

(1925) 11 BOM CK 0013

In the Bombay High Court

Case No : O.C.J. Appeal No. 91 of 1925 and Suit No. 180 of 1925

Laxmidas Goculdas Dossa

APPELLANT

Vs

Ismail Gafoor Kassum

RESPONDENT

Date of Decision : 30-11-1925

Acts Referred:

Probate and Administration Act, 1881 — Section 90(4)

Citation : (1926) 28 BOMLR 1262

Hon'ble Judges : Norman Macleod, J;Coyajee, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Norman Macleod, Kt., C.J.—One Gaffoor Cassum died on or about February 25, 1922, leaving two sons Ismail and Ibrahim, a widow and a daughter. Ismail obtained letters of administration to the estate of Gaffoor on December 19, 1922, u/s 4 of the Probate and Administration Act. The estate of Gaffoor, therefore, was vested in him. It is true, under Mahomedan law, in the absence of any Letters of Administration being granted, the estate vests in the heirs. But, I think, that the statutory vesting under the Probate and Administration Act must take effect in substitution for the vesting in the heirs which exists between the death of the deceased and the grant of the letters,

2. Gaffoor was a tenant of certain stables, rent of which was in arrears at his death. Ismail continued the business, and the arrears of rent continued, with the result that in August, 1923, a settlement was arrived at by which Ismail agreed to pay rent in all Rs. 13,951 up to August 6, 1923, which included the rent that was in arrears at the date of Gaffoor's death.

3. Eventually, the plaintiff filed a suit against Ismail in which a decree was passed on December 18, 1923, for Rs. 10,951-11-0. As Ismail did not pay this amount, the plaintiff succeeded in getting from Ismail and the other heirs of the deceased Gaffoor a third mortgage, in his favour of property situated in Doctor Street by a

mortgage dated February 25, 1924. The property was subject to prior mortgages, and was sold in September 1924 at the instance of the first mortgagee. After paying the two prior mortgages, about Rs. 13,000 remained in the hands of the solicitors of the first mortgagee to satisfy the third mortgage.

4. However, there was another claimant to that sum, because the fifth defendant herein had filed a suit No. 3021 of 1921 against Gaffoor Cassum. A decree was not passed until April 3, 1924, for the amount claimed, against the heirs of Gaffoor to the extent of the property of the deceased in their hands. In execution of that decree the fifth defendant attached the sum of Rs. 13,000 which was the balance after payment of the first two mortgages.

5. The plaintiff claimed that he was entitled to priority against the attaching creditor by virtue of his third mortgage, and that was the simple question in the case. It was contended that the fifth defendant could not contest the mortgage, although it was made by the Administrator without the previous permission of the Court. u/s 90, Sub-section (4), of the Probate and Administration Act "A disposal of property by an executor or administrator in contravention of Sub-section (2) or Sub-section (3), as the case may be, is voidable at the instance of any other person interested in the property."

6. It is suggested that, the fifth defendant has no interest in the property mortgaged by Ismail. Clearly a creditor of Gaffoor had an interest in all his estate, and is entitled to look to that estate to satisfy his claim, and it is quite clear that an administrator by disposing of property of the estate vested in him, without permission of the Court, cannot thus defeat the claims of the creditors of the deceased,

7. We think then the Judge was right in his decision, and the appeal must be dismissed with costs.