
(1940) 03 BOM CK 0013
In the Bombay High Court

Sir Jamshedji Jeejibhoy, Bart.

APPELLANT

Vs

Sorabji Byramji Warden

RESPONDENT

Date of Decision : 07-03-1940

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 52(2)

Citation : (1940) 42 BOMLR 719

Hon'ble Judges : Viscount Maugham, J;Porter, J;George Rankin, J

Bench : Full Bench

Judgement

George Rankin, J.—This is an appeal by the representatives of the original plaintiff in a suit to enforce a mortgage by deposit of title deeds. The suit was brought on the original side of the High Court of Bombay on January 7, 1936, by an old lady named Jaiji Hirjibhoy Parekh. Her daughter Meherbai had married one Byramji Hirjibhoy Warden, father of the defendants. Byramji had died on October 26, 1924, leaving a will whereby he had appointed the defendants, his four elder sons, to be his executors. Probate had been granted to them in 1925.

2. By his will dated October 6, 1922 (codicil of August 19, 1924), Byramji declared (cl. 11) that his Immovable properties were generally mortgaged and that it would take a long time before they could be sold at the best price after paying the mortgage debts. He accordingly authorised his executors to postpone the sale for any period not exceeding five years from the date of his death. He referred (cl. 12) to the fact that Bai Jaiji (the plaintiff) and a number of other persons held his promissory notes, stating that he ordinarily renewed them yearly or at longer intervals and paid them interest monthly or at times at longer intervals. He directed that the amount due to these creditors should be paid with interest by his executors and he authorised his executors to renew these notes with interest. After making provision for his daughters, for a fifth son named Rustomji and for certain other persons, he directed that at the end of seven years after his death the residue of his property should be divided into four equal parts, each part to be held in trust for one of his four elder sons (the present

defendants-respondents) for life and on such son's death for his children.

3. At his death the estate of Byramji, which consisted mainly of shares in companies and Immovable properties in Bombay, was valued by the, Collector for the purposes of the duty payable on obtaining probate at about 8 1/2 lacs of rupees and the debts of Byramji were returned at about 6 lacs. The debt due to Bai Jaiji was entered as amounting to Rs. 25,780 for principal and Rs. 620 for interest. That the solvency of the estate would depend entirely upon the condition of the property market in Bombay has at all times been plain and after the death of Byramji his executors found it difficult to realise his properties. By 1928 the fifth son, Rustomji, was threatening steps to realise the sum of Rs. 50,000 which had been settled upon him by his father's will and in this year several mortgages were given by the executors over Immovable properties of the estate to creditors of the testator. In particular, on August 10, 1928, an equitable mortgage by deposit of title deeds was given to Bai Jaiji and the registered memorandum set forth the terms thereof as follows;-

Memorandum of Agreement made and entered into at Bombay this 10th day of August 1928 between Sorabji Byramji Warden, Hirjibhoy Byramji Warden, Jamshedji Byramji Warden and Pestonji Byramji Warden all the four of Bombay Parsi Inhabitants, Executors and Trustees of the last Will and Testament of the late Byramji Hirjibhoy Warden of the one part and Bai Jaiji Hirjibhoy Parekh of Bombay Parsi Inhabitant of the other part whereas the said Byramji Hirjibhoy Warden was during his lifetime indebted to the said Jaiji Hirjibhoy Parekh in a certain sum, which with interest up to date exceeds the sum of Rs. 30,000 and whereas the said Byramji Hirjibhoy Warden died in "October 1924 leaving a Will dated 6th October 1922 Probate whereof has been issued by the High Court of Bombay in its testamentary Jurisdiction to the said Sorabji, Hirjibhoy, Jamshedji and Pestonji, the sons of the said Byramji Hirjibhoy Warden, and Executors and Trustees of the said Will and whereas the said Bai Jaiji Hirjibhoy Parekh has called upon the Executors to pay off the debt due to her by the estate and in default, threatened to proceed further in a Court of Law, and the Executors having at present no cash available for the satisfaction of the said debt, offered to give security to the extent of Rs. 30,000 by giving an Equitable Mortgage of the right title and interest of the said Byramji Hirjibhoy Warden in the Immovable properties described in the schedule A, B and C hereto by depositing their respective title-deeds described in the Schedules D, E and F which the said Bai Jaiji Hirjibhoy Parekh, the Creditor, has agreed to accept and not to sue, till such time not exceeding two years as the depression in the property market in the opinion of the Mortgagors passes off, and whereas the said Byramji Hirjibhoy Warden was entitled to the entirety of the Immovable properties in the schedules A and B and to a half share in the Immovable property described in the schedule C hereto, now it is hereby agreed that the deeds and documents specified in the schedules D, E and F relating respectively to the Immovable properties described in the Schedules A, B and C have this day been deposited by the said Sorabji Byramji Warden, Hirjibhoy Byramji Warden, Jamshedji Byramji Warden and

Pestonji Byramji Warden, with the said Bai Jaiji Hirjibhoy Parekh with intent to create an Equitable Mortgage upon the said Immovable properties for securing to her the said Jaiji repayment with interest of the sum of Rs. 30,000 (Thirty thousand) this day due to her by the estate of the said Deceased Byramji Hirjibhoy Warden, represented by the Executors of his Will the said Sorabji, Hirjibhoy, Jamshedji and Pestonji, such sum to be repayable at any time within two years from the date hereof, such time to be selected by the said Executors and that they will in the meantime pay interest every month on the first day of each English month at the rate of six per cent, per annum with compound interest at the same rate with quarterly rests on all arrears of interest not paid on the due date, and it is hereby further agreed that the said sum of Rs. 30,000 is repayable in Bombay, and until so repaid with interest as aforesaid, the said deeds and documents and the respective properties to which they relate will be held by the said Bai Jaiji Hirjibhoy Parekh as an equitable security and that the executors will, if so required by the said Jaiji, insure the structures on the lands comprised in the said security in a sum not exceeding Rs. 30,000 at the costs of the executors.

4. Having received no payment whether on account of principal or interest, Bai Jaiji brought her suit as already mentioned on January 7, 1936. She asked for the usual preliminary decree for sale, but added a claim that if the proceeds of sale should be insufficient, the defendants be held personally liable to make up the deficiency, contending that by the memorandum of August 10, 1928, the defendants had made themselves personally liable for the repayment of the principal sum of Rs. 30,000 and interest thereon. This was a very proper question to be decided at the trial. Bailee J. as trial Judge found against the defendants both as regards principal and interest, proceeding on the view that an executor must perform a promise made by him as executor *de bonis propriis* unless he has expressly excluded his own liability and that this he does not do by the mere use of the word executor. By his preliminary decree (August 5, 1936), he gave liberty to the plaintiff to apply for a personal decree against the defendants in the event of the net sale proceeds being insufficient to satisfy in full the plaintiff's claim for principal interest and costs. -While the defendants' appeal to an Appellate Bench was pending, Bai Jaiji died on December 25, 1936, and the executors of her will (the present appellants) were substituted in her stead. At the hearing of the appeal, Beaumont C.J. and Blackwell J. construed the memorandum as imposing no personal liability on the defendants. Their decree dated September 28, 1937, negatived the plaintiff's right to apply for a personal decree against the defendants, but gave liberty to the plaintiff to lodge a claim for any deficiency against the estate of Byramji but without prejudice to any question whether such claim was maintainable.

5. The evidence called at the trial has little bearing upon the true construction of the memorandum of August 10, 1928. The second defendant, Hirjibhai, who appears to have been the most active of the executors, gave evidence that he had advanced some money for paying off debts of the estate, that several

creditors had been paid off chiefly out of monies of the estate, that some legacies had been paid out of monies advanced by him including; a legacy left to one of his sisters which was paid on her marriage. He stated that the promissory notes held by Bai Jaiji carried interest at six per cent. with quarterly rests and that these had been handed over to him at the time of the mortgage transaction of August 10, 1928, and destroyed. He admitted that the income of the property in suit was collected by him after the granting of the mortgage on August 1.0, 1928, just as before. His evidence is that whatever might have been thought possible at the date of his father's death in 1924, by 1928 he had no longer any hopes of taking anything by the residuary legacy, since the utmost that could then be expected was that the debts of the estate might be cleared if land values improved. The only other witness called by the defendants was the solicitor who drew up the memorandum of August 10, 1928. He stated that he did so on the instructions of the second defendant who wanted to protect his grandmother, but that he did not himself see or consult the lady nor were any instructions taken by him from her though the second defendant was in communication with her throughout. Bai Jaiji herself gave evidence giving her age as ninety years: she said that Byramji had paid her the interest in his lifetime but that after his death the second defendant had not done so in spite of demands but had asked her to wait two years. She denied that she had handed over to him the promissory notes.

6. Before the Board Mr. Roxburgh, for the appellants, in a clear and careful argument, examined separately three possible answers to the question whether the defendants had rendered themselves personally liable to Bai Jaiji (1) that they were so liable both for principal and interest; (2) that they were so liable for interest alone either (a) for two years from the date of the memorandum, or (b) until repayment; (3) they were not so liable at all. In the High Court the learned trial Judge had taken the first view and the appellate bench the third: their Lordships agree, however, that the second must be carefully considered. It was further contended for the appellants that personal liability might be brought home to the defendants either on the footing that they have agreed to pay or on the footing that they have admitted assets. Upon the second of these alternatives it was suggested. that the learned Judges in India do not seem to have disputed the applicability of the principles of English law and that the English decisions, some of which were followed by Barlee J., are particularly strong to the effect that an executor may incur liability by making a statement about the assets of the testator which amounts to an admission of assets. Their Lordships, however, for reasons which will be indicated later in this judgment, are not prepared to give unqualified adherence to the view that English law as to admission of assets is law in India either within or outside of the Presidency towns.

7. In the present case it is to be observed that in the plaint the personal liability of the defendants was put entirely upon the memorandum of August 10, 1928. It was not pleaded that the defendants had become liable by reason of any

admission of assets dehors the memorandum whether by conduct or by words. Indeed admission of assets as distinct from agreement to pay personally was not in the plaint put forward as a ground of claim at all. In these circumstances while the memorandum must be given its true effect in law, it is not open to the appellants, for the purposes of this appeal, to rely on statements made in evidence by the second defendant as to his sister's legacy having been paid or other creditors having been paid or having been given security. If, however, the appellants should at any time get judgment against the defendants for any sum to be realised out of the assets of the testator, it may be that in execution proceedings it will still be open to them on the basis of some such facts to make a case (under Sub-section (2) of Section 52 of the code of Civil Procedure) that the defendants have not duly applied all the assets which came to their hands.

8. The only matter upon this appeal is the nature and extent of the liability incurred by the defendants under the memorandum of August 10, 1928. The defendants are in the opening words described as executors and trustees of the will of Byramji. The recitals do not contain any details of the debt due from Byramji's estate. The dates of the loans, the rate of interest, the sums outstanding for principal and for interest are not given: all that is said is that up to date the debt exceeds Rs. 30,000. The recitals do, however, purport to disclose in terms that the executors had no cash available wherewith to pay the debt, that their only prospect of paying depended on the state of the property market which was at that time depressed, and that they were giving security in order to gain two years time. There is here no suggestion that the defendants as executors had been in default in any way or were admitting that they had assets out of which they might and should have paid. Their offer to Bai Jaiji as recited is an offer to give her security for the testator's debt to the extent of Rs. 30,000 by equitable mortgage of the right, title and interest of the testator. Though the second defendant deposed that the debt originally carried interest at six per cent, with quarterly rests, the learned trial Judge was not prepared to believe that compound interest was payable at all, the promissory notes having been destroyed. But the way in which the debt is recited in this memorandum without any distinction between what was then due for principal and interest is, in their Lordships' opinion, some corroboration of the defendant on this point and there is no contradiction by Bai Jaiji. Their Lordships find it very difficult to make any inference against the defendants on the ground that the original terms as to interest were varied by the memorandum a contention which seems to them to be unproved.

9. The operative clause of the memorandum begins by creating an equitable mortgage upon the properties for securing to Bai Jaiji repayment with interest of the sum of Rs. 30,000 then due to her by the estate of Byramji represented by the executors of his will. This is followed first by a clause- "such sum to be repayable at any time within two years from the date hereof such time to be selected by the said executors "-which is no more than a way of saying that it was not to be demandable for two years. Then comes the interest Clause (so to

call it): " that they (the said executors) will in the meantime pay interest every month on the first day of each English month at the rate of six per cent, per annum with compound interest at the same rate with quarterly rests on all arrears of interest not paid on the due date."

10. By Section 58, Clause (a), of the Transfer of Property Act, it is clear that a mortgage may be given as security not merely for money lent but for any debt or liability. If the executors of a deceased debtor think fit for consideration to give security over an asset belonging to his estate to one of his creditors in respect of a debt due from the estate, the transaction may or may not be one to which other creditors or persons can take exception. But if it is not intended that the executors should assume personal liability for the secured debt, there is nothing in the Transfer of Property Act or in the law of India to make them so liable by reason that they have granted the security or by reason that they have done so by deposit of the testator's deeds. Apart from the clause as to interest, which calls for a separate discussion, the memorandum contains no covenant by anyone to repay the principal sum of Rs. 30,000, no statement that the executors would assume personal liability for it, no representation or admission to the creditor as to the sufficiency of the testator's assets to meet either the original debt or the sum of Rs. 30,000.

11. There is, however, a covenant to pay interest on the sum of Rs. 30,000. This is not itself qualified by any phrase to the effect that they agree " as executors " to pay it or that they are to pay it out of the assets of the testator. Nor is there any other specific expression directed to distinguish between a simple promise by the defendants to pay and a promise by the defendants, for themselves and their successors in office, to pay upon condition that the assets of the testator should permit of the payment being made thereout. The question arises whether such a qualification can be derived from the context, and on this point much depends upon the period in respect of which the promise to pay interest is made. Their Lordships think it to be reasonably plain that the words "in the meantime" have reference to the period of two years or less referred to in the words immediately preceding and that they cannot be extended to cover the whole period that might elapse between the date of the memorandum and the actual payment of Rs. 30,000 to Bai Jaiji. The defendants were to continue to collect the rents of the mortgaged property and might very reasonably have been expected, for the two years during which she gave up her right to recover her money, to see that the interest was paid to her. The recitals as to her having made demands must be taken against the defendants, and it seems unreasonable to doubt that the lady would feel the loss of this portion of her income. On the other hand the clause is the only covenant to pay interest and the only part of the memorandum in which any specific rate of interest is mentioned. It is Stressed in language which is common form in Indian mortgages which not infrequently, as the reports show, provide expressly for the payment of interest up to the " due date" of the mortgage but omit to make provision for any subsequent period. The last clause, however, makes the property a security for the interest as well as the principal

until repayment. The learned Judges of the Appellate Bench considered that the covenant to pay interest was to be read with the reference to interest in the previous part of the same clause and merely specified the interest already referred to. The question is by no means free from difficulty, but upon a careful consideration of the clause their Lordships think, the promise not having been expressly qualified, that in the context there is not enough to show that the promise was intended as conditional upon the sufficiency of the testator's assets having regard to the limited period of time (two years) to which it extends and the circumstances of the transaction.

12. It is to be noticed that the executors had not been paying the interest and that apparently the estate was without sufficient cash even to ensure that the interest would be regularly paid. The rate is not expressly stated to be the same rate as applied to the original debt even if it was so in fact. Their Lordships do not think that they will be applying to this Indian case a technical or unjust rule if they hold that it was for the executors to make clear that their words of promise were not to be taken in the direct and simple sense of a personal covenant, and that on a true construction of this memorandum they have made themselves personally liable for the interest which accrued during the two years with, of course, interest thereon.

13. It was contended for the appellants that if it be found that the defendants had made themselves personally liable to pay any interest, this finding would involve a liability on their part in respect of the whole of the debt both principal and interest, at all events if the obligation which they undertook differs in any way from the original obligation of the testator. It was said that the sum of Rs. 30,000 was only a part of the testator's debt and that the testator was not shown to have been liable for compound interest. Hence, on the facts of the present case, the principle was invoked¹ that a promise by an executor to pay interest differing in any particular from the testator's own obligation involves admission of assets and renders the executor personally liable for principal also. As authority for this proposition, reference was made to *Bradly v. Heath* (1830) 3 Sim 543 and *Childs v. Monins* (1821) 2 Brod & Bing. 460 *Williams on Executors*, 12th ed., Vol. II, pp. 1164-5.

14. These were both cases in which executors appear to have qualified their promise to pay the testator's debt by the words "as executors" and yet were held personally liable on the construction of the instrument as a whole upon the ground that they promised to pay in the future with interest for which the testator was not liable. In *Bradly's* case the matter was entangled with further debts incurred by the executors to the creditor after the testator's death. In *Childs's* case the instrument was a promissory note, the promise was joint and several and was to pay on demand. These cases disclose reasons why the words "as executor" will not in all circumstances be sufficient to show that the payment is only to be made "out of the estate".

15. In India as in England it is open to an executor in consideration that a

creditor of his testator will forbear to sue to make himself liable for the debt whether the assets of the testator be sufficient or insufficient. The forbearance will be consideration to support the promise. It may even be that where there is an agreement by the creditor to give time, the executor will readily be regarded as intending to make himself personally liable. This must, however, in all cases be a question either of fact (what the agreement was) or of construction, if the agreement was reduced to writing: though their Lordships know of nothing in the law of India which warrants any presumption against the executor in this regard, his words of covenant will *prima facie* be given their ordinary meaning. If the truth be that the executor has obtained time: not by promising that he would pay but by granting to the creditor a mortgage or charge over assets of the testator in respect of the debt or part of the debt, there is no rule of Indian law which alters or enlarges the agreement of the parties. And if it be, as in the present case, part of that agreement that the executor shall assume liability for the interest alone and that only for a defined period, to impose a liability for the whole of the debt would be all the more pointedly in conflict with the intention of the parties. It is good sense to infer when a person makes himself liable indefinitely for the interest on a debt that he means to assume liability for the principal, since if the debt be never paid the interest would run for ever. It is also true that the mere agreement that interest shall be paid shows forbearance by the creditor. Such considerations throw light upon the intention of the parties but they do not otherwise impose liability upon executors. If the realisation of a testator's estate is a matter of difficulty and if it be thought of benefit to the estate that a creditor should be induced to give time for payment of his debt, there may be every reason why the executor should seek to make an arrangement for time on payment of enhanced interest or on other special terms entirely at the expense of the estate and without risk to himself. The question is whether he has done so: to what has the creditor agreed? This is more safely answered by an Indian Court upon a direct view of the circumstances of the case, the character of the document, if any, and its language fairly taken as a whole, than through the refracting medium of decisions given in another country one hundred years before.

16. It is maintained, however, that by admission of assets the executor has incurred personal liability without entering into a contract to pay personally or even after entering into a contract under which the creditor's right to payment is conditional upon the sufficiency of the assets. On the terms of the memorandum in the present case, which their Lordships have now construed, it is not possible to suggest that the executors were representing, affirming" or admitting that the assets would be sufficient to meet the debt or the sum of Rs. 30,000. On the contrary they gave plain warning that everything would depend upon the future of land values in Bombay.

17. As English cases have been cited in the High Court and before the Board upon the subject of " admission of assets " their Lordships think right to notice that the English cases require to be interpreted with reference to their setting or

background in English law. In Williams on Executors the well recognised repository of learning on this subject-the scheme of the English law and the conditions upon which judgment could be recovered *de bonis testatoris* or *de bonis propriis* are described (cf. 12 ed. 1930, Vol. II, pp. 1166, 1240, 1293-6) and it will be sufficient here to refer to them in a summary manner. If; an executor was sued for the debt of his testator and had not assets to satisfy the debt, he had to take care to plead *plene administravit* or *plene adminis-travit praeter*: otherwise judgment for the plaintiff amounted to a conclusive admission that he had assets to satisfy it. Where this plea was taken the burden was on the plaintiff to show that assets existed or ought to have existed in the hands of the defendant at the date of the writ but this burden might be discharged by proof of some conduct of the defendant amounting to" admission of assets. In an administration action such admission entitled the plaintiff to an immediate order for payment without taking the accounts. Indeed the general rule was that admission of assets to one claimant on them was an admission to all: also that an admission of assets can never be retracted unless a case of mistake be clearly established. To charge an executor on his own promise to pay the debt of the testator, in addition to the writing required by the Statute of Frauds, it was necessary to show consideration for the promise. Clearly enough, forbearance by the creditor to sue would be good consideration, but there were also decisions to the effect that assets come to the hands of the executor were consideration and that if admission of assets was implied by the promise, the promise was binding.

18. The Indian system of recovering debts due from a person deceased is different in important respects. In the first place the legal representative who is liable to be sued is not in general an executor or administrator at all but the Mahomedan heir or the Hindu son or a mere) intermeddler with the deceased"s estate as is now made clear by Section 2(11) of1 the Civil Procedure Code. The form of judgment given for the debt against the legal representative is for payment out of the property of the deceased. If no such property remains in the hands of the defendant, execution can be had against his own property on proof that property of the deceased had come into his possession, unless he proves that he has duly applied such property of the deceased. The Court executing the decree will require him to produce accounts as necessary (ss. 50, 52). If the legal representative has wrongly applied part of the assets of the deceased, he may be made liable in such proceedingsi to the creditor: his right being to get credit only for what has been " duly disposed of" or " duly applied." But there is no trace in the Code or, so far as their Lordships are aware, in the decisions of Indian Courts of any doctrine comparable to the English doctrine as to admission of assets. If he has paid a small legacy when the assets are insufficient to meet the debts, the legal representative may fail to get credit for the money wrongly spent, but that is all. He will not render himself liable by an admission as though it were an estoppel; though he must like anyone else fulfil his promises and make good his representations (cf. Section 115, Indian Evidence Act). The law of India puts upon a legal representative the full burden of showing that he has

duly applied all assets proved to have come to his hands, but it has no bias tending to make a legal representative liable to answer with his own property for the debts of the deceased, even if it be true that he knows better than the creditor the position of the deceased's estate. That " assets come to his hands " is consideration for a personal promise to pay the debt of the deceased is a doctrine to which it is difficult to give a meaning under the Indian Contract Act, but (as has already been indicated) forbearance to sue is consideration as to which there is no difficulty provided it is in fact agreed; though the counter-consideration given by an executor is not necessarily an unqualified promise to pay the debt.

19. Having construed the memorandum of August 10, 1928, as imposing personal liability upon the defendants in respect only of the interest accruing during the ensuing two years with interest thereon as therein provided, their Lordships are of opinion that there should be added to the preliminary decree for sale as it now stands as order that the appellants be at liberty to apply, in the event of the net sale proceeds proving insufficient to satisfy in full the principal sum and interest and costs and interest on costs due on the security of the equitable mortgage of August 10, 1928, for a personal decree against the defendants for the interest or the balance thereof as the case may be due in respect of the period of two years from August 10, 1928, at six per centum per annum with interest thereon at the same rate with quarterly rests.

20. Their Lordships will humbly advise His Majesty accordingly. They do not find it necessary to disturb the orders for costs made by the High Court on appeal. As the appeal succeeds only upon the question of two years interest and fails as regards the principal and further interest, their Lordships do not think fit to award any costs of this appeal to the appellants and direct that the appellants pay to the respondents half their costs of this appeal.