

(1946) 04 CAL CK 0022
In the Calcutta High Court

**In Re: Official Trustees Act II of 1913, and Indenture of Release,
Appointment and Assignment on Trust**

Date of Decision : 09-04-1946

Acts Referred:

Citation : (1946) 04 CAL CK 0022

Final Decision : Allowed

Judgement

Das, J.—In this application, which has been made under the Official Trustees Act, 1913, John Amador Barretto, Mary Theresa Rodrigues and Annie Catherine Bocarro pray for an order that the Official Trustee of Bengal as the trustee of Luis Joseph Barretto deceased do make over to the petitioners the share of the deceased in the amount unclaimed by any creditors in terms of the deed of trust, dated 10th March 1827 and if necessary for a declaration that the petitioners are the only surviving descendants of the said Luis Joseph Barretto deceased. The relevant facts are as follows : More than 100 years ago there was a flourishing firm carrying on business as merchants and agents in Calcutta and elsewhere under the name and style of Joseph Barretto & Sons. In 1827 the partners of that firm were Luis Joseph Barretto and Edward. Brightman. In consequence of various untoward circumstances, difficulties had arisen preventing an immediate and prompt adjustment of chums which were then outstanding against them individually as also jointly as members of the said firm and consequently it became necessary for the said Luis Joseph Barretto and Edward Brightman to make arrangements for the liquidation of their joint and separate liabilities. Accordingly by an indenture made on 10th March 1827 between Luis Joseph Barretto and Edward Brightman of the first part, John Palmer, William Ainslie, George Ballard, William Melville and Robert Browne, creditors and trustees named and appointed on behalf of themselves and other creditors of the second part and the creditors who by themselves or their respective attornies should execute the said presents of the third part, the said Luis Joseph Barretto and Edward Brightman in order to render to their creditors the utmost satisfaction in their power conveyed, assigned and transferred to the said five trustees, being the parties of the second part, the premises and properties thereafter

mentioned (which included the assets of the firm as well as their separate properties) to have and to hold the same upon the trusts and to and for the ends, intents and purposes thereafter declared and expressed. By that deed Luis Joseph Barretto and Edward Brightman (whom I shall hereafter call the settlors) appointed the trustees as their true and lawful attorneys with certain powers therein mentioned. The trustees were authorised at their discretion to convert into money all the premises and properties conveyed to them and to stand possessed of all moneys upon trust-(i) to retain all costs charges and expenses; (ii) to pay off and satisfy, out of the proceeds of the partnership properties, the joint debts of the firm; (iii) to pay off and satisfy, out of the proceeds of their respective separate properties, their respective separate creditors; (iv) after payment and satisfaction of all debts, joint and separate, to pay or deliver the residue or surplus to the settlors their respective heirs, executors, administrators or assigns according to their respective rights therein.

2. The trustees were authorised to set apart and retain any debt owing to any creditor who should be resident abroad and. should not have executed or otherwise acceded to the deed before the final dividend and pay to such creditors the whole or any part of the money to set apart as the trustees should deem expedient for the purpose of finally closing the trust account. The balance or the surplus if any of the monies so to be set apart after satisfying the last mentioned debts would belong to and be considered part of the general residue of the trust property except as thereafter provided. Power was given to the trustees to admit any debt upon such evidence as they in their discretion thought satisfactory and also to settle the amount of any debt. There was provision for reference to arbitration in case of any difficulty in ascertaining the amount due to any creditors. It is not necessary to refer to the usual provisions and powers given to the trustees in detail. It was lastly declared and agreed that in case any creditor of the firm or of the settlors or the executors or administrators of any creditor except such creditor as the trustees should pay or settle or compound with pursuant to the powers thereinbefore contained should, for the space of one year next after notice for that purpose should have been given, refuse, decline or neglect to execute the deed or otherwise legally to accede to the same then, the creditor so refusing, declining or neglecting or his executor or administrator should be excluded from all benefit of or under the deed and the settlors should be entitled to stand in the place of such creditor and to have the same or like benefit as such creditor or his executor or administrator would have been entitled to in case he had executed or acceded to the deed except that the aforesaid provision should not extend to any creditor who should be resident abroad and the amount of whose debt should be retained in the manner thereinbefore directed or authorised unless such notice as aforesaid should be given to him by the trustees. It appears that about 93 creditors of the firm, about 9 separate creditors of Luis Joseph Barretto, and about 15 separate creditors of Edward Brightman actually executed the deed. Prior to 1831 the trustees declared a dividend of 37 1/2 per cent. Between 1831 and 1850 two further dividends of 12

per cent, and 14 per cent. were declared by the then trustees, bringing the total dividends upto 631/2 per cent.

3. On 6th February 1862 an order was made by this Court, on the application of the then surviving trustees, appointing the Official Trustee as trustee in their place, and thereupon the Official Trustee began acting as the sole trustee under the said deed. In 1876 the then Official Assignee representing the estate of William De Monti Sinaes (one of the creditors of the firm) who had been adjudged insolvent filed a suit on behalf of himself and all other creditors of Luis Joseph Barretto and Edward Brightman who had executed the deed against the then Official Trustee being Suit No. 232 of 1876 (Albert Bermingham Miller v. Frederick John Fergusson Suit No. 232 of 1876) to have the trusts of the deed dated 10th March 1827 ascertained and declared and for an account and for other reliefs. On 30th November 1876 a preliminary decree was passed in that suit: (i) declaring that the deed dated 10th March 1827 ought to be established and the trusts thereof performed and carried into execution; (ii) directing certain accounts therein specified to be taken allowing interest as therein mentioned; (iii) directing the Registrar to cause advertisements to be published in the Government Gazettes and such other papers as he should think fit to the effect that the creditors of the firm who had executed the deed and all other persons claiming to be entitled to the benefit of the deed do come in and prove their claims within a time to be specified therein or in default thereof be excluded from the benefit of the decree; (iv) ordering that the Government Securities and moneys held under the said deed be applied in payment of such claims as should be proved as aforesaid in due course of administration; (v) giving directions for payment of costs; (vi) reserving liberty to the parties to apply to Court from time to time.

4. Pursuant to the decree the matter was taken up by the Master and he made a report to the Court. Unfortunately, the records of the proceedings before the Master and the report are missing and cannot be traced. On 10th December 1878, however, a decree was passed in said Suit No. 232 of 1876, (i) declaring that there was on 19th November 1877 in the hands of the Official Trustee as trustee under the deed dated 10th March 1827 the sum of Rs. 2,47,400 in Government Securities and Rs. 1193-8-1 in cash; (ii) declaring that-(a) the persons named in Sch. "A" annexed thereto were the original admitted creditors of the firm for the sums set opposite to their respective names; (b) the persons named in sch. "B" were such of the original creditors of the firm as had not received certain of the dividends declared by the trustees the sums set opposite to their respective names representing the amount of their unpaid dividends respectively; (c) the persons named in Sch. "C" were such of the original creditors of the firm as had not come in in this suit and proved their claims, the sums set opposite to their respective names being the Sums then due to them; (d) the persons named in Sch. "D" were such of the said original creditors or their representatives as had proved their claims and were (with the exceptions of claimant No. 2) entitled in respect of such claims the sums set opposite to their

respective names with interest as mentioned in col. 5 of the said schedule; (iii) directing the Official Trustee to ascertain what sum was due to claimant No. 2; (iv) directing the Official Trustee out of the Government Securities and monies in his hands- (a) to retain his own costs and pay the plaintiff's costs, (b) to pay to Gobind Panda, heir of Panchu Panda, claimant No. 9 Its. 1040 for unpaid dividends as set out in Sch. "B", (c) to set apart the other sums set forth in Sch. "B" represent, ing unpaid dividends and hold the same subject to the further order of the Court, (d) to apportion the balance of the Government Securities and monies in an account to be prepared by him among the several persons mentioned in Schs. "C" and "D" rateably as follows, that is to say, as to the persons named in Sch. "C" in proportion to the sums set opposite to their respective names and as to the persons named in Sch. "D" in proportion to the sums set opposite to their respective names with interest as therein mentioned, (e) to pay the plaintiff and such other persons whose names appeared in Sch. "D" the respective sums which in the said account should be apportioned to them respectively (subject to certain special directions regarding the pay. ment of the claims of Nos. 8, 14, 20 and 27, (f) to retain subject to the further order of this Court, the sums which should in the said account be apportioned to the persons named in Sch. "C"; (v) reserving liberty to all parties interested in the said funds to be retained or set apart to apply to the Court from time to time.

5. At the date of the aforesaid decree, the funds in the hands of the Official Trustee were represented by 4 per cent. Government Securities of the face value of Rs. 2,79,300. Out of these, securities of the face value of Rs. 1,34,500 were sold and thus there were in the hands of the Official Trustee Rs. 1,44,800 in Government Securities and Rs. 1,46,206-3-10 in cash. The sum of Rs. 1040 was paid to the heir of Panchu Panda. The amount payable to the other persons named in Sch. "B" for unpaid dividends was Sicca Rs. 1,37,850 which in current money came to Rs. 1,45,931-4-9. The Government Securities of the face value of Rs. 1,44,800 and Rs. 168-14-3 in cash were set apart to meet these unpaid dividends payable to the persons named in Sch. "B" to the decree. After setting apart this amount for the persons named in Sch. "B" there remained in the hands of the Official Trustee the sum of RS. 1,46,237-5-7 in cash. From, this the then Official Trustee retained Rs. 537-5-7 for meeting certain costs, leaving, a nett balance of RS. 1,45,700 in current money which became available for the persons named in schs. "C" and "D" and with this sum a dividend of Rs. 11-5-6 per cent was declared for those persons. The nett result was that pursuant to the directions contained in the decree of 1878 the trust funds were split up and separately apportioned to the creditors mentioned in Schs. "B", "C" and "D" in the manner mentioned above and the trust account was closed, on 31st May 1881. On the basis of this apportionment and allocations payments were made to creditors as and when they came in and proved their claims. Thus between 1881 and 1909 out of Sicca RS. 1,37,850 set apart for the persons named in Sch. "B" for unpaid dividends (631/2 per cent.) sicca. Rs. 90,334-14-6 was paid out to four of them namely Nos. 3,5, 9 and 33 leaving a balance of sicca Rs. 47,

515-11-0 which is rupees 50,683-6-5 in current money for the remaining persons named in Sch. "B". Out of the creditors named in Sch. "C" i. e., those who had not come in in that suit upto the date of the decree of 1878 seven of them subsequently came in and received payment of the dividend RS. 11-5-6 per cent, declared by the Official Trustee. All the creditors named in Sch. "D" except No. 19 received the dividend of Rs. 11-5-6 per cent. The dividend of Rs. 11-5-6 per cent, payable to creditor No. 19 of Sch. "D" was retained by the Official Trustee as directed by the decree of 1878.

6. It may here be mentioned that the figures mentioned in Sch. "C" to the decree of 1878 were not quite accurate. As I have already mentioned the previous trustees had declared the total dividends of 631/2 per cent. According to the Official Trustee the balance of 361/2 per cent, was, therefore, set out against the persons named in Sch. "D" (with only a few exceptions). As regards the persons named in Sch. "C", i. e., creditors who had not come in in that suit upto the decree of 1878, some of them had received the dividends of 631/2 per cent, in full, some of them had received a part of them and the rest had not received any part of them. Accordingly some of the persons whose names appeared in Sch. "C" were also included in Sch. "B" as persons who had not received the 631/2 per cent, dividends in full. It follows that those persons whose names appeared in Sch. "C" but did not appear in Sch. "B" must have received the 631/2 per cent, dividends in full and consequently only 361/2 per cent, was due to them. In Sch. "C", however, against the names of all persons entered therein were set out the full amounts of their claims and not the amounts actually due to them after deducting the amounts of dividends received by them. Further the names of some of the creditors which properly appeared in Sch. "D" as creditors who had come in were also included in Sch. "C" as creditors who had not come in. The result of these mistakes was that the aggregate amount of the several sums mentioned in Sch. "C" was far in excess of the amount really due to the creditors who had not come in. But it was on the basis of these erroneous figures that the Official Trustee apportioned the nett balance of Rs. 1,45,700 amongst the "C" creditors and "D" creditors. The result was that the "D" creditors got less than what they were entitled to and what they would have received had the names and figures been correctly set out and entered in Sch. "C" These mistakes were not, however, discovered until a later date as hereinafter mentioned.

7. Between 1909 and 1926 there does not appear to have been much activity amongst the creditors. On 21st June 1926 John Amador Barretto (one of the present petitioners) and his brother Joseph Nicholas Francis Barretto since deceased took out a summons in the matter of the Official Trustees Act for discovery of the nature and extent of the funds belonging to the trust created by the indenture dated 10th March 1827 and lying in the hands of the Official Trustee and for particulars of the persons entitled to receive the same and of the sums apportioned to and unclaimed by them and for advertisements to be published in Government Gazettes and other public papers notifying unpaid creditors of the

firm of Joseph Barretto & Sons whose names appeared in the schedules to the decree dated 10th December 1878 in Suit No. 232 of 1876 of this Court their heirs and legal representatives as well as persons if any who claimed as heirs, executors, administrators or assigns of the said Luis Joseph Barretto, one of the settlors of the said trust to be interested in the trust funds then lying in the hands of the Official Trustee to appear and show cause within a time to be specified in the said advertise, mentions why the trust fund should not be dealt with or disposed of and for an order that in the event of default of appearance of those persons the petitioners be declared the sole surviving heirs and next of kin of the said settlor Luis Joseph Barretto and of the creditors John Barretto and Bartholomew Barretto and as such beneficially interested in the said trust funds and that the said Official Trustee be directed to pay to the petitioners a moiety of the said trust funds being the half share of the said Luis Joseph Barretto and such portion of the said trust funds as had been apportioned to and unclaimed by the creditors John Barretto and Bartholomew Barretto and for other reliefs. In the petition in support of the said summons after reciting the deed of trust, the appointment of the Official Trustee, the institution of the said Suit No. 232 of 1876 and the preliminary decree and the further decree passed therein on 30th November 1876 and 10th December 1878 respectively and certain correspondence the said petitioners alleged that they were the surviving heirs and next of kin of the said Luis Joseph Barretto as shown in the genealogical table thereto annexed and as such were entitled to the half share in the funds then remaining in the hands of the Official Trustee either as residue or surplus within the meaning of the said trust deed or as resulting or ultimate trust in their favour apart from the said deed in respect of such unexhausted trust funds. They also claimed that they were further entitled to the benefit of the said trust funds as heir and next of kin of some of the creditors of the said firm named in the schedules of creditors annexed to the said decree dated 10th December 1878 for the sums set opposite to their respective names. The said summons came on for hearing on 12th July 1926 before C. C. Ghose J. when upon learned counsel for the Official Trustee stating that the Official Trustee would apply to Court for the winding up of the trust it was agreed that the said application should be renewed and heard simultaneously with the Official Trustee's proposed application.

8. On or about 1st September 1931 the Official Trustee applied for directions in Suit No. 232 of 1876. In the petition in support of the said application after setting out the previous history from the creation of the trust down to the decree dated 10th December 1878 and the closing of the trust accounts on 31st May 1881 and the apportionment of the trust funds to the creditors named in schs. "B" "C" and "D" in accordance with the directions contained in the said decree and the mistakes that had crept in in sen. "C" and the declaration of dividend of Rs. 11-5-6 per cent, on the erroneous basis of the figures mentioned in that schedule and payments made in accordance therewith the Official Trustee referred to the several schedules prepared by him and annexed to the petition. Broadly speaking, in Sch. "V" he set forth a list of those creditors named in Sch.

"B" to the decree who had subsequently come in and had received payments on account of their claims and the balance of their original claims which remained unpaid. In Sch. "W" the Official Trustee set forth a list of those creditors named in Sch. "B" to the decree who had not come in and the amount still due to them. In Sch. "X" was set out a list of those creditors named in Sch. "C" to the decree (other than those named in Sch. "B") who had subsequently come in and received payments on account of their claims and the balance still due to them on account of their original claims. Schedule "Y" contained a list of those creditors named in Sch. "C" to the decree (other than those whose names appeared in Sch. "B") who had not come in but who had received payments of the dividends of 631/2 per cent, declared by the firm of trustees and the balance still due to them on account of their original claims. In Sch. "Z" the Official Trustee set forth a list of those creditors named in Sch. "D" to the decree who had come in prior to the said decree and who had all (with the exception of creditor No. 19) received both the dividend of 631/2 per cent, and Rs. 11-5-6 per cent. and the balance still due to them on account of their original claims and interest and costs. The Official Trustee also stated in the petition that the Secretary of State had claimed to be entitled under S. 23, Official Trustees Act to the assets then in the hands of the Official Trustee and that John Amador Barretto and Joseph Nicholas Francis Barretto claimed a moiety of the trust fund as the sole surviving heir and next of kin of Luis Joseph Barretto and also the dividends respectively declared in favour of the creditor John Barretto and Bartholomew Barretto and of other members of the family whose names might be found to appear in the list of unpaid creditors as their heirs and next of kin. Finally the Official Trustee referred to the claim preferred by the consul for Portugal in Calcutta on behalf of Casel De Seguirez De Macao, a company incorporated in Portugal. The prayers of the petition were as follows:

9. (i) For the directions of this Hon^{ble} Court with regard to the allocation and distribution of the fund standing to the credit of the above mentioned trust now in his hands, and in particular with regard to the following questions: (a) Whether or not the creditors named in Sch. "W" who have not come in and proved their claims in this suit are now entitled to share in the trust funds, and if so, in what proportions and subject to what terms and conditions ? (b) Whether or nor the creditors named in Sch. "Y" hereto who have not come in and proved their claims in this suit are now entitled to share in the trust funds, and if so, in what proportions and subject to what terms and conditions? (c) How the interest that has accrued upon the capital of the trust funds should be disposed of; (ii) for the directions of this Hon^{ble} Court with regard to the claim of the Secretary of State for India in Council in para. 29 hereof above referred to; (iii) for the directions of this Hon^{ble} Court with regard to the claims of J. A. and J. N. F. Barretto in para. 30 hereof above referred to; (iv) for the directions of this Hon^{ble} Court with regard to the claim preferred by the consul in Calcutta for Portugal in para. 31 hereof above referred to; (v) for an order that your petitioner do in the first place retain and pay his costs of and incidental to this

application and to carrying out the orders and directions to be made and given thereon (to be taxed if necessary as between attorney and client) out of the trust fund in his hands; (vi) for an order that your petitioner do set apart and invest in authorised trust securities such sums as may be directed to be paid to any of the creditors named in the schedule hereto and to retain them in separate accounts under the headings of the respective schedules until payment or transfer thereof as may be directed; (vii) for an order that your petitioner for the purpose aforesaid, may be at liberty to sell and/or subdivide the Government securities now held by him to the credit of the said trusts; (viii) that all necessary directions may be given for the purposes of ascertaining the present addresses of the various creditors named in the schedule hereto (or their heirs or legal representatives as the case may be) to whom payments may now be directed to be made; (ix) for an order that in the event of any sums that may be directed to be paid to creditors remaining in your petitioner's hands unclaimed, or in default of any creditors or creditor named in the schedules hereto (or their heirs or legal representatives as the case may be) to whom payment of any sums may be directed to be made establishing to the satisfaction of your petitioner within such time as this Hon'ble Court may fix his or their right to receive payment of such sums, then and in that event your petitioner may be at liberty to transfer the sums so remaining unclaimed or unpaid to the account and credit of the Government of Bengal in accordance with the provisions of S. 23, Official Trustees Act, 2 [II] of 1913; (x) for such further orders and directions as shall in the circumstances to this Hon'ble Court seem fit and proper.

10. On 3rd September 1931 Pearson J. directed advertisements to be published in India, England, Portugal, France and Hongkong which was done. Pursuant to the advertisements the said John Amador Barretto and Joseph Nicholas Francis Barretto (who had already taken out summons which stood adjourned) filed a statement of claim as heirs and next of kin of Luis Joseph Barretto claiming a moiety of the unexhausted trust funds representing the half share of Luis Joseph Barretto either as residue or surplus within the meaning of the trust deed or alternatively as a resulting or ultimate trust in their favour as heirs de hors the said deed. The application came up for hearing before Ameer Ali J. but was adjourned until the claim of the Portuguese Company was established by suit. The claim not having been established the Official Trustee's application again came up before Ameer Ali J. There appeared at the hearing before the learned Judge, besides the Official Trustee, some of the creditors named in each of the Schs. "B," "C" and "D" to the decree dated 10th December 1878 and the two Barrettos. The creditors named in Schs. "B" and "C" claimed that they were entitled to their respective portions of the amounts set apart and appropriated for the creditors named in Schs. "B" and "C" respectively and all accretions thereto. The creditors named in Sch. "D" claimed that the excess amount wrongly included in the sum allocated to the creditors named in Sch. "C" by reason or as a result of the errors I have mentioned should with all accretions thereto be utilised in making up the difference between what they actually

received as and by way of fourth dividend at Rs. 11-5-6 per cent, and what they would have received had Sch. "C" been correctly prepared or in providing a fifth dividend for the creditors named in Sch. "D" only, that is to say, the creditors who had appeared at the date of the decree of 1878 or for those creditors who had then appeared before Ameer Ali J. They also claimed that the amounts set apart and appropriated to the creditors named in Schs. "B" and "C" together with the accretions thereto should be utilised to provide a dividend for the creditors named in Sch. "D" alone or for the creditors who had then appeared before the learned Judge, The two Barrettos claimed that the portion of the excess erroneously allocated to the creditors named in Sch,"C" and the amounts appropriated to the creditors named in Schs. "B" and "C" with accretions thereto in respect of which no claims had been received should, after satisfying in full all creditors who had appeared, revert to the estate of the settlors and a moiety thereof should be paid to them as the heirs and next of kin of Luis Joseph Barretto, one of the settlors.

11. The rival contentions were decided by Ameer Ali J. by his judgment delivered on 9th July 1932 and since reported in 60 Cal. 512 A.B. Miller Vs. F.G. Ferguson, . At page 520 of the Report the learned Judge summarised the questions that had to be considered by him as follows: (i) Should the D/C Fund (meaning the excess amount erroneously credited to the creditors named in Sch. "C" and accretions) be released, and if so, for whom? (ii) Should the B and C Funds (meaning the amounts set apart and appropriated to the creditors named in Schs. "E" and "C") and/or their accretions be released and, if so, for whom ? (iii) Should the D Fund not drawn (meaning the amount standing to the credit of creditor No. 19 inSch. "D" with accretions) be released, and, if so, for whom ? The learned Judge then discussed the law and examined the authorities and summarised the principles which, he considered, were to be deduced from them at pages 525 to 527 of the Report. Shortly put, the learned Judge was of opinion that the Court dealing with claims in an administration suit might adopt one of three courses, namely : (a) The Court might consider the claims only of those claimants who had come in and disregard those who had not come in and decide which of the claimants who had come in were entitled to be paid and what amount and divide the available fund among those who had successfully proved; or (b) the Court might decide the claims of those claimants who had come in and protect those who had not come in and at once direct payment out to those who proved their claim, their proportionate share in the available fund and set aside the proportionate shares of those who had not come in, not absolutely but contingently upon their proving the claim within a time fixed by the Court which in default of proof within the specified time would revert to the general fund and be available for distribution and be again distributable amongst those who had proved their claim; or (c) the Court might consider the claims of all claimants whether they had or had not come in and decide whether they were entitled to participate and, if so, for what amount, leaving in case of those who had not come in, merely their right to receive payment on proof of title. Having

established the above principles the learned Judge proceeded to consider as to which of the three courses had been adopted by the Court by the decree, dated 10th December 1878. On a construction of the decree the learned Judge held that the Court had found in favour of all the original creditors named in Sch. "A" for the amounts set against their respective names in that schedule and that there was no resulting trust in favour of the settlors or their representatives and that he was not free to release the funds in question for the benefit of the active creditors only, The reasonings of the learned Judge for adopting the construction that he did are not set out in the report but are to be found at pp. 99 to 102 of the bundle of documents Part I where the judgment has been set out in extenso.

12. After delivering the judgment the learned Judge directed the matter to be placed on the list on some future date, so that, the Official Trustee after having considered the judgment might ask for further directions, if necessary. On 27th August 1932 the matter was again placed on the list and the learned Judge gave certain further directions and a comprehensive order was drawn up as of 27th August 1932. By the order as drawn up it was recorded that the Court was of opinion that there was no resulting trust in favour of the settlors or of the personal representatives of such settlors and it was ordered : (2) That the funds representing such of first, second and third dividends declared in favour of those creditors of the said firm whose names appear in Sch. "B" annexed to the said decree as are still unpaid be allocated to such creditors in individual accounts and that a proportionate amount of the total accretions to which such creditors shall be entitled be added to each of such individual accounts. (3) That the said Official Trustee do retain the sums so to be allocated as aforesaid for the benefit of such creditors or their representatives and subject to proof of the title of such creditors or their representatives to the sums allotted to them respectively do pay the same to them. (4) That for the purpose of remedying the errors which have been made in the calculation of the fourth and final dividend declared by the then Official Trustee of Bengal in pursuance of the said decree the said Official Trustee do re-calculate such dividend as if such calculation were being made and the proper amount appropriated to the respective creditors on 31st May 1881 on the basis of the capital which was then declared available treating any excess moneys now in his hands as accretions. (5) That in the case "of those creditors whose names appear in the said Sch. " D" to the said decree, the Official Trustee do debit the amounts heretofore received by them against the sums to be allotted to them in respect of the recalculated dividend. (6) That in making such calculations the said Official Trustee do correct any errors in the figures in any of the Schs. "B", "C" and "D" and that the said Official Trustee do deal with the claim of creditor No. 11 in the said Sch. "D" Aga Zamiel Abuddin viz. Rs. 4858-11-0 as being 361/2 of his original claim and as being in Company"s Rupees. (7) That for the purpose of carrying out the re-division and re-allocation of the funds as aforesaid the Official Trustee do deal with the excess payments made to such of the creditors whose names appear in the said Schs. "B" and "C" as shall have received in error payments in excess of the amounts

which as a result of re- calculation hereinbefore referred to shall be properly due to them by debiting to the total accretions in the accretions in the respective schedules in which such creditors appear the excess amounts so paid. (8) That the said Official Trustee do after he has made such re-calculation and adjustments as aforesaid and subject to the directions as to costs hereinafter mentioned prepare new schedules marked respectively "B", "C" and "D" in substitution for the existing Schs. "B", "C" and "D" annexed to the said decree respectively and that he do make a note in the said new schedules against the names of the creditors who have received excess payments to the effect that these creditors have already been paid and that they are not entitled to any further payment. And that the said Official Trustee do submit the new schedules so to be prepared by him to this Court. (9) That the said Official Trustee be at liberty to advertise at his discretion for creditors or next of kin or other persons who may be entitled to the said funds. (10) That the said Official Trustee do deal with the claims of the various creditors who have appeared at the hearing of this suit including the claim of the said John Amador Barretto and Joseph Francis Nicholas Barretto and all claims which may hereafter be preferred by persons claiming to be entitled to the sums due to the respective creditors or any of them and that the said Official Trustee be at liberty to require proof of the title of such claimants on affidavit or otherwise as the said Official Trustee may require. (12) That such creditors including the said John Amador Barretto and Joseph Nicholas Barretto as may have heretofore lodged statements of their respective claims be at liberty to file such fresh or additional statements of their respective claims before the Official Trustee as they may think fit. (19) The said Official Trustee and all persons now or hereafter claiming to be entitled to the funds held by the said Official Trustee in this suit or any part thereof be at liberty to apply to this Court for such or other directions as they may be advised.

13. In accordance with the directions contained in the above order of Ameer Ali J., the Official Trustee filed an affidavit sworn on 26th August 1933. To that affidavit were annexed three new schedules prepared by him and marked "BB", "CC" and "DD". Schedule "BB" corresponded with old Sch. "B" to the decree dated 10th December 1878 and contained a list of names of those creditors who had not received all or some of the three dividends declared by the previous trustees and the correct total amount of those dividends, the payments since received by some of them and the amounts still due to them in respect of the said first three dividends and their respective shares in Rs. 1,84,995-7-0 being the accretions to the sum which had been set apart for the creditors named in Sch. "B" to the decree of 1878 from 31st May 1881 (being the date upon which the trust account was closed by the Official Trustee) upto 12th November 1932. Schedule "CC" corresponded with Sch. "C" to the decree of 1878 except that the names of the 29 creditors whose names appeared in both Schs. "C" and "D" were excluded and it set forth the re-calculation of the fourth dividend at the rate of rupees 23-13-6 per cent, instead of at Rs. 11-5-6 per cent., the amounts payable to the creditors named in that Sch. "CC" at the re-calculated rate, the payments

actually made to them, the excess payments made to some of them and the adjustment thereof and their proportionate share in the accretions and the actual sum respectively payable to each of them. Schedule "DD" corresponded with Sch. "D" to the decree of 1878 and showed the re-calculation of the fourth dividend, the amounts payable at the re-calculated rate, the actual payments made to them, their proportionate shares in the accretions due on the fourth dividend and the actual sums payable to each of them. In the said affidavit the Official Trustee also showed the total accretions amounting to Rs. 4,91,451-10-2 upon the entire trust funds during the period from 31st May 1881 when the trust account had been closed upto 12th November 1932, when the last of the securities was sold and the payment out of the accretions to some of the creditors named in Schs. "B" and "C" aggregating to Rs. 91,137-14-7 leaving a balance of Rs. 4,00,313-11-6 and the allocation of Rs. 3,44,131-7-8, i.e., Rs. 4,00,313-11-6 less Rs. 56,182-8-11 paid or set apart for costs to the creditors named in Schs. "BB", "CC" and "DD". It appears from the said affidavit that out of Rs. 3,44-181-7-8 being the nett accretions available for distribution the sum of Rs. 1,34,995-7-0 was allocated to the creditors named in Sch. "BB", rupees 83,778-13-7 to those named in Sch."CC" and the sum of Rs. 1,25,357-3-1 to those named in Sch."DD". The Official Trustee submitted the said schedules for approval of the Court.

14. On 11th September 1933 Ameer Ali J. made an order in the presence of learned counsel for the creditors as well as of the two Barrettos declaring that Schs. "BB", "CC" and "DD" annexed to the affidavit of the Official Trustee and the calculations made therein had been prepared by the Official Trustee and the calculation made therein had been prepared by the Official Trustee in accordance with the directions contained in the order dated 27th August 1932 and that the amounts respectively stated against the names of creditors named in the schedules annexed to the said order and marked "B", "C" and "D" represented the aggregate sum due to each creditor therein respectively named for dividends and accretions and directing that the said schedules "B", "C" and "D" annexed to the said order be substituted for Schs. "B", "C" and "D" respectively annexed to the decree of 10th December 1878.

15. In response to an enquiry made on behalf of the two Barrettos by Messrs. Morgan & Co., by their letter dated 5th April 1937 the Official Trustee by his letter dated 26th April 1937 stated that advertisements for the creditors of the firm of Joseph Barretto & Sons had been published in two parts namely in 1934 and 1935 in Calcutta, Bombay, London, Hongkong and in Portugal. He enclosed a list of persons who had responded to the advertisements giving the names of the creditors under whom they claimed and showing the dates and amounts of payments made since the order dated 11th September 1933. After a lapse of about seven years after the afore, said reply of the Official Trustee the present notice of motion was taken out on 21st April 1944 on behalf of John Amador Barretto (one of the two Barrettos who had applied previously and who also appeared on the application of the Official Trustee) and Mary Theresa Rodrigues

and Annie Catherine Bocarro (the two Bisters of the said two Barrettos) praying for an order : (a) that the Official Trustee do make over to them the share of Luia Joseph Barretto in the amount unclaimed by any creditors in terms of the deed of trust dated 10th March 1827 and (b) if necessary, for a declaration that the petitioners are the only surviving descendants of the said deceased. It appears from the petition used in support of the present application that the said Joseph Nicholas Francis Barretto died a bachelor and intestate on 24th September 1928 leaving the present petitioners his only heirs and legal representatives. The application is opposed by the Official Trustee.

16. I have already referred to the terms of the decree of 1878 in Suit No. 232 of 1876. To recapitulate, there were four schedules annexed to the said decree. In Sch. "A" to that decree was set out a list of admitted original creditors and the amounts due to them respectively. Those creditors were then classified into three groups and named in Schs. "B", "C" and "D" thereto, Sch. "B" containing a list of those original creditors who had not received the first three dividends in whole or in part, Sch. "C" containing a list of those original creditors who had not come in in that suit and Sch. "D" containing a list of those who had come in in that suit. After the passing of the said decree and on the basis thereof the Official Trustee closed the trust accounts on or about 31st May 1881. Ameer Ali J., construed the said decree of 1878 and the schedules thereto in the light of the authorities referred to in his judgment delivered on the Official Trustee's application for directions made in that Suit No. 232 of 1876. The learned Judge held that by the decree of 1878 the Court had "found" all the creditors named in Sch. "A" thereto and "allowed" their claims and that the trust funds had been specifically allocated to those creditors classified in three groups set forth in Schs. "B", "C" and "D" thereto. Having arrived at that conclusion the learned Judge logically had to and did hold that there was no resulting trust in favour of the settlors or their representatives. It appears that at the adjourned further hearing before the learned Judge on 27th August 1932, learned counsel appearing for the two Barrettos asked the learned Judge to add the words "at present" at the end of the sentence "there is no resulting trust in favour of the settlors or their representatives." All that the learned Judge was prepared to say was that, as a matter of course, his judgment had been given upon the facts and circumstances then before him and that he had not considered the future or possible future eventualities., The last observation is hardly anything more than a mere truism if I may say so without any disrespect and cannot be construed as an expression of his opinion that a resulting trust will or even may arise in future. Indeed in the order as drawn up there is no manner of reservation or qualification to his decision that there was no resulting trust in favour of the settlors or their representatives. Ameer Ali J. did not stop at merely finding that there was no resulting trust but went further and implemented his finding by giving directions to the Official Trustee to correct the apparent errors in the scheduler to the said decree of 1878, to recalculate the dividends on the basis of correct figures and to prepare fresh schedules showing the amounts actually due to the different

creditors named in Schs. "B","C" and "D" not only in respect of their original claims but also in respect of their respective shares in the accretions to the funds allocated to the respective schedules. In accordance with these directions, the Official Trustee prepared fresh, schedules correcting the errors in the old schedules and showing the respective original claims, the payments received by way of dividends and the amounts due in respect of the original claims and their respective shares in the accretions. The total nett accretions to the trust funds less the amounts paid or set apart for costs were allocated to the creditors in the three new several Schs. "B", "C" and "D" annexed to the order of Ameer Ali J., as I have mentioned and the proportionate fund allocated to each of the schedules was again sub-apportioned amongst the creditors named therein and carried to separate accounts in the names of the respective creditors. The funds standing to the credit of each creditor became the absolute property of such creditor and there could be no possibility of any resulting trust in favour of the settlors or their heirs.

17. Learned counsel appearing for the petitioners has strongly criticised the soundness of the reasonings adopted by the learned Judge in coming to the conclusions that he did. While I appreciate the cogency of some of those criticisms I am not, however, convinced, for reasons hereinafter stated, that in the circumstances of this case the learned Judge's findings were erroneous or unfounded in principle or in, fact. Even if I had any doubt as to the meaning, scope and effect of the decree of 1878 and the schedules thereto, I have no doubt whatever in my mind as to the meaning, scope and effect of the judgments and orders of Ameer Ali J. Whether or not the Court which passed the decree of 1878 "found" the creditors named in Sch. "A" thereto and "allowed" their respective claims irrespective of whether they had come in or not, it is clear to me that Ameer Ali J. certainly "found" the creditors and "allowed" their respective claims and directed the trust funds and the accretions thereto to be apportioned to the creditors. I regard the allocation of the funds by the decree of 1878 and particularly the allocation of the funds including even the nett accretions that accrued since 31st May 1881, to the several schedules and the sub-apportionment of such allocated sums amongst the creditors named in each schedule as very significant and clearly indicative of their absolute right thereto. The Official Trustee first implemented the directions of the Court given by the decree of 1878 and closed the trust fund in 1881 and again carried out the directions of Ameer Ali J., by preparing fresh schedules and making allocations amongst the creditors named therein. It seems to me that such allocation and carrying over of the funds to separate accounts amount in law to a payment to those creditors of the sums set opposite to their respective names in due course of administration of the trust created by the deed dated 18th March 1827, for which Suit No. 232 of 1876 had been instituted. After such allocation and apportionment there remained in 1881 and there remains now no surplus in the hands of the Official Trustee in respect of which a resulting trust may arise. I now proceed to consider the criticisms of learned counsel and the arguments in

support thereof.

18. Learned counsel for the petitioners contends that carrying over of the funds to separate accounts either under the decree of 1878 or under the orders of Ameer Ali J., is not at all conclusive and decides nothing and strongly relies on the case in (1923) 2 Ch. 205 *Thompson v. Thompson* (1923) 2 Ch. 205 : 92 L. J. Ch. 544 : 129 L. T. 461 in which it was held by Sargant J. that an order in an administration action directing that a fund in Court should be carried over to a separate account did not amount to a definite and conclusive ascertainment and declaration of right so as to operate as *res judicata* and deprive the person really entitled of the fund in favour of the persons named or indicated in the title of the separate account. That case appears to me to be clearly distinguishable. In the first place the order made in that case directing the fund in Court which was over ?1000 was so made by a Master on summons in chambers which under R. S. C. O. 55, R. 2 he had no jurisdiction to make. In the next place the order directing the fund to be carried to a separate account was made in that case merely for facilitating administration and not after a decision of the rights of parties. Sargant J. recognised the distinction and explained the case in (1883) 22 Ch. D. 182 *Peareth v. Marriott* (1883) 22 Ch. D. 182 : 52 L. J. Ch. 221 : 48 L. T. 170 : 31 W. R. 68 on that basis. In my judgment the decree of 1878 and certainly the judgment and orders of Ameer Ali J. adjudicated upon the rights of the creditors and the next of kin. The decree of 1878 was made after due advertisement for all persons interested and those who did not appear are yet bound. In any case the next of kin did appear before Ameer Ali J. and unsuccessfully put forward their claim both under the deed and outside the deed. In these circumstances the allocation of the funds to the several schedules and thereafter carrying over the proportionate shares to the separate accounts of the respective creditors in each of the schedules such as has been done in this case were not merely done for facilitating administration but was done after adjudication of the rights of the creditors and next of kins of the settlor and in due course of administration of the trust for which suit No. 232 of 1876 had been instituted. The decree of 1878 and certainly the judgment and orders of Ameer Ali J. operated to wind up the administration of the trust created by the deed of 1827 and created a new trust and the Official Trustee is in contemplation of law, holding the respective amounts in trust for the respective creditors not under the original trust but under the trust created by the said decree and orders.

19. Learned counsel for the petitioners next contends that the decree of 1878 and the orders of Ameer Ali J. are not conclusive and cannot affect the rights of the petitioners. It is pointed out that the decree of 1878 and the orders of Ameer Ali J. were made in a creditor's administration action in which the rights of the next of kin could not be put in issue or adjudicated upon, Reference was made to several decisions and text books and the annual practice indicating the distinction between a creditor's administration action and a legatee's or heir's administration action. It is not necessary for me to discuss the authorities, for I consider that the arguments on this point are founded on a misapprehension of

the true nature and scope of Suit No. 232 of 1876. That suit was not a suit for the administration of the estate of a person who died testate or intestate. It was a "suit to have the trusts of an indenture of the tenth day of March one thousand eight hundred and twenty seven ascertained and declared, for an account" as the heading of the preliminary decree dated 30th November 1876 passed in that suit shows. In the cause title the plaintiff was no doubt described as suing on behalf of himself and of all other creditors of Luis Joseph Barretto and Edward Brightman, who executed the indenture within mentioned "yet in truth and substance it was a suit by a beneficiary on behalf of himself and other beneficiaries against the trustee for administration of the trust." It was not. what is commonly understood as a creditor's action for administration of the estate of a person dying testate and intestate. It was purely a suit by a beneficiary under a deed of trust made inter vivos for the administration of the trust and, therefore, for the benefit of everybody who claimed any interest under the deed of trust. The settlor or his representatives in so far as they claimed the unexhausted residue under or in terms of the deed were certainly beneficiaries and could properly come in in the suit and put forward their claims. In fact two of the Barrettos who claimed as next of kin of Luis Joseph Barretto did come in in that suit for administration of trust and appear before Ameer Ali J. and their claims under the deed were put in issue and were definitely decided against them and on such adjudication in their presence the funds were allocated to and carried to separate accounts of the creditors beneficiaries. They are, therefore, certainly bound by the orders of Ameer Ali J. One of the two Barrettos is one of the present petitioners. The petitioners are also the legal representatives of the other Barretto who has since died intestate and as such they are also bound by the orders of Ameer Ali J.

20. It is said that the two lady petitioners have independent rights as heiress or next of kin of the said Luis Joseph Barretto and they did not appear before the Court in 1878 or before Ameer Ali J. and therefore are not bound by the decree of 1878 or the orders of Ameer Ali J. In so far as these ladies claim under or in terms of the deed they are beneficiaries thereunder. Advertisements were issued prior to 1878 and again pursuant to the order of Pearson J. dated 3rd September 1931 inviting "all persons claiming to be interested in a trust deed executed for the benefit of creditors of the above-named firm of Messrs. Joseph Barretto & Sons, dated the 10th day of March 1827." There is no allegation that these ladies had no knowledge of the aforesaid advertisements. They did not appear. The Court was free after proper advertisements to "allow" the claims of such of the beneficiaries as it could "find" and in fact the Court did allocate the funds including all accretions to the creditors beneficiaries named in the several schedules and then sub-apportioned the portion allocated to a particular schedule amongst the creditors named in that schedule and carried over the funds so allocated to each creditor to a separate account in his name. This, to my mind, is nothing short of distribution in the eye of the law and all persons interested are bound thereby. An argument has been advanced that the next of kin of the

settlers had in 1878 and the present petitioners now have a claim de hors the deed, namely, by way of resulting trust to the surplus left after satisfying the claims of the creditors and that claim was not and indeed could not be adjudicated upon in that suit. There are several answers to that argument. In the first place by the decree of 1878 as construed by Ameer Ali J. the Court had "found" the creditors and "allowed" their claims and allocated the funds amongst the creditors so "found." At that time there was no surplus. Indeed the available funds were insufficient to meet the claims of creditors in full. By such allocation the funds, which were not sufficient to meet the claims in full and, therefore, left no surplus, became the absolute property of the creditors to whom they were allocated and the trust fund was closed in May 1881. Accretions since May 1881 logically, therefore, enured for the benefit of those creditors. That is what Ameer Ali J. decided by his judgment and orders to which I have referred and that is what has been done by him by his orders. In this view of the matter the trust of 1827 has been fully administered and there remains no surplus of that trust in respect of which a resulting trust may arise in favour of the settlers or their representatives. In the second place in so far as the claim of the present petitioners is by way of a resulting trust de hors the deed, it is not an express trust and, therefore, the claim must be barred. At the date of the order of Ameer Ali J. the funds exceeded the original claims of the creditors as is apparent from the affidavit of the Official Trustee to which were annexed the several fresh schedules I have mentioned. The resulting trust, if any, therefore, arose at that time if not earlier and is now barred. In the third place two of the Barretts did appear and put forward this claim which was rejected.

21. It is pointed out that in Suit No. 282 of 1876 there was no such community of interest within the meaning of O. 1, R. 8, Civil P. C., between the plaintiff and the other creditors on one side and the settlers or their representatives on the other as would make any order in that suit binding on the latter as *res judicata*. Indeed, it is said that their interests were conflicting and their claim outside the deed could not be gone into in that suit. In so far as the representatives of the settlers claim to stand in the shoes of the defaulting creditors under the provisions of the deed to which I have referred they were beneficiaries under the deed just as the other creditors and they could properly come in in that suit. If there was conflict of interest the trustee was there to represent them. In any case at the hearing before Ameer Ali J. they were separately represented and protected their own interests. If the two lady petitioners did not appear in their own rights in spite of advertisements they cannot be heard to complain. The administration by the Court cannot be held up by reason of the absence of persons claiming to be interested under the deed of trust in spite of notice. In so far as they claim outside the deed by way of resulting trust they must wait until the trust is fully administered for their claim must be limited to the surplus that may be left over after the claims of the creditors beneficiaries are satisfied in the administration suit. I have said that by the decree of 1878 the funds, which were then insufficient to meet the claims of the creditors in full, were distributed by

allocation and became the absolute property of the creditors and the trust funds were closed in May 1881. There remained no surplus under that trust. The subsequent accretions enured for the benefit of the creditors to whom the funds had been allocated. There being thus no available surplus under the original trust there can be no question of any resulting trust. In this aspect of the matter it is not a question of *res judicata* at all. It is a question of want of surplus by reason of the distribution of the funds by allocation and carrying over to separate accounts of adjudication of the rights of the creditors beneficiaries in due course of administration of the trust by the Court and there is nothing in respect of which a resulting trust can arise. There can be no doubt that in that suit for administration of the trust the Court could distribute the funds amongst those who were found entitled to participate therein and that is what the Court has done and nothing more. From this point of view the petitioners may not be bound by the decree as *res judicata* but they are bound to accept the fact that as a result of administration by the Court having jurisdiction in that behalf the trust funds have been effectively distributed and there is no surplus and therefore there is no room for any resulting trust.

22. It is said that at the date of the decree of 1878 the claims of the representatives of the settlors by way of resulting trust outside the deed were only contingent and, therefore, they could not come in in the administration suit and that now that final advertisements have been issued a new cause of action has accrued to them. The argument appears to me to be fallacious. In the first place by the decree of 1878 the funds which were then insufficient were distributed in the sense I have explained and the subsequent accretions belong to the creditors and there is nothing to which a fresh cause of action may attach. In the second place at the date of the orders of Ameer Ali J. the original funds and accretions, assuming the original trust had not been fully worked out by the decree of 1878, were more than sufficient to meet the original claims of all creditors and certainly of those who had appeared. Therefore, there was a surplus then, i. e., in 1932/1933 and the cause of action, if any, of the representatives of settlors arose then, if at all and being founded on a resulting trust and not on an express trust under the deed is barred by limitation. In the third place advertisements were issued under order of Pearson J. and the two Barretts did appear and put forward both claims, under the deed and outside the deed, but the Court disallowed the claim. Finally no new cause of action has arisen. The surplus accrued before the dates of the orders of Ameer Ali J. and the subsequent augmentation of that surplus furnishes no new cause of action. A comment is made that if Ameer Ali J. really held that the next of kin of the settlors had no possible claim then or in future and intended to give the entire fund to the creditors irrespective of whether they ever come forward to claim the same, why did he direct fresh advertisements to issue inviting the next of kin to come forward. By cl. (9) of the order of 27th August 1932 Ameer Ali J. gave to the Official Trustee "liberty to advertise at his discretion for creditors or next of kin or other persons who may be entitled to the said funds." Having regard to his

Lordship's decision that the funds and the accretions be alike allocated to the different creditors in their individual accounts and that there is no resulting trust in favour of the settlors or their representatives it is doubtful whether by "next of kin" the learned Judge meant the next of kin of the settlors or those of the creditors. Further assuming the learned Judge meant to issue advertisements addressed to the next of kin of the settlors and that the Official Trustee actually carried out such directions such advertisements cannot, in my opinion, be founded upon for establishing a right which otherwise does not in law or in fact exist. Invitation to come in does not tie the hands of the Court and compel it to allow the claim if it has no legal foundation.

23 In the view I have taken it appears to me to be quite unnecessary to discuss the question whether the time limit fixed by the deed for the creditors to execute the deed or to accede thereto or whether the gift over to the settlors themselves was valid or binding. In view of the wide powers of the trustee to admit or compound the claims of the creditors the question of construction of the final provision of the deed at p. 17 of Part I of the bundle of documents becomes unnecessary. Indeed these wide powers were, amongst other things, relied on by Ameer Ali J. as cogent reasons for construing the decree of 1878 in the manner that he did, namely that the Court in 1878 had on the admission of the trustee "found" all the original creditors and "allowed" their claims to the extent of the amounts set opposite to their respective names. In any case by his own orders Ameer Ali J. had so "found" and "allowed" and the funds and accretions allocated to the creditors and carried over to separate accounts have gone out of the trust of 1827 and become the properties of those to whom they were allocated. On a consideration of the facts and circumstances of this case and in spite of my sympathies for the present petitioners I am constrained to hold that by reason of the decree passed in 1878 after due advertisements for all persons interested, the closing of the trust, account in May 1881, and particularly by reason of the judgment and orders of Ameer Ali J. to which I have referred and which were passed after due advertisements and in the presence of the two Barrettos and in the absence of the two ladies who did not come in in spite of the advertisements on both occasions the claims of the petitioners in so far as they are founded on the deed of trust dated 10th March 1827 are concluded and negatived thereby and in so far as they are based on a resulting trust outside the deed cannot be maintained for want of subject-matter brought about by the distribution of the funds by allocation and carrying over to separate accounts of the creditors after adjudication of their rights and for lapse of time. In my judgment this application must, therefore, be dismissed. The costs of both parties as of a hearing will come out of the funds in the hands of the Official Trustee which have been set apart for costs. Costs will be allowed as between attorney and client including fees actually paid to counsel irrespective of the rules of taxation but not exceeding 25 Gold mohurs per day for leading counsel and proportionate fees for junior counsel. As regards the petitioners fees of a third counsel should also be allowed but not briefing charges therefor. These directions are given at the request of the

Official Trustee.