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application for an order absolute for sale under section 89 is only an application for enforcing the decree under sections 230 and 235 of the Code of Civil Procedure and that, as such, it is subject to the law of limitation prescribed for execution of decrees.

For the reasons stated in the judgment in A.A.O. No. 111 of 1902, it must be held that this application is also governed by article 178 and is not barred by limitation.

The appeal is accordingly allowed and, reversing the order appealed against, the case is remanded for the necessary final order to be passed in due course of law for sale of the mortgaged property. Each party will bear his own costs of this appeal.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

1902. November 27, 28. December 9.

VEERASOKKARAJU, MINOR, REPRESENTED BY THE COLLECTOR OF SALEM AS AGENT TO THE COURT OF WARDS (PETITIONER, SECOND DEFENDANT), APPELLANT,

v.

PAPIAH (COUNTER-PETITIONER, PLAINTIFF), RESPONDENT.*

Hindu Law—Rights of unsecured creditors by way of charge or lien on the inheritance—Position of legal representative—Distribution of assets.

The unsecured creditors of a deceased Hindu have no charge or lien on the inheritance. If payments are not made by the heir rateably, it does not follow that he has failed to apply the assets duly. Every payment on account of a debt is perfectly lawful, irrespective of its effect upon the other creditors, and is a due application of the assets within the meaning of section 252 of the Code of Civil Procedure.

There is no analogy between the case of an executor who is governed by the special provisions of the Succession Act and that of a legal representative under the Hindu Law with reference to the question of the distribution of the assets among creditors.

Where property of a deceased remains in the hands of the legal representative, it does not necessarily follow that a creditor is entitled to proceed against it as assets in the hands of the legal representatives. The question to be

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* Civil Miscellaneous Appeal No. 89 of 1902, presented against the order of L. C. Miller, District Judge of Salem, dated the 28th day of February 1902, in Civil Miscellaneous Petition No. 34 of 1901, in Execution Petition No. 46 of 1900, in Original Suit No. 32 of 1898.

considered is the real effect of what has been done, and where payments have been made by the legal representative to the extent of the full value of the property of the deceased which has come into his hands, a decree cannot be executed even although he may still have in his possession property which originally belonged to the deceased.

APPLICATION to raise an attachment. The respondent Papiah had obtained a money decree against the appellant, the minor Poligar of Berikai and a ward of the Court of Wards, as the representative of his deceased mother, the decree directing the payment of the judgment-debt out of the assets of the mother in the hands of the appellant. He then attached in execution of the decree certain jewels in the possession of the appellant as the separate properties of the mother, but the appellant, while admitting the liability of the jewels to attachment and sale in execution of the decree, claimed a lien on the sale-proceeds to the extent of Rs. 1,562 as follows:—Rs. 361 paid by himself to redeem two of the jewels which had been pledged by his mother; Rs. 110 lent to the mother for re-making jewel No. 11; Rs. 1,091 paid by him in discharge of debts contracted by the mother. The District Judge held that the contention of the appellant that the assets in his hands must be taken to be what was left after he had satisfied his own claims against the mother's estate was unsound and that as administrator of the estate he would not be entitled to resist creditors executing decrees on the ground that other debts remained to be paid on distribution of the assets, and that it made no difference that the debt was due to himself. He accordingly disallowed the claim.

Against this order the Court of Wards, on behalf of the minor Poligar, preferred this appeal.

T. Subramania Ayyar for the appellant.—The liability of the heir is limited to the extent of the assets not duly applied by him—section 252, Civil Procedure Code (*Joogul Kishore Singh* v. *Kalee Churn Singh*(1), *Kottala Uppi* v. *Shangara Varma*(2) and *Syud Jahur Hossein* v. *Hingum Jan*(3)). The creditor has no lien or charge on the assets and the heir is liable for their value rather than for the specific assets, although the wording of the section is a little uncertain in this respect (*Zaburdust Khan* v. *Inderman*(4), 'Ghose on Mortgage,' pages 185–187 and *Ram Golam*

(1) 25 W.R., 224.
(2) 3 M.H.C.R., 161.
(3) 8 W.R., 161.
(4) (1866) Agra, F.B., 71.

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Dobey v. *Ayma Begum*(1)). The fact that the creditor, who was paid by the heir out of his own funds, was the same that sought to proceed against the assets afterwards in this last-named case, does not affect the principle that, when once the heir has duly accounted for the full value of the assets received by him, his liability to any further debts of the ancestor is at an end. This, though not decided, was also assumed in the Madras and Calcutta cases already quoted. The question then is whether the heir in the present case can be said to have 'duly accounted' for the assets to the extent of Rs. 1,562. In the case of jewels Nos. 7 and 18, they would not be available as assets at all if they had not been redeemed by the payments made by the heir or, rather, the value of the jewels *minus* the debts charged upon them could alone go to make up the assets and it made no difference whether the debts charged upon them and due by the mother were now due to third parties or to the heir. In the case of jewel No. 11, it was made by money contributed by the heir, *i.e.*, this was a debt properly due to the heir for which he could not sue himself and which therefore he could retain out of the assets ('Theobald on Wills,' fifth edition, pages 706–720). The right of retainer of the executor is based on his inability to sue himself and a similar right would accrue, in equity to the heir who laboured under the same disability. The remaining item of Rs. 1,091 represented payments made to other creditors of the mother. Barring the bankruptcy and insolvency laws it has been held that a debtor may pay whichever creditor he pleases. It does not appear why the heir should not do the same. In *Chowdhry Wahed Ali* v. *Mussamut Jumaee*(2) there is an '*obiter dictum*' of their Lordships of the Privy Council, which throws light on the question what may be an undue or improper application of the assets within the meaning of section 252, Civil Procedure Code. This indicates that nothing short of 'waste' would be an improper application so as to make the heir personally liable. Payments made to *bonâ fide* creditors even before the respondent obtained his decree cannot amount to 'a waste of the assets.' Apparently, therefore, sections 234 and 252 of the Civil Procedure Code are not intended to impose a personal responsibility upon the 'representative' for anything short of 'misconduct' such as is implied by 'waste' or other wilful

(1) 12 W.R., 177. (2) 18 W.R., 185 at p. 188.

default. In the case of an executor or administrator, sections 327 and 328 of the Indian Succession Act would seem to make him personally liable only for 'waste' or 'wilful default.' This is also the English Law. The liability of the heir under the sections of the Procedure Code does not appear to be larger. In the case of an executor, section 282 of Act X of 1865 casts a duty upon him to apply the residue of the assets after meeting certain charges rateably in payment of debts due to himself and others. It has also been held in such a case that if he pays debts of which he has actual notice otherwise than rateably he will be personally liable for any loss occasioned to a creditor by such improper payments (*Asiatic Banking Corporation* v. *Amadorvieyas* (1)). But this obligation seems to arise by reason of the breach of duty cast on him of inviting claims under section 320 of the Act. Section 320 really provides means by which the executor could protect himself; but if he does not avail himself of them, he runs the risk of incurring a personal liability. It is therefore clear that if the law casts a duty on the executor to make a rateable distribution of the assets to creditors, it also provides the machinery by which he may discharge this duty and protect himself. But in the case of the heir no such duty is cast on him and there is no machinery provided by which to discharge it. The analogy therefore between the position of the executor and that of the heir should stop here. But if the heir is no better than the executor, still, the right of the creditor will be merely to ask that the heir shall share the assets rateably with him in respect of the Rs. 1,091. As regards the Rs. 361 he is entitled to it in any event and as regards the Rs. 110 he can pay himself this amount, since he cannot sue himself.

P. R. Sundara Ayyar for the respondent.—The words of section 252, Civil Procedure Code, are clear. The language of the section, which is plain, show that so long as the assets have not been applied in point of fact but remain with the heir, the creditor can proceed against them. In this case the assets are there and are therefore liable for the debt. The decision in *Ram Golam Dobey* v. *Ayma Begum* (2) is the only one applicable to the case of those quoted on behalf of the appellant and this decision, properly construed, does not go beyond what the section itself says. [As regards

(1) 8 B.H.C.R., 20 at pp. 25 and 26. (2) 12 W.R., 177.

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the duty of the heir to make a rateable distribution of the assets he referred to 'Domat,' Vol. II, p. 107.]

SUBRAHMANIA AYYAR, J.—The decree in execution of which the present question arises was obtained by the respondent on a promissory note against the appellant as the son and heir and legal representative of his mother, the executant of the promissory note, the decree directing payment from the estate of the deceased debtor. The respondent having attached certain jewels of the deceased in the possession of the officers of the Court of Wards who were in charge of the estate of the appellant (a minor), a claim was put forward on behalf of the appellant to the effect that the respondent, as attaching creditor, was entitled to only so much of the sale-proceeds of the jewels as might exceed the sum of Rs. 1,562 due to the appellant (made up of Rs. 361 paid after the death of the appellant's mother for the redemption of two of the said jewels from the creditor to whom they had been pledged by her, and of Rs. 1,091 also paid subsequent to the mother's death to certain of her other creditors and Rs. 110 advanced to the mother out of the appellant's own funds sometime before her death). The District Judge, without going into the truth of the alleged payments, held that the claim was not legally sustainable. The questions raised in the argument before us were whether it was the duty of the appellant and those entitled to act on his behalf in the matter to pay his mother's creditors rateably out of the assets left by her; and whether the appellant is entitled to any and what portion of the sale-proceeds of the attached jewels which appear to have been sold with the consent of the parties subject to the decision of the appellant's claim.

It is now settled that unsecured creditors of a Hindu have no charge or lien on the inheritance. No text or other Hindu Law authority has been cited in support of the contention that an heir and representative, such as the appellant was, in applying the ancestor's assets in his hands towards the discharge of the ancestor's debts is bound to pay each and every creditor rateably. Nor is there any statutory provision to that effect. The effect of section 252 of the Civil Procedure Code is only that the representative can be proceeded against personally to the extent to which he has failed to apply the assets duly. It is scarcely necessary to say that it does not follow from this that if payment is not made by the heir rateably he has failed to apply the assets duly. The cases

cited for the appellant (*Syed Jahur Hossein* v. *Hingum Jan*(1), *Joogul Kishore Singh* v. *Kalee Churn Singh*(2) and *Kottala Uppi* v. *Shangara Varma*(3)), proceed on the clear assumption that every payment on account of a debt is a perfectly lawful payment irrespective of its effect upon the other creditors and would be a due application of the assets within the meaning of the section. That assumption is made for the obvious reason that the principle of distributing among the general body of creditors the whole of the available assets rateably is unknown to the law except where it has been introduced by express legislation. If, in the absence of adequate legislation on the point, we should hold that a legal representative, such as the appellant, is bound to distribute assets coming to his hands rateably only we should be adopting a rule which, though just in the abstract, would yet, as is obvious, be attended with serious difficulties in its practical application. This is a consideration which ought not to be overlooked for, whether it is workable is, in the language of Lord Robertson, in *Janson* v. *Driefontein Consolidated Mines Company, Limited*(4), one of the tests of any legal doctrine.

It is hardly necessary to say that there is no analogy whatever between the case of an executor who is governed by the special provisions of the Indian Succession Act and that of the appellant as a legal representative under the Hindu Law with reference to the question of the distribution of the assets among creditors; nor has the passage cited from 'Domat' (Volume II, page 107) any bearing on the present case as the heir referred to therein seems to be subject a rule peculiar to the Roman Law. In my opinion, therefore, the answer to the question under consideration should be in the negative.

As to the next question, it was urged on behalf of the respondent that as the jewels themselves are still in the hands of the appellant, the respondent is entitled to proceed against them as assets undisposed of, without reference to any payments made by him or on his behalf to other creditors. Now, supposing that the Court of Wards had caused the jewels to be sold by auction and purchased them with the minor's other funds in their

(1) 8 W.R., 161.
(2) 25 W.R., 224.
(3) 3 M.H.C.R., 161.
(4) [1902] A.C., 505.

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hands and paid the sale-proceeds to the mother's creditors, it would have been impossible to contend that the jewels were still undisposed of assets on the ground that they still remained in the possession of the minor. In cases like the present, the thing to be considered is the real effect of what has been done and not whether the property which originally belonged to the deceased is still with the representative. *Ram Golam Dobey* v. *Ayma Begum*(1), relied on by the appellant, is a clear authority in favour of this view. There, Loch and Macpherson, JJ., held that when a defendant, against whom a decree had been passed in his representative capacity, had made payments in satisfaction of the decree to the full value of the property of the deceased which had come or which might have come to his hands, the decree could no longer be executed even though the defendant had still in his possession property which originally belonged to the deceased.

The good sense of the reasoning on which this decision rests, even were the question *res integra* would induce one to adopt the same view. It may be added that the present is eminently a case for raising the presumption that the payment was made on behalf of the appellant as representative of his mother inasmuch as he himself is incapacitated and the persons making the payment are public servants bound to proceed in the matter according to the provisions of section 17 of Regulation V of 1804 with the sanction of the Court of Wards. To hold otherwise would be to unjustly mulct the appellant to the extent of the payments already made.

Apart from this ground, so far as the sum of Rs. 361 said to have been paid for the redemption of the two jewels is concerned, the appellant is, in my opinion, entitled to a lien on those jewels for the amounts so paid. This payment, if true, was not a payment by a mere stranger; it was one made in the course of getting possession of the deceased's assets which the appellant had to dispose of in accordance with the law. In Sheldon on 'Subrogations' it is stated, on the authority of certain decisions in America, (where, under the initial guidance of Chancellor Kent, the doctrine of subrogation derived from the civil law has been developed more fully than in England) that

(1) 12 W.R., 177.

the wife and children of a deceased who pay valid demands against his estate have been held not to be mere volunteers and may be subrogated (see second edition, page 368). The reason for the application of the principle to such cases would seem to be well expressed in the following passage, quoted by the author referred to, at pages 368 and 369 from a judgment of Thomson, C.J.—"I regard the doctrine as applicable in all cases where a payment has been made under a legitimate and fair effort to protect the ascertained interests of the party paying and where intervening rights are not thereby jeopardized or defeated. Such payments, whatever their effect may be at law in extinguishing the indebtedness to which they apply, will not be so regarded in equity if it is contrary to equity to regard them so."

Here, no right of the respondent has been jeopardized or defeated by the payment made for redeeming the jewels and it is but equitable that creditors, like the respondent, who wish to take advantage of the redemption should do so only subject to the condition of paying what they would have had to pay were they themselves redeeming the property.

In regard to the Rs. 110 said to have been advanced to the mother in her life time the appellant has a right to pay himself out of the assets as he cannot sue himself.

It follows that the appellant is entitled to be paid out of the sale-proceeds the sums which he proves he is entitled to in the view of the law stated above and that the respondent is only entitled to the remainder.

I would, therefore, set aside the order of the District Judge and would remand the case for enquiry into the truth of the allegations made on behalf of the appellant and for disposal on the merits.

Costs in this Court should abide the result.

DAVIES, J.—I concur.