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question whether there had been such an acknowledgment made would have been inquired into in the lower Courts; but he treated the decree as the mortgage which he sought to redeem; and supposing that he could, according to the decision of the High Court of Madras, which was cited, fall back upon the mortgage of 1806, in their Lordships' opinion he is not at liberty to do that upon the present appeal. It would be making a different case from that which he made in the lower Courts, and on which the case has been tried and decided.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal.

Solicitors for the appellant:—Messrs. *T. L. Wilson & Co.*

ORIGINAL CIVIL.

Before Mr. Justice Jardine.

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MATHURA'DA'S LOWJI AND FIVE OTHERS, (PLAINTIFFS), *v.* GOCULDA'S MA'DHOWJI, DORA'BJI FRA'MJI PANDAY AND PESTONJI CA'VASJI, (DEFENDANTS).*

Probate—Executors—Executors alienating property of their testator's estate before obtaining probate—Title of alienees to such property—Where holder of such property obtained from executors is entitled to vote at election, is his qualification as a voter complete before probate granted—Trustee—Trustee elected by debenture-holders—Meeting of debenture-holders to elect a trustee—Exclusion from meeting of holders of debentures obtained from executors before probate—Validity of election of trustee elected at meeting from which such debenture-holders were excluded.

In order to secure certain money which it had borrowed by the issue of debentures the D. Company on the 23rd November, 1883, conveyed certain lands, &c., to three trustees, K.,G. and D.,by way of mortgage. With regard to the appointment of new trustees in case any trustee should die, &c., the indenture of mortgage provided that, in certain events, the surviving or continuing trustees might convene a meeting of the debenture-holders for the purpose of nominating a new trustee; and that at such meeting the election of such new trustee should be decided by a majority of votes of the debenture-holders present in person, each party having only one vote, and in case of an equality of votes then the chairman of the meeting should have a casting vote. K., one of the trustees appointed under the deed, died on the 9th February, 1886, leaving a will whereby he appointed three executors. At the time of his death, K. was the holder of one moiety of the debentures, *viz.*, 1,400 debentures, of the value of Rs. 7,00,000.

* Suit No. 70 of 1886.

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The two remaining trustees, G. and D., called a meeting of the debenture-holders for the 27th February, 1886, to elect a trustee. Previously to the meeting and for the purpose of having the large interests of K.'s estate adequately represented, the executors of K. distributed some of the debentures in their hands, belonging to K.'s estate, among nominees for the purpose of voting at the meeting; and they also sold some of the debentures. Among the persons to whom debentures were sold were the first three plaintiffs.

Pursuant to the notice convening the meeting, the plaintiffs and other persons, to whom debentures belonging to the estate of K. had been given or sold, presented themselves and claimed to attend the meeting; but none of them, except the three executors (plaintiffs 4, 5 and 6) of K. were allowed to attend, and they were admitted only in their capacity as executors. Defendant No. 1 was chairman of the meeting, and he ruled that the three executors had a joint right, in their capacity as executors, to give one vote upon any proposition that might be submitted to the meeting. At the meeting it was proposed that the holders of the debentures, who claimed admission to the meeting, should be permitted to attend. The chairman ruled the motion irrelevant, and would not allow it to be put. The executors, therefore, withdrew from the meeting. After they had withdrawn, the third defendant, P., was elected a trustee. At the date of the meeting the executors had not obtained probate of K.'s will. On behalf of the defendants it was contended that P.'s election was valid; and that the persons to whom the executors had given or sold debentures belonging to K.'s estate had been properly excluded from the meeting of the 27th February, inasmuch as the executors had not at that time obtained probate, and, consequently, the title of their alienees to the debentures was still incomplete.

Held, that P., (defendant No. 3), had not been validly appointed a trustee to the indenture of the 23rd November, 1883. Under that indenture, debenture-holders had the right to vote; and the debentures were payable to bearer. The fact, that the executors had not at the date of the meeting obtained probate, did not affect the rights of those to whom they had given or sold debentures, and such persons had, consequently, been improperly excluded from the meeting.

THE plaintiffs in this suit prayed—(1) for a declaration that Pestonji Cávasji, (defendant No. 3), had not been validly appointed and was not a trustee of a certain indenture dated the 23rd November, 1883; (2) for an injunction restraining the said Pestonji Cávasji from acting as a trustee of the said indenture; (3) for the appointment, by the Court, of a trustee of the said indenture in place of one Kessowji Jádhowji, deceased.

The plaint stated in substance as follows:—

In the year 1874 The New Dhurumsey Spinning and Weaving Company (Limited) borrowed a sum of Rs. 14,00,000 by the issue of two thousand eight hundred debentures of Rs. 500, each payable to

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bearer on the 30th June, 1886, and bearing interest thereon in the meantime at the rate of 9 per cent. per annum payable every half-year.

In order to secure the principal moneys and interest payable under the said debentures the company by an indenture dated 23rd November, 1883, granted and conveyed by way of mortgage to certain trustees therein named, *viz.* Kessowji Jádhowji (since deceased), Goculdás Mádhowji (defendant No. 1) and Dorábji Frámji Panday (defendant No. 2), certain lands, buildings, machinery and plant belonging to the company.

"The said indenture provided that in case any trustee should die, or desire to be discharged from, or refuse or decline or become incapable to act as trustee of the said indenture, the surviving or continuing trustees should, if they could agree in the appointment, by writing under their hands, appoint a new trustee in the place of the trustee so dying or desiring to be discharged or refusing or declining, or becoming incapable to act as trustee; and that in default of such appointment as last aforesaid, or in the event of there being only one or no surviving or continuing trustee, the said surviving or continuing trustees or trustee or the executors or administrators of such last surviving or continuing trustee, as the case might be, in their or his absolute discretion might, without any such request as next thereinafter mentioned, and should upon a request in writing of the holder or holders of one-third of such of the said debentures, as should, for the time being, be outstanding, (but in either case without any further consent on the part of the company or its successors or assigns), convene a meeting of the holders of such debentures for the purpose of appointing new trustees or trustee therein in the place of the trustees or trustee so dying or desiring to be discharged or refusing or declining, or becoming incapable to act as trustee by giving to such debenture-holders not less than seven clear days' notice of such meeting by advertisement in at least one English and one Gujaráti Bombay daily newspaper; such notice to state the place, day and hour of holding of the said meeting and the purpose for which it was to be held, and that at any such meeting a quorum should consist of not less than three holders of such debentures, and that

before proceeding with any other business at such meeting, the debenture-holders present should first elect a chairman, such chairman to be chosen from such of the trustees as should attend and be present at such meeting; and that in the absence of all the said trustees the debenture-holders present should choose some one of their number to be chairman; and by the said indenture it was also provided that the election of the trustees or trustee to be appointed in the place of the trustees or trustee so dying or desiring to be discharged or refusing, or becoming incapable to act as aforesaid should be decided by a majority of votes of the debenture-holders present in person, each party having only one vote, and in case of an equality of votes then the chairman of the meeting should have a casting vote."

Kessowji Jádhowji died on the 9th February, 1886, leaving a will whereby he appointed Cursandáss Nathubhái, Dwárkádás Dámodhar, and Mulji Purshotam, (plaintiffs 4, 5, and 6), to be executors or trustees thereof. At the date of this suit the said executors were taking steps to obtain probate of the said will. At the time of his death, Kessowji Jádhowji was the holder of one moiety of the said debenture,—that is to say, of 1,400 debentures of the aggregate value of Rs. 7,00,000.

Goculdás Mádhowji and Dorábji Frámji Panday, (defendants 1 and 2), the two surviving trustees of the said indenture, disagreed as to the person who should be nominated as a trustee in place of the said Kessowji Jádhowji; and, accordingly, in pursuance of their powers under the indenture, they gave notice, by advertisement, to the holders of the debenture to hold a meeting on the 27th February, 1886, and to nominate a trustee.

The above-mentioned executors (plaintiffs 4, 5, and 6) of Kessowji Jádhowji's will, in view of the said meeting and for the purpose of having the large interests of Kessowji Jádhowji's estate in the matter of appointing a trustee adequately represented at the meeting, distributed divers of the said debentures belonging to the said estate among nominees for the purpose of voting at the said meeting and also sold others of the said debentures to Mathurádás Lowji, Cursandás Vullubhdás, Mowji Shámji, (plaintiffs 1, 2, and 3) and seven other persons.

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Pursuant to the said notice, the plaintiffs (*i. e.* the three last-mentioned persons and the three executors of Kessowji Jádhowji's will) and the other persons to whom the debentures belonging to Kessowji Jádhowji's estate had been given or sold, and each of them taking with him at least one of such debentures, presented themselves at the time and place specified in the notice, and claimed to attend the meeting; but none of them, except the three executors (plaintiffs 4, 5, and 6), were allowed to attend the said meeting, and they were admitted only in their capacity of executors.

The plaint further stated that after excluding the said persons the meeting was formed, and there were present thereat the three executors (plaintiffs 4, 5, and 6) and the three defendants and divers other persons who, the plaintiffs believed, were not holders of debentures for value, but were the nominees of defendants Goculdás Mádhowji and Pestonji.

Goculdás Mádhowji, (defendant No. 1), was the chairman of the meeting, and he ruled that the three executors, (plaintiffs, 4, 5, and 6), had the joint right in their capacity as executors to give one vote either in favour of or against any proposition that might be submitted to the meeting.

At the said meeting it was then proposed by the three executors (plaintiffs 4, 5, and 6) and seconded by Dorábji Frámji Panday (defendant No. 2) that holders of debentures who claimed admission to the meeting should be permitted to attend. The chairman (defendant No. 1), however, ruled this proposition to be irrelevant, and did not allow it to be put to the meeting. The three executors, (plaintiffs 4, 5, and 6), thereupon withdrew from the meeting.

The last two paragraphs of the plaint were as follows:—

"(12). The plaintiffs are informed and they verily believe it to be true, that at the said meeting it was resolved by the votes of the defendants Goculdás Mádhowji and Pestonji Cávasji and their nominees that the defendant Pestonji Cávasji should be nominated a trustee of the said indenture in the place of the said Kessowji Jádhowji. The plaintiffs believe that the defendant Dorábji Frámji Panday voted against the said resolution and

protested against the action of his co-trustee, the defendant Goculdás Mádhowji.

"(13). The plaintiffs say that the said meeting was, by reason of the exclusion of the said holders of debentures who claimed to attend the same, not a valid meeting of debenture-holders as provided by the said indenture, and the plaintiffs further say that the said appointment of the defendant, Pestonji Cávasji, to be a trustee of the said indenture was not a valid appointment."

The plaintiffs prayed as stated at the commencement of this report.

The plaintiffs obtained leave, under section 30 of the Civil Procedure Code (Act XIV of 1882), to sue on behalf of themselves and all other holders of debentures concurring in the complaint.

Macpherson (with him *B. Tyabji*) for plaintiffs.

Latham (Advocate General) and *Lang* for defendants 1 and 3.

Robertson for defendant 2.

Macpherson:—In Kessowji Jádhowji's life-time he might have transferred his debentures one by one to nominees so as to secure himself a maximum of votes—Buckley on Companies (4th ed.), p. 23; *Stranton Iron Company*(1). After his death his executors transferred some debentures to nominees and sold others. The acts of the executors were lawful, although they had not then obtained probate. An executor "may do almost all the acts incident to his office" before probate—Williams on Executors (ed. 1879), p. 307. So he may sell, give away, or otherwise dispose of the goods and chattels of the testator. The power of a Hindu executor differs in some respects, but not in this particular: see *Shaik Moosa* v. *Shaik Essa*(2). If a Hindu executor could not sell, he could not discharge the duties imposed on him by section 12 of the Succession Act X of 1865, which by section 2 of the Hindu Wills Act (XXI of 1870) applies to Hindus. See also section 188 of the Succession Act and section 12 of Act V of 1881. The chairman of the meeting was clearly not justified in excluding those to whom the executors had alienated the debentures.

(1) L. R., 16 Eq., 559. (2) I. L. R., 8 Bom., 241.

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Latham (Advocate General) for defendants 1 and 3:—We ask the Court not to disturb the appointment which has been made.

I submit the chairman was right in excluding those who had obtained debentures from the executors. The executors, it is admitted, had not at that time obtained probate. As a matter of fact, they have not yet obtained probate, but we make no objection to the suit on that ground. We only desire to defend the chairman's action on the 27th February. He rightly excluded those to whom the executors had transferred debentures; for, at that time, the executors had not got probate of Kessowji Jádhowji's will. We admit that when probate is once granted, all previous acts are validated; but *until probate is granted* those previous acts are not ratified, and the persons whose title is derived from such acts have only an inchoate and incomplete title. Suppose the executors were refused probate; would their transferees be held to have derived a good title from them? We admit that, if the meeting was held *after probate had been granted* to the executors, the chairman would not have been justified in excluding those who had before probate got debentures from the executors. But on the 27th February the chairman had only to consider whether the persons, who attended the meeting, holding debentures, had *at that time* a good legal title to them. That being so, he was bound to decide against them; Williams on Executors (ed. 1879), pp. 308 and 311; *Newton* v. *Metropolitan Railway Company*(1); *Pinney* v. *Pinney*(2); Civil Procedure Code (Act XIV of 1882), sec. 50; Succession Act X of 1865, sec. 187, applied to Hindus by section 2 of Hindu Wills Act XXI of 1870.

The chairman was justified in excluding both those who held for value and without value. The title of neither class was good until probate was granted. I admit that an owner of shares may transfer to a nominee for voting purposes. If the nominee is registered, he has a right to vote. The register is the statutory qualification—*Pulbrook* v. *Richmond Consolidated Mining Company*(3).

(1) 1 Dr. & Sm., 583. (2) B. & C., 335.
(3) 9 Ch. Div., 610.

Only eleven persons were excluded from the meeting. After their exclusion, fifteen persons were present, and they appointed the third defendant a trustee. We ask the Court to hold his appointment good.

Macpherson in reply:—The Court cannot say what the voting would have been if the alienees had been admitted. Some of them might have addressed the meeting and influenced votes.

The chairman did not ask for the production of probate, and he allowed the executors to vote. The effect of the argument of the Advocate General would be to prevent executors from being able to act in any way to protect the estate until probate was granted, and this might be indefinitely delayed by the filing of a number of caveats. Disability in India arising from the non-issue of probate is confined to proceedings in Court. But executors may deal with the estate. How, otherwise, could they defray funeral expenses? No section has been cited to prevent the alienee of an executor from maintaining his right. The illustration to section 50 of the Civil Procedure Code (Act XIV of 1882) goes beyond the section itself. He cited Palmer's Company Precedents (ed. 1884), 250.

Robertson for defendant No. 2 submitted to any decree which the Court might make, and asked for costs.

JARDINE, J.:—I am of opinion that the defendant, Pestonji Cávasji, was not validly appointed a trustee to the indenture of the 23rd November, 1883. The 16th clause of that indenture defines the arrangements to be observed in regard to the appointment of a new trustee. The debenture-holders are to vote. The debentures are payable to bearer. The executors of the deceased debenture-holder, Mr. Kessowji Jádhowji, in order to increase their voting power at the meeting of the 27th February last, had handed some of his debentures to mere nominees, and sold others to other persons for valuable consideration. Both nominees and alienees for value attended the meeting, but were excluded by the defendant, Gocúldás, who acted under the advice of the company's solicitor. This advice was that these nominees and alienees were not entitled to vote or attend the meeting, because the executors had not yet obtained probate. These facts are undisputed. As regards the

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alienees for value, it is admitted by the Advocate General, who has appeared for the first and third defendants, that if the transfer had been made in Kessowji's life-time, they would have been entitled to vote.

The question which has been argued is, whether the mere fact, that the executors of Kessowji's will had not on the 27th February obtained probate, had the effect of depriving these debenture-holders for value of the ordinary right to vote. The point is much the same as the one that arose in *Shaik Moosa* v. *Shaik Essa*(1). The following passage from the judgment of Sir Charles Sargent, Chief Justice, is relied on by Mr. Macpherson, who supports the rights of the alienees. It refers to the construction of Act V of 1881 :—

"Much reliance, however, has been placed on section 12 of Act V of 1881. This section, as showing a contrary intention, provides that probate of a will when granted establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such. We are, however, unable to agree with the learned Judge in the Court below that this is tantamount to saying that 'until probate is taken out' there is no will at all exacting recognition of the disposition made and the authority conferred by it. The section appears to us to be intended to be a condensed statement of the English law, which regards probate as the authenticated evidence of the will itself from which the executor derives his title, and by virtue of which the property of the testator vests in him from the death of the testator (Williams on Executors, p. 239, 4th ed.) It was urged, indeed, that inconvenience would arise from a debtor paying to a creditor who had not taken out probate, and being called on again to pay by the executor who had taken it; but, in truth, such inconvenience cannot arise when it is remembered that the executor (*i. e.*, as defined in section 2), is declared by section 4 to be the legal representative of the deceased for all purposes, and that all the property of the deceased is stated to vest in him as such,—a provision which enables the executor before probate to give a valid discharge to the debtor,

(1) I. L. R., 8 Bom., 241, at pp. 254 and 255.

and places him in the same position in that respect as an executor by English law.

"Upon the whole we are unable to adopt the construction placed by the Court below on the provision of the Act of 1881, and are of opinion that whilst it is framed, like the Indian Succession Act, upon the basis of the English law, it differs in one important respect in allowing an executor to establish his right in a Court of Justice without taking out probate of the will."

In England the executor before he proves the will may do almost all the acts which are incident to his office, except only some of those which relate to suits. I think, then, as the executors are by consent of the counsel for the defendants to be treated as if they had obtained probate from the date of the hearing, that their alienees for valuable consideration had at the date of the meeting the ordinary rights of other debenture-holders under this indenture, and that they were entitled to vote, and ought not to have been excluded. A contrary ruling would interfere with the negociable quality of such debentures, and the means of the holder to protect his interest. One of the conditions in the form is that they are payable to bearer, and the company is not bound to take notice of the trusts or inquire into the title.

The case of the mere nominees or bailees is a little more difficult. But no express authority has been shown me to warrant their exclusion; and I cannot say that they do not come within the terms of "debenture-holders present in person," in clause 16 of the indenture which gives the right to vote. I have to interpret this document just as in the cases of transfers of shares, such as *Pulbrook* v. *Richmond Consolidated Mining Company*(1), and in *Stranton Iron and Steel Company*(2) the articles of association had to be interpreted. See also *Pender* v. *Lushington*(3).

Decree, that Pestonji Cávasji has not been validly appointed, and is not a trustee of the indenture of the 23rd November, 1883. That he be restrained from acting as such, and that the surviving trustees, Goculdás Mádhowji and Dorábji Frámji Panday, do within one month proceed in the manner provided by the said

(1) 9 Ch. Div., 610. (2) L. R, 16 Eq., 559.

(3) 6 Ch. Div., 70.

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indenture to call a meeting and elect another trustee. The costs of the suit to be paid by the trustees out of the trust property and as between attorney and client.

Attorneys for plaintiffs :—Messrs. *Nánu and Hormasji.*

Attorneys for defendants 1 and 3 :—Messrs. *Winter and Burder.*

Attorneys for defendant No. 2 :—Messrs. *Crawford and Buckland.*

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Farran.

1886. *July* 9, 23.

L. W. J. RIVETT-CARNAC, ADMINISTRATOR GENERAL OF BOMBAY AND ADMINISTRATOR OF PROPERTY AND CREDITS OF FULVAHU, WIDOW OF MURA'R NA'RRON, (PLAINTIFF), *v.* JIVIBA'I, WIDOW OF KHA'RVA BHA'NA' DHUNJI, AND OTHERS, (DEFENDANTS).*

Hindu law—Widow's estate—Savings or accumulations by widow.

One Murár Nárron died in 1872, leaving him surviving his widow, F., and a grandson, G., and a daughter-in-law. The widow (F.) on her husband's death became entitled to a widow's estate in his immoveable property, and accordingly entered into possession and management thereof. Under certain agreements made between her and one K., the latter received the rents of certain portions of the said immoveable property, and in consideration paid F. certain fixed annual sums. On the 26th May, 1883, there was a balance of Rs. 1,787-10-3 due from K. to F. in respect of the yearly privilege of recovering and receiving the said rents. F. died intestate on the 18th December, 1884, and the plaintiff, having obtained letters of administration to her estate, demanded payment of the said sum of Rs. 1,787-10-3 from K. It appeared that, after F.'s death, K. had paid this sum to G., who was F.'s grandson and the reversioner expectant on the determination of F.'s widow's, estate, and on her death had succeeded to all the immoveable property as the right heir of her husband (Murár Nárron). The question was, whether the said sum of Rs. 1,787-10-3 belonged to F.'s estate, or remained portion of the immoveable property of Murár Nárron, and, as such, properly payable to G. as his heir.

Held, that the plaintiff was entitled to recover it as part of F.'s estate. There was nothing to show it to be "savings or accumulations" so as to give it to the heir to her husband's estate.

THIS was a case stated for the opinion of the High Court, under section 69 of Act XV of 1882, by W. E. Hart, Chief Judge.

"The parties are agreed as to the facts set forth in the plaint, copy whereof is as follows :—

*Suit No. $\frac{48}{5834}$ of 1885 on the file of the Small Cause Court, Bombay.