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Before Mr. Justice Candy and Mr. Justice Fulton.

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FRAMJI DORABJI GHASWALA (*Original Defendant No.* 1), *Appellant* v. ADARJI DORABJI GHASWALA (*Original Plaintiff*), *Respondent.**
[12th June, 1893.]

Indian Succession Act (*X of* 1865), *ss.* 190, 266—*Executor* de son tort—*Suit by one executor* de son tort *against another*—*Letters of administration*—*Administration suit.*

D, a Parsi, died intestate in 1877, leaving him surviving a widow, three daughters and two sons A and F. On D's death his sons without taking out administration assumed the management of the estate, and each received sums of money on account of it. The widow and daughters of the deceased obtained letters of administration, but limited to the extent of their interest in the estate. In 1888 A brought a suit against his brother F and the other members of the family to recover out of the estate a certain sum of money advanced by him to D.

[338] *Held*, that the estate being unrepresented, the suit could not be maintained (s. 190 of Act X of 1865). The letters of administration issued to the widow and daughters of the deceased being limited only to the extent of their shares in the estate, were not letters of administration such as are meant by s. 190 of the Indian Succession Act (X of 1865).

Held, also, that the only course open to the plaintiff was to take proceedings for the appointment of an administrator of the estate who would either administer it by the payments of the debts and the distribution of the surplus (if any) amongst the heirs after taking an account of all property already received out of it by the creditors or heirs or who could be compelled to do so by an administration suit.

[R., 7 Ind. Cas. 242 = 20 M.L.J. 984 (985) = 8 M.L.T. 77 = (1910) M.W.N. 272.]

APPEAL from the decision of L. G. Fernandez, First Class Subordinate Judge of Poona, in Suit No. 88 of 1888.

One Dorabji Pestonji Ghaswala died intestate on the 23rd August, 1877, leaving him surviving two sons, Adarji and Framji, a widow, and three daughters. He left considerable moveable and immoveable property at Poona.

On his death his estate was managed by his sons Adarji and Framji. Both of them collected the rents and outstandings of the estate and both dealt with the creditors of the deceased by executing and renewing *khatas* in their favour. They even mortgaged a portion of the estate to pay off the debts of the deceased. But they did not take out letters of administration to the estate of their deceased father.

The widow and the daughters of the deceased obtained letters of administration, but limited to their shares or interests in the deceased's estate.

In 1888 Adarji filed a suit against his brother Framji and all other members of the family to recover a sum of Rs. 61,948-8-0 alleged to be due to him on account of moneys lent and advanced to his deceased father from time to time during his life-time. He sought to recover the amount by sale of the deceased's property.

Defendant No. 1, Framji, denied the alleged loans to the deceased, and contended that the suit was not maintainable in its present form.

Defendants Nos. 2, 3 and 4 admitted the plaintiff's claim.

* Appeal No. 6 of 1891.

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The Subordinate Judge passed a decree in plaintiff's favour, directing that the amount claimed should be recovered by sale of the deceased Dorabji's property.

[339] Defendant No. 1 appealed to the High Court.

Macpherson (with him *Shivram Vithal Bhandarkar*), for appellant (defendant):—Dorabji died intestate. Neither the plaintiff nor any other member of his family has taken out letters of administration in respect of the deceased's estate. That being the case, the suit must fail under s. 190 of the Indian Succession Act (X of 1865). The letters of administration granted to the deceased's widow and daughters are only limited to their right of suing for their shares. There is no provision in the Act for granting letters of administration otherwise than of the whole estate—*In re Bai Ferozbai* (1); *In the goods of Ram Chand Seal* (2). As a creditor, the plaintiff might and ought to have obtained letters of administration. His proper remedy was an administration suit. He cannot be allowed now to convert the present suit into an administration suit.

P. M. Metha (with him *Ghanasham Nilkant Nadkarni*), for respondent (plaintiff):—The defendant No. 1 has been managing the estate of his deceased father ever since his death. In the absence of letters of administration he made himself an executor *de son tort*. As such, he is answerable to a creditor like the plaintiff to the extent of the assets that may have come into his hands. We can, therefore, proceed against him under s. 266 of the Act X of 1865. As to the necessity of obtaining letters of administration under s. 190 of the Act, this point does not appear either in the pleadings or the issues raised in the lower Court. It must be, therefore, taken to have been waived. It would not be right to reject the claim on this technical ground.

JUDGMENT.

CANDY, J.—The plaintiff, who is the son of the late Dorabji Pestonji Ghaswala, has sued his brother defendant No. 1 and other members of his family to recover Rs. 61,948 said to be due to him from the estate of his father. The first Class Subordinate Judge passed a decree for the amount claimed with subsequent interest recoverable by the sale of certain properties described in the plaint and, in case of deficiency, from the other estate of Dorabji Pestonji.

[340] Against this decree the first defendant has appealed. At the commencement of the hearing, his counsel, Mr. Macpherson, raised the objection that the suit was wholly barred by s. 190 of the Indian Succession Act. The point was taken in the lower Court, but was disposed of by the Subordinate Judge with the following remark:—

"It was urged that s. 190 of the Indian Succession Act bars this suit. But it has been admitted that letters of administration of Dorabji's estate have already been issued to some of the defendants."

To this mode of dealing with the question Mr. Macpherson objected, stating that the only letters of administration issued were granted to the widow and daughters of the deceased, limited to the extent of their interests in the estate. He contended, on the authority of *In Re Bai Ferozbai* (1) and *In the goods of Ram Chand Seal* (2), that such limited administration could not be granted and was wholly invalid; but, without deciding whether the letters in question have any validity in regard to the shares of the ladies who obtained them, it seems clear that

(1) P. J. (1884) p. 172. (2) 5 C. 2.

they are not letters of administration such as are meant by s. 190. They purport to deal only with such shares in the estate as the ladies may be entitled to, and thereby expressly exclude the portions of the estate required for the payment of the deceased's debts.

Mr. Mehta, however, contended that the suit would lie under s. 266 of the Succession Act (X of 1865), in as much as Framji by intermeddling with the deceased's estate was an executor of his own wrong. Now there can be no doubt that a creditor may sue an executor *de son tort* for the recovery of his claim; and assuming that the plaintiff was a creditor as he alleged in his plaint, and that Framji had intermeddled with his father's estate and had assumed the management of it, we held that we could not, at that stage, without going into the evidence, dismiss the claim, which *prima facie* was sustainable against defendant No. 1 to the extent of the assests which might have come into his hands. [341] But on examining the evidence it became abundantly clear that the plaintiff was, just as much as his brother, an executor *de son tort*. and Mr. Macpherson thereon renewed his claim for the dismissal of the suit on the ground that without taking out administration one executor of his own wrong could not sue another or enforce his claims against the estate. This contention must, we think, prevail. The plaintiff's own evidence shows that after the death of their father on 23rd August, 1877, both brothers assumed the joint management of his estate. Sometimes the one recovered the rents due for bungalows belonging to the estate and sometimes the other. The plaintiff collected all the rent due by Mr. Moore after Dorabji's decease. Some of it was credited in the family account books and some not. The plaintiff cashed one cheque for Rs. 6,000 and gave another for Rs. 7,000 to Framji. He received and retained a sum of Rs. 4,000, as he had paid some of the deceased's creditors out of his own funds. He joined with Framji in executing and renewing *khatas* in favour of other creditors of the deceased, and in mortgaging to one Natu some of the deceased's property. The family account books remained under the control of both brothers, as is clear from the fact that in February, 1888, the plaintiff had them examined by his own pleaders, while, in the following month, Framji removed some of them, at least temporarily (we are not now considering the question whether he abstracted two of them altogether), and subsequently returned them to the karkun Bapuji. Under these circumstances, until an account is taken in an administration suit of all the sums that have come into the hands of the plaintiff on the one side and Framji on the other, it is impossible to say to what extent the plaintiff remains a creditor of the estate. The Subordinate Judge has dealt with the subject in discussing the 5th issue; but we are unable to agree with him in thinking that this suit having been brought by the plaintiff as one of the creditors of Dorabji's estates, other accounts between him and Dorabji's estate as one of the heirs of Dorabji cannot be imported into it, or that an administration suit would not be a more appropriate remedy. Until we know what amount the plaintiff has hitherto received out of Dorabji's estate it is impossible to say to what [342] extent that estate remains indebted to him. Under these circumstances we consider—(1) That the only course open to the plaintiff was to take proceedings to obtain the appointment of an administrator of the estate who either would administer it by the payments of the debts and the distribution of the surplus (if any) amongst the heirs after taking an account of all property already received out of it by the creditors or heirs, or who could be compelled

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to do so by an administration suit; and (2) that this suit must be dismissed with costs throughout.

This finding renders it unnecessary to go into the other questions argued on the appeal, and we, therefore, think it needless to express an opinion as to the validity of the alleged equitable mortgage or the effect of the alleged payment of interest by Framji. As, however, serious aspersions were thrown on Framji's character in reference to the disappearance of the books, and the whole of the evidence on this point was fully discussed, we think it right to say that that evidence, though it gives rise to some suspicion, does not appear to us to prove conclusively that the missing books were stolen or abstracted by him.

Decree reversed.

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

HARI BALKRISHNA JOGLEKAR (*Original Defendant*), *Appellant v.* NARO MORESHVAR JOGLEKAR (*Original Plaintiff*), *Respondent.**
[15th June, 1893.]

Contract—Contract Act (IX of 1872), s. 23—Unlawful consideration—Agreement by plaintiff and defendant not to bid against each other at an auction—Specific Relief Act (I of 1877), s. 35—Void contract.

There is nothing necessarily unlawful in two or more persons agreeing not to bid against one another at an auction sale.

[343] In order that a contract should be set aside under s. 35 (1) (*b*) of the Specific Relief Act (I of 1877), the plaintiff should be shown to have been less to blame in the transaction than the defendant.

[F., 37 P.R. 1901=97 P.L.R. 1901; R., 24 B. 622 (627)=2 Bom. L.R. 483; 1 C.L. J. 85 (89); U.B.R. (1897—1901) 317.]

SECOND appeal from the decision of Rao Bahadur Kashinath Balkrishna Marathe, First Class Subordinate Judge of Ratnagiri with appellate powers.

Suit for the cancellation of a bond.

The plaintiff alleged that certain land, portion of which had been mortgaged to him and the rest to the defendant Balaji Keshav, was attached by one Govind Nagesh in execution of a money decree which he

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* Second Appeal No. 1000 of 1891.

(1) Section 35, Specific Relief Act (I of 1877):—

Any person interested in a contract in writing may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely:—

(*a*) where the contract is voidable or terminable by the plaintiff;

(*b*) where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff;

(*c*) where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase-money or other sums which the Court has ordered him to pay.

When the purchaser or lessee is in possession of the subject-matter, and the Court finds that such possession is wrongful, the Court may also order him to pay to the vendor or lessor the rents and profits, if any, received by him as such possessor.

In the same case, the Court may, by order in the suit in which the decree has been made and not complied with, rescind the contract, either so far as regards the party in default, or altogether, as the justice of the case may require.