

APPELLATE CIVIL.

Before Rankin C.J. and C. C. Ghose J.

JAYCHANDRA RAY

v.

SATISHCHANDRA RAY.*

1930

March 18, 20.

Suit—Creditor, right of, to follow assets in the hands of the legatee—Mode of realising—Code of Civil Procedure (Act V of 1908), s. 52 ; O. XXI, rr. 58, 63.

The right of a creditor to follow the assets in the hands of a legatee is a right which has to be exercised by a suit. It cannot be exercised merely by levying execution against the assets in the hands of the legatee under a judgment against the legal representative.

SECOND APPEAL by Jaychandra Ray, defendant.

The facts of the case, out of which this appeal arose, appear fully in the judgment.

Gunadacharan Sen and Prakashchandra Pakrashi
for the appellant.

Jitendrakumar Sen Gupta for the respondent.

Cur. adv. vult.

RANKIN C. J. This is an appeal by the defendants in a suit brought under Order XXI, rule 63, Code of Civil Procedure, to have it declared that the plaintiff is entitled to a certain property and that the attachment, which has been made thereon, is invalid. The position is this:—There was one Jagatchandra Ray. The defendants brought a suit against him for possession of some property and obtained a decree. The decree was in 1907 and, under the old Code, an order was made that the question and the amount of mesne profits were to be decided in execution. An

*Appeal from Appellate Decree, No. 397 of 1928, against the decree of Saradaprasad Datta, Subordinate Judge of Dacca, dated Sept. 12, 1927, confirming the decree of Rashbihari Barman, Munsif of Dacca, dated March 7, 1927.

appeal by Jagatchandra Ray was dismissed. Jagatchandra Ray died in 1912, having by his will left the property, which is now in question, to the *shebâits* of a certain idol. A question has been raised whether a mere charge was given upon the property in favour of the idol and I am clear, and the lower courts have found, that the whole of the beneficial interest in that property was given to the idol. After Ray's death, the defendants proceeded in execution and, after certain proceedings, there was a compromise by which the mesne profits were assessed at Rs. 2,500. That was in 1918. In the meantime, the administrators with the will annexed to the estate of Ray had put the *shebâits* in possession of the property now in question. There can be no doubt that they have been in occupation of it and have been utilizing it for the purpose of the *Thâkur* since 1915. Thereupon, what happened was that the defendants as judgment-creditors proceeded in execution against the administrators of the estate of Ray to attach this property and the plaintiff made a claim in execution which was disallowed. Thereupon, he has brought this suit under Order XXI, rule 63, Code of Civil Procedure, claiming that it be declared that this property is not liable to attachment in execution of the decree against Jagatchandra Ray's legal representatives.

Both the courts have found in favour of the plaintiff and have held that the property is not liable to attachment. The defendants have appealed and what they say is that, as this is a debt of Ray, this debt must be paid before any specific legacy can take effect. The defendants rely upon section 325 of the Indian Succession Act and, in that way, they say that the plaintiff's case ought to have been dismissed.

Now, it is quite true that, if a creditor is not paid, he has a right to follow the assets of the deceased—whether they be specific legacies or whether they be of a different character. It is old law that he can follow the specific legacy just as much as any other legacy. I find it laid down in Williams on Executors,

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on the authority of the case of *Davies v. Nicolson* (1), that "property specifically bequeathed is not discharged from its liability to the testator's debts by the circumstances that there has come to the hands of the executor personal property of the testator not specifically bequeathed more than sufficient to pay his debts and that the specifically bequeathed property has been made over by the executor to the specific legatee." Now, the right in India is declared by section 361 of the Indian Succession Act. It is a right to call upon the legatee to refund and there are many cases in which it has been pointed out that that is a right which may be exercised by a creditor who remains unpaid. The question was considered in *March v. Russell* (2) and comparatively recently in *In re Eustace* (3). It is also dealt with by Lord Eldon in *Gillespie v. Alexander* (4). The present question, however, is not merely whether the creditor can follow the assets in the hands of the legatee, but whether he can do so by the simple process of levying execution under a decree against the executors or, in this case, the administrators. It is reasonably clear to me that that he cannot do. As Lord Eldon pointed out in the case to which I have referred, the legatee cannot be affected except by a suit and it is not possible upon a judgment against the legal representative to proceed to attach property which has years before been parted with to a specific legatee. The matter was considered in the case of an alienee in the case of *Greender Chunder Ghose v. Mackintosh* (5). The language in the older Code of the section, which corresponds to section 52, was somewhat different from what it is now and the alterations were apparently made in consequence of the observations made by Mr. Justice Pontifex in this very case, where he pointed out that under that section it was intended to confine the procedure to property remaining in the possession of the legal representative, leaving the creditors to

(1) (1858) 2 DeG. & J. 693 ;
 44 E. R. 1158.

(2) (1837) 3 My. & Cr. 31 ;
 40 E. R. 836.

(3) [1912] 1 Ch. 561.

(4) (1827) 3 Russ. 130 ;
 38 E. R. 525.

(5) (1879) I. L. R. 4 Calo. 897.

follow property improperly alienated by the legal representative by a separate suit. If one considers the language of section 52 of the Code and if one considers the machinery provided thereunder by rule 58 onwards of Order XXI of the Code of Civil Procedure, it is clear to my mind that the right of a creditor to follow the assets in the hands of a legatee is a right which has to be exercised by a suit. It cannot possibly be exercised merely by levying execution against the assets in the hands of the legatee under a judgment against the legal representative.

For these reasons, it appears to me that the appeal fails and must be dismissed with costs.

C. C. GHOSE. I agree.

Appeal dismissed.

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