

acknowledged the joint heirship of Musammat Bhawani, and there is no reason to doubt that the latter continued to live in her husband's house, and to be supported out of his estate, with the other widow. Musammat Ganesh was probably the head of the house and the manager of the estate, but Musammat Bhawani cannot be regarded as having been out of possession. But, however this may be, we conceive it to be sufficient for the protection of her right that it had vested in her by law before her misconduct. In her presence none of the plaintiffs have any right to succeed to the estate of Dariao Singh aforesaid. It is unnecessary to discuss the question of the legitimacy of the defendant, appellant, Maharaj Singh. We decree the appeal with costs, and dismiss the suit by reversal of the lower Court's decree.

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Appeal allowed.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

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Arbitration—Insolvency—Contract—Act IX of 1872 (Contract Act), s. 65.

K, on the one part, and his creditors including *C*, on the other part, agreed in writing to refer to arbitration the differences between them regarding the payment of his debts by *K*. The award compounded *K*'s debts, and assigned his property to his creditors, and directed that *K* should dispose of such property for their benefit, and that, if he misappropriated any of the property he should be personally liable for the loss sustained by the creditors on account of such misappropriation. *C* signed the award, amongst other creditors, but the award was not signed by all the creditors. *C* received a dividend under the award. *Held*, in a suit by *C* against *K*, to recover a debt which had been compounded under the award, in which suit *C* alleged that several creditors had not signed the award; that some of them had sued *K* and recovered debts in spite of the award; that *K* had misappropriated some of the property; and that, if the plaintiff did not sue, there would be no assets left to satisfy his debt, that such suit was not maintainable.

THE facts of the case were as follows: By an instrument in writing dated the 9th May, 1877, the firm of Kheta Mal and Kashi Nath on the one part, and the creditors of that firm, amongst whom was one Chuni Lal, on the other part, agreed to refer the differences between them to arbitration. The arbitrators appoint-

* Second Appeal, No. 670 of 1878, from a decree of H. G. Keene, Esq., Judge of Agra, dated the 1st March, 1878, affirming a decree of Babu Avinash Chandar Banarji, Munsif of Agra, dated the 19th September, 1877.

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ed by the parties delivered an award, dated the 10th May, 1877, in the following terms : “ Whereas Kheta Mal and Kashi Nath on the one part, and Hazari Lal and the other persons hereinafter mentioned, have appointed us arbitrators to settle the disputes between them regarding *hundis*, purchase and sale of goods, debts, &c., appertaining to the firm of Kheta Mal and Kashi Nath, and have signed a duly stamped agreement to that effect, after examining the account-books and taking evidence, it appears that Kheta Mal and Kashi Nath had transactions with all the said creditors by way of *hundis*, &c.: and it appears that Rs. 21,502 is due to the creditors on account of *hundis*, &c., by Kheta Mal, and at present Kheta Mal has no cash, nor can he get any from which the debts could be liquidated, and the creditors are pressing Kheta Mal for payment, but Kheta Mal has stores, &c., to the value of about Rs. 16,569-13-6, including cash, Rs. 104, and outstandings, Rs. 2,892-13-6, which are now in his possession, and these stores are kept in different shops, *i. e.*, three shops, and a “*mukkan*” of Musammat Janki, also in a shop of Ganga Prasad and other places, and besides these stores Kheta Mal has no cash, immoveable property, nor jewels from which these debts could be realised : there is a difference of Rs. 4,632-2-6 between Kheta Mal’s assets and liabilities, and this deficiency can in no way be made up : the firm of Kheta Mal and Kashi Nath has failed, and there is no hope of the Rs. 4,632-2-6 being hereafter liquidated : we have, therefore, awarded that in payment of the said sum of Rs. 21,502 the stores, &c., now in Kheta Mal’s possession, amounting to Rs. 16,569-13-6, be made over to the creditors : and the creditors have released Kheta Mal from the payment of the said balance of Rs. 4,632-2-6 : now there is no claim for these debts by the creditors against Kheta Mal and Kashi Nath, nor will there be any such claim hereafter : and Kheta Mal and Kashi Nath have no claim to the stores, &c., now in their shops, nor will they have such claim hereafter, but Kheta Mal and Kashi Nath shall sell these stores, &c., on the part of the creditors, and shall engage Bankey Lal, son of the one and brother of the other, and shall act as “*gomashtas*,” these three men shall manage the affairs for four months, getting a consolidated salary of Rs. 30 per month : the proceeds of cash-sales and realised debts shall be made over every evening and accounts rendered to Gobind Ram,

Har Sahai Mal, Chuni Lal, or to any one appointed by them: the keys of the shops shall be made over to the person appointed to be in charge: if the stores, &c., are not all sold within four months Bankey Lal and Kashi Nath shall leave the shop and carry on their own work, leaving Kheta Mal only to sell the balance on a salary of Rs. 10 per month: Kheta Mal may draw his salary daily or monthly, if his salary is not paid, Kheta Mal need not serve: if Kheta Mal realises any sums on account of stores sold from the shop, or if he has previously so realised any sums, or if he misappropriates any of the property, or if he acknowledges the claims of any other parties, Kheta Mal and Kashi Nath will be responsible for the payment of such sums and for the defence of such claims: if Kheta Mal or Kashi Nath collusively allow a suit to be instituted against them, they shall be liable to pay the amount of the decree, the property made over by this award shall not be liable for the payment of such decree, nor will the decree-holder be entitled to recover from this property, because up to-day's date, except those persons on account of whose claims this property has been made over, there are no other creditors, inasmuch as their claims have not been admitted before us, nor are their names entered in Kheta Mal's account-books: the rents of the shops and houses shall be paid by the creditors and not by Kheta Mal and Kashi Nath: no further claims remain between the parties and both parties are agreeable to be bound by this our award and have signed this award."

This award was signed by Chuni Lal, amongst other creditors, but it was not signed by all the creditors who had signed the agreement to refer to arbitration, some of them refusing to sign it. On the 11th May, 1877, by an instrument in writing which recited that Kheta Mal, Kashi Nath, and Bankey Lal had entered into the service of the creditors, the former bound themselves to perform faithfully the duty of selling the property assigned under the award, and to render accounts, and empowered the creditors in case of any misappropriation of the property, to sue to recover the value of the property misappropriated. On the 13th September, 1877, the present suit was instituted by Chuni Lal against Kheta Mal to recover Rs. 878-14-0 on two *hundis*, being a debt which had been compounded under the award. The defendant set up as a

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defence to the suit that the plaintiff could not maintain the suit in the face of the award. The plaintiff contended that the award was not binding on him on the ground that all the creditors had not signed it; that several of the creditors who had not signed it had sued and had recovered their debts from the property assigned under the award, and that the defendant had fraudulently disposed of some of such property. The Court of first instance held that the suit was maintainable and gave the plaintiff a decree. On appeal by the defendant the lower appellate Court also held that the suit was maintainable for the reasons set forth in its judgment, the material portion of which was in the following terms: "Did the respondent (plaintiff) make with the appellant (defendant) a complete and valid contract by virtue of which his original right under the bills was foregone, and another right substituted for it to which he is now confined; or is he at liberty to treat that contract as incomplete and void and to fall back upon his original right under the bills? I have no hesitation in concluding that the contract or compromise between the parties was never carried out. The respondent has admitted that he received a sum of money under its provisions, but he has made restitution by suing for the balance due to him after crediting the amount. In so doing he has made the restitution required by s. 65 of the Contract Act, if the agreement is void. That it is so seems plain to me. It arose out of a proposed composition between the appellant and the whole of his creditors, by virtue of which they were to sign a deed releasing him from immediate liability and appointing their agent to carry on the business for their benefit. The respondent signed the deed, and the arbitrators handed him his dividend under the proposed composition. But about one-third of the creditors afterwards refused to sign; and the appellant, instead of conducting his business as the common agent of all and for their common benefit as he had engaged to do, made separate arrangements with some of the others. On this the respondent was perfectly justified in regarding the contract as a lapsed and void agreement, and in suing on his original right, restoring the amount received as dividend. I annex an English abstract (for which I am indebted to the pleader for the respondent) from which it will be seen that the signature of all the creditors and the

bonâ fide management of the business for the joint benefit of all were essential conditions, the non-fulfilment of which affected the whole consideration of the agreement, and rendered it void and of no effect. With reference to the fourth plea, I may observe that no specific point was stated as to which the account-books would give satisfaction to the Court's doubts. There was proof on the record, and in the corroborative papers called for from the Court of Small Causes, to show that the business had not been carried on in good faith for the common benefit of all the creditors, as it ought to have been under the terms of the agreement in virtue of which the composition was allowed. I therefore uphold the award of the lower Court and dismiss the appeal with costs."

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The defendant appealed to the High Court, contending that the suit was not maintainable.

Mr. *Conlan* and the *Junior Government Pleader* (*Babu Dwarka Nath Banarji*), for the appellant.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the respondent.

The following judgments were delivered by the Court :

SPANKIE, J.—Respondent admitted in his plaint that he agreed to the arbitration and the award made by the arbitrators, in which a composition was made between the creditors of defendant, appellant, and defendant himself. He admits that he signed the award, and it is certain that he accepted payments towards the satisfaction of his debt, due by defendant on his failing to meet two *hundis* when they fell due. But plaintiff avers that several of the creditors did not accept the award, and some had sued and recovered debts due to them in spite of the award: also the defendant had acted dishonestly, and had made away with some of the goods over which he was placed in charge by the award and the creditors who signed it: plaintiff was therefore compelled to sue, as there were not sufficient assets left to satisfy his debt and the debts of the others who were also suing defendant.

But it appears to me that the plaintiff and all persons who signed the award and were parties to and signed the agreement to refer to arbitration are bound by their acts. The arbitrators decided that there were not sufficient assets to discharge all the debts due

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to that of the creditors, but the latter should surrender their claims to a sum Rs. 4,632-2-6, which is mentioned in the award as irrecoverable, and that the stores, &c., now in the defendant's possession should be made over to the creditors for their benefit. The award goes on to say that the creditors "have released Kheta Mal from the payment of the said (irrecoverable) balance of Rs. 4,632-2-6 : now there is no claim for these debts by the creditors against Kheta Mal and Kashi Nath, nor will there be any claim hereafter, and Kheta Mal and Kashi Nath have no claim to the stores, &c., now in their shops, nor will they have any claim to them hereafter. But Kheta Mal and Kashi Nath shall sell these stores, &c., on the part of the creditors, and shall engage Bankey Lal, son of Kheta Mal and brother of Kashi Nath, and shall act as *gomashias* : these three men shall manage the affairs for four months, getting a consolidated salary of Rs. 30 per mensem." Then come some other less important conditions and the award proceeds : "If these stores are not all sold in four months, Bankey Lal and Kashi Nath shall leave the shop and carry on their own work, leaving Kheta Mal alone to sell the balance on a salary of Rs. 10 per mensem."

There are certainly the following conditions : "If Kheta Mal realises any sums on account of stores sold from the shop, or if he has previously sold any, or realised any sums, or if he misappropriates any of the property, or if he acknowledges the claim of any other party, Kheta Mal and Kashi Nath will be responsible for the payment of such sums and for the defence to such claims: if Kheta Mal and Kashi Nath collusively allow a suit to be instituted against them, they shall be liable to pay the amount of the decree: the property made over by this award shall not be liable for the payment of such decrees, nor will such decree-holders be entitled to recover from this property, because up to-day's date, except those creditors to whom this property has been made over, there are no other creditors, inasmuch as their claims have not been admitted before us nor are their names entered in Kheta Mal's account-books : no further claims remain between the parties and both parties agree to be bound by our award."

Now, from these extracts it is quite apparent that there are no conditions such as those referred to by the lower appellate Court

which rendered the agreement void or voidable. The defendant is made responsible under the award. No right is given to the plaintiff to rescind the agreement and repudiate the award and fall back upon his dishonoured *kurdis*. The Judge's application of s. 65 of the Contract Act to this case altogether fails. The very fact that the plaintiff received on two occasions moneys in satisfaction of his claim under the award shows incontestibly that the award was carried out, and was in full operation when the suit was brought. The agreement entered into for the satisfaction of the claims of creditors was a new contract substituted for former contracts between creditors and defendant. This agreement was never discovered to be void, nor had it become void by any circumstances making it so. The defendant was the paid servant of the creditors as manager of the stores, and if he misappropriated them or behaved fraudulently, they could proceed against him and hold him responsible for losses, but only under the award. If creditors who had not signed the award obtained decrees, the creditors who had signed it could only protect themselves under the terms of the award. They could not rescind the award and fall back on their old debts in satisfaction of which the defendant had assigned all his property for the benefit of his creditors. As the award declares: "Now, there is no claim for these debts by the creditors of Kheta Mal and Kashi Nath, neither will there be any such claim hereafter, and Kheta Mal and Kashi Nath have no claim to the stores now in the shops."

I am clearly of opinion that the suit was not one that could be maintained, and that it should have been dismissed. I would decree the appeal and reverse the decrees of both the lower Courts with costs.

STUART, C. J.—I agree in the conclusion arrived at by Mr. Justice Spankie. Both the lower Courts have utterly mistaken the law applicable to this case. There is no bankruptcy law in these provinces, nor any coercive legal process which can be enforced against the property of an unwilling insolvent for the benefit of all his creditors. A person in the position of the present defendant, appellant, may avail himself of the provisions of the Code of Civil Procedure for the purpose of being relieved of his debts, but he can

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only do so under the conditions of that Code, he himself being the applicant, and under executed process by arrest or imprisonment. No such result can be attained by the legal action of any or even all of an insolvent's creditors. Doubtless creditors and their debtors can agree as to the disposal of property for the benefit of the former, and that is an agreement of course that can be given effect to. But irrespective of such an agreement among a debtor and his creditors, the law, at least in these provinces, places no compulsory machinery in the hands of the creditors as a body. On the other hand, there is no law in this country to prevent a debtor from making an assignment of his estate for the benefit of all or a limited class of his creditors; nor, for that matter, from his assigning, conveying, or settling his estate in favour of any person or persons whom he may wish to favour, provided of course that he makes those assignments, settlements, or conveyances without fraud, that he does so honestly and in good faith. The fundamental principle that underlies this state of things is that, so long as the law does not step in to deprive a man of his control over his estate, he remains *sui juris*, and can up to the last moment of its possession deal with his property as he thinks fit. The legal right remains in him, and if he acts honestly and in good faith, and not fraudulently, he may transfer his estate, or any portion of it, to any one or more of his creditors, but whose acceptance of such transfer or assignment, or whatever the form of the conveyance may be, of course deprives them of all further relief against their debtor, and the only remedy of other persons to whom he is indebted, and who have by that means been excluded from any such transfer, assignment, or other conveyance, can only be against such property of the debtor as may not have been so dealt with, or against the debtor's person.

Now, applying these legal principles to the present case, there can be no doubt that the agreement between Kheta Mal and those creditors of his who joined with him in the arrangement was in effect such a transfer or conveyance as I have referred to, and the plaintiff, being one of the creditors who accepted that mode of settlement, is bound by it, and cannot recover any balance that may remain over after the event of the award in the arbitration proceedings; and the fact that he had on foot of the award accepted

payments from the sale of the defendant's goods only still further weakens his contention that he has a surviving right of action against his debtor.

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I must here observe that a more extraordinary misreading of a plain law than that afforded by the recorded opinion of the Judge as to the application of s. 65 of the Contract Act to the facts of the present case I never met with. That section of the Contract Act is in the following terms: "When an agreement is discovered to be void, or where a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it." So that, according to the Judge, the payments made to the plaintiff in the present case is merely an advantage for which compensation may be made by being credited to the debtor as against his *lundis*. Now, there was here no void contract, no contract void in any sense, but the arbitration proceedings between Kheta Mal and his other creditors who are parties thereto, including Chuni Lal, the plaintiff, constituted, together with the award made by the arbitrators, a good and sufficient contract, valid and effectual, against the plaintiff and those other creditors in the same position, and all these persons are thereby concluded against any further remedy *ultra* the arbitrators' award.

The present appeal must therefore be allowed, the decrees of both the lower Courts reversed, and the suit dismissed with costs in all the Courts.

Appeal allowed.

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Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

NAIIAK CHAND AND ANOTHER (DEFENDANTS) v. RAM NARAYAN (PLAINTIFF).
Act VIII of 1859 (Civil Procedure Code), ss. 323, 324—Arbitration.

The plaintiff in this suit sued the defendants to recover certain moneys presented to him on his marriage, which he alleged the defendants had received and appropriated to their own use. The defendants denied that they had received such

* Appeal under cl. 10, Letters Patent, No. 5 of 1877.