying in a Court; (2) that he is entitled to have the amount realised by his exertions paid to him to the extent of his costs and expenses so long as the money is under the control or in the custody of the Court; (3) it is lost the moment the money goes out of the control or custody of the Court by payment to a third party; (4) in any case, the lien referred to above arises only in favour of a solicitor on his obtaining an order from the Court securing the fund in the custody of the Court for payment of his dues or obtaining an order in respect thereof. Till that is done there is in essence no lien though the mere right to apply has been often called a lien; (5) the order of the Court may be obtained at any time by the solicitor and even in spite of and after an attachment levied by a creditor, provided rights of third parties have not supervened in the meanwhile.

41. The next question is whether the position is in any way different in an administration suit. The contention is principally based upon the clause in Seton's Forms of Judgments and Orders, Vol. 2, p. 3362 as follows :

Independently of the provisions of the Judicature Act, 1873, Section 10., the following is the order in which, after payment of funeral and testamentary expenses.... and costs of administration suit, the debts are payable from legal assets:-1. Debts due to the Crown by record or specialty, which take precedence over debts of whatever nature, as well prior as subsequent:....

It is urged that this is the position at common law even in England and therefore testamentary expenses are preferred to the debts due to the Crown even under common law. Similar statements are to be found in other commentaries particularly Williams on Executors and Administrators, 14th edn., at p. 464, article 770 where the order of priority is thus stated :

On the death of a person before 1926 insolvent his personal representatives when administering the estate out of court, after having paid the funeral and testamentary expenses, were bound to apply the residue of his assets in the payment of other liabilities in the following order:

(1) Debts due to the Crown by record or specialty.

(2) Judgment debts.

(3) Specialty debts and simple contract debts,...

The position under the Indian law is also the same having regard to the provisions of Section 321 of the Indian Succession Act where the expenses of obtaining probate or letters of administration, including the costs incurred for or in respect of any judicial proceedings are to be paid next after the funeral expenses and death-bed charges. It was, therefore, urged that whether one has regard to the statutory law in India or to the operation of common law by virtue of Section 217 the position is the same and that testamentary expenses would have precedence over the Crown debts.

42. Before we consider this contention, it is necessary to say that 'testamentary expenses' has by now acquired a special connotation. They are not expenses merely limited to obtaining probate of a will or letters of administration with the will annexed but also include expenses of any proceedings taken for the administration of the estate of a deceased person upon succession without a testamentary document. A reference to Stroud's Judicial Dictionary, 3rd edn., Vol. 4 under the head 'Testamentary Expenses' will show that included in testamentary expenses is the cost of obtaining letters of administration to an estate where a person died intestate. (See Note 9.) It is also clear that the costs of an administration action are 'testamentary expenses'. (See Note 7). Therefore no doubt the costs of the administration, to the extent they are allowable, would be testamentary expenses and would also fall within the meaning of expenses of obtaining letters of administration within the meaning of Section 321 of the Indian Succession Act. The same position is indicated in Williams on Executors and Administrators, para 762 at p. 459, and in Daniell's Chancery Practice at p. 1067.

In Jowitt's Dictionary on English Law, under the heading 'Testamentary Expenses', it has been stated that they include the costs of an administration action.

43. In *Attorney-General v. Jackson* [1982] A.C. 365, (a case relied on on behalf of the respondents), the question of priority of debts in an administration action vis-a-vis the Crown's claim to arrears of income-tax came up for consideration. The solicitor's lien was not in question but the executrix herself claimed to retain the whole of the assets in order to satisfy her dues. The Crown had a claim for arrears of income-tax and super tax amounting in all to 4,000. There were also other creditors of 4000 and the claim by the executrix for about 1,000 for money lent to the testator. The Crown disputed her rights claiming that her claim has no priority against any part of its debt. The Court of appeal decided in favour of the executrix and the matter was taken on behalf of the Crown to the House of Lords who reversed the decision of the Court of Appeal. Clauson J. put the position in law thus (p. 370) :..As stated by Blackstone, the law allows the executor to retain so much as will pay himself before any other creditors whose debts are of equal degree. We, therefore, are brought to consider what is meant by debts of equal or higher degree. 'In payment of debts [the executor] must observe the rules of priority; otherwise, on deficiency of assets,' if he pays those of a lower degree first, he must answer those of a higher out of his own estate. For the purpose of administration the order of degree of debts was the order in which they were entitled, to priority of payment. Such an order was established by common law. It was, of course, capable of being varied by statute; and accordingly in the order of degrees there found place debts which have been given priority by statute. Thus Blackstone in stating the order says: 'First, funeral and testamentary expenses. Secondly, debts due to the King on record or specialty. Thirdly, such debts as are by particular statutes to be preferred to all others;... Fourthly, debts of record;- Fifthly, debts due on special contracts;,...' And it may be noted that as to the last class he adds: 'Among these simple contracts servants wages are by some with reason preferred to any other: and so stood the ancient law according to Bracton and Fleta'.

Now what was said in that case was said in the circumstances existing in that case and the first thing that we notice is that in that case the attorneys were not making

a claim to the exercise of their common law lien as in the present case. What was there being claimed by the executrix herself was the possessory lien of the executrix for expenses incurred by her for the estate. In other words all that the executrix in that case was claiming was her right to continue to be in possession of the property of the deceased so long as she was not paid her expenses and charges. There was no question there of claiming a fund in the custody of the Court by a solicitor whose exertions had resulted in that fund being preserved or recovered. That case is thus entirely different from the case before us, in that the nature of the lien claimed by the executrix was only a retaining lien (a possessory lien) and not a common law lien (a non-possessors lien) which the solicitors are claiming in the present case. Therefore, no question arose of considering whether an order was necessary to be passed by the Court or not, because the fund was not in Court but in the hands of the executrix herself. In the present case we have already shown that in order to entitle the solicitors to claim their costs, charges and expenses, an order from the Court granting them a security over the funds in Court or a charging order was essential. So far as the priority mentioned in the several references which we have given above are concerned also the position is the same. In each one of the statements which we have reproduced above it was assumed that a valid solicitor's lien had arisen in favour of the solicitor and having arisen the question was what is the order of priority. In none of these statements is it said that a common law lien in favour of a solicitor arises without first obtaining an order from the Court. The decisions show that the position is the contrary. Thus none of these cases or citations say that even in an administration suit a solicitor can get his costs and expenses without an order from the Court, whether it be a charging order or otherwise. None of these statements was concerned with any competition between the common law lien of the solicitor and the Crown's claim to have its debt paid in preference to ordinary creditors. In Jackson's case a competition with the claim of the Crown did arise but it was conceded that the competition was not with the common law lien of solicitor but with the executrix's lien on the property in her own hands.

44. While we are on this subject, we may also indicate a further limitation to the award of costs and expenses of administration. Both by common law as well as by Section 321 of the Indian Succession Act it is clear that only such expenses as are

necessary for the administration of the estate alone can be granted. Under common law the principle is that the solicitor is entitled to have his costs and expenses secured from the fruits of his own exertions. Of necessity therefore that must also mean that he would be entitled strictly only to costs incurred in preserving or recovering the estate administered and no more. This position was succinctly put in a decision of the English Court of Chancery in Clayton, In re : Collins v. Clayton and Reade [1940] 1 Ch. 539:..Mr. Stamp has referred me to Greer v. Young (1882) 24 Ch. D. 545 and in particular to the observation of Chitty J. : 'A point to which I called counsel's attention was that the order had not been so drawn as to limit, as it ought to have done, the costs of the solicitor to his costs properly incurred in recovering and preserving the property.' Mr. Stamp also relied on the observations of Sir Williat Baliol Brett M. R. (in the same case) 'I do not adopt the idea of salvage as an accurate analogy in all respects, but I think the fundamental theory is, that what is recovered by the action of the solicitor is to be treated as if he had earned salvage, and that he is to be paid for his services on the theory that salvage services have been rendered.' Similarly Bowen L. J. said (in the same case): 'It appears clear to me that it is a salvage section'. (That is the section in the 1800 Act to which I have referred.) 'The solicitor is treated as a salvage who has recovered or preserved something in a time of danger by his work and labour. Into whatever hands it may fall it is charged with the salvage.'

These passages seem to us to show quite clearly that the principle upon which the Court proceeds is that the solicitor is to be rewarded for his efforts to the extent of receiving the costs, charges and expenses properly incurred in recovering or preserving the property.

45. Therefore, even assuming that in this case we had held that the four solicitors concerned had a common law lien in their favour, which we have found they had not, we would certainly have remitted this ease to the learned single Judge for consideration of the question whether the costs, charges and expenses were necessary for the purposes of administration of the estate. As it is, no one has determined that question and from the facts which We have stated it is quite clear to us that in this case the total costs of administering the estate which is said to be worth about 2 or 2J lakhs of rupees, is excessive. It is claimed to be Rs. 96,203

which is almost half the estate and which prima facie appears to us difficult to accept. However, in our opinion, no solicitor's lien has arisen at all in the present case and, therefore, the claim made by the respondents on behalf of the solicitors in the present case is a claim made on their behalf as ordinary creditors. If so, the Union's claim like the common law debt of the Crown would certainly prevail against such ordinary creditors. In that view we must hold that the learned Judge was in error in dismissing the chamber summons. On the other hand, he should have held that the Crown was entitled to be paid in priority to the solicitors the full amount of Rs. 61,571.60.

46. At this stage Mr. Joshi on behalf of the Union of India tells us that the outstanding amount in the custody of the Court is not Rs. 61,571.60 as we were told by counsel on both the sides and throughout supposed, but only an amount of Rs. 52,754.56. It appears much to our surprise that after the chamber summons was taken out certain amounts were allowed to be paid to two attorneys Messrs. Zaiwalla & Co. and Messrs. Vakil Dadabhoy & Bharucha and to an attorney Mr. M.D. Dharu for certain costs, charges and expenses without any notice to the Union of India and while the chamber summons was pending. The Union would therefore be entitled to this amount of Rs. 52,754.56. Nothing that we have said in this order, however, shall affect the right of the attorneys to reimburse themselves if they can from any other property under administration. That there is such a property is clear from the letter dated June 12, 1953 which respondent No. 5 Anant Keer wrote to the Commissioner of Income-Tax and in which he requested that officer to realise the income-tax dues from that property.

47. We, therefore, allow the appeal, set aside the order dated December 6, 1965 and make the chamber summons absolute in terms of prayer (1) to the extent of Rs. 52,754.56.

48. There then remains the question of costs. The chamber summons dated October 11, 1963 and this appeal from the order thereon dated December 6, 1955 have been opposed by the plaintiff and the defendants in the administration suit. We are satisfied that such an opposition was not in the interest of any of the parties to the administration suit themselves but was undertaken solely in the

interests of the attorneys of the respective parties. The real contest as to priority of the claim was between the Union of India on the one hand and the attorneys for the parties to the suit on the other. It is really the attorneys for the parties to the suit who claimed priority over the Union of India in the payment of their costs, charges and expenses out of the funds lying in the Court who alone were to benefit by all this litigation. The parties to the suit were not affected by the order at all, nor by the chamber summons. They were not to gain a single rupee by opposing. The fund in the Court no doubt belongs to them but as we have said if it was to be paid to the Union they would still have their liability to their solicitors. If it was paid to their solicitors they would still be liable to the Union of India for the arrears of income-tax. It should have been, therefore, a matter of complete indifference to them whether the fund lying in the Court went to the State or to the attorneys. As the attorneys are not parties to the litigation they have really got their respective clients to oppose the claim of the Union of India to priority and their clients are really acting in the interests of and on behalf of their respective attorneys and not in their own interests.

49. The matter has been argued for several days. We think that it was quite unnecessary to incur these costs so far as the parties to the suit are concerned. In these circumstances, we are of the view that it will not be proper to burden the parties to the suit or the estate with the costs of this litigation conducted in their name but really for the benefit of the solicitors. We, therefore, disallow the costs between the parties to the suit and their respective attorneys. We order that the costs of the parties to the administration suit in respect of this appeal and the chamber summons dated October 11, 1963 will not come out of the estate under administration and will also not be taxed between attorney and client. The respondents will, however, pay to the appellants their costs of this appeal as well as of the chamber summons dated October 11, 1968. Liberty to the appellants to withdraw the amount of Rs. 500 deposited as security for costs.