PRIVY COUNCIL.

P. C.*
1921
Feb. 10.

HOOK
v.
ADMINISTRATOR-GENERAL OF BENGAL AND OTHERS.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Res judicata—Administration suit—Validity of gift—Decision in same suit—Civil Procedure Code (Act V of 1908), s. 11.

Section 11 of the Code of Civil Procedure, 1908, is not exhaustive of the circumstances in which an issue is *res judicata.*

A testator by his will and codicils provided that certain annuities should be paid out of a trust fund thereby created, and that the residue of the income of the fund should be paid to the deacons of a Baptist church, subject to certain conditions, with a gift-over to another Baptist church if the conditions were not fulfilled. In an administration suit in the High Court during the life of the last surviving annuitant, it was held that the conditions had not been fulfilled and that there was not an intestacy as to the surplus income, rejecting a contention on behalf of the next-of-kin that the gift-over was invalid, as creating a perpetuity; the decree provided that the determination of the destination of the income or corpus of the fund upon the death of the annuitant should be deferred until after that event. In further proceedings in the suit after the annuitant's death, the next-of-kin contended that under the reservation in the decree they were entitled again to raise the contention that the gift-over was invalid.

Held, that the validity of the gift-over was *res judicata.*

Ram Kirpal Shukul v. *Rup Kuari* (1) and *Peareth* v. *Marriott* (2) followed.

Judgment of the High Court reversed.

APPEAL (No. 148 of 1919) from a judgment of the High Court (July 1, 1918), reversing a decree of Chaudhuri J. (March 4, 1918).

* *Present* : LORD BUCKMASTER, LORD PHILLIMORE, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

(1) (1883) I. L. R. 3 All. 633 ; L. R. 11 I. A. 37.

(2) (1882) 22 Ch. D. 182.

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The 3rd defendant was the appellant to His Majesty in Council.

The appeal arose out of proceedings in an administration suit instituted in the High Court in 1911 by the respondent, the Administrator-General, as executor and trustee of the will with codicils of Henry Wilkins Jones, who resided at Calcutta, and died there in 1909. The appellant, the Rev. G. H. Hook, was pastor of the Lal Bazar Baptist Church. The respondents on the record other than the Administrator-General were J. H. Jones and E. A. Jones, as executor and executrix of one of the next-of-kin and as being next-of-kin of the testator, other parties who were alleged next-of-kin, and (the fourth respondent) the Rev. B. E. Evans. pastor of the Howrah Baptist Church.

The material facts are stated in the judgment of the Judicial Committee.

The judgment of Chaudhuri J., delivered on July 16, 1912, upon the suit originally coming before him for trial is fully reported in I. L. R. 40 Calc. 192, and its effect is stated in the present judgment. He held, *inter alia*, that the gift-over upon the Baptist Church, failing to observe the conditions imposed upon the gift to it, was valid.

In the present proceedings which were commenced in 1917 by petition in the suit, Chaudhuri J. delivered judgment on March 4, 1918. The learned Judge stated that it was contended by the next-of-kin that his former decision that the gift-over was valid was not correct, and that, having regard to the death of the annuitant, it was open to them to question the decision. The learned Judge did not think that it was open. He said that a further contention had been raised, namely, that s. 101 of the Indian Succession Act, 1865, applied to charitable bequests and rendered the gift-over void. After a consideration of that question

the learned Judge rejected the contention, adding that he did not think that it was open to the next-of-kin to raise it. An order was made directing that the corpus of the fund and the accumulated income, after the payment of costs, should be handed over to the present appellant and to the respondent in equal moieties.

An appeal to a Division Bench, consisting of Sanderson C.J. and Woodroffe J., was allowed, and it was declared that the bequests to the Howrah and Lal Bazar Baptist Churches were invalid under s. 101 of the Indian Succession Act, 1865, and that as to the residue of the corpus and income of the residuary trust fund there was an intestacy. The learned Judges were of opinion that there was no *res judicata*, since s. 11 of the Code of Civil Procedure did not apply, and in their view the order made on July 16, 1912, left it open to the next-of-kin to raise that contention, which they pointed out had not been raised at the former hearing

De Gruyther K. C. and *R. H. Hodge*, for the appellant. By the decision of Chaudhuri J. on July 16, 1912, the validity of the gift-over in favour of the Howrah Baptist Church and the Lal Bazar Baptist Church was *res judicata*. The decision was material to the judgment then delivered, and was a final determination. The next-of-kin could have appealed, but did not do so. The decision with regard to the destination of the income and corpus on the death of the annuitant was deferred in view of a contention that the Lower Circular Road Baptist Church had the period of the life of the annuitant to fulfil the conditions. Although s. 11 of the Code of Civil Procedure, 1908, applies only to a former decision in another suit, that section is not

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exhaustive; the general principle of *res judicata* applies: *Ram Kirpal Sukul* v. *Rup Kuari.* (1)

The Judicial Committee desired to hear counsel for the respondents, the next-of-kin, on the question of *res judicata.*

Tomlin K.C. and *Andrewes-Uthwatt*, for the respondents J. H. Jones and E. A. Jones; *Turnbull* for the respondent Rev. B. Evans. There was no *res judicata* affecting the question now for determination. The will and codicils provided for two distinct gifts; the first disposed of the surplus income during the life of the annuitants, and the second disposed of the corpus at the end of that period. Questions with regard to the second gift were not, and could not be, determined by the decision in 1912. With regard to the gift of the surplus income, there could not be any question of a perpetuity, because the gift involved the disposition of the income during lives in being. That consideration was overlooked by the trial Judge. The decree expressly leaves open in the widest terms questions arising on the death of the annuitant; it gave liberty to all parties to apply, and cannot therefore be treated as reserving only questions between the charities. The terms of the decree of 1912 lead the next-of-kin reasonably to suppose that the whole question of the disposition of the fund on the death of the annuitant was left over; they consequently did not appeal. In these circumstances it should not be held that the matter is *res judicata.*

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The judgment of their Lordships was delivered by

LORD BUCKMASTER. On the merits of this controversy their Lordships are not called upon to decide, for in their opinion the respondents are estopped from

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raising the contention they desire to advance by reason of the judgment that has already been given between themselves and the appellant upon the point.

The dispute arises under a will and four codicils made by one Dr. Henry Wilkin Jones, who died on July 8, 1909.

By his will the testator appointed the Administrator-General of Bengal as executor and trustee, and bequeathed to him his real and personal estate upon trust for sale and investment, and directed, after payment of debts, funeral expenses, and legacies, that the residue should be held to apply the income as therein provided, during the life of his wife. On the death of his wife, he directed payment of certain legacies and then created trusts of the income of the fund to endure during the lifetime of certain named persons.

By para. 17, he directed that on the death of the survivor of these named persons—and such survivor was Miss Eliza Humphreys—a further trust should be imposed upon his trustees to sell and convert his real property, apparently forgetting that that had already been done. He also again provided for the investment of the proceeds of sale and declared that the trustees should hold the same: "For the full sum of 30,000 rupees if the said trust funds shall amount to so much or exceed that sum but not otherwise and if the said trust funds shall not amount to so much then to hold the whole thereof upon trust to pay the income thereof quarterly to two of the deacons for the time being of the Circular Road Baptist Church to be by them applied in manner following, namely, as to a moiety thereof for the Poor's Fund in connection with the said Church for the sustenance and support of the poor belonging to the said Church or the congregation usually worshipping in the said Baptist Chapel and as to the other moiety for the General Fund in

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connection with the said Church for the following purposes, namely, the support of the Pastor for the time being the expenses of the religious services held in the said Chapel repairs to the Chapel Pastor's dwelling-house and out-offices connected therewith and also for keeping my grave in decent order which shall be a duty imperatively incumbent on the deacons for the time being of the said Church to perform." If the trust fund exceeded the sum of Rs. 38,000, and this in the event has happened, he declared that as to all the balance thereof the trustees were to hold the same on the trust declared in respect of the sum of Rs. 30,000.

By his first codicil (May 22, 1901) the testator revoked a number of provisions in the will, gave new directions with regard to the payment of the income, and provided that if Miss Eliza Humphreys should survive her sister, Miss Anne Humphreys, her annuity should on her death be paid to two deacons of the Lower Circular Road Baptist Church, to be applied by them in the manner mentioned in para. 17 of his will, and by clause 20 of this codicil he gave the balance of the income in the same terms.

By his second codicil, dated March 2, 1903, the testator imposed certain conditions upon the gift made in favour of the Lower Circular Road Baptist Church, and provided that if the conditions should be broken, "Then, and in that case one-half of the interest, dividends, &c., that I have set aside for the said Lower Circular Road Baptist Church shall be made over and paid to the Pastor for the time being of the Howrah Baptist Church for the benefit of the said Church generally, and the other half thereof to the Reverend Arthur Jewson's Faith Orphanage, at present at No. 117, Dharamtalla Street (if then existing), or, if not in existence, to the Pastor of the

Lal Bazar Baptist Church for the benefit of the said Church and of the poor of the Church."

His third and fourth codicils are not material for the purpose of this appeal.

The testator's wife predeceased him, and died on July 25, 1907.

The Lower Circular Road Baptist Church did not comply with the conditions set out in the codicil, and on February 17, 1911, the Administrator-General of Bengal instituted a suit asking, among other things, what would be the destination of the funds in the event of the provisions in favour of the Circular Road Baptist Church being forfeited and whether the gift-over in the second codicil would take effect or whether there would be an intestacy. To this suit the present respondents, Joseph Henry Jones and Emma Adelaide Jones, were parties as representing the next-of-kin of the testator, and they contended in favour of the intestacy on the ground that the period in which the gift-over might take effect would be beyond the period in which vesting must occur.

The case was heard in July, 1912, before Chaudhuri J. By his judgment, delivered on July 16, 1912, he decided that the Baptist Church had not conformed to the conditions, and he held that the gift-over to the other charities was valid. He then dealt with the contention, which he said was strenuously urged on behalf of the next-of-kin that the whole gift to the Baptist Church and other charities failed for the reasons already mentioned. He carefully examined the authorities and held that the contention was unsound. He concluded this part of his judgment in these words: "The vesting in this case is immediate, but the Lower Circular Road Baptist Church is divested because certain conditions cannot be fulfilled by them." He then continued:

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"I also hold there is no intestacy as to the surplus income or any part of it during the lifetime of Eliza Humphreys."

Finally, he dealt with the question as to whether a gift of income, without more, was a gift of corpus, and he stated that that question did not then arise, as Miss Eliza Humphreys was still alive, but he stated definitely that the question would arise upon her death. In the same way he dealt with the contention that the Lower Circular Road Baptist Church might finally comply with the conditions, and that also was left over. The decree that was drawn up contained an express declaration that the gift-over in the eighth clause of the second codicil was valid, and concluded by a provision in these words: "And this Court doth not think fit at present to determine the destination of the income of the said Residuary Trust Funds or of the corpus thereof or the rights of parties therein and thereto respectively after the death of the said Eliza Humphreys and doth defer the determination of the said questions until after the death of the said Eliza Humphreys;" and liberty to apply was reserved.

Miss Eliza Humphreys died on April 10, 1917, and on September 8, 1917, the Administrator-General of Bengal presented a petition for the further construction of the will and codicils.

Upon the hearing the respondents, representing the next-of-kin, contended that the reservation in the decree enabled them to reraise all the questions that had formerly been discussed. They urged that the gift of the surplus income during the life of Miss Eliza Humphreys must be treated as distinct from the gift after her death, and that as to the former no question as to a perpetuity could possibly arise, and that such question was consequently one of the matters that was left over for subsequent decision.

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The learned Judge held that this matter had already been definitely settled and in addition gave reasons why he adhered to his former opinion. This was, in fact, superfluous. The question as to the perpetuity had been definitely and properly before him on the former hearing, and was, in fact, decided without any reservation, as is made plain by the terms of the judgment itself, which show that the determination of the dispute as to the perpetuity was the foundation of the whole judgment, and that the questions left over were those to which attention has been directed and which themselves are abundant to explain the meaning of the passage in the decree on which reliance is placed. It is not, and indeed it cannot be, disputed that, if that be the case, the matter has been finally settled between the parties, for the mere fact that the decision was given in an administration suit does not affect its finality: see *Peareth* v. *Marriott* (1). The appellate Court, however, took a different view, and regarding the question as still open decided it against the appellant, but the error in their judgment is due to the fact that they regarded the question as completely governed by s. 11 of the Code of Civil Procedure. That section prevents the retrial of issues that have been directly and substantially in issue in a former suit between the same parties, and this question obviously arises in the same and not in a former suit, but it does not appear that the learned Judge's attention was called to the decision of this Board in *Ram Kirpal Shukul* v. *Rup Kuari* (2), which clearly shows that the plea of *res judicata* still remains, apart from the limited provisions of the Code, and it is that plea which the respondents have to meet in the present case. In the

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words of Sir Barnes Peacock (at p. 41): "The binding force of such a judgment in such a case as the present depends not upon s. 13 of Act X of 1877" (now replaced by s. 11 of the Code of Civil Procedure, 1908), "but upon general principles of law. If it were not binding, there would be no end to litigation."

Their Lordships are therefore of opinion that the appellant in this case is right, and that this appeal must be allowed. They have accordingly humbly advised His Majesty to this effect and also that the appellant should receive his costs here and in the Appellate Court out of the estate; the Administrator-General and the fourth respondent also to have their costs in the Appellate Court out of the estate, and the order of the Judge in the Court of first instance as to costs to remain undisturbed.

A. M. T.

Solicitors for appellant: *Gush, Phillips, Walters & Williams.*

Solicitors for respondents (next-of-kin): *Orr, Dignam & Co.*

Solicitors for respondent (Evans): *Watkins & Hunter.*