
(1949) 07 MAD CK 0041

In the Madras High Court

Case No : Appeal No's. 256 and 546 of 1945

G.F.F. Foulkes and Others

APPELLANT

Vs

A.S. Suppan Chettiar and Another

RESPONDENT

Date of Decision : 22-07-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 20 Rule 13, Order 20 Rule 13(2)
Succession Act, 1925 — Section 307, 307(1), 323, 360
Trusts Act, 1882 — Section 68, 93

Citation : AIR 1951 Mad 296 : (1950) ILR (Mad) 607 : (1942) 55 LW 1101 : (1950) 2 MLJ 220

Hon'ble Judges : Rajamannar, C.J.; Balakrishna Ayyar, J

Bench : Division Bench

Advocate : O.T.G. Naliar, i./b., King and Partridge, for the Appellant; Alladi Krishnaswami Aiyar, A.V. Narayanaswami Aiyar, Alladi Kuppuswami and E.A. Viswanathan, for the Respondent

Judgement

Rajamannar, C.J.—These two appeals arise out of a suit, O. Section No. 67 of 1943, instituted in the Court of the Subordinate Judge of

Madura by two plaintiffs on behalf of themselves and on behalf of the other creditors of the estate of one Robert Foulkes deceased, for an

administration of his estate and inter alia to declare certain alienations effected by defendant 1 as the administrator of the said estate in favour of

defendants 3 to 7 invalid and not binding upon the plaintiffs and the other creditors of the estate, and for directions for the proper disposal of the

properties comprised in the said estate, and, alternatively, to direct defendant 1, in any event, to make good to the plaintiffs, the loss of Rs.

1,32,268-9-8 with subsequent interest thereon, occasioned by reason of his acts of devastavit. The learned Subordinate Judge granted a decree

personally against defendant 1 for rendition of accounts of the assets and income of the estate of Robert Foulkes (deceased) from 14-13-1938

and directing the amount due on taking accounts to be paid by defendant 1 in satisfaction of the debts due to the plaintiffs and the other creditors of

the estate, if any, in rateable distribution. The suit was dismissed against all the other defendants. Appeal suit No 266 of 1945 is by defendant 1 and

appeal suit No. 546 of 1945 is by the plaintiffs.

2. The main facts leading up to the suit are not in dispute and may be briefly stated. One Robert Fischer died on 29-11-1908 leaving behind him

his last will and testament, dated 10-3-1908, and considerable properties which he disposed of by the said will. Letters of administration with the

will annexed were granted to four persons, among whom defendant 1 was one, as executors named in the said will. Under the said will, Fischer

bequeathed a life interest in certain properties to his wife Sybil Fisher and the remainder over to Robert Foulkes, one of the executors under the

will. By an indenture, dated 24-4-1913, Robert Foulkes took on lease the said properties for a period of ten years and on the same day executed

in favour of the trustees under the will, a mortgage whereby he assigned to the other trustees the reversionary right to which he was entitled under

the will to secure payment of the rent and other moneys due and payable under the indenture of lease upto a maximum limit of one lakh of rupees.

In pursuance of a covenant for renewal contained in the indenture of 1913, another lease was granted to him on 12-9-1923, for a further period of

ten years commencing from 1-9-1922 and it was agreed that the mortgage of 1913 would cover also payment of rent reserved under the renewed

lease. On 26-6-1926, Robert Foulkes executed in favour of one Rao Sahib Alagannan Chettiar a deed of mortgage for Rs. 1,25,000, in respect of

properties covered by the mortgage to the trustees of Robert Fischer's estate. On 21-9-1932, he executed a promissory note in favour of the

same Chettiar for Rs. 20,000. He died on 24-9-1935 leaving a will, dated 30-5-1917, in and by which he bequeathed all the properties to his wife

Isabel Foulkes. The will could not take effect as the wife had predeceased the testator. Defendant 1 who was a brother of the deceased Robert

Foulkes applied to the District Court of Madura in O. P. No. 53 of 1935, for grant of letters of administration to the estate of the deceased. His

petition was allowed on 31-3-1936 and on 7-4-1936, letters of administration were duly issued to him.

3. On 21-1-1936, he i e., defendant 1 in the present suit, brought a suit, O. Section no. 10 of 1936, in the Court of the Subordinate Judge of

Sivaganga, later on transferred to the Court of the Subordinate Judge of Eamnad, at Madura and numbered there O. Section No. 35 of 1937,

against himself as the administrator of the estate of Robert Foulkes (deceased) to recover a sum of Rs. 34,485-2-8 and to enforce the mortgage

executed by Robert Foulkea on 24-4-1913 in respect of Rs. 20,323-2-8 out of the said sum. To this suit, Alagannan Chettiar was made

defendant 2, because he was entitled to the rights under the mortgage of 26 6-1926, executed by Robert Foulkes which, however, would rank

only after the mortgage of 1913. On 20-12-1937, a preliminary decree was passed directing defendant 1 therein to pay to the plaintiff therein out

of the estate of the deceased Robert Foulkea, a Bum of Rs. 33,854-1-7, and costs, out of which sum it was declared that the amount due to the

plaintiff therein on the mortgage of 1913 upto 20-6 1938 was Rs. 16,835-18-7. The decree further declared that the amount due to defendant 2

Alagannan Chettiar on his mortgage calculated upto the same date was Rs. 2,74,605-13-3 and further interest and that the plaintiff was entitled to

the payment of the amount due to him in priority to defendant 2. The decree was in Form No. 9 and the date fixed for payment was 20-6-1938.

The decree contained the usual clauses for sale of the hypothecs on failure to deposit the amount. In that suit a charge was claimed only on one of

the three items of properties comprised in the mortgage-deed in favour of Alagannan Chettiar and the decree consequently was confined to that

item.

4. As Alagannan Ohettiar felt that he might not obtain satisfaction of hia claim from a sale of the item in that suit, he brought another suit (O.

Section No. 35 of 1938) on the file of the Sub-Court, Madura, praying for a mortgage decree in respect of all the three items of the hypotheca and

for a personal decree against the other properties belonging to the estate of Robert Foulkes, in the event of the mortgaged properties proving

insufficient. On 26-12-1939, a preliminary decree for sale was passed for a sum of Rs. 2,65,445-0.-7 and the date of payment was fixed as

30.4.1940. It was of course provided in this decree that any amount which the plaintiff decree-holder may realise in O. Section No. 35 of 1937

should be given credit towards the amount due under it. On 6-8-1940, Alagannan Chettiar died and the plaintiffs in the present suit were brought

there in on re-oord as his legal representatives, and the final decree was passed on 7-12-1940. In the other suit, namely, O. Section No. 35 of

1937 also, a final decree was passed at the instance of the plaintiffs on 1-8-1941. There were sales of the mortgaged items in execution of the

decrees in both the suits. On 18-6-1942, the item covered by the decree in O. Section No. 35 of 1937 was sold in court auction and purchased

by the plaintiffs for Rs. 2,01,700 out of which they deposited into Court the amount payable to the plaintiff-decree-holder in that suit in respect of

the mortgage of 1913. On 21-12-1942, the sale was duly confirmed. In execution of the decree in the second suit, the plaintiffs purchased the

other two items and their sale was confirmed on 23-3-1942.

5. In the preliminary decree in O. Section No. 35 of 1937, it was provided that if the money realised by the sale directed by it was not sufficient

for payment in full of the amount due in respect of the mortgage in favour of Alagannan Chettiar, he shall be at liberty to apply for a personal

decree against defendant 1 therein for the amount of the balance, provided of course, such remedy was open to him and was not barred in law. In

the later suit, i. e., O. Section No. 35 of 1938, a specific issue was raised whether the personal remedy was in time, and it was found by the Court

that the personal remedy was not barred and the plaintiff would be entitled to apply for a personal decree under Order 34, Rule 6, Civil P. C., if

the amount realised by the sale of the mortgaged properties was not sufficient for the payment of the amount declared to be due to him. As the

amount actually realised by the sale of the mortgaged items in execution in the two suits was not sufficient to satisfy the decree in their favour, the

plaintiffs applied on 15-2-1943, for a personal decree for BB. 1,28,285-10-4. This application they made in O. Section no. 35 of 1937

(interlocutory Appln. no. 67 of 1943), and it was granted by an order, dated 30-7-1943 (EX. P-10 (d)).

6. It was during the pendency of the application for personal decree and during the summer recess, that defendant 1 executed the sales in favour of

defendants 3 to 7, which are being impeached in this suit by the plaintiffs. On 5-6-1943. defendant 1 executed five sale deeds in favour of

defendants 3 to 7, respectively and it is common ground that these sales practically covered the entire properties then remaining out of the estate of

the deceased Robert Foulkes. We say ""practically"" because it was represented to us that there was one item of property which the plaintiffs

succeeded in proceeding against and having it sold in part satisfaction of the personal decree. But it is apparent that this item was not considered at

the time of these sales as a saleable asset. By these sales, it may be now taken as not disputed, all the debts payable out of the estate of Robert

Foulkes except the personal decree in favour of the plaintiffs were fully discharged, and among such debts was a debt due to Alagannan Chettiar

himself under a decree obtained by him on 21-12-1936, in O. Section No. 29 of 1936 on the file of the Sub. Court, Madura, for the amount

payable on the promissory note executed in his favour by Robert Foulkea on 21-9-1932. On 27-7-1943, the decree in respect of the promissory

note was fully satisfied with the proceeds of one of the above sales. On 20-8-1943, the plaintiffs instituted the present suit. There were originally

nine defendants of whom defendant 1 represented the estate of Robert Foulkes as well as the estate of Robert Fischer, and defendant 2 was an

additional trustee to Robert Fischer's estate. Defendants 3 to 7 are the alienees under the sales of 5-6-1943. Defendants 8 and 9 were impleaded

because provision was made in one of the sale-deeds for the satisfaction of the debt in their favour. Defendant 9 died pending the suit and

defendants 10 to 13 were added as his legal representatives. Later on, defendant 11 also died and defendants 15 to 18 were added as his legal

representatives. Defendant 14 was added to represent the estate of Mr. Fischer who died in December 1938.

7. The allegations in the plaint on which the plaintiffs sought the several reliefs in this suit were as follows : No notice was given to the plaintiffs of

any intention on the part of defendant 1 to effect any alienation of the remaining properties of the estate of the deceased Robert Foulkes; but the

plaintiffs, coming to know of the secret arrangement for such alienations, sent registered notices on 3rd and 4th June 1943 to defendant 1 and his

agent, respectively, protesting against any such alienation. The plaintiffs also published in the local newspaper ""Thanthi"" on 3-6-1943, a warning to

prospective purchasers that any alienation by defendant 1 would not be binding on them. Similar notices were also published subsequently in

Dinamani"" and ""Hindu"", The alienations of the entire properties then remaining were made without making any provision for the large claim of the

plaintiffs to the extent of Rs. 1,30,000. Defendants 3 to 7 were parties and privies to the devastavit by defendant 1 in the matter of these

alienations and had all acted in collusion and conspiracy to defeat the plaintiff's claims. Defendant 1 was in a fiduciary position to all the creditors

of the estate and was bound to make provision for the payment of all the debts by a rateable distribution of the assets, as they were insufficient for

the payment of the debts in full, and as these alienations were made with the deliberate object of defeating the claim of these plaintiffs and

defendants 3 to 7 had full knowledge of the plaintiff's claim, the alienations were invalid and inoperative and not binding on the plaintiffs. The

consideration recited in the sale deeds was grossly inadequate. Certain allegations were made specially against defendant 1 that he has been

appropriating the entire profits and income accruing from the estate to the extent of Rs. 30,000 every year. These allegations were substantially

denied by the concerned defendants. 8. The learned Subordinate Judge found that at the time defendant 1 executed the impugned sales, he was

fully aware of the plaintiffs' claim, made in his application for a personal decree, and he must have had the intention to defeat the plaintiffs' claim

and though there was no positive evidence that defendants 3 to 7 had knowledge of the plaintiffs' claim and that there was a conspiracy amongst

them to defraud the plaintiffs, there were circumstances from which it could be inferred that defendants 3 to 6 who were creditors of the estate had

knowledge of the plaintiffs' claim and that it was being left out of the settlement with the creditors. The sales were made for proper and adequate

consideration. Defendant 6 was a creditor only in respect of a small sum i. e., about RS. 1600 and defendant 7 was no creditor at all and should be

held to be a bona fide purchaser. The alienations, therefore, could not be held to be fraudulent. The learned Judge also rejected the legal

contention raised on behalf of the plaintiffs that, under the provisions of the Succession Act, the creditors who have directly been paid the full

amount of their claims, leaving nothing towards the plaintiffs' claim, should disgorge what they had taken and return the properties purchased by

them to the estate, so that there might be an equal and rateable distribution of the assets among all the creditors, including the plaintiffs. He

therefore dismissed the suit against the alienees and the creditors who were not alienees. The learned Judge, however, held that defendant 1 was

liable not only to render accounts for the rents and profits of the estate during the period of his administration, but also would be liable for the loss

caused to the plaintiffs and other creditors, if any, by his disposal of the remaining assets of the estate without providing for the plaintiffs' claim.

9. Before dealing with the several questions of fact and law, which were canvassed before us by counsel on both sides, it will be convenient to

dispose of a preliminary objection raised by the respondent in A. Section No. 256 of 1945, which is the appeal preferred by defendant 1. This

objection is based on the fact that respondent 2 (plaintiff 2) died pending the appeal, but his legal representatives were not brought on record in

time, There were applications made seeking to excuse the delay and to set aside the abatement (C. M. P. Nos. 8276 to 3278 of 1948) but they

were dismissed. On behalf of respondent 1, it is contended that the appeal has consequently abated in its entirety. The two plaintiffs, it may be

recalled, are the legal representatives of Alagan. nan Chettiar, who was the original creditor and the decree-holder in O. Section No. 35 of 1937

and O. Section No. 35 of 1938. According to the respondent, they are in the position of joint decree-holders and the abatement of the appeal as

against one of them results in the abatement of the appeal in toto.

10. The appellant met this objection by relying upon the representative capacity in which the two plaintiffs instituted the suit. In Para. 30 of the

pleading, the plaintiffs stated that they had applied for permission to file the suit both on their behalf and on behalf of the other creditors, if any, of the

estate of the late Mr. Robert Foulkes. They did apply for an order under Order 1, Rule 8, Civil P. C. In his written statement, defendant 1 denied

that the plaintiffs were entitled to file the suit for and on behalf of themselves and on behalf of the other creditors, if any. He stated that there were

no other creditors except the legal representatives of Mrs. Fischer and one Mrs. Zara Berry to whom an annuity of Rs. 6000 was payable and this

annuity was made a charge on all the properties. This written statement was filed on 18.12-1943. Nevertheless, the plaintiffs pressed their

application under Order 1, Rule 8, and obtained an order on 21-12-1943, permitting them to proceed with the suit in a representative capacity.

The counsel for respondent 1 (plaintiff 1) wanted to rely on the fact that there were no other creditors whom the plaintiffs could be said to

represent and therefore the suit must be treated as a suit by the two plaintiffs in their individual capacity as joint decree-holders, He relied upon the

decision of a Division Bench in *Jaina Muhammad Sheriff Maracair and Others Vs. Official Assignee of Madras and Others*, . In that case, there

was no order of Court under Order 1, Rule 8, Civil P. C. and objection was taken that the suit was not maintainable because of the absence of

such an order. The learned Judges held that Order 1, Rule 8 applied only when some persons out of a large body of persona entitled to file a suit

desired to conduct proceedings on behalf of themselves and on behalf of the absentee parties; but when all the persons jointly interested were

made parties, Order 1, Rule 8 did not apply and there was no need to apply for leave of the Court. This decision can have no application to the

facts of the present case. Here, the plaintiff did apply for an order under Order 1, Rule 8 and did obtain such an order. It is impossible thereafter

for them to contend that the suit was not brought by them in a representative capacity.

11. There is authority for the position that when a suit is brought by several persons in a representative capacity, and if one of them dies, the suit

does not abate, because, the right to represent others of a class is not a right which ipso facto survives to the legal representatives of the deceased

party. The source of that right is the order of the Court permitting the party to represent others. In such a contingency, namely, the death of one of

the parties to whom originally permission was granted to institute a suit in a representative capacity, it is for the Court to decide whether the suit

can be allowed to be continued by the surviving person or persona or whether other person or persons should be joined. In *Venkatakrishna Reddi*

v. Srinivasachariar, 54 Mad, 627 : A. I. R. 1931 Mad. 452 *Ramesam J. hag* discussed this question and with great respect to that learned Judge,

we are in entire agreement with his conclusion. He points out that the proper procedure, in a case like this, is for the remaining person or persons

to apply to the Court for directions and it is for the Court to decide whether it will permit the remaining person or persons to whom the original

sanction was given to continue to prosecute or defend the suit or appeal or it will give directions to bring on record additional person or persons

(vide also Jagdam Ram Vs. Asarfi Ram and Others, . The appellant has made such an application to us and we direct that the appeal be

proceeded with as against the surviving respondent. The preliminary objection is therefore overruled.

12. As the main targets of the attack by the plaintiffs were the alienations in favour of defendants 3 to 7 and the scheme of the distribution of the

proceeds to certain of the creditors, which was a part of the transactions of sale, it is necessary to ascertain further details relating to them. All the

sale deeds contain more or less the same recitals. They bear the same date and each of the sale deeds provides for execution by both the vendor

and the purchaser. In the pre. amble to each of the sale deeds, there is a list of the debts payable by the estate of Robert Foulkea as follows: (i)

RS. 33, 151-6-8 to defendant 3, under a decree obtained by him in O. Section No. 18 of 1942 on the file of the Court of the Subordinate Judge

of Madura on 7-4-1942, (ii) Rs. 26, 966-6-8 to the family of M. Ganapathi Chettiar represented by defendant 4 due under a decree obtained by

the father of defendant 4, against the estate of Robert Foulkes in O. Section No 7 of 1936 on the file of the Court of the Sub-ordinate Judge of

Madura on 11-1-1937, in which an execution petition had been filed by defendant 4, as the legal representative of his father, (iii) Rs. 1600 due to

defendant 6, under a decree obtained by him against the estate in O. Section No. 178 of 1938 on the file of the Court of the District Munsif of

Madura on 27-4-1939, (iv) Rs. 18,400 due to Mrs. Fischer under the decree in O. Section No. 35 of 1937 on the file of the Court of the

Subordinate Judge of Ramnad at Madura, already referred to, (v) RS. 1120 due to defendant 8, being the balance due to him under a decree

obtained by him against the estate in O. Section No. 163 of 1936 on the file of the District Munsifs Court of Madura town, (vi) RS. 700, a book

debt, due to defendant 9, (vii) a sum of about Rs. 21,000 to Rao Sahib A. Section Alaganna Chettiar, that is to say, the plaintiffs, after his death,

due under the decree obtained by Alaganna Chettiar in O. Section No. 29 of 1936 on the file of the Court of the Subordinate Judge of Madura on

foot of the promissory note already referred to and in respect of which the plaintiffs had filed an execution petition and secured an attachment of

the properties which were the subject-matter of the sales, (viii) RS. 5691-9-6 due to defendant 5, under two decrees in O. Section No. 359 of

1946 and O. Section No. 221 of 1941 respectively on the file of the District Munsifs Court, Madura, in respect of which he had filed execution

petitions in the District Munsif's Court, Melur, and had attached one of the villages belonging to the estate.

13. The preamble to the sale deeds contained the following further recitals :

Whereaa by these agreements the entirety of the debts of the estate of Robert Foulkes subsisting today is fully discharged; whereas there is no

other means of satisfying them in respect of their dues otherwise than by a disposal of the properties of the said Robert Foulkea.

The sale-deeds in favour of defendant 3, defendant 4, and defendant 5, contained rather an unusual covenant which runs thus :

The purchaser undertakes to indemnify the vendor from all claims and litigations that might arise hereafter in respect of the undermentioned

property.

All the sale-deeds contain a clause relieving the vendor from all responsibility and liability for any inaccuracy, or mistatement or deficiency or

defect of title. Of the five alienees, defendant 7 was not a creditor of the estate, and defendant 6 was a creditor only to an extent of Rs. 1,600. The

sate in favour of defendant 3 (Ex. D 1) was for a consideration of Rs. 34,971 6 8 made up of Rs. 33,151.6 8 due to the purchaser himself, Rs.

1120 to be paid to defendant 8 and Rs. 700 to be paid to defendant 9. The sale to defendant 4 (EX. D-4) was for a consideration of Rs. 26,966

6-8 being the amount due to the purchaser himself under the decree obtained by him. The sale to defendant 5 (Ex. D7) was likewise in discharge

of the decrees obtained by him under which a sum of Rs. 5691-9-6 was due as aforesaid. The sale in favour of defendant 6 (EX. D 9) was in

consideration of a sum of Rs. 20,000 of which Rs. 18,400 went to discharge the decree debt due to Mrs. Fischer under the decree in O. Section

no. 35 of 1937 and the balance of Rs. 1,600 was taken in discharge of the decree debt owing to the purchaser himself. The sale to defendant 7

(EX. D-11), a stranger, was for a sum of Rs. 25,000 out of which Rs. 4,000 was paid to the vendor by cheque and Rs. 21,000 were reserved

with the purchaser to be deposited into the Court of the Subordinate Judge of

Dindigul to the credit of the decree obtained by Alagannan Chettiar in O. Section No. 29 of 1936.

14. In their plaint the plaintiffs charged that defendants 3 to 7 acted in collusion and conspiracy with defendant 1 to defeat the claim of the plaintiffs under the personal decree in O. Section No. 3C of 1937 and had acted mala fide in taking such sales. The plaintiffs also charged that the sale transactions were only nominal and not intended to be given effect to. They alleged that the consideration recited in the sale-deeds was grossly inadequate. They, therefore, prayed for a declaration that the alienations were invalid and not binding on the plaintiffs and other creditors, if any, of the estate and that the properties continued to be liable for the plaintiffs' claim and the claims of the other creditors of the estate. Alternatively, the plaintiffs claimed, as part of the administration of the estate, an equitable enforcement of rateable distribution by calling upon defendants 3 to 6 and 8 and 9 to disgorge the benefit or the consideration received by them in excess of what they would be legitimately entitled to take on a rateable distribution (vide Para. 28).

15. The learned Subordinate Judge held that the alienees (defendants 3 to 7) had paid proper and adequate consideration for their purchases and that the underlying purpose of these transactions was not to defraud the plaintiffs. Mr. Alladi Krishnaswami Aiyar, the learned counsel for the plaintiffs, did not challenge these findings of the trial Judge. Nor did he press the plea that the sales were nominal and not intended to be acted upon. He did not suggest that the sales were vitiated by fraud and that they should be set aside on that account. His entire argument was based on (i) the right of the creditors to obtain an equal and rateable distribution of the assets of the estate, with the correlative duty of the administrator to make an equal and rateable payment of the debts and (ii) the knowledge of the alienees of the plaintiff's claim which had been left unsatisfied in the scheme of distribution evidenced by the sale-deed in question, which amounted to participation by the alienees in the devastation committed by defendant 1.

16. In our opinion, on the findings of the learned trial Judge that the sales were for adequate consideration, that the sales were not nominal transactions and that they were not vitiated by fraud or other similar defect, it

must be held that the sales, as such, in favour of the several alienees must stand, unless the purchasers were privy to a breach of trust committed by the administrator. u/s 307(1), Succession Act, an executor or administrator has power to dispose of the property of the deceased, vested in him u/s 211, either wholly or in part, in such manner as he may think fit. The restrictions and the conditions to which this general power is subject under Sub-section (2) do not apply to the present case as the deceased did not belong to the class of persons enumerated in that sub-section. It is a general rule of law and equity in England--and that rule is followed in India--that an executor may dispose of the testator's assets over which he has an absolute power and they cannot be followed either by the creditors or by the legatees into the hands of the alienee. But neither jurisdiction will permit the rule to be observed so as to protect a disposition founded on fraud or a transaction amounting to a breach of trust, concerted between the executor or administrator and the purchaser. There is no duty cast on the purchaser to see to the application of the purchase money. He is not obliged to ascertain whether the executor is discreetly exercising his power, but the purchaser will not be protected if he is privy to a breach of trust and if the transaction of sale is in its nature incompatible with the legitimate administration of the testator's estate. A purchaser would not have the benefit of the general rule protecting a purchaser from an executor, if the purchaser concurs in any act which manifests from the transaction itself that it is not the legitimate mode of administering the estate. If the nature of the transactions imports notice to him that the executor is dealing with the assets otherwise than in due course of administration, then, he would have participated with the administrator in an improper conversion and application of the estate of the deceased and the sale in his favour would be invalid.

17. Mr. Krishnaswami Aiyar relied upon two provisions of the Succession Act as the foundation of the plaintiffs' case as against the alienees and the creditors who had received payments in satisfaction of their debts as a result of the sales. They are Section 323 and the proviso to Section 360, Succession Act. Section 323 is as follows :

Save as aforesaid, no creditor shall have a right of priority over another; but the executor or administrator shall pay all such debts as he knows of,

including his own, equally and rateably as far as the assets of the deceased will extend.

Though only the proviso to Section 360 was relied upon, it will be useful to set out the main section as well :

Section 360 : Where an executor or administrator has given such notices as the High Court may, by any general rule, prescribe or, if no such rule

has been made, as the High Court would give in an administration suit, for creditors and others to send in to him their claims against the estate of

the deceased, he shall, at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets, or any part thereof, in

discharge of such lawful claims as he knows of, and shall not be liable for the assets so distributed to any person of whose claim he shall not have

had notice at the time of such distribution;

Provided that nothing herein contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, in the hands of

the persons who may have received the same respectively.

Having regard to the peculiar and complicated facts of this case, in discussing the various problems which emerge for our solution, it is useful and

necessary to adhere to a logical division. Among such major problems are these; ex hypothesi, they arise only, when the assets of the deceased are

not sufficient to fully satisfy all his creditors; (i) Does Section 323, Succession Act, confer any right on the creditors? (ii) If it does, against whom

can such a right be enforced? (iii) If some of the creditors have received payment of their debts in full or in excess of what would be due to them

rateably, has an unsatisfied or dissatisfied creditors, who has not been paid at all or has been paid less than what would be due to him rateably, any

rights enforceable against the creditors who have been paid in full or in excess ? Section 323, Succession Act, 1925, replaced Section 282,

Succession Act, 1865, and Section 104, Probate and Administration Act, 1881. Section 282, Succession Act, 1865, ran as follows :

Save as aforesaid, no creditor is to have a right of priority over another, by reason that his debt is secured by an instrument under seal or on any

other account. But the executor or administrator shall pay all such debts as, he knows of including his own, equally and rateably, as far as the

assets of the deceased will extend.

Section 104, Probate and Administration Act, was in these terms :

Save as aforesaid, no creditor is to have a right of priority over another. But the executor or administrator shall pay all such debts as he knowa of,

inoluding his own, equally and rateably, as far ad the assets of the deceased will extend.

18. It will be seen that the present Section 323 is a reproduction of Section 104, Probate and Administration Act, which did not contain the words

by reason that his debt is secured by an instrument under seal or on any other account."" These words were omitted because they were merely

explanatory. But their presence in the Act of 1865 was neceseary and not accidental. This was because the Act of 1865 followed the English law

with only slight variations and, according to the English law of that time, precedence in order of payment was given to debts by special contract.

The executor or administrator waa bound to give preference to bonds, covenants and other instruments under seal of the party over debts by

simple contract. The framerg of the Indian Act deliberately abolished this preference. It may be mentioned that even in England such distinction

was abolished by 32 and 33 vict. Ch. 46, Apart from this abolition of the distinction between speciality debts and simple debts, Section 282,

Succession Act of 1865 also departed from the English law in another respect. According to the English law of the time, an executor had the right

to pay any creditor, whether himself or another person, in preference to another creditor of equal degree. The framers of the Indian Act

deliberately departed from this rule and made it incumbent on the executor or administrator to pay all debts (saving exceptions) as he knows of,

including his own, equally and rateably. While the distinction between different classes of debts has been abolished in England, the old English rule

which confers a right on the executor or administrator to prefer any debt is still retained and is now to be found in Section 94(2), Administration of

Estates Act, 1925, which runs thus :

The right of retainer of a personal representative and his right to prefer creditors may be exercised in respect of all assets of the deceased

There is no doubt then that Section 323 does restrict the powers of an executor or administrator as regards payment of debts. He must pay all

debts as he knows of, including his own, equally and rateably. There can be no

doubt that a creditor can insist upon such an equal and rateable

payment among creditors by filing an administration action. The same principle substantially underlies the provisions of Order 20, Rule 13 (2), Civil

P. C., which lays down that in the administration of the property of any deceased person, if such property proves to be insufficient for the payment

in full of his debts and liabilities, the same rules as those applicable in the bankruptcy shall be observed. But if an administration action had not been

filed in due time, and the executor or administrator had paid some of the creditors in excess of the rateable amount due to them, what are the rights

of the other creditors who had not been paid ? One right they certainly have and that is against the executor or administrator who has committed a

breach of his duty. It was held as early as 1871 in *Asiatic Banking Corporation v. Amador Viegas*, 8 Bom. H. C. R. 20 that an administrator who

pays such debts as he knows of otherwise than equally and rateably as far as the assets of the deceased will extend was personally liable for any

loss occasioned to a creditor of the deceased by such improper distribution of the assets : vide also *Kissondas Premchand Vs. Jivatlal Pratapshi*

and Co., at : 167 I. C. 529.

19. But have the unsatisfied and unpaid creditors any further right? Have they the right to call upon the creditors who have received in excess of

their rateable proportion to refund the excess ? Is this right an absolute right, that is to say, can it be enforced against any creditor who has

received an excess payment irrespective of the fact that he had or had no notice of the fact that the assets of the deceased were not sufficient to

fully satisfy all the debts ?

20. There is very little of authority bearing on this question in any of the reported cases in this country and this question cannot arise in England in

the absence of a rule corresponding to that contained in Section 323, Succession Act. The only decision on which Mr. Alladi Krishna-swami Aiyar

relied in support of his contention that irrespective of any notice of the insufficiency of the assets to discharge all the debts in full, creditors who

have received payment in excess of their rateable proportion should refund the excess for the benefit of unpaid and unsatisfied creditors, is that of

Tyabji J. in Mathuradas Vassanji Vs. Raimal Hirji, . Even this decision is not on fours, but there are observations which prima facie appear to

support this contention of his. The material facts in that case were as follows : One K died leaving a will appointing his widow as executrix. She obtained probate of the will. Defendant 1, one H, was one of the creditors of the estate, and he demanded payment of his debt. The executor thereupon created in favour of defendant 1 an equitable mortgage of some of the immovable properties belonging to the estate to secure his claim. Defendant 1 brought a suit on his mortgage and obtained a preliminary and then a final decree. At this stage, the other creditors of the estate brought the suit to prevent that decree from being executed so as to infringe the rights of the other creditors of the deceased. They prayed for a declaration that the mortgage in favour of defendant 1 was unauthorised and not binding upon the other creditors of the estate, and that the properties purported to be mortgaged should be followed in the hands of defendant 1 for the purpose of having the debts of all the creditors liquidated therefrom, without priority and equally and rateably as far as the assets of the deceased extended. It was admitted that the executrix committed a breach of her duty to pay the debts equally and rateably and the personal liability of the executrix to make good the loss to the other creditors u/s 968, Succession Act, was also admitted. The only question which had to be decided was whether creditors who suffered by this breach of duty had a right to prevent the decree being executed for enforcement of the mortgage created in disregard of their rights. The learned Judge substantially granted a decree as prayed for. He granted an injunction restraining defendant 1 from executing the decree so as to affect other creditors' rights to have the property equally and rateably applied towards the payment of their debts and declare that he was entitled to satisfaction of the decree according to law in due course of administration.

21. As Mr. Alladi Krishnaswami Aiyar adopted the reasoning and observations of the learned Judge in this case as part of his argument, we shall analyse the judgment. We wish, however, to preface the discussion by stating that we are in entire agreement with the decision of the learned Judge in that case in so far as he granted an injunction restraining one of the creditors from recovering more than his rateable share from the assets of the deceased. The steps in the reasoning of the learned Judge are as follows: Section 323, which is an innovation in the Indian law, provides for an

equal and rateable payment of the creditors (with a few exceptions). Therefore, the rights of all the creditors become inter-dependent and the rights of each creditor are brought into relation with the rights of all others. This is not the case in England. The section no doubt lays down the duty of the executor to pay equally and rateably, but this duty comes only as a sequel to the declaration that no creditor shall have a right of priority over another. The intention of the Legislature appears to be to cut down each creditor's claim; he is not entitled to his full debt, but merely to an equal and rateable payment out of the assets. It would be the duty of the Court to protect the rights of the creditors under that section to receive equal rateable payment. How the rights of the creditors, declared by this section, are to be worked out is not specifically provided in the Act. The proviso to Section 360, though it does not create by itself a new right, assumes the existence of the creditor's right to follow the assets. The Court ought to intervene so long as the situation is not beyond its control or irremediably altered and so long as no injustice is done to any innocent party. The assets coming to the hands of defendant 1 in excess of what he was entitled to receive may be followed in his hands. As the creditors had intervened before the injustice to them had been effectuated and before any steps were taken as would create new equities, they were entitled to an injunction restraining defendant 1 from executing the decree in his favour so as to affect the other creditors' rights to have the property equally and rateably applied towards the payment of their debts. This, in short, is the gist of the judgment of Tyabji J.

22. It may be conceded that Section 323 not only enjoins on the executor or administrator the duty of equal and rateable payment of debts; it also declares that no creditor is entitled to priority over another. It may also be conceded that it is the duty of the Court to assist the creditors to protect their rights. We are in entire agreement with the learned Judge in his observation that it would be the duty of the Court to assist the creditors to resist the attempts of other parties so secure for themselves more than what has been laid down as their due.

In our opinion, the creditors would certainly be entitled to seek intervention by the Court to prevent a breach of the duties of the executor or

administrator being consummated. If any of the creditors apprehend that the executor or administrator intends to commit a breach of the duty laid

on him by Section 323, they can forth, with file a suit for administration and obtain an order restraining the executor or administrator from

effectuating his intention. The case of Soobul Chunder Law v. Russick L&I, 15 Cal. 202 which was decided by a Bench of three Judges

(Petheram, C. J., Wilson and Tottenham JJ.) is an instance in point. In that case, one of the creditors of the deceased who had obtained a money

decree secured an attachment of certain properties belonging to the estate. Before further proceedings in execution could take place, another

creditor filed a suit for administration of the estate and applied for an order staying all proceedings taken by the attaching decree-holder against the

estate and directing him to come in, should he think fit so to do and prove his claim in the administration suit, i. e., share rateably along with other

creditors. The application was granted and the attaching decree-holder was restrained from further execution of the decree. The case before

Tyabji J. himself was another example. It appears from the judgment that though defendant 1 had obtained a final mortgage decree, the decree had

not been executed. So, it cannot be said that the imperative terms of Section 323 would be reduced to a mere recommendation, unless the

creditors are given a right to proceed against such of the creditors who had been paid in excess of their rateable share and rights of refund similar

to those expressly conferred on them against legatees (Section 361).

23. The learned Judge admits, what is quite apparent, that while the Act makes specific provision empowering the unsatisfied creditor in certain

circumstances to call upon a legatee who has received payment of his legacy to refund, the Act is silent in respect of such questions as to whether

or not a creditor who had not received equal and rateable payment had any rights against another creditor who had received more than his due on

an equal and rateable basis. But the learned Judge assumes that the omission by the Legislature to work out its intention expressed in Section 323

in and by appropriate provisions was a mere oversight and that omission can be supplied by taking guidance from the analogy of provisions relating

to legatees. With great respect to the learned Judge, we think this is a dangerous principle to assume that there was an inadvertent oversight on the

part of the Legislature in such an important matter. As Earl Loreburn observed in *Bristol Guardians v. Bristol Waterworks Co.*, (19U) A. C. 379 :

83 L. J. Ch. 393:

Now it is one thing to introduce a Law into an Act of Parliament in order to give effect to its clear intention by remedying mere defeats of

language. It is quite another thing to imply a provision which is not in the statute in order to remedy an omission, without any ground for thinking

that you are carrying out what Parliament intended To insert such a provision would be simply making, not interpreting, the law. After all, it is

not our function to repair the blunders that are to be found in legislation. They must be corrected by the Legislature.

(Vide also Halsbury's Laws of England, 2nd Edn. vol xxvi, para. 635)

24. We must now refer to a line of cases which starts from the decision in *Nillcomul Shaw v. Reed*, 12 Beng. L. R. 287 : 17 W. R. 513 in 1872. It

has been uniformly held in these cases that when a creditor has obtained a decree against the estate of a deceased person, and applies to execute

the decree in the hands of the legal representative of the deceased, such as an executor or administrator, he is entitled to have the amount of his

decree paid out of the assets of the deceased in the hands of such legal representative. In such a case, the executor or administrator is bound to

pay to the decree-holder the full amount of the decree, though there may be other creditors of the deceased and the assets may not be sufficient to

pay them all in full. Tyabji J. no doubt refers to the decision in *Nillcomul Shaw v. Reed*, 12 Beng. L. R. 287 : 17 W. R. 513, but distinguished it

on the ground that there, the other creditors were not before the Court and the question whether they could object to the decree being applied in

disregard of their rights u/s 323 was not under consideration. We do not think that this distinction helps the learned Judge to escape from the

principle of the decision, namely, that in certain cases a creditor may receive more than what is rateably due to him, And, it has never been held,

nor did Mr. Alladi Krishnaswami Aiyar contend that when a creditor has received his debt in full in execution of; a decree obtained by him, he can

be asked subsequently to refund for the benefit of other unsatisfied creditors the amount received by him in excess of what would have been

payable to him rateably. In other words, the unsatisfied creditors have never

been held to be entitled to follow up the moneys which so came into the hands of the decree-holder creditor.

25. In *Nilccmul Shaw v. Reed*, 12 Beng. L. R. 287 : 17 W. R. 513, Couch C. J. expressly held that Section 282, Succession Act, (corresponding

to Section 323 of the present Act) did not interfere with the right of a decree-holder to have his decree satisfied out of the property of the

deceased or out of the property of the executor, if it should appear that he has not duly applied the property of the deceased. The principle of this

decision was followed by Pigot J. in *Remfry v. De Penning*, 10 Cal. 929. in which it appeared that the assets were not sufficient to pay in full all the

claims made against the estate. The case of *Venkatarangayan Chetti v. Krishnaswami Anjangari* 22 Mad. 194 was one to which the Probate and

Administration Act of 1881 applied, in which the provision corresponding to the present Section 323 was Section 104. It was held by Shephard

O. C. J. and Benson J. that the right of a decree-holder to have his decree executed against the legal representative of a deceased judgment-debtor

was not affected by Section 104, Probate and Administration Act. The following observation in the judgment is significant:

Although there are certainly difficulties in construing Section 204, Probate and Administration Act, we think that the language of the section is so

far similar to that of the corresponding section in the Succession Act that we must follow the ruling in *Nilkomul Shaw v. Reed*, 12 Beng. L. B. 287:

(17 W. R. 513).

26. In *Bai Meherbai v. Maganchand*, 29 Bom. 96, a creditor of an estate represented by the administrator obtained a decree on an award against

the administrator and in execution of that decree, certain property forming part of the estate was purchased by the decree-holder. Afterwards, a

suit was brought to set aside the said decree and the sale in execution on the ground that u/s 282, Succession Act, the decree holder was entitled

only to a rateable distribution among the creditors of the estate. It was held that, in the absence of fraud or collusion, the decree and the

subsequent sale in execution could not be set aside. It was contended therein that having obtained the decree, the creditor was bound by Section

282, Succession Act, to ask for a rateable distribution in due course of administration in satisfaction of his decree and that was his only right. The

answer given by the learned Judges was: whatever might have been the proper way of executing such a decree, as a matter of fact it had been

executed rightly or wrongly and the sale could not be set aside. Chandavarkar J. threw out a suggestion that a creditor's action against a deceased

person's estate must be always treated as an administration suit and the decree should merely give a declaration of the debt and that the decree-

holder is entitled to satisfaction of the decree according to law in due course of administration and not otherwise, The learned Judge said:

It is the duty of the Court to see in such actions that one creditor is not enabled to gain advantage over other creditors by getting an unconditional

decree for full payment and executing it against the deceased's estate to the prejudice of those creditors.

Whatever force there may be in these observations, they proceed on the basis that once a creditor realises in full his debt from the assets of the

estate in execution of a decree obtained by him, the other unsatisfied creditors cannot compel such a creditor to refund the excess which he had

received over his rateable share.

27. In our opinion, there is nothing in the proviso to Section 360 which necessarily leads to the conclusion that creditors who have received a

payment from the executor or administrator of their debts in full or in excess of their legitimate proportion should refund the excess received by

them for the benefit of unpaid and unsatisfied creditors. The main section, it may be noticed, deals both with creditors and other claimants and,

provided certain conditions are fulfilled it absolves the executor or administrator from all liability for the assets distributed by him to any person or

of whose claim he shall not have had notice at the time of the distribution. The proviso is really in the nature of a saving clause which declares that

the fact that the executor or administrator is discharged from liability does not destroy such rights which a creditor or a claimant may have to

follow the assets in the hands of the persons receiving the payments from an executor. Tyabji J. himself was of the same view that the proviso itself

did not confer any new right, if the creditor or claimant had no right apart from it. It is legitimate to presume that the proviso contemplates the rights

of creditors and claimants embodied in the other sections in the chapter. We may also concede that if there are under the general law, any rights to

which the creditors or claimants may be entitled to, such rights also would not be prejudiced, having regard to the proviso. It is not as if the proviso

would be devoid of content unless we hold that the unpaid or unsatisfied creditors have a right to follow the assets in the hands of the creditors

who have received payment. The proviso can well apply to the right of a creditor u/s 361 to call upon a legatee to refund. It is unnecessary to

devote any time to a discussion of the question in the abstract whether a proviso as such can or cannot create a substantive right. There may be

provisos and provisos and there is nothing inherently impossible in even a proviso conferring a substantive right.

28. The learned Advocate General cited to us a number of decisions of the English Courts, namely, *Gillespie v. Alexander*, (1827) 3 Buss, 130 :

38 E. R. 525, *March v. Russell*, (1837) 3 My. & Cr. 32 : 40 E. R. 836, *Jervis v. Wolfrestan*, (1874) 18 Eq. 18 : 43 L. J., Ch. 809 and *Harrison v.*

Kirk, (1904) A. C. 1. 73 L. J. P. C. 35 to show that the rights of the unpaid and dissatisfied creditor is only against the legatee. In *Hodges v.*

Waddington, 2 Vent. 360 : 86 E. R. 485 there is the following observation, the full significance of which it is difficult to gather from the very meagre

report : ""But if an executor pays a debt upon a simple contract, there shall be no refunding to a Creditor of a higher nature."" These decisions have

little bearing on the present question. It is not entirely without significance that this proviso which was a proviso to Section 820, Succession Act,

1865, is in terms identical with the proviso to Sections 29 of 22 and 23 Vict. Ch. 35 (Lord St. Leonard's Act), Surely, the proviso in the English

statute could not have regard to the right of a creditor to claim a refund from another creditor and there can be no doubt whatever that the

proviso had reference mainly to the refunding by legatees and others in certain special circumstances.

28a. On this point we agree with the view of *Bangnekar J.* in *Kissondas Premchand Vs. Jivatlal Pratapshi and Co.*, (167 I. C. 029) and his

construction of Section 323 and the proviso to Section 360; and in particular, with the following remarks :

The scheme under the Indian Succession Act seems to me to be this, namely, that when the executor finds that the assets of a deceased person

are insufficient for the payment of his debts in full, he has to pay rateably, and Section 323 casts the duty on the executor. If the executor is about to

act in contravention of that duty, there is a perfectly simple remedy open to the creditor, and that is to file an administration action. If, on the other hand, payment has already been made and the executor cannot be protected because he has not acted in accordance with Section 360, then there is a remedy open to the creditor to proceed against the executor, who, in turn, has a right to proceed against the legatees. Section 360, which was enacted to protect the executors making bona fide payments to creditors and in order that the administration of estates should not be unduly and indefinitely hampered, saves a right which the legislature gives to the creditor when he finds that the estate has been distributed by the executor properly and enables the creditor to proceed against the legatees.

29. Our answers to the three questions formulated at the outset of this discussion are as follows : (i) Section 323 of the Indian Succession Act does confer a right on the creditors to an equal and rateable payment of all the debts, (ii) Such a right can be enforced against the executor or administrator unless he is protected by following the procedure in Section 360 in which case, a creditor of whose debt the executor or administrator had no notice cannot proceed against the executor. The creditor can also file an administrator suit making the other creditors parties to the suit and can in that suit enforce the right Order 50, Rule 13 (2), Civil P. C. also comes to his aid. Ordinarily he cannot have a right of action against the other creditors, (iii) Generally speaking, an unsatisfied or dissatisfied creditor who has not been paid or has been paid less than what would be due to him rateably has no rights enforceable against the creditors who have been paid in full or in excess of their rateable share, i. e., he cannot compel those who have received the payment to refund the excess.

30. Having stated the general rule, the next question which falls for consideration is whether there is an exception to it. As this question is also mixed up in this case with the alienations which are being impeached by the plaintiffs, it is convenient to deal with this question bearing in mind the alienations.

31. It was not disputed before us that an administrator who pays certain creditors out of the available assets of the estate, deliberately leaving other creditors who have equal claims against the estate, will be guilty of a breach of duty. Such a misapplication of the assets goes by the technical

name of devastavit in English law. We have already expressed the view that payments made in contravention of the provisions of Section 323

make an executor or administrator liable for devastavit see *Asiatic Banking Corporation v. Amador Viegas*, 8 Bom. H. C. R. 20. As the executor

or administrator occupies a fiduciary position towards the creditor of the estate and the beneficiaries, including the legatees, if he is guilty of

devastavit, he is guilty of breach of trust. Now it is a cardinal principle of English law--and that principle is applicable to India also--that a person,

who joins a trustee in the commission of a breach of trust and earns a benefit by that wrongful act of the trustee, shall hold the advantage so

obtained for the benefit of all the beneficiaries: vide Section 68 of the Trusts Act.

32. This doctrine has been applied over and over again in England as a recognised exception to the general rule that a purchaser of the assets of a

deceased from his legal representative like an executor or administrator obtains a free, complete and valid title and the subject-matter of the sale

cannot be followed by creditors or legatees into the hands of the alienee. In India, the general rule is embodied in Section 307(1), Succession Act.

The exception is stated thus in the early case of *Scott, v. Taylor*, (1788) Dickens, 725: 21 E. R. 448 :

If one concert with an executor or legatees by obtaining the (estator's effects at a nominal price or at a fraudulent undervalue or by applying the

real value to the purchase of other subjects for his own behoof or in extinguishing the private debt of the executor, or in any other manner contrary

to the duty of the office of executor, such concert will involve the seaming purchaser or his pawnee and make him liable for the full value.

In *Hill, v. Simpson*, (1802) 7 Ves. 153 : 32 E. R. 63, a transfer by an executor which was a clear misapplication of assets, because, it was made

to secure a debt of the executor and future advances under circumstances of gross negligence, though not direct fraud, was set aside at the instance

of legatees. Williams, in his book on Executors, vol. I (1930 Edn.) states the law in the following manner at p. 576:

Thus, where the person to whom an executor collusively conveys the property knows that the executor is acting in violation of his trust, and in

fraud of the persons interested in the due administration of the assets, the fraud vitiates the transaction, and the attempt to transfer the property is

ineffectual and void. That an executor may waste the money is not alone sufficient to invalidate the sale or mortgage; it must further appear that the purchaser or mortgagee participated in the devastavit, or breach of duty in the executor. Where there exists such collusion as to render a dealing by a personal representative invalid, not only a creditor, but a legatee, whether general or specific is entitled to follow the assets. But they must enforce their right within a reasonable time, or it may be barred by their acquiescence.

The case of *Crane v. Drake*, (1708) 2 Vern 616 : 23 E. R. 1004 is an apposite instance. A purchased a leasehold estate from an executor, having notice that a debt of the testator was unpaid and out of the purchase money set off a sum of (sic) due to him from the testator and a debt of $\text{£}1\frac{1}{2}$ 550 due to him from the executor and the remainder $\text{£}1\frac{1}{2}$ 150 was paid in money. An unsatisfied creditor filed an action to have satisfaction of his debt out of the leasehold purchased by A as part of the testator's assets. The sale was held to be not good, because the defendant was a party consenting to and contriving a devastament. Actually in this case there does not appear to have been a charge of fraud or collusion between the purchaser and the executor. But it was admitted that the defendant had notice of the plaintiff's debt which remained unsatisfied. In *Andrew, v. Wrigley*, (1792) 4 Bro. C. C. 125 : 29 E. R. 812, there is a reference to a note in Gilbert's Equity Reports that "'Where the party knew of other debts, he could not take the testator's property in satisfaction of his own debt.'" Sir John Leach in *Walking v. Cheek*, (1825) 2 S S. 199 : 57 B. B.

821, stated the general rule and the exception as follows :

"'So a mortgagee or purchaser from the executor of a part of the personal property of the testator has a right to infer that the executor is, in the mortgage or sale, acting fairly in the execution of his duty, and is not bound to inquire as to the debts or legacies. But if the nature of the transaction affords intrinsic evidence that the executor, in the mortgage or sale, is not acting in the execution of his duty, but is committing a breach of trust, as where the consideration of the mortgage or sale is a personal debt due from the executor to the mortgagee or purchaser, there, no, mortgagee or purchaser being a party to the breach of trust, does not hold the property discharged from the trusts, but equally subject to the

payment of debts and legacies as it would have been in the hands of the executor.

33. These principles we find embodied in the Trusts Act in India. Section 93 of the Act enacts.

Where creditors compound the debt due to them, and, one of such creditors by a secret arrangement with the debtor gains an undue advantage

over his co-creditors he must hold for the benefit of such creditors the advantage so gained.

34. Section 94 is a residuary section in Chap IX dealing with constructive trusts and runs thus :

In any case not coming within the scope of any of the preceding sections, where there is no trust but the person buying possession of property has

not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the

case may be), to the extent necessary to satisfy their just demands.

Illustration (a) to this section is material. It says :

A, an executor, distributes the assets of his testator B to the legatees, without having paid the whole of B's debts. The legatees hold for the benefit

of B's creditors, to the extent necessary to satisfy their just demands, the assets so distributed.

The person who is thus under an obligation to hold the property for the benefit of persons having interests or claims against the property are

subject to the same liabilities and disabilities as if he were a trustee of the property for the person for whose benefit he holds it.

35. For an application of this doctrine, it is clear that three conditions should be satisfied : (i) there should be an act of a person occupying a

fiduciary position like an executor or administrator, (ii) such person must be under a duty, statutory or otherwise, and have committed a breach of

such duty. In the case of an executor or administrator, he must be guilty of devastavit, and (iii) the person deriving an advantage from such

wrongful act of the trustee (or executor or administrator) must have participated in it; participation necessarily implying notice of the wrongful

nature of the act.

36. It now remains to be considered whether these conditions are fulfilled in this case. Admittedly, the first two conditions are satisfied. Then is the

third condition satisfied and in respect of which of the defendants? The alienees are defendants 3 to 7. While defendants 3 to 6 are creditors,

defendant 7, is not a creditor. He is a stranger who had nothing to do with any of the transactions of the estate except the purchase under Ex. D.

11. In spite of the argument of Mr. Narayanaswami Aiyar, we are not convinced that it has been proved satisfactorily that defendant 7, was "a

party to the scheme of the alienations and the distribution of the assets. We accept the finding of the learned Judge that he is a bona fide purchaser

for value and that he was not aware of either the plaintiff's claim or the intentions of defendant 1. Defendant 6, is a creditor only for a small sum of

Rs. 1600. As already mentioned it is only this sum he was allowed to set off against the consideration for the sale in his favour and he had to pay

the balance of consideration Rs. 18,400 towards the amount due to the decree-holder in O. 8. No. 38 of 1937.

37. The learned Judge found that all the creditors, namely, defendants 3 to 6 and 8 and 9 had notice of the plaintiff's claim and of the available

assets of the estate and that the assets were not sufficient to pay all the debts including the debt of 1½ the plaintiffs under their claim for a personal

decree against the estate. None of the defendants 8 to 6 was examined to deny knowledge of the plaintiff's claim or the other facts relating to the

scheme of alienations. It is enough to refer to Ex. P. 6 series, the proceedings before the Debt Conciliation Board, Madura Taluk, to impute to the

several creditors a knowledge of the total claim of the plaintiffs in respect of their mortgage. Ex. P. 14 series which relate to an application filed by

one of the plaintiffs herein to be added as a party to the suit filed by defendant 3 (O. Section No. 18 of 1942) clearly fix defendant 3, with notice

of the plaintiff's claim (vide paras of EX. p. 14 (a)). Defendant 4, in the written statement filed by him in this case, admits that he was aware of the

decrees obtained by the plaintiffs and the sales in execution of them and that he made investigation thereafter. The decree obtained by defendant 5,

expressly limited his right to the satisfaction of the amount decreed according to law in due course of administration and not otherwise (Ex. D. 8

(a)). A few days before the date of the sale deeds, the plaintiffs published notices in "Thanthi" a local Tamil newspaper and in "Dinamani", and in

the "Hindu", newspapers published in Madras, notifying that a large sum of about Rs. 1,50,000 was due to them from the estate of Robert Foulkes

and warning intending purchasers from defendant 1, (EX. p. 12 (a) and P. 12 (b), respectively). The plaintiffs also sent a registered letter to

defendant 1, himself and to his agent prohibiting him from entering into any kind of negotiations for alienation of the assets of the estate of Eobsrt

Foulkea (Kx. P. 11 (a) and p. 11 (b)).

38. There can be no doubt that all the sales virtually formed one transaction and were executed by defendant 1, in pursuance of a general

agreement with all the creditors, other than the plaintiffs. Each sale deed, as already mentioned, recites the subsisting debts and the fact that there is

no other means of satisfying them than by disposal of the remaining properties of the deceased Robert Foulkes. Mention has already been made of

the unusual covenant in the sale deeds in favour of defendants 3 to 5 and the clause relieving the vendor of his responsibility and liability for any

deficiency or defect of title. Defendant 3 obtained full satisfaction of the debt due to him (RS. 33,151-6.8) by the sale in his favour. He had to pay

Rs. 1120 to defendant 8 and Rs. 700 to defendant 9. Likewise, the sales to defendants 4 and 5 were in consideration of the amounts due to them

respectively.

39. An application of the legal principles set out above to the facts in respect of the several defendants leads to the following conclusions. The sale

in favour of defendant 1 is valid and proper because he had no notice of the plaintiffs' claim and he obtained no advantage by reason of the sale as

he was not a creditor. Though defendant 6 was a creditor, the advantage which he obtained from the sale was only to the extent of his debt of Rs.

1600 the balance of the consideration he paid in cash. Defendants 3, 4 and 5 secured the advantage of having their debts satisfied in full by the

respective sales to them. Defendants 8 and 9 were also paid in full by defendant 8. As the learned trial Judge found that the consideration for the

several sales was not low and inadequate, the sales will stand. But the creditors who were a party to this scheme of disposal of the available assets

of the deceased and thereby gained an undue advantage over the plaintiffs cannot be allowed to retain such advantage. The measure of this

advantage is the amount which they must be deemed to have received in excess of what they would have got if there had been an equal and

rateable distribution, taking into account the plaintiffs' claim also. It is this

excess amount that must be held by them for the benefit of the plaintiffs.

There will be a declaration accordingly.

40. Appeal No. 516 of 1945 is allowed to this extent except as against defendant 7 against whom it shall stand dismissed with costs.

41. In App. no. 266 of 1916, defendant 1 was the appellatit. He died pending the appeal and his legal representative has been brought on record.

So far as defendant 1 is concerned, as an administrator who clearly committed a breach of the duty imposed on him by Section 323, Succession

Act, he would be liable u/s 868 of the Act for devastavit. The very decision relied upon by Mr. O. T. G. Kissondas Premchand Vs. Jivatlal

Pratapshi and Co., contains observations which go directly against his client. At p. 438, the learned Judge said :

""If an executor follows it (8. 323) and further follows the provisions of Section 360, he is protected. If he does not, he is liable If the executor

pays out of Court, the unpaid creditor has a remedy against him."" See also Asiatic Banking Corporation v. Anador Viegas, 8 Bom. H. C. R. 20.

Mr. Nambiar attempted to found an argument on the series of decisions beginning with Nilkomul Shaw v. Reed, 12 Beng. L. R. 287 : 17 W. R.

513, to which reference has been made above, based on the fact that most of the creditors who had been satisfied by the sales had obtained

decrees. All these cases, however, will have no application, because the payment was made by the administrator out of Court and in pursuance of

a scheme of distribution of the available assets among all the creditors except the plaintiffs.

42. Mr. Nambiar's next contention was that it is not open to the plaintiffs to file an administration suit when they could get the relief they now claim

against defendant 1 in execution of their decrees. For this contention, he sought support in the judgment of Somayya J. in Venugopala Naidu v

Valambal Ammal, 1942-1 M. L. J. 680 : A. I. R. 1942 Mad. 588. The answer to this contention is twofold. There is nothing in the circumstances

of this case to preclude the plaintiffs from filing an administration suit simply because they could have obtained a personal decree against the

administrator u/s 52(2), Civil P. C. Moreover, the suit was not only against the administrator but also against alienees and creditors and these latter

could not have been made parties to the proceedings in execution of the

plaintiffs' decrees. Another answer is that the suit must be deemed to have been filed not only on behalf of the plaintiffs in their individual right but also in a representative capacity on behalf of all the creditors. Surely, it cannot be maintained that the tight of the creditors as a body could be agitated in the execution proceedings. Mr Nambiar cannot be heard to say this is not a suit in a representative capacity, because it was on that ground that we have held that the appeal did not abate though the legal representatives of respondent 2, were not brought on record in time.

43. Clauses 1 (a) and (b) of the decree must stand. Apart from the devastavit which consisted of the alienations in favour of defendants 3 to 7, the plaintiffs also alleged that defendant 1, has been appropriating the entire profits and income from the estate to the extent of nearly Rs. 30,000 every year without making any payment either towards the principal or the interest on the debts of the estate. Defendant 1, therefore, must account for the income of the estate. Of course, when such an account is rendered it would be open to the plaintiffs to surcharge and falsify. Clause 1 (a) of the decree, however, appears to be in the highest degree vague and indefinite. It seeks to make defendant 1, personally liable "for mal-administration and neglect, if any, in the management of that estate as administrator". Now, a preliminary decree cannot be in that hypothetical form. It must be first decided on allegation specifically and properly made of maladministration whether any of the charges has been made out. It is only thereafter that the Court can direct on account on that basis. Mr. Alladi Krishnaswami Aiyar very properly conceded that such a vague decree should not have been passed. This clause will therefore be deleted but otherwise the appeal will be dismissed with costs. These appeals having been posted for being mentioned, the Court made the following Order.

44. These appeals have been posted to-day for mentioning certain matters. So far as costs of the suit and the appeal are concerned, we have heard counsel again, and we think that the best order to be made in the circumstances of this case is as follows: Defendant 1 will be liable to pay to the plaintiffs the costs of the suit and the appeal calculated on the amount in which he may be found ultimately liable at the stage of the final decree.

So far as defendant 7, is concerned, our order will stand, namely, that Appln. No. 346 of 1945 will stand dismissed as against him with costs. The

order of costs in the lower Court will also stand. As regards the defendants other than 1 and 7, the order will be that the costs of all of them shall come out of the estate. The costs of the plaintiffs, after giving credit to the costs they may be entitled to against defendant 1 personally, shall come out of the estate, both in the suit and in the appeal. As defendant 1, is dead, the costs will be recoverable against his legal representatives to the extent of the assets in their hands.

45. On behalf of defendant 1's legal representatives, it was represented that as this Court has set right, as it were, the devastavit committed by defendant 1, viz, distributing the sale proceeds of the several alienations between the creditors to the exclusion of the plaintiffs, Cl. 1 (b) of the decree of the lower Court should be deleted. That clause dealt with the loss caused by defendant 1's act of devastavit, namely, the distribution of the assets of the estate among the other creditors leaving out the plaintiffs. No other act of devastavit was specifically made out against defendant I, except) of course, the charge as to the appropriation of the income of the estate. The lower Court obviously included" that clause in the decree because it found that the plaintiffs were not entitled to any relief whatever against defendants other than defendant I. Now that we have found that the creditors who have received payments in excess of their rateable share should bring into Court for the benefit of the plaintiffs such excess, the plaintiffs cannot be said to have again a claim against defendant 1 in respect of the alienations and the distribution of the proceeds of the alienations.

Mr. Narayanaswami Aiyar contended that though the sales might be good as against the alienees as not being for a grossly inadequate consideration, it is open to the plaintiffs to establish that the sales were at undervalue and that defendant 1 would be liable for the loss sustained by the creditors on account of such undervalue. In the lower Court, there was no finding that the sales were actually made at an undervaluation, nor was it sought to be established before us. On the other hand, the finding of the learned Judge was that the alienees paid proper and adequate consideration for their purchases. We think that, having regard to our judgment and decree in App. No. 546 of 1945, the proper order would be, rather than to completely delete Clause 1 (b) of the decree of the lower Court, to declare that Clause 1 (b) will be confined to cases in which the

plaintiffs are unable to recover the excess payments made to any of the creditor from such creditors themselves. Defendant I will be liable for such

amounts. Otherwise, Clause (b) will have no operation.

46. Finally, we think, in the interests of clarity, it is better to indicate that if any amounts are recovered from defendant I or from properties

belonging to the estate of Robert Foulkes, other than the subject-matter of the alienations in favour of defendants 3 to 7, all the creditors including

the plaintiffs will be entitled to rateable distribution of such moneys. Of course, the payments which the creditors may have to refund in accordance

with our judgment will enure only to the benefit of the plaintiffs.

(These appeals having been set down to be mentioned, the Court made the following Order):

47. In our judgment we held that the creditors, who had received excess payments in the distribution consequent on the several alienations in

favour of defendants 3 to 6, should refund the excess amounts which they must be deemed to have received. The creditors who were mentioned

specifically were defendants 3 to 6, 8 and 9. Actually, however, there was admittedly another creditor, namely, defendant 1 himself as representing

the estate of Mrs. Fischer. This dual capacity which cannot be denied was not specifically adverted to in this portion of the judgment. The decree

as drafted, which follows the judgment, naturally did not mention defendant 1 in his capacity as representative of Mrs. Fischer as creditor along

with defendants 3 to 6, 8 and 9. To bring the decree in accordance with the finding in the judgment, it is necessary that the following words should

be added in clause 1, Sub-clause 1 (a) of the decree after the word "defendants", "NO. 1 as representative of the estate of Mrs. Fischer.

48. In Sub-clause 1 (b) of Clause 1, the words from "and do personally render accounts" to "in favour of defendants 3 to 6 as aforesaid" shall be

deleted, because the effect of this direction is contained in the clause left after deleting these words.

49. We dismissed App. No. 546 of 1945 with the costs of defendant 7. Defendant 7 is interested only in one item of property covered by the sale

in its favour which was for a sum of RS. 25,000. He would be entitled to advocate's fee calculated on this amount only.

50. The decree will be drafted in accordance with these directions.