APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Chandavarkar.

1904. *September* 15.

BAI MEHERBAI (ORIGINAL PLAINTIFF), APPELLANT, *v.* MAGANCHAND MOTIJI (ORIGINAL DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), sections 244, 13—Indian Succession Act (X of 1865), section 282—Administrator, decree against—Execution sale—Suit by subsequent administratrix to set aside decree and sale—Fraud or collusion—Rateable distribution—Res judicata—Procedure in creditor's suit against estate of deceased—Court-Fees Act (VII of 1870), section 7—Appeal.

A decree on an award having been passed against an administrator at the instance of a creditor of the estate represented by the administrator, certain property referred to in the award was purchased by the decree-holder in execution proceedings with the sanction of the Court. Afterwards an administratrix, appointed in the place of the administrator, having brought a suit to set aside the decree and the subsequent sale in execution on the ground that under section 282 of the Indian Succession Act (X 1865), the decree-holder was entitled only to a rateable distribution among the creditors of the estate,

Held, that in the absence of fraud or collusion the decree and the subsequent sale in execution could not be set aside.

Held, further, that according to sections 244 and 13 of the Civil Procedure Code (Act XIV of 1882) the decree having been executed, the execution bound the parties and all persons claiming through them, and that the question was, therefore, *res judicata*.

PER CHANDAVARKAR, J. :—"The position of an executor or administrator, as the case may be, of a deceased person, as such person's legal representative in whom all the property of the deceased vests as such by virtue of section 179 of the Indian Succession Act, may be said to be similar to that of the Sebait of an Idol."

Prosunno v. *Golab*(1) referred to and applied.

A creditor's action against the estate of a deceased person should be treated as an administration suit.

A preliminary objection was taken that no appeal lay to the High Court on the ground that the suit had been valued at Rs. 640 and was one for a declaration, the prayer for possession being merely consequential.

Held, overruling the objection, that the suit fell within the scope of section 7, clause v, of the Court-Fees Act (VII of 1870), and that the real value of the property being more than Rs. 5,000, an appeal lay to the High Court.

* Appeal No. 26 of 1904.

(1) (1875) 2 I. A. 145.

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FIRST APPEAL against the decree passed by Chimanlal Lallubhai, First Class Subordinate Judge of Surat, in original suit No. 222 of 1901.

The facts material for the purpose of this report were as follows :—

One Beramji Kuvarji died on the 24th June, 1896, leaving outstandings, debts and some lands. On the 7th August, 1896, Beramji's three sons and his brother Manekji mortgaged certain property belonging to the deceased to the defendant's father Motiji Galal under a registered mortgage deed. Of the consideration money Rs. 2,142-8-0 represented a debt due by the deceased Beramji himself, and the remaining Rs. 1,856-8-0 were paid in cash by the mortgagee. On the 5th July, 1898, the District Court of Surat granted a certificate to one Jetha Kupaji, one of the creditors of the deceased, to administer his property. On the 31st July, 1898, the defendant (his father having died in the meanwhile) and the said administrator referred to arbitration the question of what was due to him under the mortgage. The arbitrators made their award on the 5th August, 1898. The defendant, thereupon, applied to the Court to pass a decree on the terms of the award, and the administrator having raised no objection, the Court, on the 30th August, 1898, passed a decree, No. 458 of 1898, accordingly. In execution of the decree the defendant himself having purchased the property with the sanction of the Court under section 257A of the Civil Procedure Code (Act XIV of 1882), the administrator Jetha Kupaji executed in his favour a sale deed on the 16th September, 1898. On the 8th June, 1901, the certificate granted to Jetha Kupaji was revoked and on the 5th July following a fresh certificate of administration was granted to the plaintiff Bai Meherbai, the widow of Beramji Kuvarji, who brought the present suit to set aside the decree, No. 458 of 1898, and the subsequent sale under the deed dated the 16th September, 1898, and to recover possession of the property, alleging that the mortgage, which was the basis of the award and the decree, was executed by unauthorized persons and that the administrator Jetha Kupaji had caused a fraudulent and illegal decree to be passed in favour of the defendant.

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The defendant contended, *inter alia*, that the sale deed was passed for valuable consideration and was binding on the plaintiff and that the whole transaction was in no way null and void.

The Subordinate Judge found that the mortgage deed dated the 7th August, 1896, was genuine and *bonâ fide* but was executed by persons not legally competent to do so: that the decree obtained by the defendant against the mortgaged property on the strength of the arbitrators' award was *bonâ fide* and legally binding on the property and the plaintiff, and that the sale deed dated the 16th September, 1898, and executed by the then executor Jetha Kupaji in defendant's favour, was not invalid and was binding on the plaintiff. He therefore dismissed the suit.

The plaintiff appealed.

At the hearing a preliminary objection was raised by the respondent's (defendant's) pleader that the appeal did not lie to the High Court on the ground that the claim was valued at Rs. 640 for the purpose of the computation of the court fees, and that the suit being one for a declaration and consequential relief, was not excepted from the operation of section 8 of the Suits Valuation Act (VII of 1889), and that although possession was sought to be recovered, this relief was prayed for as consequential to the principal relief of declaration and the setting aside of the decree.

The Court overruled the objection, holding that the suit fell within the scope of section 7, clause v, of the Court-Fees Act (VII of 1870), and that the real value of the property being more than Rs. 5,000, an appeal lay to the High Court.

Setalvad, with (*Manmukhram K. Mehta*), for the appellant (plaintiff):—The sale in question being against the provisions of section 282 of the Indian Succession Act, is invalid. The administrator was bound to distribute the proceeds of the sale rateably and could not legally give priority to the defendant. The mere fact of the decree being passed in defendant's favour could not put him in a better position and he had no right to get by the sale more than he was entitled to on a rateable distribution.

Manubhai Nanabhai, for the respondent (defendant):—An administrator has an absolute discretion as to selling the property of the deceased: section 269 of the Indian Succession Act.

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The decree gives us priority. Section 282 of the Indian Succession Act does not in any way affect the rights of a decree-holder. The debt having become merged in the decree, he is no longer a creditor. The administrator is bound to obey the decree to its fullest extent, and if he declines he can be compelled to do so under the provisions of the Civil Procedure Code relating to execution: *Nilkomul* v. *Reed*(1), *Remfry* v. *DePenning*(2), *Khusrubhai* v. *Hormajsha*(3).

At any rate the question of the validity of the sale is concluded by the proceedings. The present administratrix cannot question them because she had not urged fraud and proved it. She stands in the shoes of the former administrator and is as effectually bound by the proceedings as he was.

Setalvad in reply.

CHANDAVARKAR, J. :—The appellant, Bai Meherbai, as administratrix of the estate of her deceased husband, Beramji Kuvarji, brought the suit, out of which this appeal has arisen, to set aside the decree in suit No. 458 of 1888, obtained by the respondent against the former administrator of the estate, and the sale which took place in execution of that decree. It is contended before us in support of this appeal that the respondent, one of the creditors of the deceased, had, under section 282 of the Indian Succession Act, no right of priority over other creditors but was only entitled to rateable distribution. In answer to that contention it is urged by the respondent's pleader, on the authority of *Nilkomul* v. *Reed*(1), *Remfry* v. *DePenning*(2) and a dictum in *Khusrubhai* v. *Hormajsha*(3), that the said section has no application to a creditor, who, having obtained a decree, has executed it according to the provisions of the Code of Civil Procedure. It is not necessary to decide in this case whether the construction, put upon the section, in the decision cited is right. In the present case, the respondent brought suit No. 458 of 1888 against the former administrator of the deceased's estate in respect of a debt due to the respondent from the said estate. A decree was obtained in that suit against the then administrator, and

(1) (1872) 12 Beng. L. R. 287. (2) (1884) 10 Cal. 929.
(3) (1892) 17 Bom. 637 at p. 642.

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in execution thereof, the said administrator executed the sale deed, now in dispute, with the sanction of the Court obtained under section 257A of the Code of Civil Procedure. Under these circumstances, the decree obtained and execution had against the former administrator, in whom the aggregate of rights and obligations of the deceased were vested as the legal representative of the estate, are binding upon his successor as long as that decree and the sale consequent upon it were not the result of fraud or collusion: see *Satra Gokuldas Marwadi* v. *Maria Conceicao*[1]. The lower Court has found that the decree and the sale are not vitiated either by fraud or collusion, and the appellant's counsel before us has not only not questioned that finding but has conceded that the evidence is not such as to justify the presumption of fraud or collusion.

But it was further urged for the appellant, that, though the decree obtained in the previous suit was binding and could be executed, the only execution allowed by law was that authorised by section 282 of the Indian Succession Act—that, in other words, having obtained his decree, the respondent was bound by that section to ask for a rateable distribution in due course of administration in satisfaction of his decree and that was his only right. The answer to that is, that whatever might have been the proper way of executing such a decree, as a matter of fact, it was executed, rightly or wrongly, under section 257A of the Civil Procedure Code. According to section 241 and section 13 of the Code such execution bound the parties to the decree and all persons claiming under them; and the question is *res judicata*. The former administrator represented the estate for the purposes of that execution, and, in the absence of fraud or collusion on his part, the orders in execution and all acts done thereunder bind the estate and consequently the present administratrix, who represents it.

The position of an executor or administrator, as the case may be, of a deceased person, as such person's legal representative, in whom all the property of the deceased vests as such by virtue of section 179 of the Indian Succession Act, may be said to be similar to that of the Sebait of an idol. It certainly cannot be worse. An executor or administrator has, under section 269,

(1) (1883) P. J. p. 355.

power to sell the property of the deceased. A Sebait is "empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir": see *Prosunno* v. *Golab*[1] where the Privy Council have held that decrees and judgments obtained against a Sebait are binding upon his successors in the absence of fraud or collusion, because the succeeding Sebaits "in fact form a continuing representation of the idol's property." The same principle applies to executors or administrators. They likewise form a continuing representation of the deceased's estate. Therefore, a decree obtained and execution had against them must bind their successors in the absence of fraud or collusion.

On this ground we confirm the decree with costs.

This result is no doubt to be regretted, because it virtually gives preference to one creditor as against other creditors of the deceased's estate, whereas the rule of law is that they shall all share rateably. But the result is due to the fact that that rule of law has to give way in this case to another rule, *i. e.*, the rule of *res judicata*, which could have been avoided had the Court, which passed the decree in the suit brought on an arbitrator's award by the respondent's father as a creditor of the deceased, treated it, as it should have, as an administration suit and passed its decree accordingly. We think that we must take this opportunity of impressing upon the Mofussil Courts the necessity of treating a creditor's action against a deceased person's estate as an administration suit and insisting upon the amendment of the plaint in such a suit on that basis. Where the plaintiff is not willing to amend, the Court, if it finds the claim proved, should pass a decree simply giving him a declaration of the debt due and a declaration besides that he is entitled to satisfaction of the decree according to law in due course of administration and not otherwise. It is the duty of the Court to see in such actions that one creditor is not enabled to gain advantage over other creditors by getting an unconditional decree for full payment and executing it against the deceased's estate to the prejudice of those creditors.

G. B. R.

Decree confirmed.

(1) (1875) L. R. 2 I. A. 145 at p. 152.