APPEAL FROM ORIGINAL CIVIL

Before Costello and Lort-Williams JJ.

1934

June 1, 5, 6, 7, 8; *July* 5.

DINANATH

v.

HANSRAJ GUPTA.*

Will—Construction—Debts, if may include "subscriptions promised"—Parol evidence to specify charities and amounts promised, if admissible.

The testator, by his will, provided as follows :—I direct that all my debts be paid out of my estate in the first instance including the charities and subscriptions promised.

Held that the words "including the charities and subscriptions promised" cannot be given legal effect to and this part of the clause is void for uncertainty ; and the legacies thereby given, if any, are invalid.

Held, further, that the charities and subscriptions referred to are not debts and cannot be included in that category or within the direction to pay them.

In re *Whitaker* (1) relied on.

Held, also, that parol evidence is not admissible to show to what charities the testator promised subscriptions although for reasons of equity it might be admissible to establish a trust.

In re *Hetley*. *Hetley* v. *Hetley* (2) and *Blackwell* v. *Blackwell* (3) relied on.

Kedar Nath Bhattacharji v. *Gorie Mahomed* (4) commented on.

APPEAL by the plaintiff from a judgment of Ameer Ali J.

On a construction of the will Ameer Ali J. held that, though the charities and subscriptions were not debts provable in administration, the promises to charities were valid legacies and directed an enquiry to ascertain the charities to which promises had been made and the amounts thereof. Lala Dinanath, an executor, appealed from the judgment.

Sudhir Ray (with him *S. N. Banerjee*) for the appellant. Clause 1 is clearly bad for uncertainty. Where neither the subject nor the object is defined,

*Appeal from Original Decree, No. 122 of 1933, in Original Suits, Nos. 1221 of 1930 and 1517 of 1929.

(1) (1889) 42 Ch. D. 119.
(2) [1902] 2 Ch. 866.
(3) [1929] A. C. 318.
(4) (1886) I. L. R. 14 Calc. 64.

there can be no question of allowing parol evidence to define them. In re *Hetley*. *Hetley* v. *Hetley* (1), *Blackwell* v. *Blackwell* (2).

H. D. Bose (with him *H. Banarji*, *Arun K. Roy* and *C. L. Jhunjhunwalla*) for various charitable institutions, respondents. The sums promised as may be ascertained on enquiry are payable out of the estate as debts or quasi-debts. In re *Sowerby's Trust* (3). The executors here are trustees for the payment of bounties mentioned in clause 1, after payment of legal debts. *Turner* v. *Martin* (4).

These are not general gifts to charities but limited gifts which may and ought to be determined on enquiry. *Stubbs* v. *Sargon* (5).

The testator clearly includes "subscriptions promised" in "debts" and at least some subscriptions may be debts. *Kedar Nath Bhattacharji* v. *Gorie Mahomed* (6). The word including is used clearly to extend the meaning of the word debt as is often done in statutes. In re *Whitaker* (7).

H. C. Majumdar for the Advocate-General. Sections 74 and 75 of the Indian Succession Act are codified from the English law and make the position clear. In view of the word "promise" there must be evidence taken. *Rajamannar* v. *Venkatakrishnayya* (8).

B. C. Ghose (with him *P. N. Banerji*) for respondent Gopaldas Modi, an executor. The testator's whole intention clearly was that the promised charities should be paid before other legacies, specific or residuary. The words "in the first instance" apply to these payments, which should therefore be paid in the same manner and at the same time as debts.

Charitable institutions to which subscriptions have been promised can be determined just as creditors may

(1) [1902] 2 Ch. 866.
(2) [1929] A. C. 318.
(3) (1856) 2 K. & J. 630 (633); 69 E. R. 935 (936).
(4) [1857] 7 DeG. M. & G. 429; 44 E. R. 168.
(5) (1837) 2 Keen 255; 48 E. R. 626.
(6) (1886) I. L. R. 14 Calc. 64.
(7) (1889) 42 Ch. D. 119.
(8) (1902) I. L. R. 25 Mad. 361.

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be ascertained. That which can so be made certain cannot be called "uncertain." In re *Sowerby's Trust* (1). Enquiry was properly directed under Order XXVI, rule 59.

K. P. Khaitan (with him *B. M. Agarwalla*) for respondent Lala Hansraj, another executor. The only question is whether parol evidence is admissible to make certain that which is not certain in the will. Section 75 of the Indian Succession Act completely covers the point. The word "promised" defines the subject-matter and the word "charity" defines the object and therefore under section 75 there should be an enquiry.

H. N. Sanyal for the respondent Lala Gobardhandas, another executor. The clause is void for uncertainty. In trying to include the subscription in "debts," the testator does not make clear if he meant mere moral debts or debts legally recoverable. No evidence to prove the intention of the testator is admissible. Section 81 of the Indian Succession Act applies. See also *Administrator-General of Madras* v. *Money* (2).

Sudhir Ray in reply. In construing a section, the illustrations must be considered *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (3). Since there is no legal liability to pay these subscriptions, they cannot be treated as debts and there is no valid declaration of legacy. See in this connection sections 63, 64, 67 of the Indian Succession Act. The gifts, the amounts and objects thereof are not specified nor is there any limit as to time and therefore no extraneous evidence (except perhaps contemporary documents) can be allowed. *Blackwell* v. *Blackwell* (4). Clause 2 of the will clearly indicates that nothing in clause 1 was intended to be a legacy and the subscriptions cannot be valid debts. In re *Hudson, Creed* v. *Henderson* (5).

(1) (1856) 2 K. & J. 630 (632-33); 69 E. R. 935 (936).
(2) (1892) I. L. R. 15 Mad. 448, 449, 473.
(3) (1916) L. R. 43 I. A. 256, 263.
(4) [1929] A. C. 318.
(5) (1885) 54 L. J. (Ch.) 811.

[Lort-Williams J. If the clause was "I leave to "my debtors such sums as they owe me," would it be good?]

No, it would be hit by section 89. The gift here is not a gift to a class as all charities are not included.

Cur. adv. vult.

LORT-WILLIAMS J. The validity or otherwise of a clause in a will is the only question for decision in this appeal.

Raghumull Khandelwal, died on the 5th of September, 1926, leaving a will, dated the 4th of September, 1926, and considerable property.

Clause 1 of the will is as follows :—

I direct that all my debts be paid out of my estate in the first instance including the charities and subscriptions promised.

The will was typewritten, but the words "including "the charities and subscriptions promised" were written in ink, and initialled in the margin, apparently at the last moment, but before execution.

By clause 14 thereof the testator bequeathed property of considerable value to trustees for the purposes of "education, hospital, orphanage, social service, "widows and other religious and/or charitable pur- "poses," to be applied as the trustees should think fit.

The executors issued advertisements to ascertain the names and the validity of the claims of parties to whom charities and subscriptions had been promised by the testator. Twenty-two claims, amounting in all to over 6 lakhs of rupees, were made, mostly without any documentary proof. Of these alleged promises, no date was forthcoming with regard to three, two were alleged to have been made so far back as 1917, three in 1918, two in 1919, three in 1920, two in 1921, one in 1922, three in 1924, two in 1925 and one of a small amount in 1926, and less than Rs. 20,000 were alleged to have been promised since 1922. Of the total, under one lakh of rupees only had been paid by the testator at the date of his death.

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In these circumstances, the executors decided to ask for the directions of the Court as to whether the charities and subscriptions promised, referred to in clause 1 of the will of Raghumull Khandelwal, deceased, are valid and binding and payable out of the estate of the deceased or not.

The matter was heard by Ameer Ali J. and the following issues were raised, *inter alia* :—

(1) Can the provisions of clause 1 as to "the charities and subscriptions "promised" constitute such "charities and subscriptions" debts provable in the administration in the manner of legal debts although they may not be legal debts ?

(2) If not, are they legal debts ?

(4) Can the clause be construed as a legacy?

(5) If so, is it a valid legacy ?

(7) What is the true construction and effect of clause 1 of the will ?

After further discussion, the Judge formulated the following questions of construction :—

(1) What can be included in debts, the word "debts" in an ordinary direction for payment of debts by a testator so as to constitute those claims debts provable in the administration ?

(2) Can the testator of his volition give an extended meaning to the ordinary significance of the word "debts" in his will ?

(3) Can clause 1 constitute the promisees legatee ? Can it be construed as a legacy ?

(4) If a legacy, is it valid or is it void for uncertainty ?

It was contended on behalf of the claimants that there could be a class of debts in an extended sense, something between a debt and a legacy, and that the testator could by the terms of his will extend the class of debts. The learned Judge decided, and in my opinion correctly, against this contention, and held that the only debts which may be proved in administration are debts at law, and do not include promises made without consideration, which are not binding. In re *Whitaker* (1).

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On the question of construction, he decided that clause 1 should be read as follows :—

"I direct my debts to be paid including the "amounts and subscriptions promised to charities," and that the "amounts and subscriptions promised" were valid legacies, in the nature of limited charitable bequests, if and so far as they had been promised to charities, and he directed that an enquiry should be held to ascertain to whom such promises had been made, and the amounts which had been promised.

The main argument on behalf of the claimants on appeal has been based upon the maxim "*id certum est, quod certum reddi potest*," and the case of In re *Sowerby's Trust* (1). This argument is based of course upon the assumption that clause 1 is capable of the construction put upon it by the learned Judge. Once it has been decided that the latter part of clause 1 means "amounts and subscriptions promised to "charities," it might be possible to argue that there is no real uncertainty or ambiguity about the intended legatees, because the testator has defined them as those to whom he has promised "amounts and subscriptions," and these and the amounts promised to each can be ascertained by enquiry, just as debts and creditors can be so ascertained. Even so, in my opinion, parol evidence could not be admitted for this purpose. In re *Hetley*. *Hetley* v. *Hetley* (2). Though for reasons of equity it might be admissible to establish a trust. *Blackwell* v. *Blackwell* (3). It is true that where a general charitable intent is disclosed, the legacy will not fail for uncertainty of object. But no such general charitable intent is disclosed in clause 1 : the testator's general charitable intentions are disclosed specifically in clause 14.

But in my opinion the latter part of clause 1 is not capable of the construction put upon it by the learned Judge, and that part is void for uncertainty. It is capable of several constructions, each of which may

(1) (1856) 2 K. & J. 630 ; 69 E. R. 935.

(2) [1902] 2 Ch. 866.

(3) [1929] A. C. 318.

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reasonably represent what the testator really intended. In the first place, it is to be noted that the "charities "and subscriptions promised" are included among debts, and are referred to in a clause directing payment of debts, and not in clause 14 which deals specifically with charitable bequests. This may mean that only such charities and subscriptions are referred to as are of the nature of legal debts, that is to say, promises which were made for consideration, and which were legally binding upon the testator. Such, for example, as periodical subscriptions payable to a club or other institution under the terms of a contract of membership, or where work has been undertaken or debt incurred at the promisor's instigation, or upon his promise to indemnify, express or implied. Or it may mean that the testator regarded his promises which only created moral obligations as being equivalent to legal debts, and wished them to be so treated by his executors.

Or the word "including" may have been intended to mean "in addition to." That is to say, the charities and subscriptions promised were to be paid as legacies, in addition to the payment of debts.

The latter part of the clause may refer only to amounts and subscriptions promised to charities, as thought by the learned Judge. But the testator did not say so, and if these amounts are to be regarded as legacies, there seems to be no valid reason why subscriptions to institutions other than charitable should be excluded.

It is almost impossible to say with certainty what the testator meant by the word "subscriptions." He may have meant only subscriptions in arrear at the time of his death, or he may have meant subscriptions which would become due in future, that is to say, he may have meant something in the nature of an endowment; because apparently some of the institutions which were brought into being as a result of his promised help, could not be carried on at all, unless such help were to be continuous and permanent.

Again it seems necessary to fix some limit of time during which the promises must have been made, but no indication of any such limit is given in the will. The testator cannot have intended to refer to promises which he may have made at any time during his life, perhaps many years before and long forgotten, and if effect were to be given to such a provision, it would open the door to every kind of fraudulent claim. Yet no other limit is indicated and the Court cannot make the testator's will for him or supply such a deficiency.

It is true that of claims so far received the earliest date from no further back than 1917—if the three undated promises are disregarded, but the fact that the testator had met so few of his alleged promises at the time of his death seems to indicate that most of the claimants were not within his recollection or intention when he caused these words to be added at the last moment to clause 1 of his will.

For all these reasons I am of opinion that the words "including the charities and subscriptions "promised" in clause 1 of the will cannot be given legal effect to, and that this part of the clause is void for uncertainty; that the legacies thereby given (if any) are invalid, and that the charities and subscriptions referred to are not debts, and cannot be included in that category or within the direction to pay them. To this extent only the decision of the learned Judge is modified, and the decree set aside.

There is of course nothing to prevent the trustees under clause 14, if they should think fit, from including some of these claimants among the charitable beneficiaries indicated in that clause.

The appeal is allowed—Mr. H. D. Bose leading counsel for all the charities interested, having undertaken on their behalf not to appeal against this decision, it is ordered that the receiver do pay out of the assets in his hands the costs of all parties appearing including all reserved costs upon the same terms and conditions, *mutatis mutandis*, as were imposed

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by the final Court. The Advocate-General will get his costs as between attorney and client.

COSTELLO J. I agree with the judgment which has been given by my brother Lort-Williams. I desire, however, to make one or two observations with regard to one point which was put before us in connection with the question whether, in any sense and in any circumstance, the testator, in using the expression "including the charities and subscriptions promised," could have had in mind obligations which might properly be comprised in the term "debts." It was suggested in the course of the argument before us in support of the validity of the latter part of clause 1, that there might possibly be cases where "a subscription "promised" actually constituted a debt enforcible in law and we were referred in that connection to the decision in *Kedar Nath Bhattacharji* v. *Gorie Mahomed* (1), where it was held that a suit would lie to recover a subscription promised, if the subscriber knew that, on the faith of his and other subscriptions, an obligation would be incurred to a contractor for the purpose of erecting a building to be paid for out of the monies subscribed. The plaintiff in that case was a municipal commissioner of Howrah and one of the trustees of the Howrah Town Hall Fund. It had been in contemplation to build a Town Hall in Howrah, provided the necessary funds could be raised, and, upon that state of things being existent, the persons interested set to work to see what subscriptions they could obtain. When the subscription list had reached a certain point, the commissioners, including the plaintiff, entered into a contract with a contractor for the purpose of building the Town Hall, and plans of the building were submitted and passed; and as the subscription list increased, the plans increased also and the original cost, which was intended to be Rs. 26,000, swelled up to Rs. 40,000. For the whole of that increase the Commissioners, including the plaintiff, were liable to the contractor as well as for the amount of the original contract, because the additions

(1) (1886) I. L. R. 14 Calc. 64.

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to the building were made by the authority of the commissioners and with their sanction. The defendant, on being applied to, put down his name in the subscribers' book for Rs. 100, and the question was whether the plaintiff, as one of the persons who made himself liable under the contract to the contractor for the cost of the building, could sue, on behalf of himself and all those in the same interest with him, to recover the amount of the subscription from the defendant. Sir Comer Petheram C. J. and Beverley J. held that there was "a perfectly valid contract and "for good consideration; it contains all the essential "elements of a contract which can be enforced in law "by the persons to whom the liability is incurred." On the strength of that case, it was argued before us, that at any rate as regards those of the claimants under clause 1 of the will of Raghumull Khandelwal who had actually carried out or started building operations on the faith of promises made to them by the testator, they could undoubtedly benefit under the terms of clause 1, because there had been a relationship of a contractual character relationship between them and the deceased which the law would recognise and give effect to. It was said, therefore, that the testator was not mistaken in thinking that some of his promises at least would be regarded as "debts" for the purpose of the administration of the estate after his death. With all possible respect to the learned Chief Justice and the other learned Judge, who decided the case of *Kedar Nath Bhattacharji* (1) just referred to, I take leave to doubt whether that case was rightly decided, particularly having regard to the decision in the English case of In re *Hudson, Creed* v. *Henderson* (2), where in circumstances similar to those of the Howrah Case, Pearson J. in the course of his judgment said :—

I believe this is the first time * * * when an attempt has been made and made against a dead man's estate, to make it liable for a promise given by him during his lifetime to make a charitable contribution to any object. Certainly when I heard the case opened, I was struck with the novelty of the application. I asked whether there was any authority for it and I was told that there was none.

(1) (1886) I. L. R. 14 Calc. 64. (2) (1885) 54 L. J. Ch. 811, 814, 815.

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Later, the learned Judge says:—

Mr. Cookson admitted very frankly at the beginning that, unless he could show that there was a legal debt due from the estate of the testator, he had no case at all; and it was, therefore, necessary for him to shape the case so as to satisfy the Court that there was a positive legal contract entered into by the testator to pay the whole of this sum of £20,000 which rendered the estate of Mr. Hudson liable for so much of the £20,000 as was not paid by him during his lifetime.

Later in the judgment the learned Judge stated:—

I am utterly at a loss to ascertain that there was any consideration.

Again, he says:—

The whole thing from beginning to end was nothing more than this: an intention of this gentleman to contribute to the fund and an intention of the committee, so long as the different members of it remained members of that committee, to dispose of that fund according to the purposes for which it was contributed. There really is in this matter nothing whatever in the shape of a consideration which could form a contract between the parties.

I entirely agree with the views expressed by Pearson J. It is to be noted that this decision was given in the month of May, 1885, and the decision of Sir Comer Petheram was given only about a year later. The probability is that, having regard to the length of time required for communication between England and India at that period the English case was not brought to the attention of this Court when the Howrah case was being heard. I make these observations in order to emphasise what my learned brother has already said with regard to the impossibility of construing the clause under consideration as being a direction to pay debts. The terms of the clause are too vague and uncertain and obviously susceptible of such a variety of interpretations for the Court to give effect to them as constituting a gift in the nature of a legacy.

I agree that this appeal must be allowed and the judgment of the learned Judge as regards his decision on clause 1 set aside.

Appeal allowed.

Attorneys for appellant: *N. C. Bural & Pyne.*

Attorneys for respondents: *P. D. Himatsingka, G. C. Chunder & Co., N. K. Roy, Khaitan & Co., Dutt & Sen, B. N. Basu & Co.*

S. M.