

(1932) 08 CAL CK 0001
In the Calcutta High Court

A.B. Miller

APPELLANT

Vs

F.G. Ferguson

RESPONDENT

Date of Decision : 27-08-1932

Acts Referred:

Citation : AIR 1934 Cal 300

Hon'ble Judges : Ameer Ali, J

Bench : Division Bench

Judgement

Ameer Ali, J.—(After stating the facts and the questions to be considered his Lordship proceeded to consider the law on the point.)

2. Law?In this case, I will deal with the law before dealing with the question of construction. The authorities to be considered are not many: Williamson v. Naylor (1838) 3 Y&C 208, Alder-son v. Petrie (1873) 25 WR 361-n, Ashley v. Ashley (1875)1 Ch D 243; Ashley v. Ashley (1876) 4 ChD 757 and In re. Macdonald (1889) 59 LJ Ch 231, Wilson v. Church (1911) 106 LT 31 and the following text-books: Daniel's Chancery Practise, pp. 890-2, 897-8; Seton, Edn. 7, forms 2417 and 2429 ; and English Rules of Court, Order 55, inter alia, Rules 56 and 65, and forms in appendix I, Nos.5 and 6, at pp. 1699 and 1701 of the 1931 rules. I will take these authorities in the above order.

3. In Williamson v. Naylor (1838) 3 Y&C 208, there was a trust by will of one-fifth of the estate of the testator to be distributed rateably amongst 52 persons mentioned in the schedule to the will. It was held, and this was the crux of the case, that these persons were not legatees but creditors whose debts were revived by the will. The one-fifth amounted to a sum of ₹3999. At p. 212 this amount is referred to as having been set apart for the creditors. Of the 52 creditors named in the schedule to the will, only 22 had come in and proved before the Master, and in the result these 22 creditors were allowed to receive and appropriate the whole amount towards satisfaction of their debts to the exclusion of the 30 who did not come in. The real point of the case is that, for reasons good or bad, the schedule to the will was not accepted as equivalent to

proof of the debts and the Court actually found only 22 to be creditors. The reasons are indicated at p. 215 of the original report (inter alia that there was no knowing whether the debts had or had not been discharged). The principle applied is not different from that so clearly expressed in *David v. Frowd* (1833) 1 My K 200, to which I shall again refer, namely, that the Court is perfectly entitled to distribute among those whom it "discovers" to the exclusion of other creditors whom it does not "discover" subject to certain reservations of the right in favour of those others.

4. The second authority is *Alder son v. Petrie* (1873) 25 WR 361-n recited in *Ashley v. Ashley* (1875) 1 Ch D 243. This was decided by Lord Selborne, and the principle laid down was that all the creditors, named in the schedule to the master's report, as having established their claims, acquired a vested interest in the original funds and any funds subsequently falling in, and that "only the proportion of the fund which the debts of those who claimed payment at the subsequent period bore to the entire debts could be paid out, and that the rest must be retained in Court (p. 773).

5. *Alderson v. Petrie* (1873) 25 WR 361-n was followed in and applied in *Ashley v. Ashley* (1875) 1 ChD 243 to which I must refer to in a little detail. This was the administration of an estate of one Charles Pitfield. On 9th August 1792, there was a report by the master, specifying the fund in Court and specifying the creditors "found." Some of the creditors "found" did not withdraw their dividends, which amounted to £125-10s. In 1867 a sum of £3,146-16-3 fell in, and an inquiry was directed as to who were entitled to share to the £425-10s and £3,146-16-3. Only two creditors came in in this inquiry and they claimed payment in full to the exclusion of all others (see p. 246). On 5th April 1875, a certificate was given. It was held that the two creditors who came in only received a rateable proportion of the fund that had fallen in. (As I read it they were not entitled to share in the £425-10s at all.) I do not refer in detail to the judgment on appeal (1876) 4 ChD 757, although there is much that bears closely on the matters in question in this case.

6. In *Re. Macdonald* (1889) 59 LJCh 231 is an authority, which at first sight, appears to be on all fours with the present case. In 1864, the testator died and, in 1866, there were advertisements for creditors. Some came in, but the proceedings were abortive. In 1888, a large sum of money, £1,180, was paid into Court and the administration was again taken up with the result that, on 16th November 1889, there was a certificate, showing (i) Debts "allowed" to the extent of £609; (ii) 20 creditors were ascertained, i.e., either living or by their personal representatives. Their debts amounted to £325. (iii) 15 creditors not traced. Their debts amounted to £282. The fund was divided and £282 was apportioned and retained in Court subject to further orders. It was argued, by way of distinction, that in this case, all the creditors had put in claims, but that does not appear to be so. So far as the 15 creditors are concerned, in this respect there does not appear to be any distinction between them and the C

creditors of the decree of 1878. The only question to my mind is whether the order was intended to be a final order. It would be interesting to know what happened to the fund retained. I am inclined to think that it was a final order: (see Daniel's Chancery Practice, p. 395 and Saton, p. 1403). I propose however for the purpose of deciding this case not to make that assumption.

7. The last case is *Wilson v. Church* (1911) 106 LT 31. The history of the matter will be found in another report 41 L. T. 50. As this case has been strongly relied upon by the D creditors, the judgment of the Court of appeal, on 20th June 1879, declared that the trust fund, to which the bondholders were entitled by way of resulting trust, amounted to X. The trustees were directed to raise ? 744,300 and apportion this sum rateably to the unredeemed bonds. The trustees were to give notice to the bond-holders to attend and receive the amounts. The trustees were to pay the holders of the bonds, on presentation, the amount apportioned, and they were to give certificates to such persons entitling the holders to a rateable proportion of the balance. Lastly, the trustees were to apportion the balance and then to distribute to the holders of the certificates on presentation. The trustees raised ?744,300, and, out of it paid a dividend of 45 per cent "upon issued certificates." (This must refer to some certificates attached to the bond and not to those issued by the trustees.) There remained a balance of ?39,987. On 8th July 1881, an order was made giving the trustees leave to pay a further dividend of ?2.6s per cent and (this is the important point) to pay into the Court to the credit of an account headed "unpresented bonds" 45 per cent plus ?2-6s per cent on ?9,600 worth of bonds not presented. The sum so set aside apparently amounted to ?1,918. There was a direction as to the ultimate residue with which we are not concerned. As to what happened afterwards, I find some difficulty in following, for instance, as to how the names of the holders of the unpresented bonds were ascertained: see p. 33, Col. 1.

8. However that may be, the ultimate result was that the sum of ?1,918 being "the unpresented bonds" fund was released and applied in payment of bondholders who had presented their bonds. The case therefore is an authority for the proposition that funds set aside for inactive creditors may be applied for the benefit of active creditors. From a practical point of view, the case is not dissimilar to the present case. Legally however there is a vital difference, namely, that the Court had not by a decree, as in *Alderson v. Petrie* (1873) 25 WR 361-n and *Ashley v. Ashley* (1875) 1 ChD 243, "found" the holders of the bonds to be creditors or entitled to share in the fund in Court. This difference enabled Eve, J. to distinguish the cases mentioned. This therefore being the state of the authorities, the question is whether, or not the present case falls within the scope of *Alderson v. Petrie* (1873) 25 WR 361-n and *Ashley v. Ashley* (1875) 1 ChD 243. The D creditors, represented by Dr. Gupta and Mr. Isaacs, seek to distinguish these cases on the following grounds:

(i) They contend that, on a proper construction of the final decree, there is no finding that the persons named in the schedules are creditors. (This is the

question of construction which I shall deal with next.)

(ii) They contend (and this a purely legal point) that there can be no finding in the absence of a claim. That there cannot be a debt without a creditor. That the master or the officer cannot "allow" a claim of "find" a debt unless there is some action on the part of the creditor. The expression used by Mr. Isaacs is that the creditor "must manifest his appearance." That there can be no passive proof of the debt with the effect of vesting the fund in the creditor. They point out that in the cases, *Alderson v. Petrie* (1873) 25 WR 361-n and *Ashley v. Ashley* (1875)1 ChD 243, there has been such active proof. As regards *Re. Macdonald* (1889) 59 LJCh 231 I have expressed my view.

9. I will now summarize as shortly as I can the principles which I consider are to be deduced from the authorities:

(i) If the Court decides that A, B, and C are creditors for the amount of X, Y and Z, that is to say it "finds" or "allows" or "discovers" them as creditors (all these expressions being used in the authorities I have mentioned), then A, B and C are entitled to proportionate shares in the fund and in any subsequent addition to that fund.

(ii) A, B and C or their representatives on proving title are entitled to receive such share.

(iii) In deciding who are the creditors, the Court is perfectly entitled to disregard D and E, who have not come in in answer to the advertisement. D and E need not be regarded as creditors, see *Ashley v. Ashley* (1875)1 ChD 243 and *David v. Frowd* (1833) 1 My K 200, and the Court may divide the fund among those who prove. This is so even if the Court may be aware of a possible claim by D and E.

(iv) Such division will not prejudice the right of D and E or of F and G (of whom the Court has no knowledge at all) to come in and claim before distribution against the fund, and after distribution, subject to certain qualifications, against those who have received their shares: see *In re McMurdo* (1902) 2 Ch 684, where this aspect of the matter is fully discussed.

(v) The Court on the other hand (being aware of possible or likely claim) may not disregard D and E. It may protect them by setting aside the proportionate shares D and E pending a finding, that is, may set them aside not absolutely but contingently upon a finding. Failing proof within the time set by the Court, the shares so set aside will revert to the General Fund. In other words, the Court may give D and E interlocutory protection.

(vi) Can the Court do more for D and E? Can it make a final allocation, although D and E have not come in? Can the Court, in spite of the ordinary rule of practice, "no claim, no creditor" [*Ashley v. Ashley* (1875)1 ChD 243] in a special case decided as to D and E's right just as it decides on A, B and C's right, and find D and E to be creditors, i.e , without active proof, treat the claim as "allowed," leaving merely the right to receive contingent on proof of title. Personally I can

see no insuperable obstacle on principle to that being done, and I can conceive many cases in which it might be desirable or inevitable, cases, for instance, where there has been considerable lapse of time resulting in loss of evidence and death of various creditors, cases where the claim had once been proved or admitted, cases where not only there had been proof, but where there had been part payment and so forth.

10. In this connexion I would like to refer, by way of parenthesis, to the D's. Is the position of the D in 1932, from a practical point of view, materially different from the A's in 1878? We know that they have not been paid, but also we know from the finding of the Court that the A's had not been paid in 1878. Many of them show no active movement. We do not know whether they are alive or dead. It is clear, in law, that the sum of Rs. 260-3-9 retained in the D Fund for creditor D-19 cannot be applied for the benefit of those D's who now manifest their appearance.

11. Upon the question whether the Court can "find" without active proof, I think the portion of Daniel's Chancery Practice, to which I have referred, give the answer, as also the forms in the Annual Practice. In the administration of estates, it is the duty of the executor or to whomever the conduct of the proceedings is entrusted in furnishing the materials for the report to state to the Court not merely the claims of the creditors who come forward but any other claims of which he is aware, vide *Re Land Credit Company of Ireland* (1872) 21 WR 135, and indeed, the English form provides a special schedule for this purpose. Form 6-B is to set out "List of sums of money due but in respect of which no claim has been received," and there are two Sub-schedules: Part 1, "sums admitted to be due": Part 2, "sums which may be due but in respect of which the liability ought to be proved." It contemplates that for the purpose of preparing the certificate, or its equivalent, the Report, upon which the finding of the Court will follow, persons, having what may be called the carriage of the proceedings are to state sums admitted to be due, and which should be taken as proved although no claim has been put in. It therefore appears both in principle and practice that an "active" claim is not essential for a finding.

(vii) Therefore it will be a question to be decided in each case whether there has been a finding or whether there has been merely interlocutory protection. Has the Court established a right? Has it merely protected the creditor? That brings me to the final question of construction.

12. Construction? The question is whether the decree of 1879 is a finding in favour of the A creditors for the amounts set against their names in the schedules I will call Construction I. Or was it, so far as the C creditors are concerned, protection, pending a finding? I will call this Construction II. (His Lordship found in favour of Construction I after giving reasons for the same and the judgment proceeded). That being my finding on the questions of construction, the whole matter to my mind is covered by *Alderson v. Petrie* (1873) 25 WR 361-n and *Ashley v. Ashley* (1875) 1 ChD 243, and I am not free

to release the funds in question for the benefit of the active creditors.

Result

13. The result is as follows: (i) There is no resulting trust in favour of the settlors or their representatives, (ii) The D-C Fund. This fund is a surplus fund and may be released. If there were no higher claim to this fund, it would, in accordance with *Ashley v. Ashley* (1875)¹ Ch D 243, go to provide further dividends to all those whose claims have been allowed ; but, in my view, it is the duty of this Court, first, to correct the error which has resulted in the fourth dividend to the D's being inadequate and I will direct that the D-C Fund be applied, first, apart from the question of costs, which I will deal with hereafter, to remedy the defect of the fourth dividend. As to the precise manner in which this should be done, I need not give directions, unless I am asked to do so, but it would appear, at first sight, that the best method of doing this would be to recalculate the dividend debiting the C's with the amounts which they had actually received.

14. At present, I merely declare that the D-C Fund may be applied for this purpose. The balance, if any, of the D-C Fund will be apportioned between all those creditors whose claims have been allowed according to my finding (and of course any new claimant who comes in before the distribution). Those A creditors or their representatives, who have come in and are entitled to receive, may be paid out. With regard to the others, their portions must be retained in the same way as the other funds with which I now propose to deal.

(iii) The B Fund must be sub-apportioned and separate individual accounts opened. The sums so apportioned will remain subject to proof of title.

(iv) C Fund to be dealt with in precisely similar manner.

(v) B and C accretions, in my view of the law, go with the share of each individual. In other words, the B and C Funds will be treated as if so many individuals were beneficiaries of a particular portion of the fund from the year 1878.

(vi) The B and C Funds will be apportioned as they stand at present irrespective of any amounts paid out to B and C creditors since the final decree, whether in excess of the amounts properly payable to those creditors or not. As regards such amounts the Official Trustee is discharged.

(vii) The D Fund (Rs. 260-3-9 plus accretions, Rs. 481-14-1 total Rupees 742-1-10) will remain subject to proof of title.

(viii) There will be no E Fund.

(ix) On the question of costs I am prepared . to direct as follows: Before the D/C Fund is applied in accordance with direction (ii) above, it will bear the following costs: (The remaining portion is not necessary for the purpose of this reporting).