

1895.

BÁBÁJI  
v.  
MAGHIRÁM.

former to hold just as he held the latter, *viz.*, as mortgagee for the occupant Bábáji and his heirs. See *Virarágava v. Krishnasami* (1). The Special Judge, therefore, acted illegally in reversing the decree of the Subordinate Judge on his finding on his 4th issue, and we must reverse his order and remand the case to him in order that he may dispose of the other points at issue before him. The opponent must pay the costs of this rule.

*Order reversed.*

(1) I. L. R., 6 Mad., 344 at p. 347.

## APPELLATE CIVIL.

*Before Chief Justice Farran and Mr. Justice Parsons.*

NAVAZBA'I (ORIGINAL DEFENDANT NO. 1), APPLICANT, v. PESTONJI RATANJI (ORIGINAL PLAINTIFF), OPPONENT.\*

1895

December 19.

*Executor—Executor de son tort—What constitutes an executor de son tort—Liability of such executor to creditors of deceased—Intermeddling with estate after order for probate made but before issue of probate—Receipt of assets with consent of person appointed executor—Indian Succession Act (X of 1865), Sec. 255—Act XL of 1858.*

Probate is necessary to complete the title of a rightful executor, and until it is actually taken out, a person intermeddling with the assets constitutes himself executor *de son tort*.

The executrix appointed by the will of one Jamsetji Jehangir applied to the High Court for probate of the will, and Navazbai, the widow of Jamsetji, entered a caveat. By a consent decree, dated 25th February, 1892, it was ordered that probate should issue to Ratanbai, and by the same decree it was declared that Ratanbai as executrix was not entitled to a sum of Rs. 4,178-10 or any other sum or sums of money to be received from the B. B. and C. I. Railway Company. In that same year Navazbai obtained payment from the Railway Company of the said sum of Rs. 4,178-10 and of another sum of Rs. 166 due to the deceased. On the 3rd February, 1893, probate was issued to Ratanbai. In 1894 the plaintiff sued Navazbai and Ratanbai for Rs. 165 due to him by the deceased Jamsetji. He claimed against Navazbai as executrix *de son tort*.

*Held* that probate not having actually issued to Ratanbai at the time that Navazbai received the money from the Railway Company although an order for probate had been made, she had by receiving it constituted herself executrix *de son tort* and was, therefore, liable to the plaintiff, and could be joined as co-defendant with Ratanbai in the suit.

\* Application No. 81 of 1895 under the extraordinary jurisdiction.

*Held*, also, that the fact that by the terms of the consent decree of the 25th February, 1892, she was allowed to receive the money and retain it, was no defence. The consent decree did not bind the creditors or free her from her responsibility to them to the extent of the assets which she received.

1895.

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 NAVAZBÁI  
 v.  
 PESTONJI.

APPLICATION under the extraordinary jurisdiction of the High Court (section 25 of the Provincial Small Cause Courts Act, IX of 1887) against the decision of Khán Bahádur B. E. Modi, Judge of the Court of Small Causes at Surat.

One Jamsetji Jehangirji Dalál died in Bombay on the 14th October, 1891, leaving a will dated 25th August, 1887, whereby he appointed one Ratanbái Sorábji Umrigar as his executrix and bequeathed to her all his estate.

Ratanbái applied for the probate of the will to the High Court, and Navazbái, the widow of the deceased, filed a caveat against the grant.

On the 25th February, 1892, a consent decree was passed by the High Court (No. 36 of 1891) between "Bái Ratanbái, the sole executrix named in the will of the deceased," as plaintiff and "Navázbái, widow of the deceased," as defendant. The decree ran as follows:—

"This Court doth by consent order and direct that probate of the will of the said Jamsetji Jehangirji Dalál, deceased, do issue to the said plaintiff and that the schedule to the said petition be amended by striking out the words 'Monies standing to the deceased's credit at the time of his death in the Provident Fund in the B. B. & C. I. Railway Company, Rs. 4,200;' and this Court doth declare that the plaintiff as executrix of the estate of the said J. J. Dalál, deceased, is not entitled to the said sum, Rs. 4,178-10, or any other sum or sums of money hereafter to be received from the B. B. & C. I. Railway Company by way of gratuity or otherwise howsoever."

Probate of the will was granted to Ratanbái on the 3rd February, 1893.

In 1892, while the proceedings in the High Court were pending, Navazbái, the widow of the deceased, applied to the Railway Company and received from the Company's Provident Fund Committee the above-mentioned sum of Rs. 4,178-10-0. A further sum of Rs. 166 was paid to her by the company in respect of certain arrears of salary and bhátta due to the deceased.

In the year 1894 the plaintiff sued Navazbái and Ratanbái in the Court of Small Causes at Surat to recover Rs. 165 in

1895.

NAVABÁI  
v.  
PESTONJI.

respect of certain loans advanced by him to the deceased during his life-time.

The Judge awarded the plaintiff's claim to be recovered from the estate of the deceased, and held (*inter alia*) that Navabái had by her conduct rendered herself liable to the plaintiff as an *executrix de son tort*.

Navabái applied to the High Court under its extraordinary jurisdiction and obtained a rule *nisi* calling on the plaintiff to show cause why the decision should not be set aside, contending that the Judge erred in holding that she was executrix *de son tort* and as such liable for the debt sued on; that he should have held that the consent decree made by the High Court protected her from the claims of the creditors of the deceased, and that he should have held that the plaintiff's remedy, if any, was against Ratanbái, the executrix of the deceased, and not against the applicant.

*Máneksháh J. Taleyárkhán* appeared for the applicant (defendant Navabái) in support of the rule:—Navabái has been held liable as executrix *de son tort* because she obtained the sums of Rs. 4,178-10 and Rs. 166 from the Railway Company. We deny that she was executrix *de son tort*. The consent decree of February, 1882, gave her the right to these sums, and the plaintiff has no claim to any part of them—*Hill v. Curtis*<sup>(1)</sup>. At the time she received these sums the order for probate had been made by the consent decree although probate had not actually been issued. But the order for the grant of probate is tantamount to the grant itself—*Mugnirám v. Gursahai Nand*<sup>(2)</sup>. There was, therefore, an executrix in existence. It is she who is liable to the creditors, and Navabái, if she has done wrong, is liable to her. But the creditors cannot sue Navabái. They can only sue the executrix Ratanbái. Navabái has not rendered herself liable as executrix *de son tort*.

*Nárayan G. Chandávarkar* appeared for the opponent (plaintiff) to show cause:—Navabái had no authority under the will to recover any money due to the deceased, and having done so, she was rightly held to be executrix *de son tort*, and is, therefore,

(1) L. R., 1 Eq., 90.

(2) I. L. R., 17 Cal., 317.

liable to the plaintiff—section 265 of the Indian Succession Act ;  
*Padget v. Priest*<sup>(1)</sup>.

FARRAN, C. J.:—Upon this application we have been asked to set aside the decree made by the Provincial Small Cause Court at Surat against the defendant Navazbái as executrix *de son tort* of her deceased husband Jamsetji. Ratanbái, the executrix of the deceased, was joined as a co-defendant in the suit, and a decree was also passed against her.

It appears to be settled law that an executor *de son tort*, or “of his own wrong”, as he is styled in the Indian Succession Act, can be sued jointly with the rightful executor—Williams on Executors, p. 217 (9th Ed.). No objection has been taken before us to the decree on that ground.

It is, however, contended that there was a rightful executrix in existence when the defendant Navazbái intermeddled with the estate of the deceased by collecting a debt due to him by the Bombay Baroda and Central India Railway Company, and that section 265 of the Succession Act (X of 1865) shows that under these circumstances Navazbái cannot be sued by a creditor of the deceased, the only person to whom she is responsible being the rightful executrix.

The deceased Jamsetji died on the 14th October, 1891. Thereafter Ratanbái applied to the High Court for probate of his will. To that application Navazbái filed a caveat. By a consent decree made on the 25th February, 1892, the caveat was dismissed, and it was ordered that probate should issue to Ratanbái. Probate did not, in fact, issue until the 3rd February, 1893. In the meantime in May or June, 1892, Navazbái collected the debt of Rs. 166 from the company. This collection, it is not denied, would constitute Navazbái an executrix *de son tort*, unless there was at the date of its collection a rightful executrix in existence. We are of opinion that there was not then a rightful executrix in existence within the meaning of section 265 of the Succession Act. The following passage from Williams on Executors, (9th Ed.), page 211, explains the law upon this question:—

(1) 2 Term. Rep., 97.

1895.

NAVABÁI

P. PESTONJI.

“When the will is proved or administration granted and another person then intermeddles with the goods, this shall not make him executor *de son tort* by construction of law, because there is another personal representative of right against whom the creditors can bring their actions, and such a wrongful intermeddler is liable to be sued as a trespasser.” In *Tomlin v. Beck*<sup>(1)</sup> Sir Thomas Plumer, M. R., describes a rightful executor as one “deriving his title from the will which he has proved.” Probate is, therefore, we think, necessary to complete the title of a rightful executor, and until it is taken out, a person by intermeddling with the assets can constitute himself executor *de son tort*.

Probate, as defined in the Succession Act, means not the mere declaration by the Court that the will has been duly executed, but (section 3) “the copy of the will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator.” The provisions of the Succession Act are wholly different from those of Act XL of 1858, and the case of *Mugnirám v. Gursahai Nand*<sup>(2)</sup> does not, therefore, apply.

In the present case it being admitted that Navazbái received the Rs. 166, it lay upon her to discharge herself from the liability she thus incurred to the creditors of Jansetji. This she could only do by showing under section 266 of the Succession Act payment of it over to the rightful executor or payment made in a due course of administration. She has not established either of these defences. What she has shown is that by the terms of the consent decree of the 25th February, 1892, she was allowed to receive this sum and retain it. This consent decree does not bind the creditors of the deceased, nor does it, in our opinion, free her from responsibility to them to the extent of the assets which she has received. This case does not come within the principle laid down in *Sykes v. Sykes*<sup>(3)</sup>, nor within the rule enunciated in *Hill v. Curtis*<sup>(4)</sup>. Navazbái does not hold the moneys which she has collected for the executrix, nor has she settled accounts with the latter. To the detriment of the

(1) 1 Turn. &amp; Russ., 438.

(3) L. R., 5 C. P., 113.

(2) I, L. R., 17 Calc., 347.

(4) L. R., 1 Eq., 90.

creditors she has been permitted to collect and retain part of the property of the deceased. The Judge finds that she has done so without the knowledge and consent of the executrix. The application must, therefore, be dismissed with costs. We see no grounds, even if we had the power, for directing in what order the decree is to be executed.

1895.

NAVAZBÁI  
v.  
PESTONJI.

*Application dismissed.*

## INSOLVENCY JURISDICTION.

*Before Mr. Justice Strachey.*

IN THE MATTER OF JAMES CURRIE, AN INSOLVENT.

*Jurisdiction—Insolvent Court of Bombay, jurisdiction of—Indian Insolvent Act (Stat. 11 and 12 Vict., C. 21), Sec. 5—High Court Charter, Clauses 18 and 44—Act V of 1872—Trader at Karachi presenting petition in Bombay—Relation of Insolvent Court to High Court—Acts limiting jurisdiction of High Court limit jurisdiction of Insolvent Court.*

1896.

October 12.

J. C., a European British subject residing at Karachi in Sind, failed in business in 1895, and on 11th June of that year he filed his petition in the Court for Relief of Insolvent Debtors in Bombay.

*Held* that, having regard to Act V of 1872<sup>(1)</sup> read with clause 18 of the Letters Patent, 1865, the Court had no jurisdiction to entertain the petition.

By section 5 of Statute 11 and 12 Vict., c. 21, the Insolvent Court was given jurisdiction over residents within the jurisdiction of the Supreme Court of Bombay. The jurisdiction of the Supreme Court extended over all inhabitants of the town and island of Bombay and over European British subjects in any of the factories subject to or dependent on the Government of Bombay.

The jurisdiction of the Insolvent Court as defined by the above section remained unaffected by the establishment of the High Court in the place of the Supreme Court except so far as it may be limited by clause 18 of the Letters Patent, 1865.

(1) Act V of 1872 as amended by Act XX of 1872:—

Whereas it is expedient to remove doubts which have arisen as to the jurisdiction of the High Court of Bombay over the Province of Sind; it is hereby enacted as follows:—

1. The High Court of Bombay has not, and shall be deemed never to have had, jurisdiction over the Province of Sindh.
2. Nothing herein contained shall be deemed to affect the Administrator General's Act, 1874.
3. Nothing herein contained shall be deemed to invalidate the grant of any probate or letters of administration heretofore or hereafter made by the High Court of Judicature at Bombay or to affect the rights, powers or duties of any executor or administrator under, or by virtue of, any such probate or letters.
4. Nothing herein contained shall be deemed to affect the Criminal Jurisdiction of the said High Court, so far as regards European British subjects of Her Majesty.