

(1897) 05 CAL CK 0010
In the Calcutta High Court

Omrita Nath Mitter

APPELLANT

Vs

Administrator-General of Bengal

RESPONDENT

Date of Decision : 19-05-1897

Acts Referred:

Administrator Generals Act, 1963 — Section 35
Interest Act, 1839 — Section 1
Probate and Administration Act, 1881 — Section 104
Succession Act, 1865 — Section 282

Citation : (1898) ILR (Cal) 54

Hon'ble Judges : Sale, J

Bench : Single Bench

Judgement

Sale, J.—Kumar Indra Chundra Singh of Paikparah died on the 14th of May 1894, leaving a will whereof he appointed the Administrator-General of Bengal the executor, and leaving also a very large estate valued for the purposes of probate duty at over 38 lakhs of rupees, It appears that at the time of his death the testator was indebted to the extent of about 14 lakhs of rupees, a very large portion of this sum, viz., 12 lakhs, being due to Maharajah Doorga Churn Law, a secured creditor.

2. On the 30th June 1894 the Administrator-General obtained probate of the will of the testator and has since been engaged in the administration of his estate. On the 2nd October 1894 the plaintiff" gave notice to the Administrator-General of a claim against the estate for principal and interest due on a promissory note executed in his favour by the testator dated the 2nd April 1892. The principal sum secured by the note is Rs. 50,000 carrying interest at the rate of 71/2 per cent, per annum. The plaintiff", however, claimed that, under an oral arrangement come to with the testator, he was entitled to interest at 9 per cent. A correspondence ensued between the plaintiff and the Administrator-General as to the rate of interest chargeable, and eventually an arrangement was come to, and, as appears from the Administrator-General's certificate dated the 8th June 1895, the plaintiff's claim was admitted and registered for the sum of Rs.

55,988-14-8 carrying interest on Rs. 50,000 at 8 per cent, per annum from the 1st June 1895.

3. The Administrator-General then, out of the income of the estate, as it was realized, proceeded to declare dividends in favour of the creditors who had registered their claims and tendered the proportion payable to the plaintiff in part satisfaction of his claim. The first of those dividends was declared on the 30th 1895, and the last on the 20th of January 1897, and the total sum thus set apart for payment of the plaintiff's debt and which the Administrator-General now holds for this purpose amounts to Rs. 52,144-14-7. The plaintiff declined to accept payment of his debt by instalments and claimed to be paid the whole amount due to him in one sum with interest on the entire principal sum. The Administrator-General, on the other hand, insisted that the plaintiff was bound to accept payment of his debt by instalments, and denied that (sic) plaintiff was entitled to interest on the dividends tendered to him and set apart to his credit.

4. It appears that in the year 1895 the Administrator-General proposed to raise a sufficient sum to pay off the creditors of the estate by selling a portion of the estate; but the beneficiaries under the will of the testator were opposed to any scheme of payment which would necessitate either a sale of any portion of the estate or even a fresh charge being created for that purpose. In the course of that year two suits were instituted in this Court against the Administrator-General, one by Sreemutty Saraswati, the daughter, and the other by Sreemutty Mrinalini, the widow, of the testator, praying for administration of the estate. In the one suit the plaintiff Saraswati asks that the Administrator-General may be restrained from raising a loan to pay off the creditors, while in the other suit the plaintiff Mrinalini seeks to restrain the Administrator-General from resorting to a sale of any portion of the estate for the purpose of satisfying the debts due thereon.

5. On the 6th of December 1895 the plaintiff gave notice in writing to the Administrator-General that he would claim interest at 8 per cent, on the sum of Rs. 55,988-14-8, being the sum admitted to be due to him by the certificate of the 8th of June 1895, including interest due on the principal sum up to the 1st of June 1895.

6. On the 7th of December 1896 the plaintiff instituted the present suit against the Administrator-General claiming payment of the following sums:

(1) Rs. 62,055-9-4, being the sum of Rs. 55,988-14-8 representing the original registered claim and a further sum of Rs. 6,066-10-8 representing interest at 8 per cent, per annum calculated on the principal amount of the debt from 1st June 1895 to the date of the institution of the suit;

(2) Rs. 599, being the interest at 8 per cent, calculated on the sum of Rs. 5,988-14-8 from the 6th of December 1895; and

(3) Rs. 300, representing the damages alleged to have been sustained by the

plaintiff by reason of his having been put to proof of his original claim. The last of these claims has not been pressed and it is not necessary therefore to refer to it further.

7. As regards the claim to interest on the sum of Rs. 55,988-14-8 the plaintiff relies on the provisions of Section 1 of the Interest Act (Act XXXII of 1839). It is suggested that the sum of Rs. 55,988-14-8 is a sum "payable by virtue of a written instrument" within the meaning of the section, inasmuch as it is the total sum admitted to be due by the certificate of the 8th June 1895. But in my opinion the certificate of the Administrator-General is not a "written instrument" such as is contemplated by the Act, because the amount mentioned therein is not payable by virtue of the certificate which merely purports to certify the registration of the amount of the admitted debt for the purposes of convenience in administering the estate. In any case the sum claimed represents interest upon interest, and as such ought not I think to be allowed under the discretionary powers vested in the Court.

8. The main object of the suit is, however, to establish the plaintiff's right to immediate payment of his claim with interest on the entire principal sum from the 1st of June 1895.

9. The general principle applicable to a creditor's suit against an executor is clear. If the plaintiff's demand be uncontested or proved, and the executor admits assets, the plaintiff is entitled at the hearing to in immediate order for payment without taking the accounts, and, moreover, the admission of assets for the payment of a debt is also an admission of assets for the purposes of the suit, and extends to costs if the Court thinks fit to give them - *Williamson Executors*, 9th Edition, Vol. II, pp. 1892-93.

10. The term "assets," thus employed, has a wide signification, and means the property of a deceased person chargeable with and applicable to the payment of his debts. An admission of assets in this sense therefore means an admission of the sufficiency of the realizable property of the deceased available for the immediate payment of his debts. An admission of assets may be made by the executor or proved against him in various ways; *Seton on Judgments and Orders*, 5th Edition, Vol. II, p. 1253. In the present case there is no question, but that the assets in the hands of the defendant are and have always been amply sufficient to pay in full all the debts of the deceased. Nor is it suggested that a sufficient portion of these assets could not immediately be realized and applied in satisfaction of the entire amount of the liabilities of the estate.

11. The difficulties that exist in the administration of the estate are created only by the beneficiaries who object to any portion of the estate being charged or sold for the immediate payment of the creditors' claims. But as between the beneficiaries and the creditors, the rights of the creditors to immediate payment, if the assets are sufficient for the purpose, are paramount. It is clear from the defendant's written statement that, though there were sufficient realizable

assets in his hands for the payment in full of all the creditors of the estate, the course he proposed to adopt in the administration of the estate was to pay the creditors rateably out of the surplus income of the estate.

12. In the 4th paragraph of the written statement the defendant states as follows:

Kumar Indra Chundra Singh in the plaint mentioned was at the time of his death heavily indebted---his debts amounting to nearly 14 lakhs of rupees, and the income of the estate not being sufficient to enable the defendant there-out to pay all the debts at once, he proposed to sell off a portion of the estate.

In the 6th paragraph there is this statement: "From time to time, the defendant out of the surplus income of the estate available for the payment of debts declared dividends rateably in respect of the creditors of the estate whose claims had been duly registered."

As regards the 8th paragraph of the written statement it would seem at first sight that it was denied that the realizable assets of the estate were sufficient for the immediate payment of the claims of all creditors in full. The paragraph runs thus:

It is not the fact that the defendant is in possession of ample means for the immediate discharge and satisfaction of the amount due to the plaintiff for principal and interest, and of all other claims against the said estate as alleged in the 12th paragraph of the said plaint. So far as funds belonging to the said estate have been available for the payment of debts, the defendant has always been ready and willing and has offered to make payments from time to time by way of dividends as aforesaid to the plaintiff in respect of the amount due to him equally and rateably with the other creditors.

13. Comparing these allegations with those made previously and with what follows in a later paragraph, and with the allegations contained in the correspondence between the parties which has been read, it is quite clear, and it has not been otherwise suggested in argument, that the insufficiency referred to in the 8th paragraph is the insufficiency, not of the realizable assets, but of the annual surplus income. The equal and rateable payment which the defendant offered to make to the plaintiff", and which is referred to in this paragraph, is rateable payment out of the surplus income.

14. It is only necessary to refer to one other paragraph of the written statement.

15. In the 12th paragraph the defendant says: "If this Court should be of opinion that the defendant is not bound to accept payment of the amount due to him by instalments or by way of dividends, the defendant states that by reason of the institution of the said administration suits he is unable to pay and discharge the amount so due to the plaintiff, but, that he is willing to pay the same in the ordinary course of administration."

16. What I understand the defendant to convey by this paragraph is that his refusal to accede to the plaintiff's demand for immediate payment of his claim in full has been occasioned, not by the insufficiency of the realizable assets in his hands, but solely by the conduct of the beneficiaries who object to the debts being paid out of the corpus of the estate.

17. It has been shown that the annual nett income of the estate is very large, amounting to two lakhs of rupees or thereabouts, and this would be sufficient in the course of time to provide for the payment of all claims, and no doubt the Administrator-General was acting in the interests of the estate in endeavouring to pay off the claims by instalments out of surplus income, but the question is whether there is any legal warrant for thus postponing the rights of creditors. No real difficulty I apprehend exists or is created by reason of the institution of the two administration suits by beneficiaries. These suits have, I understand, been amalgamated and are now pending, but no order has been obtained restraining the defendant from raising a sufficient sum by sale of a portion of the assets for the purpose of paying off the creditors. Moreover, in the event of a decree for administration being made, the Court would, in the usual course, after proof of claims if a sufficient fund be not then available for payment of the debts in full, direct the required amount to be raised by a sale of a sufficient portion of the assets.

18. It is contended, however, that Section 35 of the Administrator-General's Act has placed a restriction on the rights of creditors, and that the effect of the Section is to give the Administrator-General the right to insist that creditors of estates in his hands shall accept payment of their claims by instalments out of nett income although there may be ample realizable assets available for immediate payment of all debts in full.

19. The clause of the Section relied on in support of this contention is as follows:

If in any such suit (i.e., a creditor's suit against the Administrator-General) judgment is pronounced in favour of the plaintiff, he shall nevertheless be only entitled to payment out of the assets of the deceased equally and rateably with the other creditors.

20. A similar provision was contained in Section 33 of the Administrator-General's Act of 1867. The right of creditors to rateable payment is also defined in Section 282 of the Succession Act and Section 101 of the Probate and Administration Act.

21. Section 282 of the Succession Act provides : "Save as aforesaid, (i.e., as provided by Section 281) no creditor is to have a right of priority over another; by reason that his debt is secured by an instrument under seal or any other account. But the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably, as far as the assets of the deceased will extend."

22. Section 104 of the Probate and Administration Act is, excepting the omission of a clause which is immaterial for the present purpose, in precisely similar terms.

23. Now the "rateable payment" referred to in all these sections is rateable payment out of the assets. It is nowhere provided that rateable payment shall be made out of the nett income of the estate, or any other specific part of the assets. These sections deal with the creditors' rights as regards the general assets of their deceased debtor, and apart from any question of lien, the object is to prevent any creditor obtaining an advantage over another in respect of the payment of his debt, and to provide for the payment of all claims proportionately out of the assets of the estate. The language of these sections shows that the Legislature was dealing with cases where the general assets or the realizable assets were or might be insufficient for the payment in full of the claims of all the creditors. It would be unnecessary and meaningless to provide for proportionate or rateable payment when the realizable assets are amply sufficient for the immediate payment in full of all claims, nor could in such a case the payment of one creditor in full in any way prejudice or postpone the rights of other creditors. There is, in my opinion, nothing in Section 35 of the Administrator-General's Act which qualifies or restricts or otherwise interferes with the right of a creditor to demand immediate payment of his claim in full, when the realizable assets in the hands of the Administrator-General are sufficient for the immediate payment of all claims in full.

24. It could not have been intended by this Act any more than by the Succession Act or the Probate and Administration Act to give representatives of deceased persons the power, where assets are admittedly sufficient, to postpone indefinitely the payment of debts. It appears to me that my view of the Section is in accordance with the authorities bearing on the question.

25. In *Haninabalu Sannappa v. Cook* (1883) 6 Mad. H. C. 346 property had been attached before judgment, and the Administrator-General before judgment took out letters of administration and was made a party to the suit in the place of the widow, the original defendant, and it was held u/s 33 of Act XXIV of 1867 that under the decree obtained by the plaintiff he was only entitled to rank with other creditors. It does not appear in this case that there were any assets available for distribution amongst the general body of creditors beyond the fund which had been attached before judgment and which was admittedly insufficient to pay all the creditors in full.

26. In *Nilkomul Shaw v. Road* (1872) 12 B. L. R. 287 it was held that when a person obtains a decree against an executor or administrator he is entitled to have his decree satisfied out of the assets of the deceased, and that Section 282 of the Indian Succession Act does, not interfere with that right.

27. In the case of *Alliance Bank of Simla v. Hoff* (which is unreported) execution was issued against the executor of a judgment-debtor for the full amount of the decree, although the testator's estate was not sufficient to pay the full amount

of his debts.

28. The last case is that of *Remfry v. De Penning* (1884) ILR 10 Cal. 929 where the defendant having died after judgment a rule was obtained against the Administrator-General as representing his estate to show cause why the decree should not be executed against him. The course pursued in the case of *Alliance Bank of Simla v. Hoff* was followed, and it was observed by Pigot, J., that "Section 35 of the Administrator-General's Act is limited to the express purpose for which it was enacted, and there is nothing in that Act or in the CPC to charge the position of the Administrator-General or to place him in a better position than an ordinary suitor.

29. It has been contended next that in any case the plaintiff must bear the costs of this suit, and reference is made to the 1st clause of Section 35.

30. That clause provides that "if any suit be brought by a creditor against the Administrator-General in his representative character, the plaintiff shall be liable to pay the costs of the suit down to and including the decree, unless he is able to show that no less than one month previous to the institution of the suit he had applied to the Administrator-General to register his claim and that the Administrator-General refused or neglected to do so."

31. Now, I think the clear object of a provision of this character is to prevent the costs of a suit being unnecessary incurred by a creditor, who is desirous of proving his claim, and accordingly a creditor who institutes a suit without first submitting claim to the Administrator-General as provided in that section, renders himself "liable to pay the costs of the suit down to and including the decree."

32. It is to be observed that what the Section says is that a creditor is under certain circumstances to be liable to pay the costs of the suit, not that he shall pay the costs. In my opinion the language used shows that it was intended not to impose upon a creditor to whom the condition of exemption was inapplicable an absolute obligation to pay the costs of the suit, but to leave a discretion to the Court to relieve him of the obligation if the circumstances of the case required it.

33. So, where u/s 136 of the CPC it is provided that under certain circumstances a party, if a plaintiff, shall be liable to have his case dismissed, or if a defendant to have his defence struck out, this Court has invariably exercised a discretion as to whether the penalty shall in any given case be imposed or not.

34. And again in the case of *James v. Young* (1884) L. R. 17 Ch. D. 652 North, J., in considering the meaning to be attached to the words "shall be liable to forfeiture" occurring in a certain statutory enactment, made the following observations:

It is said that under that section, as soon as there is any default in working under the rules or any non-compliance with the rules, there is an absolute forfeiture, which cannot be got rid of, so that at the end of the five years the

gales came to an end without the exercise of any discretion by the gaveller or any other person. But in the first place if the Legislature had intended that, I think it would have said so. Nothing would have been easier than to have said "it shad he forfeited and come to an end." I say nothing about the construe ion of those words if they had been there, but when the words are not shall be forced but shall be liable to be forfeited, it seems to me that what was intended was not that it should be an absolute forfeiture, but a liability to forfeiture which might or might not be enforced."

35. The present suit is in no sense an unnecessary one The object of if is not to prove the plaintiff"s claim, but to establish his right to immediate payment of the entire sum with interest thereon, which right the defendant has refused to recognise. This is not, therefore, a case where the penalty as to costs provided by the Section should be enforced. The result is that there must be a decree in favour of the plaintiff for payment of the sum of Rs. 62,055-9-4, together with further interest at the rate of 8 per cent, on the principal sum of Rs. 50,000 from the date of institution of the suit to the date of the decree.

36. The plaintiff is also entitled to the costs of this suit, which, together with the decretal amount, the defendant must pay out of the assets in his hands belonging to the estate of Kumar Indra Chandra Singh.

37. The defendant may also retain his costs as between attorney and client out of the estate; both sets of costs to be taxed on scale No. 2.