

(1879) 03 CAL CK 0006

Calcutta High Court

Case No: None

Greender Chunder
Ghose

APPELLANT

Vs

Mackintosh

RESPONDENT

Date of Decision: March 12, 1879

Acts Referred:

- Limitation Act, 1963 - Section 10

Citation: (1879) ILR (Cal) 897

Hon'ble Judges: Richard Garth, C.J; White, J

Bench: Division Bench

Judgement

White, J.

This suit is instituted by persons who are creditors of the estate of Aushootosh Day, on behalf of themselves and all the other creditors of that estate against the defendant Mackintosh and also against Charoo, Surruth, and Nobinmoney, the executors and executrix of Aushootosh Day's will. Its object is to follow in the hands of the defendant Mackintosh certain property which originally formed portion of the testator's estate, and was mortgaged to Mackintosh, partly by the defendants Charoo and Surruth, and partly by them and the other defendant Nobinmoney Dossee. The plaintiff's allege that Mackintosh took the mortgages with notice that certain suits were pending in which they and others claimed to be creditors of Aushootosh Day, and also with notice that the debts due from his estate were unpaid, and that the mortgage money was intended to be applied by the borrowers to their own private purposes and not in a due course of administration.

2. The prayer of the plaint has a wider object than what I have just stated. and extends to other property alleged to be in the hands of the executors and executrix themselves. The issues, however, which were settled in the suit relate solely to property the subject of mortgage to the defendant Mackintosh, and the case was argued both here and apparently in the Court below solely with reference to such

property.

3. The mortgages sought to be impeached by this suit were made on the 14th of July and the 16th of August in the year 1863, more than thirteen years before the present suit was brought, which was filed on the 23rd of November 1876.

4. Several issues were raised on behalf of the defendant Mackintosh, of which the third is whether the plaintiffs are barred by the law of limitation.

5. The law of limitation to be applied is Act IX of 1871, and the defendant Mackintosh contends that the suit is barred by Article 118 of the second schedule to that Act.

6. The plaintiffs, on the other hand, contend that, taking the circumstances under which the mortgages were made to be such as are alleged in the plaint--an assumption which I make for the purpose of disposing of the question of limitation--the present suit is exempt from the operation of the law of limitation by virtue of Section 10 of Act IX of 1871.

7. That section enacts that "no suit against a person in whom property has become vested in trust for a specific purpose or against his representative for the purpose of following in his or their hands such property shall be barred by any length of time." An explanation is appended to that section, which is as follows: "A purchaser in good faith and for value from a trustee is not his representative within the meaning of this section." The plaintiffs contend that, upon the facts assumed, the defendant Mackintosh is a representative of a trustee within the meaning of that section. Before considering whether the defendant is such a representative, it will be necessary to determine the position held by Charoo, Surruth, and Nobinmoney with reference to the estate of Aushootosh Day. The will of the testator appoints these three defendants executors and executrix; and they have taken out probate. It contains no specific bequest to them as executors, nor any device to them of property for the purpose of paying debts, nor indeed does it contain any direction that they testator's debts, should be paid, or so far as I am aware, any allusion to debts, tout it bequeaths several legacies and gives the residue of all the testator's real and personal property, after satisfying the legacies, to his grandsons by daughters--a class which in 1863 was, and is still, represented by Charoo and Surruth. It is admitted that no property of the testator vested in the ordinary sense of the word in the three defendants by virtue of their appointment as executors; that, being Hindu executors, they were managers only of the testator's estate, and as such had only a power to sell or mortgage the same in cases of necessity, of which payment of debts would of course be one. It is also admitted that Charoo and Surruth in their character of residuary devisees did not hold any part of the residue in trust for any purpose. But it is argued that, inasmuch as Charoo and Surruth were, to the knowledge of the defendant Mackintosh, executors as well as residuary devisees, they were substantially in the same position as English executors, who by their office take a property in the assets for the purpose of applying them in due

course of administration. Assuming that to be so, the broad question arises, whether executors, in whom a property in the assets is vested by virtue of their appointment, but to whom no property is specifically or expressly bequeathed for the purpose of paying debts, are, as regards the creditors of their testator, persons in whom property is vested in trust for a specific purpose within the meaning of Section 10 of Act IX of 1871.

8. No doubt executors are in almost every respect considered in Courts of Equity as trustees by virtue of their office (2 Williams on Executors, pp. 1658 and 1852). But the obligations which are thus imposed upon executors are irrespective of whether any property has or has not been bequeathed to them by the will in trust for the payment of debts or legacies. Did the Legislature intend that the word "trustees" in Section 10 should be co-extensive in meaning with the same word as used in Courts of Equity? I think not. It has been already held by this Court in *Kherodemoney Dossee v. Doorgamoney Dossee* (I.L.R., 4 Cal., 455), that the words "vested in trust for a specific purpose" are used by the Legislature in the restrictive sense, and that they limit the character and nature of the trust attaching to the property which is sought to be followed. A consideration of the words themselves shows that this must be so.

9. In ordinary parlance, "specific" means something "specified" or "particularised; it also means something "definite," and is used in opposition to what is "general" and "undefined." But in all its ordinary uses the word "specific" points to a distinction or difference or distinguishing feature which marks off the thing described from a larger class of similar things. This distinction is illustrated by the cases in which the Courts of Probate have held that, where the whole personal estate is left to a trustee in trust for a specific purpose under a will in which no executor is named, such trustee is not entitled to probate as executor according to the tenor. The ground of the refusal is that the trustee has only the power to apply the estate as directed by the trust and not the general power to administer the estate, which belongs to the office of executor--In *the goods of Jones* (2 Sw. & Tr., 155) citing *Baddicot v. Dalzeel* (2 S G. L., 294). Although the phrase referred to is to my mind clearly restrictive, I admit that it is not easy to draw the line between what trusts are and what are not trusts for a specific purpose, if the attention is confined to discovering the meaning of the Legislature from that phrase alone. But it appears to me that the solution of the question where the line is to be drawn must be sought for in the context of the Act of Limitation, and that the key to the solution is to be found in Articles 133 and 134 of the second schedule of the Act, which is incorporated with it by Section 4. Articles 133, 134 prescribe a period of limitation when a suit is brought to recover moveable or Immovable property conveyed in trust, deposited, or pawned or mortgaged, and afterwards bought from the trustee, depository, pawnee or mortgagee in good faith and for value. Such a suit is in effect a suit to follow the trust property in the hands of a purchaser, and when the purchase is made in good faith, the plaintiff is barred by the lapse of twelve years from the date of the

purchase. But where the purchase is not made in good faith, the twelve years' limitation does not apply. What then in the latter case is the period of limitation prescribed by the Act, or does the Act prescribe any period of limitation in the latter case? Section 10 furnishes the answer which is that time shall be no bar in such a case; in other words, that such a case shall be exempt from the operation of the law of limitation. Unless we construe Section 10 as applying to such a case, the Act is silent on the subject, and leaves that case undisposed of. The language of Section 10 is satisfied by giving it that application; and I think upon the true construction of the Act, Section 10 was intended to have that application. In my opinion therefore the phrase "vested in trust for any specific purpose" is a compendious form of expression for trusts of the nature and character mentioned in Articles 133 and 134, namely, such as attach to property conveyed in trust, deposited, pawned or mortgaged.

10. On the other hand, if we were to construe Section 10 as meaning that the assets of a testator when in the hands of an executor should be considered as vested in him in trust for a specific purpose merely by virtue of his office, it seems to me that we should be attributing to the Legislature in some respects a strange inconsistency; for the creditors of the estate are by the operation of various Articles of Scheduleii of the Act barred from prosecuting their claims after the lapse of certain periods, commencing from the date of the contract or the arising of the cause of action. Similarly a legatee, or the claimant of a distributive share of the moveable property of a testator, must pursue his remedy within twelve years from the time when the legacy or share becomes payable or deliverable. To give to Section 10 the construction contended for by the plaintiffs would be tantamount to supposing that the Legislature has declared in the same breath that the particular claimants mentioned above, if they desire to be satisfied out of the assets of a testator, must sue the executors within a limited time, or may sue them at any time they please.

11. For the above reasons, I am of opinion that the property, the subject of Mackintosh's mortgages, was not vested in or held by the three other defendants for any specific purpose within the meaning of Section 10 of the Limitation Act. It becomes unnecessary therefore to consider whether the defendant Mackintosh was within the meaning of that section a representative of those persons.

12. As the suit is not exempt from limitation by the 10th section, the next question to be considered is, what is the period of limitation? The object of the suit is, as I have stated, to follow the assets of Aushootosh Day's estate in the hands of the defendant Mackintosh. The plaint prays that the mortgages may be declared void as against Aushootosh Day's creditors and for relief consequential upon such a declaration.

13. In my opinion the Article applicable to the present suit is Article 118, this being a suit for which no period of limitation is provided elsewhere in the second schedule.

14. The time when the period begins to run under this Article is when the right to sue accrues.

15. This suit was brought on the 23rd of November 1876. The plaint alleges that the cause of action arose in November 1872, and the plaintiffs' counsel stated that the right to bring this suit first accrued on the 22nd of that month, when the plaintiffs obtained the administration-decree, which was made supplemental to the suit brought by the two first plaintiffs against John Bartlett and others.

16. I cannot accept this view. The administration decree of 1872 appears to me to have nothing to do with the question of limitation. The present suit is one on behalf of all the creditors of Aushootosh Day, several of whom were in existence and unsatisfied at the time when the mortgages now sought to be impeached were made. I think that the right to bring against the defendant Mackintosh such a suit as the present one first accrued in 1863, when these mortgages were executed. If a devastavit was then committed at which the defendant Mackintosh assisted, the creditors of Aushootosh Day had thus the right to impeach the mortgages, and file a suit for the purpose of following the property in the hands of Mackintosh. It was not through any fraud or concealment on the part of the defendant Mackintosh that the creditors of Aushootosh Day omitted to file their suits till thirteen years afterwards.

17. The plaintiffs, however, allege that two of their number personally could not have joined in suing in 1863, because, although that had brought their suit for contribution so far back as 1859 the debt due to them from the estate of Aushootosh day in respect of such claim was not ascertained by a decree of this Court until 1867. This appears to me to make no difference; and even if it did, the plaintiffs have not brought their suit within even six years after they had obtained that decree; nor do they assert that they were kept from knowledge of their rights by means of fraud to which the defendant was party or privy.

18. On the whole I am of opinion that the suit is barred, and I would therefore dismiss the appeal.

Garth, C.J.

19. I am also of opinion that the plaintiffs' claim is barred by limitation.

20. Their debt against the estate of Aushootosh Day, upon which their right to bring the present suit depends, is founded upon a decree for about Rs. 15,342, which they obtained against the representatives of that estate on the 11th of May 1867.

21. Having been unable, as they allege to realize their debt out of Aushootosh Day's property, they brought this suit on the 23rd of November 1876 on behalf of themselves and the other creditors of his estate, praying for a declaration by this Court that certain estates, which were mortgaged to the defendant Mackintosh so long ago as the month of July 1863, and the mortgage of which has since been foreclosed, are now liable in the hands of Mackintosh to satisfy their own debt and

those of the other creditors, and praying that such estates may be duly administered in a suit which was instituted in the year 1872 for the administration of Aushootosh Day's estate.

22. The representatives of that estate, who are made defendants in this suit, are Charoo Chunder Ghose, Surruth Chunder Ghose, and Sreemutty Nobinmoney Dossee, who were named as executors and executrix of Aushootosh Day's will, and Charoo Chunder and Surruth Chunder were also his residuary legatees, and as such entitled to the property in question subject to the payment of his debts.

23. Aushootosh Day died on the 30th of January 1856 possessed of considerable property; but after his death Charoo Chunder and Surruth Chunder became much involved; and in June 1863 they and Nobinmoney arranged with a Mr. Temple, who was then acting in this country for the defendant Mackintosh, to lend them Rs. 1,00,000 of Mackintosh's money upon the security of a bond and a mortgage of certain Immovable property, including that which is the subject of this suit.

24. This agreement was subsequently carried out by means of a bond and two mortgages, one dated the 14th of July, by which the estates in question were conveyed, and the other dated the 6th of August.

25. The mortgages professed to be made by Charoo Chunder and Surruth Chunder in their character of residuary legatees, but Nobinmoney was also necessarily made a party to them, because by a clause in Aushootosh's will the property could not be dealt with during her life without her consent.

26. The plaintiffs' say that Temple, who acted for Mackintosh, had notice of the plaintiffs' claim when the mortgages were made, and how far he had such notice is one of the main questions in this case; but for the purpose of deciding the point of limitation, I will take it that the plaintiffs' statement is in that as well as in other respects true, and that the notice which Temple had was also notice to Mackintosh. In the year 1868 Mackintosh commenced foreclosure proceedings, and on the 14th of April and the 10th of July 1870 he obtained orders foreclosing both mortgages; but the estates which are the subject of this suit were comprised in the first mortgage only, and Mackintosh has been in possession of them ever since the foreclosure.

27. The plaintiffs' case is therefore that although the amount of their claim was not ascertained until 1867 (nearly four years after the first mortgage) they had a right, in common with the other creditors of Aushootosh Day, to treat the estates comprised in that mortgage as subject to the payment of Aushootosh's debts, and to bring this suit for the purpose of enforcing their charge in that respect.

28. But then, assuming that they are right in this, the defendants say that the plaintiffs might have brought their suit in 1863, when the mortgage was made, or at any rate in 1867, when the amount of their debt was ascertained, and that as this is

a suit for which no special period of limitation is provided by the Act of 1871, it comes under Article 118 of the schedule, and should have been brought within six years of the time when the cause of suit arose.

29. To this the plaintiffs say:

1st.--That this is in substance a suit for possession of Immovable property, or of an interest therein, within the meaning of Article 145, and consequently that the period of limitation is twelve years from the time when the possession of the defendant became adverse to that of the plaintiffs.

2ndly.--That this is a case coming within Section 10 of the Limitation Act, inasmuch as the property has become vested in the defendant Mackintosh in trust for a specific purpose, that is to say, for the payment of Aushootosh's debts; and

3rdly.--That this suit is supplemental to the administration suit of 1872, and that having regard to its true nature, it could not have been brought previously to the suit of 1872.

(1) The first of these points we disposed of during the argument: it is quite clear that the plaintiff personally claims no right to the possession of the estates in question. He only asks that they may be made chargeable in the hands of the defendant, with the payment of his own debt and those of the other creditors, and may be administered with the rest of Aushootosh's estate.

(2) The second point raises the more arguable question, whether the property in suit can be considered as vested in Mackintosh in trust for any specific purpose within the meaning of Section 10. It is said that if the property in his hands is in fact chargeable with the payment of debts, it has then become vested in him for the specific purpose of paying those debts. But that view of the section is one which I cannot adopt. It appears to me, as I have already said in the case of *Kherodemoney Dossee v. Doorgamoney Dossee* (I.L.R., 4 Cal., 55) that the words "in trust for a specific purpose" are intended to apply to trusts created for some defined or particular purpose or object, as distinguished from trusts of a general nature, such as the law imposes upon executors and others who hold recognized fiduciary positions.

30. The estates in question cannot be said to be subject to any specific trust in the hands of Mackintosh any more than they were in the hands of Charoo Chunder and Surruth Chunder, the mortgagors, and the only trust to which they could be subject in their hands is that general trust upon which a Hindu executor holds the whole of the estate which he represents. If a general trust of this kind is to be construed into a trust for a specific purpose, it appears to me that the words "specific" in Section 10 would have no meaning whatever.

31. It is argued that this view of the section is opposed to that which the High Court of Bombay have adopted in the case of *Lallubhai Bapubhai v. Mankuvarbhai* (I.L.R., 2

Bom., 415). But that case was decided u/s 2 of Act XIV of 1859, which would appear to apply to all trustees, and which certainly contains no words restricting the scope of the section to trusts for a specific purpose.

32. (3) The third point also appears to me to be without foundation. It is true that the prayer of the plaint consists of two main parts 1st, that the property in suit may be declared by the Court to be subject to the payment of Aushootosh's debts; and 2ndly, that in that case it may be dealt with under the decree in the administration suit, and that this suit may be considered as supplemental to the administration suit.

33. But I see no reason whatever why a suit to enforce the first part of this prayer should not have been brought, if at all, as soon as the amount of the plaintiff's debt was ascertained in the year 1867, or at any rate, as soon as the plaintiff found, which he must have done soon afterwards, that Aushootosh's general estate was not sufficient to satisfy his debts, and I think he has no right to evade the law of limitation by putting off the administration suit till the year 1872 (nine years after Mackintosh's mortgage), and claiming the same period of limitation after that suit as he would have had from the time when his cause of action really arose, upon the spacious ground that he desires his present suit to be supplemental the administration suit.

34. There was no reason whatever why both this suit and the administration suit should not have been brought within six years from the 11th of May 1867; and having regard to the circumstances under which the property in question is now sought to be charged in the hands of Mackintosh, I consider that the plaintiff had no excuse for delaying to enforce his charge against it at the first available opportunity.

35. It is clear, I think, that the defendants are quite right in their contention that this is a case coming under the six years' limitation prescribed by Article 116 of the schedule, and that being so, the further point which the plaintiff wished to raise, namely, that he was not bound to bring his suit till the mortgages were foreclosed, would not avail him, because the mortgages were both foreclosed by the 10th of July 1870, and this suit was not commenced till the 23rd of November 1876.

36. Upon the ground of limitation therefore, apart from the merits of the case, I consider that the appeal should be dismissed with costs on scale No. 2.