

1904.

MACLEOD

v.

KISSAN.

Bank's agent or with the Bank's consent and that the 1st defendant acquired his right as a *bond fide* sub-lessee. There is no evidence to show that the 2nd defendant acted as the Bank's agent or that the Bank even assented to the sub-letting by him in such a way as to estop the Bank from asserting its rights under the mortgage against the sub-lessees. I cannot presume such agency or such assent from the mere fact that the 2nd defendant was allowed to remain in possession and to sub-let. He was so allowed subject to the condition in the mortgage-deed that, if there should be demand for payment and the mortgagors should fail to pay, the Bank or its assignees should have the right to enter into possession. The mortgage-deed was registered and the 1st defendant must be treated as having had notice of its terms. As pointed out by Romer, L. J., in *Reynolds v. Ashby & Son, Limited*,⁽¹⁾ "it would be very dangerous if anything like a general authority to the mortgagor to deal with or affect the mortgaged property could be implied from the mere fact that the mortgagor has not taken possession of it." [His Lordship then recorded findings on the remaining issues.]

Attorneys for the plaintiff:—*Messrs. Crawford, Brown & Co.*

Attorneys for the defendants:—*Messrs. Captain & Vaidya and Messrs. Thakurdas & Co.*

A. H. S. A.

(1) [1903] 1 K. B. 87 at p. 102.

ORIGINAL CIVIL.

Before Mr. Justice Tyabji.

HAJI SABOO SIDICK, ORIGINAL PLAINTIFF, v. ALLY MAHOMED
JAN MAHOMED AND OTHERS, ORIGINAL DEFENDANTS.*

Kutchi Memons—Succession—Hindu Law—Sons administering the property of their deceased father.

Among the Kutchi Memons, who are governed by Hindu Law, the sons as heirs are entitled to the estate of their deceased father, subject to the payment of his debts. They are, therefore, entitled to take possession of their father's property, to administer it, and to pay debts without being liable to account to the Court otherwise than as heirs.

Veerasokkaraju v. Papiiah⁽¹⁾ followed.

* O. C. J. Suit No. 515 of 1903.

(1) (1902) 26 Mad. 792.

1904.

September 20.

THIS was a suit brought by Haji Saboo Sidick, for the administration of the property of Jan Mahomed Haji Ahmed, who died on the 23rd April 1903, leaving behind him surviving his widow (defendant 3) and two sons (defendants 1 and 2).

The plaintiff had lent Rs. 2,500 to the deceased on the 29th March 1903, for which the latter passed a promissory note in his favour.

The defendants Nos. 4 and 5 were joined as executors *de son tort*. Defendants Nos. 6 and 7, who were creditors of the deceased, were also joined for a similar reason.

The plaintiff's complaint was that "immediately on the death of the said deceased all the defendants took possession of the property of the deceased consisting of the stock in trade and goods in his shop and intermeddled with the same and began distributing the same among themselves and certain other creditors of the deceased with whom they were on friendly terms without regard to and in fraud of the right of all the other creditors of the deceased." He, therefore, prayed that the estate of the deceased may be administered by the Court; that the defendants and each of them may be ordered to make full discovery of, and to account for, all the estate of the deceased come to the hands of the defendants or any of them and of their application of the same; that a Receiver may be appointed of the estate of the said deceased with power to file suits to recover any property of the deceased wrongfully disposed of by the defendants or any of them and to recover the outstandings due to the deceased; that the estate of the deceased when ascertained may be distributed between the plaintiff and the other creditors of the deceased according to their rights.

Davar and Lowndes, for the plaintiff.

Kanga and Khairaz, for defendants 1 and 2.

Scott (Advocate-General) and *Strangman*, for defendants 6 and 7.

TYABJI, J.:—The plaintiff claims that the estate of the late Jan Mahomed Haji Ahmed may be administered by this Court and that the defendants and each of them may be ordered to make a full discovery of, and to account for, all the estate of the said deceased which has come to their hands or any of them, and of

1904.

HAJI SABOO
v.
ALLY
MAHOMED.

1904.

Haji Saboo
v.
ALLY
MAHOMED.

their application of the same; that a Receiver be appointed of the estate of the said deceased, with power to file suits, to recover any property of the deceased wrongfully disposed by the defendants, or any of them, and to recover the outstandings due to the deceased; and that the estate of the deceased, when ascertained, may be distributed between the plaintiff and the other creditors of the deceased, for costs of the suit and for further and other reliefs.

The suit is filed by one Haji Saboo Sidick, a Memon Merchant of Bombay, originally against seven defendants. The 1st and 2nd defendants are the sons of the deceased, the 3rd defendant is the widow of the deceased. The 4th defendant is a broker, and it is sought to make him liable as executor *de son tort*. The 5th defendant is a merchant, and he is made liable also as an executor *de son tort*. The 6th defendant is also a merchant, and is sued because he has taken possession of certain property and also as executor *de son tort*; and the 7th defendant is also sued in a similar manner.

The plaintiff Haji Saboo Sidick is a creditor of the deceased Haji Jan Mahomed on a promissory note of Rs. 2,500. Jan Mahomed died on the 23rd April 1903: the date of Jan Mahomed's death, given in the plaint as being the 5th May 1903, is admitted by the plaintiff to be a mistake.

The plaintiff complains that, immediately after the death of Haji Jan Mahomed, the defendants took possession of all his property and his stock in trade, and without any justification proceeded to deal with the property, and proceeded to distribute the stock in trade and goods among the various creditors in any way they liked, and not proportionately. The contention of the plaintiff in short is that this amounted to tort, on the part of the defendants, and that they all have rendered themselves liable as executors *de son tort*, and that the goods, which have gone into the possession of the various creditors, should be brought back and distributed among the various creditors rateably.

On the other hand the defendants 6 and 7 claim that they were rightfully in possession of the goods as creditors.

Now defendants 1 and 2 are the sons of the deceased, and the deceased being a Kutchi Memon, with regard to inheritance his

family is governed by the rules of inheritance under the Hindu Law. Therefore defendants 1 and 2 as heirs were entitled to the estate of the deceased, subject, of course, to the payment of his debts.

Defendant 6 is a creditor of the deceased on two promissory notes of Rs. 2,500 each. He says that he received the goods in question, in part satisfaction of his claim of Rs. 5,000 from the 2nd defendant, and that he is entitled to retain these goods, and that he is not liable to account for the goods, or share the value of the goods rateably with other creditors. The 7th defendant Ebrahim Haji Haroon is creditor to the extent of Rs. 2,500 under a promissory note. His contention is similar to that of defendant 6.

The question, therefore, it seems to me, in spite of the time taken in argument, is a simple one. The present suit is prosecuted against defendants Nos. 1, 2, 6 and 7, defendants 4 and 5 having been disposed of by the previous order of this Court. The question is whether defendants 6 and 7 are bound to bring into hotch-potch the goods they have taken away and share with the other creditors, or can they retain them? The provisions of the Indian Succession Act do not apply to the parties in the suit except so far as they may have been extended to them by the Probate and Administration Act. The provisions as to executors *de son tort* are not reproduced in the Probate and Administration Act, nor are the Hindus and Mahomedans bound to take out probate of the will of the deceased. It is quite clear that defendants 1 and 2, being heirs, were entitled to take possession of the property, to administer the property, and to pay debts without being liable to account to the Court otherwise than as heirs. This is quite clear from the case of *Veerasokkaraju v. Papial*⁽¹⁾, the head-note in that case being:—

“The unsecured creditors of a deceased Hindu have no charge or lien on the inheritance. If payments are not made by the heir rateably, it does not follow that he has failed to apply the assets duly. Every payment on account of a debt is perfectly lawful, irrespective of its effect upon the other creditors, and is a due application of the assets within the meaning of section 252 of the Code of Civil Procedure.”

(1) (1902) 26 Mad. 792.

1904.

Haji Saboo

v.

ALLY
MAHOMED.

1904

Haji Saboo
v.
ALLY
MAHOMED.

[His Lordship read portions bearing on this point from the judgment of Subrahmania Ayyar, J., at page 796.]

I entirely agree with the judgment I have read and I must hold that defendants 1 and 2, as sons and heirs of the deceased Jan Mahomed, were entitled to pay the various creditors in the way they have done. The only question is whether there is any collusion. As to this there is not a scintilla of evidence, except the mere suggestion of Mr. Davar, that there has been collusion, but Mr. Davar's suggestion is not supported by a tittle of evidence.

Defendants 1 and 2, therefore, being heirs, and having carried on the business, were fully justified in their proceedings.

As regards defendant 1, however, I must observe that he was separate from his father, and beyond visiting the shop now and then he took no part in the proceedings complained of, and the allegations against him are entirely unsupported.

I hold that defendants 6 and 7 are not bound to account for the goods which they have received. They were given to them in satisfaction or part satisfaction of their claims and the plaintiff must pay their costs.

Defendant 1 has not interfered and so the plaintiff must pay his costs of the contention against him.

Defendant 2 has undoubtedly interfered but he was justified in doing what he has done and the plaintiff must pay the costs of the issues raised against him also.

The other defendants have been already discharged from attendance on this issue.

Suit against defendants 6 and 7 must be dismissed, but defendants 1 and 2 will be retained and must account for whatever assets have come into their hands. The decree against them will be that they are liable and must account for any assets that may have come into their hands.

Attorneys for the plaintiff:—*Messrs. Edgelow, Gulabchand & Wadia.*

Attorneys for the defendants:—*Mr. J. P. Dastur, Messrs. Sorabji & Jehangir, Messrs. Matubhai, Jamietram & Madan, Messrs. Payne & Co., Messrs. Little & Co., and Messrs. Ardeshir, Hormasji, Dinsha & Co.*