

(1935) 12 BOM CK 0001
In the Bombay High Court
Case No : O.C.J. Suit No. 1700 of 1931

Kissondas Premchand

APPELLANT

Vs

Jivatlal Pratapshi and Co.

RESPONDENT

Date of Decision : 20-12-1935

Acts Referred:

Succession Act, 1925 — Section 323

Citation : AIR 1936 Bom 423 : (1936) 38 BOMLR 864

Hon'ble Judges : Rangnekar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Rangnekar, J.—This is an action the like of which I have never heard of and in support of which no precedent can be or has been produced. Counsel in the case tell me that one of the questions raised by it has not yet come up for decision in any Court. The claim in the suit is for a redistribution of the fund paid over by the Court to the creditors of a deceased person whose estate was under its administration, and it is made by one creditor who has not received his rateable share in the distribution of the fund against the other creditors.

2. The plaintiff was carrying on business in Bombay till 1927. He had entered into various transactions for the sale and purchase of cotton for April-May-December, 1926, and January, 1927, validas with one Noorani in Bombay. Noorani committed suicide on or about October 8, 1926. At the time of his death he was indebted to the plaintiff, as a result of the transactions, in the sum of Rs. 18,762-3-6.

3. Three days after Noorani's death, defendants No. 1 in this suit brought an action on behalf of themselves and all other creditors for the administration of his estate against his son under the provisions of Order I, Rule 8, Civil Procedure Code. The usual notices, as required by law, were published which, the plaintiff alleges, never came to his knowledge. On March 6, 1930, there was a decretal

order of reference, which inter alia directed the Commissioner of this Court to take an account of the debts due by Noorani. In pursuance of this order, the Commissioner invited claims against the estate of Noorani. A notice for this purpose was published in the Bombay Samachar of July 1, 1930, and in the Times of India on July 2, 1930. The plaintiff says that this notice, too, never came to his knowledge.

4. The Commissioner made his report on September 4, 1930. On October 6, 1930, he was directed to investigate some further claims which came in, which he did, and made a further report on November 5, 1930. On November 10, 1930, a decree was made confirming the two reports, which inter alia declared that defendants Nos. 1 to 7 in this suit were the only creditors of Noorani for the amounts mentioned against their names in the first schedule to the decree and directed the Commissioner to make a rateable distribution among these creditors, except defendant No. 7, as the assets left by Noorani were insufficient for a full payment, and as to defendant No. 7 it was provided by the decree that Mr. Moos, who was the receiver appointed in the suit, should retain a sum of Rs. 7,500 in order to meet the claims of defendant No. 7 in this suit, who meanwhile had filed a suit for the recovery of his debt.

5. Accordingly, on March 7, 1931, the Court Receiver, Mr. Wadia, who by subsequent orders of the Court was substituted in place of Mr. Moos, paid a dividend of twelve annas in the rupee of the amounts mentioned in the schedule to the said decree to defendants Nos. 1 to 6 in this suit; and on July 23, 1931, he satisfied the claim of defendant No. 7 out of the sum of Rs. 7,500, which, as stated above, had been retained for him.

6. The plaintiff alleges that he had no knowledge of the decree at the time it was passed and came to know of it in March, 1931. He says he immediately caused his attorneys to write to defendant No. 8, who is the Court Receiver, not to distribute the moneys in his hand, to which the receiver replied that he was bound to carry out the orders of the Court. By his attorneys' letter dated March 6, 1931, the plaintiff requested the receiver not to proceed with the distribution so as to give an opportunity to the plaintiff to establish his claim. This letter, as the record shows, was received in the receiver's office by the 1st assistant to the receiver on the same day. He thereupon made an endorsement on the letter asking an assistant who attended to this matter to note the request of the plaintiff and to inform all the parties of it. In spite of this, the receiver made the payment on March 7, 1931, as no order from the Court had been obtained restraining him from carrying out the earlier orders of the Court. The receiver made an endorsement at the foot of this letter in these terms : " Received by me on March 9, at 11-50 a.m." and initialled it. In my opinion, this endorsement is entirely unmeaning and unnecessary. The letter having been received by the receiver in his office on March 6, it was absurd to say that the receiver received it on the 9th. Even if he had made no such endorsement on the letter, he would have been perfectly justified in proceeding to distribute the moneys in his hands

as the plaintiff had taken no steps to obtain an order from the Court restraining him from so doing. It was open to the receiver, after the receipt of the letter of March 6, to stay his hands in his discretion; but he was not bound to do so, and he would have been perfectly safe even if he had proceeded to distribute the fund in spite of the plaintiff's letter without making an absurd endorsement of this nature on the letter. I need not pursue the matter further, as the conduct of the receiver does not in the slightest degree make any difference to the questions which I have to determine in this case.

7. This suit was filed on September 9, 1931. It appears that, prior to the institution of this suit, defendants No. 9 in the present suit took out a chamber summons in the administration suit for an order that the suit should be referred back to the Commissioner to investigate their claim against the estate of Noorani and to make a further report. This summons was, by an order made on March 2, 1931, adjourned into Court. Meanwhile, the plaintiff, after the institution of his suit, took out a notice of motion on November 17, 1931, for an injunction restraining the receiver from making any further payments out of the moneys in his hands and the creditors receiving any portion of their claim. The plaintiff alleges that in spite of this notice of motion defendants No. 9 went on with their summons, and as a result of it, it was found that a sum of Rs. 6,650 was due to them, and they withdrew from the receiver a sum of Rs. 4,987-8-0 being a dividend of ten annas in the rupee of their claim.

8. It also appears that prior to the institution of the plaintiff's suit, defendants No. 10, alleging themselves to be creditors of Noorani, took out a notice of motion in the administration suit for a relief similar to that prayed for by defendants No. 9 in their chamber summons. This notice of motion was heard, and the claim of defendants No. 10 was referred to the Commissioner for taking accounts to investigate the said claim. By an order made on January 7, 1932, defendants No. 10 were allowed to receive the amount of the dividend payable to them, and this order was made without prejudice to the contention of the plaintiff that the amount (if any) paid to defendants No. 10 should be treated as if it was retained in the hands of the receiver and not taken away by them.

9. Under these circumstances, the plaintiff says that defendants Nos. 1 to 7 and 9 are not entitled to receive the amounts which have been paid out to them and submits that he is entitled to a decree against them for refund. He further says that he accepts the report of the Commissioner made in the administration suit as regards the property and estate left by Noorani and accepts the same as binding on him but submits that he is entitled to a redistribution of the assets on the footing of all the creditors of the estate being ascertained and to a pro rata refund of the amounts paid to defendants Nos. 1 to 7 and 9. In any event, the plaintiff submits that he is entitled to have the amount lying in the hands of the receiver to the credit of the said estate on January 7, 1932, rateably distributed between him and defendants No. 10 in proportion to their respective claims against the estate, and, of course, subject to the order made on the notice of

motion taken out by defendants No. 10.

10. The answers made by defendants Nos. 1, 2, 3, and 6 and adopted by others are : (1) That a suit of this nature is not maintainable. (2) In any event, the plaintiff is guilty of gross delay and laches as he was aware of the suit and the decree, the advertisements published inviting claims and the notices given under the suit and all further proceedings taken thereon. (3) The suit is barred by the law of limitation. The defendants by their written statement had also contended that they do not admit that the plaintiff was in fact a creditor of Noorani; but at the hearing they have, for the purposes of this case, abandoned the contention, and the plaintiff now has to be treated in this suit as a creditor of Noorani.

11. It would be convenient to deal first with the question of gross delay and laches. The plaintiff is an educated man, a Rai Bahadur, and was doing business in Bombay for at least five or six years prior to 1926. In the beginning of 1927 he was in debt and had many creditors and was, in the middle of the year, declared a defaulter on the Cotton Exchange under the rules of the East India Cotton Association. Although he denies that he knows Gujarati, I have no doubt he is telling a falsehood. His accounts were kept in Gujarati, and he certainly can speak Gujarati. He denies knowledge of that language, because it was put to him that he used to read Gujarati papers and in one leading paper in that language the notice of the Commissioner inviting claims was published, as also the notice of the suit. As stated above, he denies all knowledge of the institution of the suit and the proceedings taken under it. Moneys became due from Noorani on October 1, 1926, and he sent his sub-broker and his Munim to Noorani's office to demand payment up to October 8, when Noorani committed suicide. It soon became known in the market that Noorani had failed and had many creditors who, the plaintiff admits, were pressing for payment of their claims. After Noorani's death, the plaintiff went to his pedhi once or twice, and his sub broker and Munim also used to go there. The administration suit was filed on October 11, and on the same day, an interim receiver was appointed, and Noorani's office was sealed and possession taken by the receiver. The receiver was confirmed on October 20. The plaintiff admits that he had seen Noorani's Mehta about two or three days after Noorani's death. He is careful to limit this up to October 11; but I have no doubt he must have gone to Noorani's office many times to see what the position was, particularly as he had a large claim against Noorani and he himself was in monetary difficulties. He admits that he understood from his sub-broker that when all the creditors of Noorani would be called for distribution from his estate he would get his share, and he says he thought that the heirs would sell the estate, but he admits he made no enquiries who the heirs were and whether the property of Noorani was subsequently sold. Now, this is a statement which I find difficult to accept, as later on he says he knows the practice of this Court in insolvency or otherwise, particularly as to the filing of claims in insolvency and before the Commissioner; and yet he left Bombay on December 1 or 2 and did not return till February, 1927. His explanation that he went to his native place because of his daughter's marriage

may or may not be true, but he does not account for his long absence for nearly three or four months, having regard to his position at the time. When he left Bombay, however, he left two Munims in charge of his affairs, and his brother, upon whose information he ultimately acted and took these proceedings, was admittedly in Bombay. Between 1927 and 1931 the plaintiff himself used to be mostly in Bombay. He settled with his creditors, and he admits that he used to do business in Bombay, though, he says, it was on a small scale. During this time he had a suit in this Court which went on from 1927 to 1929. It is a fact of general knowledge that Noorani's death had created a sensation in the market as he was a very large trader and it was generally known what was happening in regard to his estate. Apart from that, it is impossible to believe the plaintiff when he says he was entirely ignorant of what was happening, and of the administration suit. From what I have seen of him I disbelieve him altogether, and under the circumstances hold that he was fully aware of the suit and the proceedings under it, and took no action. It may be asked why then he did not come forward all this time. One explanation seems to me that he was playing a hide-and-seek game with his own creditors, and that in the first instance he ran away to avoid them. This was put to him but denied by him. There may be more than one explanation of his conduct, but I do not wish to speculate. It is impossible to hold on the facts before me that a person in his position would do nothing and forego a large claim apparently for nothing. It seems to me that his carrying on business in Bombay although he was declared a defaulter may have something to do with the game which he was playing, and it was only after he settled with his own creditors that he found courage to come forward. Then, again, his brother, on whose information he acted, is not examined, and there is nothing to show how he came to know that dividends were being paid. The letter which he wrote and the telegram which he sent are not forthcoming. The telegram which the plaintiff sent in reply, in which he says that his claim was "not admitted", suggests that he knows the practice of admission and rejection of claims by the Commissioner. But, then, if he came to know in February of the fact that dividends were about to be paid by the receiver, there is no satisfactory explanation as to why the suit was not filed till September, 1931, some five months after he came to know that in fact the receiver had made certain payments to the creditors under the administration decree. Beyond writing the letter of March 6 he did nothing. It is difficult to understand why for all these years he himself took no action in his own interest, particularly as he knew that Noorani had died in insolvent circumstances. It was open to him as a creditor to take legal proceedings and bring a suit for administration of Noorani's estate, at any rate when he realized that nothing was done by the heirs. He must have known that time would be running against him. His explanation that he thought he would be sent for by the heirs when they started distributing the assets of Noorani among the numerous creditors of Noorani seems to me to be unsatisfactory and unconvincing. As I have pointed out, it is difficult to understand what he was doing between February and September. There is no satisfactory explanation of this. He cannot explain satisfactorily why he did not

come in under the administration decree and ask for a stay order immediately on his coming to know that dividends were being paid, particularly as two other creditors having come to know at such a late period of what was happening with regard to Noorani's estate did come forward and received payment in regard to their claims. His solicitors had given him proper advice as appears from the telegram his brother sent under their advice. He did nothing till September and then launched this substantive suit. Upon these facts I hold that he was guilty of gross delay, negligence and laches, as on his own admission he does not seem to have made the slightest enquiry all these years to ascertain the position of Noorani's estate and to see that his claim was paid.

12. Mr. Bilimoria, who has now left the bar and who has argued this case with ability, says that no question of negligence, delay or laches can arise in the suit, if the plaintiff has a cause of action, and that the only question would be whether there is any bar of limitation. He says that the issue of laches and delay would arise only if the plaintiff had come under the administration decree to prove his debt and for a rateable distribution, and the only question in this suit is whether it is barred by the law of limitation. I do not agree. What the plaintiff wants in this suit is that the estate should be redistributed. There is no statutory law which he can invoke. All that he can say is that by analogy of certain provisions under the Indian Succession Act, to which I shall turn at the proper stage, he is entitled to have a rateable distribution and a refund from the creditors who had been paid under the administration decree. Now, it is clear on the authorities that such a claim is purely an equitable claim in its nature and the relief claimed is also equitable, and a Court of Chancery always rejects a claim of this nature if the claimant is proved to be guilty of laches, negligence or gross delay.

13. Now, delay in seeking an equitable remedy is technically called " laches ". So far back as 1767 Lord Camden in *Smith v. Clay* (1767) 3 Bro. C.C. 646 observed as follows (p. 640) :-

A court of equity. has always refused its aid to stale demands, where the party has slept upon his right and acquiesced for a great length of time.

" Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence;...

In *Sawyer v. Birchmore* (1836) 1 Keen 391 it was argued that the case of *David v. Frowd* (1833) My. & K. 200 established the principle that the decree in a suit for the administration of an intestate's estate does not declare the rights of the parties, and is consequently no final decision against the rights of those who may claim to be next-of-kin against persons who have been found by the Master to be the next-of-kin, and among whom the intestate's estate has been actually distributed. On the other hand, it was argued in that case that the plaintiffs had full notice of the proceedings, and although they knew the consequences of their neglect, they voluntarily lay by and permitted the fund to be distributed. The Master of the Rolls, Lord Langdale, observed as follows (p. 403) :-...

Whether the Plaintiffs have now proved that they are next of kin, has not been discussed before me; nor is it necessary; for, under the circumstances to which I have adverted, considering the knowledge which the Plaintiffs had of the former proceedings; their neglect to go in and prosecute their claims; the lapse of time after distribution before the present suit was instituted; the failure of the Plaintiffs to establish any case of concealment, or intimidation; or any conclusive recognition by the Defendants of the validity of their claims, I am of opinion that the Plaintiffs cannot sustain the suit,...

This decision clearly establishes the principle that long delay and negligence of the plaintiff, which, in other words, amounts in the language of equity pleadings to " laches ", will disentitle a claimant to come in and establish his claim, even though that claim is not disputed. In *Hull v. Falconer* (1865) 11 L.T.N.S. 761 it was held that a creditor who has neglected to come in at the proper time and prove his debt in an administration suit cannot be allowed to disturb the dividend of the other creditors after an order has been made directing payment thereof. In the short judgment which the Vice-Chancellor delivered, he stated that the claimant in that suit had ample opportunity of coming in to prove, and, having neglected to do so, must take the consequences of her laches, and could not now be allowed to disturb the dividend of the other creditors. In that suit, it was in July, 1864, that an order to pay a dividend to certain creditors who had proved at the time was made. The claimant did not take any steps to prove her debt until October, 1864. *David v. Frowd*, on which Mr. Bilimoria relies in connection with another question in this case, was also a suit in which it was held that a creditor would succeed against the next of kin in his claim for a refund of rateable distribution provided he is not guilty of wilful default. I hold, therefore, that the plaintiff is not entitled to the relief he seeks in this suit, even if the suit is maintainable, by reason of his gross delay, negligence and laches.

14. Even if the plaintiff is not precluded from maintaining the suit by reason of his laches and gross delay, I have no doubt that the suit is clearly barred by the law of limitation; and that is the next question to which I shall now turn. In paragraph 2 of the plaint the plaintiff says that his debt became due at or about the time of the death of Noorani. In the particulars which he has annexed to the plaint he claims interest on the amount from October 1, 1926. In his evidence he admits that the moneys became due to him on October 1, 1926. The administration suit was filed on October 11, 1926, and the decree was made on November 10, 1930. At that time, therefore, under Article 115 of the Indian Limitation Act the plaintiff's claim was clearly barred, unless the suit for the administration of the estate of Noorani saved the claim from the operation of the Indian Limitation Act. Mr. Bilimoria, therefore, was constrained to argue that the mere institution of a suit for the administration of the estate of a deceased person saves limitation in favour of every individual creditor and time stops from running. But, it is clear on the authorities, to which I shall presently refer, that time does not stop running against an individual creditor by the mere fact that a suit for the administration of the estate of a deceased person is instituted. It

cannot be disputed that the institution of such a suit is not one of the circumstances which, under "the provisions of the Indian Limitation Act, would prevent time from running. There is no authority which is cited before me to show that the mere institution of a suit by a creditor for himself and other creditors for the administration of the estate of the deceased debtor would save limitation in favour of an individual creditor who is not in fact a party to the suit and who is not the plaintiff. The authorities are all the other way.

15. Proceedings for the administration of the estate in the Chancery Division may be commenced either by writ or by originating summons issued by a creditor or any person interested in the estate as legatee, devisee, next of kin or heir, or by the personal representative of the deceased himself. A creditor's action for administration need not under the present practice in England show on the face of it that it is brought on behalf of the plaintiff and all other creditors of the deceased; but a creditor at the date of the issue of the writ or originating summons must show, first, that the debt on which he sues is a debt of the deceased himself, and, secondly, that the claim is in time. This action, according to all authorities, can only be instituted by persons whose claims are not barred by any statute of limitation : *Barnes v. Glenton* [1899] 1 Q.B. 885. Then, the position of a plaintiff creditor in such a suit is described by *Williams on Executors and Administrators*, Vol. II, 12th Edn., at p. 1271, in these terms :-

Until an order for administration has been made the plaintiff is dominus litis, so that he may deal with the action as he pleases. He may settle the matter with the personal representative, by the latter paying the debt and costs of the action, and compromise the action and relinquish proceedings. Indeed, the Court will compel the creditor to accept payment of his debt if the personal representative offers to pay it with the costs of the action.

" On the other hand, after the usual judgment or order for administration has been obtained every creditor has an interest in the action, and is, in a sense, deemed to be before the Court. The present practice is to allow all creditors to come in under the order, whose debts have become due before the date of the report.

It is clear on the authorities that the Court is not bound to make an order for the administration of the estate if the questions between the parties can be properly determined without such order. (*R. S. C*, Order LV, Rule 10; *In re Blake : Jones V. Blake* (1885) 29 Ch. D. 913) The order may be refused, even if the testator has directed his executors to take proceedings to have his estate administered by the Court : *In re Stocken : Jones v. Hawkins* (1888) 38 Ch. D. 319. *R. S. C*, Order LV, Rule 10A, provides that upon an application for administration made by a creditor or a beneficiary under a will or on intestacy, where no accounts or insufficient accounts have been rendered, the Court may order that the application shall stand over for a certain time, and that the executors or administrators shall in the meantime render proper accounts to the applicant, with an intimation that if this is not done they may be made to pay the costs of

the proceedings; and to prevent proceedings by other creditors or other beneficiaries, the Court may make the usual administration order, with a proviso that no proceedings are to be taken under it without the leave of the judge in person. The same principles are laid down in Halsbury's Laws of England, Vol. XIV, 2nd Edn., para. 844, at p. 443 :--

Until judgment the creditor, though suing on behalf of himself and all other creditors, is dominus litis, and may deal with the action as he pleases : but the judgment enures for the benefit of all creditors, and the plaintiff creditor cannot subsequently thereto accept payment of his debt and allow action to be dismissed.

Then, at p. 449, para. 858, it is laid down that-

A judgment for administration prevents time from running against the claims of all creditors coming in under the judgment, but the mere institution of administration proceedings is not sufficient to effect this.

16. Mr. Bilimoria relies on *Sterndale v. Hankinson* (1827) 1 Sim. 393. That case, no doubt, is in his favour; but that case is no longer good law since the decision in *In re Greaves, Deceased: Bray v. Tofield* (1881) 18 Ch. D. 551. It was argued in *In re Greaves* that although the judgment in the administration action was not pronounced till after the expiration of six years from the date of the promissory note on which the claim was founded, yet the action was commenced within six years, and reliance was placed on *Sterndale v. Hankinson*. Jessel M.R. observed as follows (p. 553):-

Reliance is placed upon the case of *Sterndale v. Hankinson*, which was decided (in 1827, far too long ago for me to interfere with it now, even if it had not been approved of by Lord St. Leonards. I wish to point out first of all that that case has no application at all to the action before me; and, secondly, that creditors had better not rely upon that decision for the future.

The reason for this is set out at p. 554 in these words :-

In the first place, the Statute of Limitations did not affect Courts of Equity, because it only applied to what were commonly called common law actions. If any action is properly described by the statute of James, that statute applies to the action now before the Court, whether it is brought in one Court or another; and the statute is consequently binding upon the High Court-there is no question about that -in every case to which it applies. Bills in Equity have been abolished, and wherever it is an action to recover a debt upon a contract, the statute is binding upon the High Court in every case in which it applies.

On this point Williams observes at p. 1243 as follows :-

It appears to be now settled that an action for administration brought by one creditor (not on behalf of himself and all other creditors) does not save the claim of another creditor which was barred by the Statute of Limitations before

judgment. And it may perhaps be doubted whether at the present time the position would be different even though the one creditor sued on behalf of himself and all other creditors.

And the authorities cited in support of this statement are : (1) In re Greaves, Deceased : Bray v. Tofield (1881) 18 Ch. D. 551, to which I have referred, and (2) Berrington v. Evans (1835) 1 Y. & C. Ex. 434. In Lightwood's Time Limit on Actions, at p. 312, it is observed as follows :-

The writ only saves the statute for the purpose of the particular action which it originates.

Then, at p. 313, it is observed that-

In Ireland the case of Sterndale v. Hankinson was treated with more favour than here.

Then, dealing with other cases at p. 314 the following observations are made :-

For England, however, the rule in Sterndale v. Hankinson was abolished by Re Greaves, where Jessel, M.R., pointed out that the reasons upon which the rule was based had ceased to exist. The Act of 1833 had already imposed an express limitation in equity on judgment debts, and the effect of the Judicature Acts, he held, was to make the statute of James binding upon each division of the High Court as regards simple contract debts. Hence the Chancery Division was bound to apply the six years' limitation to such debts. Moreover, as regards actions for administration of personal estate, the action was not expressed to be on behalf of all creditors, nor under the present practice were there any considerations of expense which required that it should be treated as the action of all the creditors.

Then, later on, at the same page, it is observed :-

As soon, however, as a judgment is pronounced to the benefit of which the creditors generally are entitled, the statute ceases to run against those whose debts are not then barred. Every one who has a subsisting claim at the time of the administration judgment is entitled to participate in the assets.

The authority cited is In re General Rolling Stock Company (1872) L.R. 7 Ch. App. 646 the following observations occur :-

And where there has been a judgment for administration, it stops the statute, notwithstanding that a creditor, who has proved under the judgment, has to take an independent step, such as a petition for a sale, in order to obtain payment of his debt;... It is assumed that the creditor duly comes in under the judgment; otherwise he cannot rely upon it as stopping the statute in his favour.

The cases cited in support of this statement are : (1) re Ebbs' Estate (1893) 31 L.R. Ir. 95; (2) Berrington v. Evans (1835) 1 Y. & C. Ex. 434, and (3) Tatam v. Williams (1844) 3 Hare 347.

17. It is argued that the cause of action in this case is not debt but a right" to

refund, and the article of the Indian Limitation Act applicable would be Article 120. The answer to it is that if the plaintiff has no enforceable claim at the date of the suit as a creditor, it is difficult to see how he can "be said to be a creditor. It is difficult to see that he has any" cause of action if he is not a "creditor with" an enforceable "Claim. Then it is said that the plaintiff must be deemed to be a party to the administration action. Now, excepting the case of *Sterndale v. Hankinsorn* (1827) 1 Sim. 393 in which it was observed that a creditor, after the institution of an administration action, has an inchoate interest in such an action, there is no authority in favour of this proposition. It was pointed out by Mr. Justice Davar in *Vassonji Tricumji & Co. v. Esmailbhai Shivji* ILR (1909) 34 Bom. 420 : 11 Bom. L.R. 1054 that in an administration suit it is extremely undesirable that individual creditors should be added as parties unless they show some very strong reason, and that the mere willingness of the applicants to bear their own costs does not counterbalance the delay caused by the addition of a party and the consequent increase in the costs of other parties. Now, although a creditor may have an inchoate interest in such an action, he cannot be said, in my opinion, to be a party to such an action. This, as I have pointed out, is made clear in *Williams on Executors*. Cases in England have gone to the extent of holding that an individual creditor is not a party even though he appears in response to an advertisement. In the case of *Schwabacher, In re : Stern v. Schwabacher* [1907] 1 Ch. 719, an order had been made in a creditor's action for accounts and inquiries and the administration of the estate of S. A creditor whose debt had been admitted for ₹10,000 applied for leave to attend the proceedings at his own expense, or that he might at his own expense be supplied by the defendants' solicitors with a copy of the list of claims lodged in the action and copies of affidavits relating thereto, and that the defendants might be directed to give him notice of all proceedings to be taken under the order in reference to claims against the estate. It was held in that case that there was no power under the rules to give leave; that this was a matter for the discretion of the Court under the general power of the judge to manage the business in his own chambers; that general leave to attend the proceedings would impede the progress of business in chambers and ought not to be given. The rule relied upon by Mr. Justice Parker, which is rule 47 of Order XVI, is in these terms :

In any cause or matter for the administration of the estate of a deceased person, no party other than the executor or administrator shall, unless by leave of the Court or a Judge, be entitled to appear either in Court or chambers on the claim of any person not a party to the cause or matter against the estate of the deceased person in respect of any debt or liability.

Then the learned Judge observes that a creditor comes in under the advertisement for claims, but he is never made a party by service of notice of judgment, the reason being that if an individual creditor is allowed to be a party to these proceedings, the administration of the estate will be embarrassed in the greatest possible degree. *Williams* in his *Executors and Administrators* observes at pp. 1271-2 as follows:-

In an administration action no party other than the personal representative may, except by leave of the Court, appear either in Court or in chambers on the claim of any person not a party to the action. The Court may, however, direct or give liberty to any other party to the action to appear, either in addition to or in place of the personal representative, upon such terms as to costs or otherwise as it thinks fit.

Our own rule is contained in Order I, Rule 8, of the Civil Procedure Code, under which a representative suit is never allowed to be instituted except with the leave of the Court. Sub-clause (2) undoubtedly contemplates that a person on whose behalf or for whose benefit a suit is instituted may apply to the Court to be made a party to such suit. But it is clear on the authorities that the Court will not compel the plaintiff to add the persons on whose behalf he sues as co-plaintiffs. In *Vassonji Tricumji & Co. v. Esmailbhai Shivji* the suit was brought by a creditor for the administration of the estate of the deceased debtor, on behalf of himself and other creditors; one of the creditors applied to be joined as a party, and it was held that he should not be so joined unless the Court was satisfied that his interests would be seriously prejudiced if he was not so joined. This disposes of the contention that the plaintiff in this case must be deemed to be a party to the administration action, and, therefore, time will cease to run.

18. I may now refer to a contention which was advanced right at the end of the case. Mr. Bilimoria stated that the date as to when moneys became due from Noorani was wrongly given by the plaintiff in his plaint and in his particulars, and that the claim of the plaintiff against Noorani under the rules of the East India Cotton Association could not ripen until May, 1927, as the contract was of April-May 1927 *vaida*. He then applied formally for leave to amend the plaint and stated that the plaintiff's debt became due in May, 1927. The application was opposed. It seems to me that, having regard to the fact that the plaintiff was a defaulter, he certainly would not be entitled to take the benefit of the rules under which it may be that he would be entitled to recover those moneys in May, 1927, from Noorani. Apart from that, the application is made at a very late stage, and to grant the application would deprive the defendants of a vested right of pleading limitation against the plaintiff, and no Court under such circumstances would grant the amendment. But the fact remains that the plaintiff himself admitted in his evidence that the moneys became due on October 1, 1926, and that he went to demand the same from Noorani in his lifetime, and from his heirs and Mehta after his death. I, therefore, rejected that application. I hold, therefore, that the claim in the suit is barred by the law of limitation.

19. This leaves the most difficult question in the case as to the maintainability of a suit of this nature, to which I shall now turn. Mr. Bilimona bases his claim first on the rule contained in Section 323 and the proviso to Section 360 of the Indian Succession Act- Then he relies on the case of *David v. Frowd* (1833) 1 My. & K. 200, and on a passage in *Williams on Executors* and on *Daniel's Chancery Practice*, Vol. I, p. 899. He admits that none of these authorities create

specifically any right in favour of a creditor for a refund from other creditors when the estate has been administered by a Court of Equity as the result of which all other creditors who had proved their claim under the judgment for administration had been paid. But he says that the proviso to Section 360 assumes the existence of a right of a creditor or claimant to follow the assets. He then says that the legislature allows a creditor to go against a satisfied legatee, and it was a mere oversight on the part of the legislature not to have placed the creditor in the same position in relation to paid-off creditors.

20. In England whether the estate is administered out of Court or in Court, the administration involves three distinct duties, viz., collection of the assets, payment of the debts, and distribution of the surplus to the persons beneficially entitled. The property of a deceased person, which is liable to answer his debts, is called his assets. The position as to the order in which debts had to be paid in England was somewhat complicated, and at one time the order for priority was different according as the estate was administered in Court or out of Court; but since the Administration of Estates Act, 1925, came to be enacted, by Section 34 a uniform set of rules is laid down for the administration of an insolvent estate, and after payment of certain debts, such as the funeral, testamentary and administration expenses, the rule is that the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities, as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt. The general rule in bankruptcy is that all creditors must be paid *par passu*. Certain debts, however, are preferred debts, whereas others are deferred. According to the order of payment under the bankruptcy practice, after the payment of preferred debts which are not more than five or six, all other debts are paid *par passu*. As among creditors in equal degree, an executor has a right to prefer one to another. He may pay one in full although the payment leaves nothing for the others. If the personal representative distributes the estate among the beneficiaries without discharging all the debts and liabilities, any person who has a claim against the estate is entitled to "follow the assets", that is, he may sue any beneficiary, and claim payment from him to the extent of the assets received by him : *Hunter v. Young* (1879) 4 Ex. D. 256. By Section 32 (2) of the Administration of Estates Act, 1925, if the beneficiary has disposed of the property, he is personally liable for the value of the interest so disposed of by him. Very extensive powers are given to the Court by Section 38 of that Act for the enforcement of this right (to follow the assets on the application of any creditor. The right of following the assets is a purely equitable right, and the Court will not allow it to be exercised if the conduct of the creditor would render its exercise inequitable : *Blake v. Gale* (1886) 32 Ch. D. 571. An unpaid creditor has also a right to sue the personal representative and enforce payment of the debt against him to the extent of the assets which he has distributed, unless he

has administered the estate under the Court's direction, or has taken advantage of Section 27 of the Trustee Act, 1925, 15 Geo. V, c. 19, which allows him to advertise for creditors and distribute the estate after paying all debts of which he has notice. When a personal representative, after distributing the assets, is compelled to discharge a debt or liability of the estate, he has a right to call upon the beneficiaries to refund the amount of the assets received by them, or sufficient to indemnify him, if, at the time of the distribution, he had no notice of the debt, or in the case of a contingent liability, even if he had notice; but he has no such right if he distributed the assets with knowledge of the debt, and the right only extends to the recovery of the amount received by the beneficiaries, and not to interest on it.

21. Prior to the passing of Lord St. Leonard's Act, 22 & 23 Vic. c. 31, Section 29, which is now replaced by Section 27 of the Trustee Act, 1925, no executor could safely distribute the assets of his testator except under the direction of the Court which involved great expense and frequently great delay. Therefore, the statute came to be passed and provided that an executor after issuing certain advertisements might distribute the assets, and should not then be answerable for any more than he would have been if he had distributed them under the decree of the Court. Section 360 of the Indian Succession Act, which is. en passant it may be observed, in similar terms, affords relief to an executor or administrator who has distributed the assets after giving due notice on the expiration of the time mentioned therein and in ignorance of claims of which he had no notice. If the executor pays away the assets in legacies, and afterwards debts appear, of which he had no previous notice, and which he is obliged to discharge, he may compel the legatees to refund : see *Doe v. Guy* (1802) 3 East 120, 123; (Cf. Section 359, Indian Succession Act). A creditor's primary remedy lies against the executor and not the legatee. The Court of Chancery, however, in order to do justice and to avoid the evil of allowing one man to retain what is really and legally applicable to the payment of another man, devised a remedy by which, when the estate has been distributed, either out of Court or in Court, without regard to the rights of a creditor, it has allowed the creditor to recover back what has been paid to the beneficiaries or the next of kin : *Harrison v. Kirk* [1904] A.C. 1, 7. This right of the creditors, as I have pointed out, is purely equitable in England : *Blake v. Gale* (1886) 32 Ch. D. 571; and so equitable defences may be raised against the claim, e.g., laches, acquiescence. In dealing with the position of a creditor qua a legatee, Williams observes as follows (p. 986) :-

In what cases a creditor of the testator can call on a legatee to refund. An unsatisfied creditor, even though he may also be the executor, can compel a satisfied legatee to refund, whether the legacy was paid voluntarily or by compulsion. He has this right whether the testator's estate at the time of his death was, or was not, sufficient to satisfy both debts and legacies; and though the assets were] handed over to the legatee by the personal representative in ignorance of the creditor's demand.

The general principle governing the position of creditors of an estate under administration by Court was laid down in *Rose v. Sreemutty Biddadhurry Dassee* 9 C.W.N. 167, and it is this, that creditors will, on due cause shown, be let in at any time while the fund is in Court, and that, even where the money has been apportioned amongst the creditors and transferred to the Accountant-General for payment to them. If there be no wilful default, a creditor coming in afterwards will be allowed to establish his claim, and there will be rateable apportionment among creditors without preference or priority. But the default of a creditor guilty of remissness in the assertion of his claim will not be allowed to operate to the prejudice or inconvenience of others more diligent than himself. But if a creditor who, for some reason or other, has been excluded from a first dividend and later on has his claim admitted to the schedule so as not to disturb past dividends, and if further assets come in, then he is entitled to have a preferential dividend paid to him out of such assets before any further dividend is paid to others, who had already been paid. (*Snee v. Prescott* (1743) 1 Atk. 245).

22. The law and practice in England, to which I have referred, is, as far as I can see, reproduced with slight modification in our Indian Succession Act, with the exception of Section 323 which makes a wide departure. That section says-

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.

It seems to me that Section 323 merely lays down a rule of procedure that must be followed by an executor or administrator. It is clearly not applicable when a creditor who has obtained a judgment and decree against the estate of a deceased person applies to execute the decree against the estate in the hands of the legal representative of the deceased. (*Ma Min Dwe v. C. A. P. C. Shunmugam Chetty* (1912) 5 B.L.T. 288). This is clear from, another rule of procedure which is laid down in Sections 50 and 52 of the Civil Procedure Code. Section 50 is in the terms following :-

(1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased, which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

23. In other words, under this section, a decree-holder is entitled to execute the decree which he has obtained, against the legal representative of a deceased judgment-debtor, and such legal representative can only escape liability by saying either that no assets of the deceased judgment-debtor had come to his

hands, or that after they had come to his hands they had been duly applied in the course of the administration; but he is liable if he has wasted the assets come to his hands without satisfying the debts of the deceased. It is important to note that the liability in this case is of the legal representative, and it is limited to the property of the deceased which has come to his hands. It was held in *Venkatarangayan v. Krishnasami Ayyangar* ILR (1898) Mad. 194 that a decree-holder is entitled under the section in the old Act corresponding to this section to have the amount of the decree paid out of the assets of the deceased in the hands of the legal representative which have not yet been duly disposed of. Hence the legal representative 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. Then comes Section 52 of the Code which says-

Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property-of the deceased, it may be executed by the attachment and sale of any such property.

So that here at least is one instance of one creditor getting more than his rateable share than the other creditors where the assets are insufficient. If the executor pays the full amount of the decree, as he must under these provisions, out of the assets in his hands, it cannot be said that they were not duly applied though there are other creditors who have not been paid. This principle as to the rights of an execution creditor was first laid down in *Nilkomul Shaw v. Reed* (1872) 12 Beng. L.R. 287 by Chief Justice Couch who, incidentally it may be observed, was on the Committee which ultimately came to enact Section 282 of the old Succession Act, which corresponds to Section 323 of, the present Indian Succession Act. This decision was cited with approval by this Court in *Khusrubhai Nasarvanji v. Hormajsha Phirozsha* ILR (1892) 17 Bom. 637. It was also relied upon by the Calcutta High Court in *Omrita Nath Mitter v. Administrator General of Bengal* ILR (1897) Cal. 54. Then Section 322 clearly contemplates the priority of rights among creditors. After mentioning certain debts which have to be paid in priority, it says-

and then the other debts of the deceased according to their respective priorities (if any).

Then, u/s 323, what is of importance to note is that the liability of the executor to pay debts *par passu* is limited to the debts which he knows of. Rateable distribution is allowed by the section only among the creditors as the executor is aware of, and the legislature apparently has not dealt with the creditors of whom the executor had no notice or knowledge. What about them? Section 323, therefore, is nothing more than a rule of procedure which has to be observed by the executor in paying the debts of the deceased.

24. Mr. Bilimoria relies upon a dictum of Mr. Justice Chandavarkar in *Bai Meherbai*

v. Magmchand ILR (1904) 9 Bom. 96 : 6 Bom. L.R. 853. Having decided the appeal on the question of res judicata the learned Judge then observed as follows (p. 101) :-

This result is no doubt to be regretted, because it virtually gives preference to one creditor as against other creditors of the deceased's estate, whereas the rule of law is that they shall all share rateably. But the result is due to the fact that that rule of law has to give way in this case to another rule, i.e., the rule of res judicata,... We think that we must take this opportunity of impressing upon the Mofussil Courts the necessity of treating a creditor's action against a deceased person's estate as an administration suit and insisting upon the amendment of the plaint in such a suit on that basis. Where the plaintiff is not willing to amend, the Court if it finds the claim proved, should pass a "decree simply giving him a declaration of the debt due and a declaration besides that he is entitled to satisfaction of the decree according to law in due course of administration and not otherwise.

With all sincere respect to the learned Judge, I am unable to agree in these observations. The question of rateable distribution only comes in and becomes material when the assets are insufficient, and that is clear from the language of Section 323 of the Indian Succession Act. Then when a creditor sues a legal representative for a debt due by a deceased person, the Court is not in a position to know if the assets are sufficient or not. An administration action is not exactly a song which anybody may sing at any time. The mere fact that a representative suit is not allowed to be filed except under special circumstances and by special leave of the Court shows the danger of converting a simple creditor's suit into an administration action. But even if one were to file an administration action, the Court is not bound to make an administration decree or order. As I have pointed out from the authorities in England, the Court may refuse to pass an administration decree if the claim of the plaintiff who sues for administration is satisfied or is such that it could be disposed of without landing the estate into what may happen to be a protracted and expensive litigation. Why should, therefore, in the case of a simple suit by a creditor, he be asked to convert it into a costly and protracted litigation such as an administration action? Then, further, what about the procedure laid down in Order I, Rule 8, of the CPC ? As far as I can see, a representative suit cannot be instituted under the Code except under the provisions of Order I, Rule 8, and if the Court were to convert a simple suit by a creditor into a representative suit, other difficulties will arise. That is why Sub-section (2) of Section 50 empowers the Court in a proper case to compel the legal representative to produce his accounts, and it is clear that the Court has the power in a proper case to order accounts and to make inquiries for this purpose. To accept this dictum is entirely to nullify and ignore the rule of procedure laid down in Sections 50 and 52 of the Civil Procedure Code, which clearly contemplate a suit by a creditor against a legal representative for the debt of the deceased, or a suit against the legal representative for a debt created by the legal representative himself. The usual decree, which under the practice of

this Court is made in such a case, is to limit the decree to the assets of the deceased, if any, in the hands of the defendant, which means, of course, assets not duly applied for.

25. I now come to the proviso to Section 360. It is conceded that it does not create a right, but it saves one if the statute has given it. The statute has given a right as Section 361 and the sections which follow it show. Then why is there an oversight? If the legislature intended to give a creditor a right to proceed against other creditors, it would have said so. It cannot be argued that the legislature is ignorant not of any other law made by it anywhere else but of a section of the statute which it has enacted and which it has reproduced differently from the English law, when the rest of the statute embodies the whole of the English law. Besides I do not think it is open to a Court to accept an argument which is based upon an oversight of the legislature. In Vol. XXVII, at p. 146, para. 274, Halsbury observes as follows :

It is not competent to any court to proceed upon the assumption that Parliament has made a mistake, there being a strong presumption that Parliament does not make mistakes; and, as a rule, it is not permissible to supply omissions, even though they are evidently unintentional.

It is sufficient for me to say that the legislature has not said so, and, therefore, as far as I am concerned, there is an end to the whole argument. But what does the proviso say ? It says : " follow the assets." Now, this clearly is language which is commonly used in cases of trust property. I have already explained how that expression is construed under the English law. Dealing with this question, Williams observes at p. 1096 as follows :-

This may be a convenient place in which to "mention the right to follow assets. It has been shown in an earlier part of this Work (p. 569) that, in view of the wide powers of disposition vested in personal representatives, creditors and legatees have no right to follow assets into the hands of purchasers from the representatives.

" On the other hand, it is now clearly established that where the proceeds of the assets can be identified they remain subject to the trust, and can therefore be followed into the hands of the representatives and those claiming through them otherwise than for value.

I have also dealt with the right of the creditor to follow the assets in the hands of the legatees. Section 361 and the following sections clearly preserve a right of the creditor to go against a satisfied legatee for refund in the event of his debt remaining unpaid. This then being the English law, is there any reason why the same expression which was taken from the English law should be construed differently ? In my opinion, to do so would be to legislate. If it is said that unless you did that you cannot give effect to Section 323, I do not see why. That section, as I have pointed out, lays down only a procedural rule which has to be followed by executors. If an executor follows it and further follows the provisions

of Section 360, he is protected. If he does not, he is liable. Why should a creditor who has been vigilant and who has besides in his favour an order of the Court be made to suffer in favour of another creditor who has not come forward in time to claim his debt ? A creditor, as I have pointed out, has clearly a remedy to come in at any time and after any amount of delay, unless it amounts to gross delay or laches, under the administration decree itself, and claim a rateable distribution. Is there any special equity in favour of a creditor in the position of the plaintiff as against bona fide creditors who too give value for what they receive and actually receive less than the full value ? If the executor pays out of Court, the unpaid creditor has a remedy against him. He has also a remedy against the legatees for refund. If the Court pays other creditors, the creditor can come in under the administration decree at any time unless he is precluded from so coming. I think public interests require that Courts should administer estates as speedily as possible and that there should be a definite limit to such litigation, even though there may be an apparent hardship in a particular instance. Interest republicae at sit finfa litiam.

25. Mr. Bilimoria relies on a decision of Mr. Justice Tyabji in Mathuradas Vassanji Vs. Raimal Hirji, . It is conceded that this decision does not apply to the facts of this case, and if it did, whatever my own view of the judgment may be, I would certainly have followed it as being the judgment of a Judge of coordinate jurisdiction. But I consider myself fortunate in being free to decide the case before me without following the judgment in that case. But there are one or two observations which I should like to make with regard to that case. In that case, as appears from the recital of the facts in the report, a certain person was indebted to a trust, of which defendant No. 1 was a trustee. He then died leaving property of considerable value which, it appears, became reduced in course of administration. To secure the trust amount, the trustee (defendant No. 1) obtained from the executrix title-deeds of certain properties belonging to the estate of the deceased by way of equita-able mortgage. Then the trustee (defendant No. 1) brought a suit to enforce the equitable mortgage and obtained a final decree for sale. After this the grandsons of the deceased brought a suit for the administration of the estate, and in that suit Mr. Moos was appointed receiver. Then it appears, the plaintiffs, who were some of the creditors, brought a suit for a declaration that the mortgage in favour of the trustee (defendant No. 1) and the decree obtained by him gave him no priority over the claims of other creditors of the deceased's estate, and that all such creditors as well as the trustee (defendant No. 1) were only entitled to rateable distribution of the proceeds of the estate, which was not sufficient to meet the claims of all the creditors in full. Now, I find it rather difficult to understand how this suit was allowed to be maintained when there was an administration action pending. The very fact that the learned Judge found it necessary to go into the question of the value of the assets and to find out whether the assets were sufficient or not shows the danger of a suit of this nature, instead of allowing the rights of creditors inter se being discussed, ascertained and realised in an administration

suit. Secondly, from the statement of facts it does not appear that the suit was filed in a representative capacity under the provisions of Order I, Rule 8, Civil Procedure Code. The learned Judge very rightly rejected the argument of the plaintiff that Section 323 created a trust in favour of creditors. Then the learned Judge referred to Section 359 of the Indian Succession Act, which provides that-

When the executor or administrator has paid away the assets in legacies, and he is afterwards obliged to discharge a debt of which he had no previous notice, he is entitled to call upon each legatee to refund in proportion,

The point to note is that this section does not say that the executor is to call upon creditors to contribute, obviously because when he paid their debts the estate was sufficient, or the assets were sufficient to pay in full all the debts then known to the executor and the legacies, and he may not know the creditor who subsequently appears on the scene. The second point, which seems to have impressed the learned Judge, was that it was an oversight of the legislature. I have already disposed of that argument. The intention of the legislature is to be gathered from the language used by the legislature. I prefer to find the intention from the words used and not from the consideration of a supposed policy, which, in my opinion, is to embark upon a sea of speculation. If there is an obvious gap or omission, it is for the legislature to fill it up. Then the learned Judge refers to Section 361 which provides that-

A creditor who has not received payment of his debt may call upon a legatee who has received payment of his legacy to refund, whether the assets of the testator's estate were or were not sufficient at the time of his death to pay both debts and legacies; and whether the payment of the legacy by the executor or administrator was voluntary or not.

Now, here the legislature clearly provides a remedy for a creditor whose debt has not been paid. It seems to me it would have been perfectly simple for the legislature to say in this section that he has a similar right to proceed against creditors who had received payment. The very language of the section suggests that the only right of the creditor who has not received payment, and where the assets, whether they were sufficient or insufficient, have been utilised for the payment of debts known to the executor or the administrator as also the legacies, is to go obviously against the legatees, because they are volunteers and take the legacies subject to the rights of the creditors. A creditor does not derive title from or under a will or on an intestacy as a legatee or the next of kin does. An unsatisfied creditor has no lien or charge on the assets of the deceased debtor. His right is to proceed either against the executor or the satisfied legatee. If he proceeds against the executor and the executor is compelled to pay him, the latter can proceed against a satisfied legatee. That seems to be the scheme. In England the position seems to be the same. An unsatisfied creditor can follow the assets in the hands of a volunteer claiming through a legatee but not in the hands of a bona fide purchaser for value or of a mortgagee, the reason being that unsatisfied creditors have no lien or charge on any assets and that persons

dealing with the executor in good faith are entitled to look to him alone, and are not bound to ascertain that all debts and liabilities have been discharged. But, of course, where the executor has not parted control over assets, or where the legacy is represented by a fund in Court, the purchaser from the legatee takes subject to the rights of the unsatisfied creditors, though their claims be established after purchase. Then the learned Judge says that the decree was obtained in that case by the trustee (defendant No. 1) in the absence of other creditors. But what about Sections 50 and 52 of the CPC ? These sections clearly contemplate an action of a perfectly simple nature by an individual creditor to recover the debt in which the deceased was indebted to him against his legal representative out of the assets come to his hands. There can be no question of the other creditors being aware of that suit. It is perfectly open to any creditor, if he thinks that the assets are insufficient, to bring in an administration action and to apply for stay of a suit by a single creditor; and I am unable to see why the claim of a person who has obtained judgment against the estate of a deceased person should be subordinated to the claims of other creditors merely because Section 323 directs the executor to distribute the estate rateably if that estate is insufficient. 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 his 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. I do not, therefore, agree that legislature has been guilty of an oversight, assuming that it is open to me to consider whether it is or not.

26. This brings me to two other provisions of law which have an important bearing on the action. Order XX, Rule 13, of the Civil Procedure Code, which is based upon the English statute to which I have referred, provides in effect that in the administration by the Court of the property of a deceased person, if such property is insufficient for the payment in full of his debts and liabilities, the rules which obtain under the Insolvency Act or in bankruptcy practice are to be followed. That exactly is the practice in England, as I have pointed out. The section of the Presidency-towns Insolvency Act, which lays down the rule which is followed in bankruptcy practice, is in these terms :-

Section 72. Any creditor who has not proved his debt before the declaration of

any dividend or dividends shall be entitled to be paid out of any money for the time being in the hands of the official assignee any dividend or dividends which he may have failed to receive, before that money is applied to the payment of any future dividend or dividends but he shall not be entitled to disturb the distributor of any dividend declared before his debt was proved by reason that he has not participated therein.

Exactly the same principle was laid down in the case to which I have referred, namely, *Hull v. Falconer* (1865) 11 L.T.N.S. 761, in these terms :-

A creditor who has neglected to come in at the proper time and prove his debt in an administration suit, cannot be allowed to disturb the dividend of the other creditors after an order has been made directing payment thereof.

The only right which a creditor who has not received his dividend has is under this section (see *Rose v. Sreemutty Biddadhurry Dassee* 9 C.W.N. 167). It seems the right is based upon an equitable principle, and that is that he cannot disturb the distribution already made, but he is certainly entitled to participate in any future distribution which is to be made out of the moneys in the hands of the official assignee as is observed in *Harrison v. Kirk* [1904] A.C. 1. The principle at the bottom of these authorities is that a creditor must be diligent.

27. I shall now consider what the practice in England is in such cases, and refer to the cases, some of which have been cited at the bar. As pointed out before, by virtue of the provisions of the Administration of Estates Act, 1925-

Where a person dies after 1925,. .. Crown debts, judgment debts, specialty debts and simple contract debts are, subject to the rules in bankruptcy in force for the time being, all payable *pari passu* out of his estate. Hence it is conceived that a personal representative may prefer any one of these debts to any other of them. In such a case, therefore, a creditor cannot, by obtaining judgment defeat the right of preference.

" On the other hand, it is conceived that the right of preference, being exercisable only among creditors of equal degree, cannot be exercised so as to defeat either the priority of preferred debts or the postponement of deferred debts prescribed by the bankruptcy rules in force for the time being.

" After an order appointing a receiver or an order for administration has been made the right of preference cannot be exercised. If personal representatives exercise such right, or, indeed, make any payment after such an order has been made, "the utmost that they are entitled to, is to stand in the place of the creditors with respect to those payments". (Williams, p. 647.)

28. *Gillespie v. Alexander* (1826-27) 3 Russ. 130 is the leading authority upon the general rights of a creditor who comes late under the decree. The facts were that in an administration action creditors were paid. There was an apportionment order for legatees. Certain bank annuities were to be purchased and then given to the legatees. After this was done, one creditor petitioned to be at liberty to go

and prove his debt, and that the bank annuities which were with the Accountant-General and therefore subject to the control of the Court might be sold and his debt satisfied. The Master reported that the debt due to the creditor was ₹1,636. In the meantime the fund in Court had been apportioned by the Master among the annuitants and the unsatisfied legatees, and part of it was paid out in discharge of some of the legatees. The creditor then made another petition that certain annuities were still outstanding and prayed for payment. It was argued that a creditor who comes in late cannot interfere with payments which have been made-with a distribution which has actually taken place; but he can look for the satisfaction of his claim only to an unappropriated residue, which may be in Court and subject to the control of the Court, or to assets which may be collected in future. The Lord Chancellor held that the creditor was entitled to receive out of the funds of the legatees so remaining in Court, not the whole of the debt, but only part of it, bearing the same proportion to the whole as the legacies given to those legatees bore to the whole amount of the legacies given by the will; and his judgment is so important on this whole question that I make no apology for quoting it here. The Lord Chancellor said (p. 136):-

Although the language of the decree, where an account of debts is directed, is, that those, who do not come in, shall be excluded from the benefit of that decree; yet the course is, to permit a creditor, he paying the costs of the proceedings, to prove his debt, as long as there happens to be a residuary fund in court or in the hands of the executor, and to pay him out of that residue. If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree. If he has a mind to sue the legatees, and bring back the fund, he may do so; but he cannot affect the legatees, except by suit; and he cannot affect the executor at all.

" The present case is involved in much singularity. Previously to January 1825, several of the legacies had been paid by the executor; and the order of January 1825 is a judgment of the Court in favour of the executor, with respect to these payments;--a judgment which sanctions them upon the ground of there being a report that all the creditors had come in and were paid. The executor being thus indemnified as to these legacies, there were left in court certain funds, which were directed to be appropriated to legatees who had not been paid. In the following November the creditor makes his application : the Court thinks proper to allow him to go in and prove his debt; and that order stands unreversed. In December 1825, the Master makes his report, and appropriates the fund in court among a number of individual legatees. Now, when the creditor made his first application, it would have been well if the real state of the case had been disclosed to the Court. The question would then have been, whether a creditor, so coming in, was to be paid his debt by three or four legatees, while the other legatees had received their legacies in full; or whether the rule of the Court was not, that he should take from the unpaid legatees such a proportion only of his debt as would have been borne by those three or four legatees, if he had applied before the other legacies were paid, and that he should be left to recover the

residue of it by what means he best might. In short, the question is, on whom, under such circumstances, does the burden lie, of enforcing contribution against the legatees ?

This case, therefore, clearly shows what the practice in England is; and, as I said, it is a leading authority on the subject which has been followed in later cases, to some of which I shall presently refer. The practice is that the right of an unsatisfied or unpaid creditor, who has not come in under an administration decree to obtain payment in respect of his debt, unless he is precluded from exercising it by reason of negligence, default or laches or any of the circumstances which would make it inequitable on the part of the Court to make a decree in his favour, is not by way of action but by way of a petition under the administration action itself; secondly, such a petition can only succeed if the fund is in Court or subject to the control of the Court; and, thirdly, the claim can only be made against satisfied legatees, and that a claim of this nature can never succeed against the creditors who have already been paid in respect of their debts. This is how the case is understood by Williams (p. 882) :- "

Lord Eldon held that the creditor was entitled to receive out of the funds of the legatees so remaining in Court, not the whole of the debt, but only part of it, bearing the same proportion to the whole as the legacies given to those legatees bore to the whole amount of the legacies given by the Will; and that he must seek the payment of the rest of his debt, in proper proportions, amongst those legatees who had been actually paid.

This decision was relied upon in another important case to which I shall next refer, namely, *David v. Frowd* (1833) 1 My & K. 200. In that case, an intestate's estate had been distributed under a decree in an administration suit among persons found by the report to be his next of kin. Rather more than a year afterwards, notice was filed by a person claiming to be the sole next of kin of the intestate against the persons among whom the estate had been distributed for the purpose of compelling the defendants to refund to the plaintiff the shares they had received. The plaintiff had had no notice of the administration proceedings, and it was held that if, on inquiry, the plaintiff established that she was sole next of kin of the intestate, the defendants were bound to refund to her the several sums they had received in the administration suit; and, that if the plaintiff established that she was one of the next of kin of the intestate, the defendants were bound to repay to her the amount of the sum which the plaintiff, in that case, should appear to be entitled to. There are certain observations in the judgment of the Master of the Rolls which are relied upon on behalf of the plaintiff. In the first place, it is nowhere said by the Master of the Rolls that a creditor who is ignorant of the administration decree and has not been paid can bring an action against other creditors. The judgment must be read with the facts of the case. The claim there was by a next of kin against other next of kin. Then the Master of the Rolls refers to the position of creditors, and as to the principle applicable in the case of a creditor, he relies upon *Gillespie*

v. Alexander and then observes that that decision establishes the principle that legatees, who had received payment under the order of the Court, were bound to refund to a creditor who had never claimed before the Master. It seems to me that the judgment read as a whole is not an authority for the proposition advanced by Mr. Bilimoria. In my opinion, the case of David v. Frowd establishes only the principle that the decree in a suit for the administration of an intestate's estate does not declare the rights of the parties and is consequently no final decision of the rights of those who may claim to be next of kin against persons who have been found by the Master to be the next of kin and among whom the intestate's estate has been actually distributed. In *Angell v. Haddon* (1816) 1 Madd. 529, the fund was in Court, and it was held that the parties claiming redistribution must come in under an administration suit. The same principles are laid down in *McMurdo, In re : Penfield v. McMurdo* [1902] 2 Ch. 684.

29. I have dealt with the practice which is followed by the Court of Chancery in England. In this connection I shall refer to *Harrison v. Kirk* [1904] A.C. 1. The facts were that in 1877, Richard Davison Harrison mortgaged part of his real estate in Ireland for ?8,000 to one Wallace. In January, 1888, he died, having by will made the appellant his residuary legatee and devisee. In April an action was brought by a creditor for the administration of the testator's estate. In July the primary decree was made in the usual terms for accounts and inquiries. In November advertisements were issued in newspapers requiring all creditors to send in their claims on or before December 4, 1888, in default whereof they would be peremptorily excluded from the benefit of the decree. The mortgagee, Wallace, made no claim against the personal estate, but in February, 1889, he made an affidavit in the administration suit verifying his claim to the mortgage debt and interest charged upon part of the real estate. At that time the lands mortgaged were believed to be a sufficient security for the claims upon it. In June, 1902, the respondent Kirk, in whom the mortgage was then vested, moved for leave to claim for a debt of ?7,000 and interest against the personal estate. It was opposed by the residuary legatee, Henry Harrison, the appellant. The application was rejected by the Master of the Rolls; but this decision was reversed by the Irish Court of Appeal" who made an order permitting the respondent to prove his claim on certain terms as to costs, etc. The appellant then appealed to the House of Lords. The judgment of Lord Davey is so important that I would like to refer to it in some detail (pp. 5, 6):-

When the Court of Chancery had taken into its own hands the administration of an estate, it restrained creditors from pursuing their legal remedy against the executors. The Court made a decree for the administration of the estate which operated as a judgment for all the creditors, and, as it precluded the creditors from ascertaining their legal remedies, it provided other means for them to obtain payment of their debts. The Court was bound to see that the creditors whom it restrained from pursuing their legal remedies were not deprived of the means of having the assets of the testator applied to the payment of their debts. It is an entire fallacy, but I think a very common one, to suppose that because

the debt had to be proved, or the payment of the debt had to be enforced through the medium of the Court of Chancery, it became an equitable demand and ceased to be a legal demand. Its character was not altered one whit : it remained a legal demand, and the right of the creditor who came in to prove under an administration decree remained a legal right and the debt which was recoverable was a legal debt : the only difference made was in the remedy by which the debt could be recovered.

" That being so, the Court of Chancery usually fixed a time within which the creditors could come in and prove their debts; and obvious convenience rendered that necessary, because otherwise the administration would have been hung up for ever. No doubt, as has been pointed out, the language in which the time was fixed was somewhat peremptory; it told people that they would be excluded from the benefit of the decree if they did not come in within the time. But it has long been settled that the language so used was in terrorem only, and that the effect of it was merely this, and nothing more : that any creditor who did not come in and prove his debt before the day fixed ran the risk of some of the assets being administered and disposed of by the Court in payment of other creditors; and in that way the fund for the payment of his debt might be imperilled, or if the estate was insolvent he might lose a portion of the dividends which he would otherwise have received.

Then, after referring to *Gillespie v. Alexander*, his Lordship pointed out that in admitting creditors to come in at any time to take the benefit of the decree the Court is entitled to and does impose certain terms, e. g., costs, etc. He then proceeded as follows (p. 7) :-

And here a distinction must be drawn. In the very able argument of the appellant at your Lordships' bar he did not always bear in mind the distinction between the case where there is still remaining in Court a residue or a fund legally applicable to the payment of debts, and the case where the whole of the estate has been distributed, and it is necessary in order to obtain payment for the creditor to get back from legatees or others who have been paid, the money which has been paid to them. In the first case the creditor is exercising merely a legal right. In the other he is exercising an equitable right which is given him by the equitable doctrines of the Court of Chancery, because he has no legal right against the legatees; he has no legal right against the residuary legatee; his only legal right is against the executor. But the Court of Chancery, in order to do justice and to avoid the evil of allowing one man to retain what is really and legally applicable to the payment of another man, devised a remedy by which, where the estate had been distributed either out of court or in court without regard to the rights of a creditor, it has allowed the creditor to recover back what has been paid to the beneficiaries or the next of kin who derive title from the deceased testator or intestate. In that case, no doubt,, equitable defences may be made to the claim.

Incidentally I may refer to what Lord Halsbury observed in that case as regards the difficulties which may arise when the whole of the estate is paid away under

the orders of the Court before the claimant who has not appeared in time comes in to prove his claim. His Lordship observed as follows (p. 3) :-

Here there is no doubt about the existence of the debt or of a fund in court; and I have inquired with some interest what authority there is for saying that the Court of Chancery or any other Court, under those circumstances, can refuse to recognise the right of a person who is entitled to have his debt paid out of a particular estate. It is a totally different question where the money has been distributed to legatees or to claimants, and the question is about following the money and endeavouring to get back that which has been already distributed. That case may raise questions of considerable difficulty.

30. In my opinion, the result of these decisions is, that where there has been, a judgment or order in any action for administration of an estate in chancery, the creditors have to come in under the judgment or order, but. they are allowed to come in even after a certificate of debts has been made and share in the administration of any assets remaining undistributed or under the control of the Court upon such terms as to costs or otherwise as the Court thinks fit to impose. If a creditor does not come in till after the executor has paid away the residue, or the fund has been distributed, he is not without remedy though he is barred from the benefit of the judgment. If he chooses to sue the legatees and bring back the fund, he may do so : *David v. Fnoibd*, and *Sawyer v. Birchmore* (1836) 1 Keen 391; but he cannot affect the executor at all when the distribution has been made under the order of the Court, or after advertisement, in accordance with Section 27 of the Trustee Act, 1925. If, after individual legatees or creditors have received their dues in full under the sanction of the Court, some funds are still in Court, he is entitled to go against such funds even though they are directed to be appropriated to other individual legatees. In such cases, the rule laid down by Lord Eldon in *Gillespie v. Alexander* is that the creditor was entitled to receive out of the funds of the legatees so remaining in Court not the whole of the debt but only part of it, bearing the same proportion to the whole as the legacies given to those legatees bore to the whole amount of the legacies given by the will; and that he must seek the payment of the rest of his debt in proper proportions among those legatees who had been actually paid.

31. Mr. Bilimoria relies upon a passage at p. 899 in *Daniel's Chancery Practice* (8th Edn.). In my opinion, the law is somewhat loosely stated in that passage and is not justified by the decisions referred to by Daniel in support of it. These decisions are *Gillespie v. Alexander*, *David v. Frowd*, and *Sawyer v. Birchmore*. I have referred to the first two. In *Sawyer v. Birchmore* the dispute was between some next of kin who had not received their share in the distribution of an intestate's residuary personal estate against other next of kin who had and among whom the estate had been distributed. The defence was that the former had full notice of the administration proceedings and were not entitled to reopen the distribution. This contention was accepted by the Master of the Rolls- This decision, therefore, is no authority for the proposition in the passage in *Daniel's*,

but it is interesting to note how the earlier two decisions in *Gillespie v. Alexander* and *David v. Frowd* were understood by the Master of the Rolls. At p. 401 Lord Langdale observed as follows :-

The rule applicable to cases of this nature, as stated by Lord Eldon in *Gillespie v. Alexander*, is that a creditor who does not come in. till the executor has paid away the residue is not without remedy, though he is barred the benefit of the decree. If he has a mind to sue the legatees, and bring back the fund, he may do so; but he cannot affect the executor at all. In *David v. Frowd*, Sir John Leach determined that the next of kin, who had made no claim till after the fund was distributed, might maintain a suit to compel those who had been found next of kin, and had received distribution, to refund.

32. Mr. Bilimoria also relies upon a passage at p. 1271 in *Williams*. The authority there relied upon is a passage in *Storey on Equity Pleadings*, Ch. IV, p. 11.6, which deals with the topic of Proper Parties to a Bill. Both the passages purport to be based on *Gillespie v. Alexander* and *David v. Frowd*, with which I have already dealt.

33. Upon the whole, therefore, I have reached the conclusion that the suit is not maintainable.

34. There only remains the claim made by the plaintiff against defendants No. 10, as to which Mr. Bilimoria says that the fund was in Court and subject to the orders of the Court under the consent order taken by him against this defendant. There is more than one answer to this claim. In the first place the plaintiff's claim is not made under an administration decree, but in a substantive suit which, I have held, does not lie. Secondly, the plaintiff is precluded from asserting a claim of this kind which, as I have said, is purely an equitable claim, for an equitable relief, by reason of his laches and gross delay in the assertion of it; and, thirdly, the suit is barred by the law of limitation. That contention, therefore, must be rejected.

35. In the result, the suit must be dismissed with costs. I have heard counsel on the question of costs, and I see no reason why I should depart from the usual rule that when several persons are joined as defendants in one action, where, though the defence may be more or less common, the interest of each defendant is confined to himself, they are entitled to separate sets of costs. That being the case, I think I must order five separate sets of costs as follows :

(1) to defendants Nos. 1, 2, 3 and 6.

(2) to defendant No. 4.

(3) to defendant No. 5.

(4) to defendant No, 7.

(5) to defendants No. 10.

36. The security brought in by defendants No. 10 under the order dated January 1, 1932, to be returned to him, and the Prothonotary directed accordingly.