The Court must act in the interests of all the creditors and not in the interest of any particular creditor who wishes by way of compensation for his loss to put the insolvent in jail. This may often result in an insolvent's relations paying money to the execution creditor to get the insolvent released. It is for the interests of the creditors that the affairs of an insolvent should be fully investigated under the Act, and that cannot possibly be done if he is put in jail, or has to go into hiding to escape from arrest. Section 25 provides the Court with means whereby the Court can secure compliance with the provisions of the Act, and an opposing creditor should show that the Court has a grievance when asking the Court to exercise its discretion against an insolvent.

In my opinion the opposing creditors have not realised the change effected by the new Act, and I see no reason why the insolvent should not be granted protection. On the contrary it must be in the interests of all the creditors that he should be given a chance of winding up his estate.

Attorneys for the insolvent: Messrs. *Ardeshir Hormusjee, Dinshaw & Co.*

Attorneys for opposing creditors: Messrs. *Crawford, Brown & Co.*, and *Edgelow, Gulabchand and Wadia.*

K. McI. K.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1910.
July 13.

MOJILAL PREMANAND AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* GAVRISHANKAR KUSHALJI AND OTHERS (ORIGINAL DEFENDANTS 1, 4 AND 3), RESPONDENTS.*

Limitation Act (XV of 1877), section 10—Will—Trustees—Suit by testator's sister for declaration of heirship and ownership of the residue of testator's estate—Resulting trust arising by operation of law—Limitation.

One Jethabhai died on the 7th December 1889 after having made a will dated the 20th February 1889. The will gave certain legacies, including one

* Second Appeal No. 402 of 1909.

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of Rs. 300, to the plaintiff, testator's sister. Under the will five trustees were appointed and it provided as follows:—"Out of these five (trustees), Dave Gavrishankar Kushalji and my nephew (plaintiff's son) Desai Mojilal Premanand should both join and take possession of my properties after my death in accordance with the above will, and with the consent of the remaining trustees, they are to dispose of the properties in accordance with what is written in the above will, and should any outstandings have to be recovered for giving effect to the said dispositions, they are to do the same and I do by this will give them power to do whatever else they may have to do to carry out the will."

In the year 1906 the plaintiff having brought a suit for the declaration that she was the heir of the testator, her brother, and as such owner of the residue remaining after administering his property under the will and for the recovery of the residue, a question arose as to whether the suit was time-barred on the ground that there was no trust declared with regard to the residue and no direction given to distribute it among heirs at law.

Held, that the suit was not time-barred, and that once the testator's property was vested in the trustees for a specific purpose, it was not necessary that any resulting trust of the residue, which necessarily arose by operation of law, should be specified in words in the will in order to bring it within the scope of section 10 of the Limitation Act (XV of 1877).

SECOND appeal from the decision of T. N. Sanjana, First Class Subordinate Judge of Ahmedabad with Appellate Powers, reversing the decree of Keshavlal V. Desai, Acting Subordinate Judge of Nadiad.

One Jethabhai Walavram died on the 7th December 1889 after having made a will dated the 20th February 1889. Under the will the testator gave certain legacies, including one of Rs. 300, to his sister Saraswatibai. The material portion of the will was as follows:—

With the property that might remain after paying as above the expenses of my obsequies are to be defrayed. I do make disposition in this way in my consciousness and in order to carry out these dispositions, I appoint after me the following gentlemen as trustees:—Dave Gavrishankar Kushalji, Desai Mojilal Premanand, Dave Parbhashankar Purshottam, Desai Desaibhai Kalidas and Desai Maneklal Amratlal. Out of these five Dave Gavrishankar Kushalji and my nephew Desai Mojilal Premanand should both join and take possession of my properties after my death in accordance with the above will and with the consent of the remaining trustees, they are to dispose of the properties in accordance with what is written in the above will and should any outstandings have to be recovered for giving effect to the said dispositions, they are to do the same and I do by this will give them power to do whatever else they may have to do to carry out the will.

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In the year 1906 the testator's abovementioned sister Saraswatibai brought the present suit (1) for a declaration that she was the heir of the testator and as such the owner of the residue remaining after administering his property under his will, (2) for an account determining the amount of the said remaining property and of the outstandings realized by the defendant trustees and determining with which of the defendants the same or any part thereof was, (3) for an injunction restraining the defendants from obstructing her in taking possession of the property and outstandings so found remaining and restraining them from recovering the same, (4) for an order directing the defendants to hand over to her all the account books, bonds and other vouchers pertaining to the estate of the testator and (5) for an order directing defendants 1 and 4 to give to her a registered san-mortgage-bond for Rs. 1,300 and to pay to her the outstandings belonging to the testator which they and defendant 4's father and grandfather had realized as trustees under the will.

The plaintiff Saraswatibai having died after the institution of the suit, her son Mojilal Premanand, who was one of the trustees under the will and who was joined in the suit as defendant, applied with his brothers to have their names entered on the record in the place of the deceased and the Court ordered it to be done. So Mojilal, original defendant 2, became one of the plaintiffs in the suit.

Defendant 1, Gavrishankar Kushalji, answered *inter alia* that the suit was time-barred, that the testator had by his will disposed of his residue, that the plaintiff was not entitled to the residue, that what was directed by the will to be given to the plaintiff was given to her and that he had with him Rs. 105-14-6 as the balance of the trust property.

Defendants 2 and 3, Desaibhai Kalidas and Harilal Desaibhai, admitted the plaintiff's claim and stated that the residue of the testator's property and the bonds and documents were with defendants 1 and 4.

Defendant 4, Ganpat Chunilal, raised the same contention as defendant 1 and added that he was not a trustee under the will, that he simply did what the other trustees asked him to do and that he had Rs. 107-11-3 and documents in his possession.

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The Subordinate Judge found that the plaintiff Saraswatibai was the nearest heir of the testator and was entitled to recover the residue of the testator's property after giving bonds of the nominal value of Rs. 100 to *Vyatipat* institution in Mahudha, that defendant 4 was in management of the estate as trustee, that the plaintiff was entitled to recover from defendant 1 Rs. 81-7-0 and from defendant 4 Rs. 107-11-3, that the plaintiff was entitled to recover from defendants 1 and 4 documents and other papers relating to the estate of the testator and the suit was in time. The Subordinate Judge, therefore, decreed the plaintiff's claim.

On appeal by defendants 1 and 4, the appellate Court reversed the decree and dismissed the suit on the ground that it was time-barred.

The plaintiffs preferred a second appeal.

M. P. Modi with *N. K. Mehta* for the appellants (plaintiffs).

Rangnekar with *T. R. Desai* and *Raghawaya and Bhimji* for respondents 1 and 2 (defendants 1 and 4).

L. A. Shah for respondent 3 (defendant 2).

SCOTT, C. J.:—This is a suit instituted by Saraswatibai, widow of Premanand Parbhudas and sister of Jethabhai Walavram, for a declaration that she is the heir of her brother Jethabhai and as such owner of the residue remaining after administering his property under his will.

Jethabhai Walavram by his will, dated 20th of February 1889, gave certain legacies including one of Rs. 300 to the plaintiff and by the last clause provided as follows:—"With the property that might remain after paying as above the expenses of my obsequies are to be defrayed. I do make disposition in this way in my consciousness and in order to carry out these dispositions, I appoint after me the following gentlemen as trustees: Dave Gavrishankar Kushalji, Desai Mojilal Premanand, Dave Parbhashankar Parshottam, Desai Desaibhai Kalidas and Desai Maneklal Amratlal. Out of these five, Dave Gavrishankar Kushalji and my nephew Desai Mojilal Premanand should both join and take possession of my properties after my death in accordance with the above will and with the consent of the remaining trustees,

they are to dispose of the properties in accordance with what is written in the above will and should any outstandings have to be recovered for giving effect to the said dispositions, they are to do the same and I do by this will give them power to do whatever else they may have to do to carry out the will."

The trustees named in the will have performed the funeral obsequies which are necessary in the case of a Hindu in the position of the testator, and they have also paid the legacies mentioned in the will. Three of the trustees are now dead. The property of the testator has not been exhausted in carrying out the trusts of the will. It now consists of money advanced upon a san-mortgage-deed for Rs. 1,300, the mortgagees being Gavrishankar Kushalji, Mojilal Premanand, Desaibhai Kalidas and Maneklal Amratlal and a small sum of cash in the hands of the second respondent.

The suit was brought against Gavrishankar Kushalji, Mojilal Premanand, original trustees, Ganpatlal Chunilal as representative of Maneklal Amratlal, and Harilal Desaibhai as representative of Desaibhai Kalidas.

A decree was obtained by the plaintiff in the Court of the Subordinate Judge, but that decree was reversed upon the appeal to the Joint First Class Subordinate Judge with Appellate Powers on the ground that the suit was barred by limitation.

In second appeal the point which has been argued is whether the suit is barred by limitation having regard to the fact that the property is in the hands of the trustees named in the will and the representatives of named trustees who are dead.

It is argued that the property is vested in the defendants in trust for a specific purpose and that this is a suit of the nature contemplated in section 10 of the Limitation Act of 1877.

It has been held by a Full Bench of this Court in *Lallubhai Bapubhai* v. *Mankuvarbai*[1] that a suit against an executor by an heir of a testator who has by will made the executor an express trustee for certain purposes is, as to the

(1) (1876) 2 Bom. 388 at 414.

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undisposed of residue, a suit within the scope of section 2 of Act XIV of 1859. That section provided that no suit against a trustee in his life-time, and no suit against his representatives for the purpose of following in their hands the specific property which is the subject of the trust, shall be barred by any length of time.

The section of the Act of 1877 with which we are concerned provides that no suit against a person in whom property has become vested in trust for any specific purpose or against his legal representatives or assigns not being assigns for valuable consideration for the purpose of following in his or their hands such property shall be barred by any length of time.

Is the property which is the subject of this suit, property which has become vested in the trustees in trust for any specific purpose? It is, we think, clear that it has been vested in them for the purpose of application in carrying out the trusts of the will. Once the testator's property is vested in them for a specific purpose it is not necessary that any resulting trust of the residue which necessarily arises by operation of law should be specified in words in the will in order to bring it within the scope of section 10. That was the opinion of the Court in *Vundravandas* v. *Cursondas*[1]. The learned Judges in that case said, "It must, we think, be conceded that where a Hindu will makes the executors trustees of the whole estate of the testator, and the bequests in the will are not sufficient to exhaust that estate, the executors become express trustees of the undisposed of residue for the next-of-kin of the testator. That has been so decided by this Court in *Lallubhai* v. *Mankuvarbai*[2], where the case of *Salter* v. *Cavanagh*[3] was followed, as it was also followed by the Queen's Bench Division in England in *Patrick* v. *Simpson*[4]," and after further discussion of the point they add "We have considered this question, as though the expression 'express trust' had been used in our Statute (Act XV of 1877, section 10), but for this purpose we think that 'vested in trust for a specific purpose' may be treated as a more

(1) (1897) 21 Bom. 646 at 664.
(2) (1876) 2 Bom. 388 at 414.
(3) (1838) 1 Drury and Walsh 668.
(4) (1889) 24 Q. B. D. 131.

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expanded mode of expressing the same idea. Our decision on this point is supported by the case of *Kherodemoney* v. *Doorgamoney*[1] which cannot, we think, be substantially distinguished from it."

We, therefore, hold that the suit was not barred by limitation.

There is no dispute as to the property to which the plaintiffs, as representing the original plaintiff Saraswatibai, are entitled.

We reverse the decree of the lower appellate Court and declare that the appellants are entitled to recover the sanmortgage-bond, Exhibit 84, and all the mortgage-bonds and personal bonds and documents relating to the undisposed of and unexhausted residue of Jethabhai's estate. Order that respondent 2 do retain one bond of the nominal-value of Rs. 100 for delivering to the *Vyatipat* institution. Order that the respondents 1 and 2, if and when required so to do by the appellants, do assign to them the said bonds and documents at the appellants' expense. Decree that respondent 1 do pay Rs. 81-7-0, that respondent 2 do pay Rs. 107-11-3, and that respondents 1 and 2 do pay Rs. 60 to the appellants. Decree that first and second respondents do pay the costs throughout of appellants and third respondent.

Decree reversed.

G. B. R.

CRIMINAL APPELLATE.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

EMPEROR v. SHANKAR SHRIKRISHNA DEV.*

1910.
July 12.

Press Act (XXV of 1867), sections 4, 5—Declaration made by owner who took no part in managing a printing press—Publication of a seditious book at the press—Penal Code (Act XLV of 1860), section 124A—Sedition—Intention.

The accused made a declaration under Act XXV of 1867, section 4, that he was the owner of a press called "The Atmaram Press". Beyond this, he took

* Criminal Appeal No. 117 of 1910.

(1) (1878) 4 Cal. 455.