ORIGINAL CIVIL.

Before McNair J.

GONESH PROSAD AGARWALA

v.

MONO HAR LAL MALLIK.*

1938

Nov. 18 ;
Dec. 7.

Amendment of decree—Error in decree— Court making decree, if can correct error brought to notice during execution— Will—Contingent bequest— Code of Civil Procedure (Act V of 1908), s. 152—Indian Succession Act (XXXIX of 1925), s. 119.

Where the defendants were sued only in their representative capacity as "sons, heirs and legal representatives" of their deceased father and it was clear that in such capacity their liability was limited to their father's assets which had come into their hands and in the operative part of the decree it was "ordered and decreed that the defendants personally do pay to "the plaintiffs" the decretal amount,

held: (*i*) that there was an accidental omission in the decree which provided for personal liability of the defendants in failing to limit such liability to the extent of the assets of their father which had come into their hands;

(*ii*) that the Court which made a decree has power to rectify at any time an error found therein and such power may be exercised when the error is brought to its notice in the course of an application for execution of the decree.

In re *Swire*. *Mellor* v. *Swire* (1) relied on.

Kalicharan Singha v. *Bibhutibhusan Singha* (2) distinguished.

A testator by his will gave and devised his properties as follows "I give "and devise my real and personal estate.....to my wife....for life.....and "after her death to vest in my sons or their heirs who may then be in exist- "ence" and later on he said "It is my wish that my sons hereinbefore "mentioned will not be entitled to my estate during the lifetime of my said wife."

Held that the testator's sons had only a contingent interest which did not ripen into a estate of inheritance until the death of their mother.

In re *Deighton's Settled Estates* (3) referred to.

APPLICATION for execution of a decree.

Kanai Lal Mallik by his will gave and devised his properties as follows. "I give and devise my real and "personal estate.....to my wife.....for life ".....and after her death to vest in my sons or

*Application in Original Suit No. 637 of 1923.

(1) (1885) 30 Ch. D. 239. (2) (1932) I. L. R. 60 Cal. 191.
(3) (1876) 2 Ch. D. 783.

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"their heirs who may then be in existence". Later on he said "It is my wish that my sons hereinbefore "mentioned will not be entitled to my estate during "the lifetime of my said wife". He appointed Sreemati Uttam Mani Dasi, his wife, the sole executrix of his will. Kanai Lal died in 1888, leaving Uttam Mani, his widow, and six sons. During the lifetime of the widow, Gokul and two other sons of Kanai mortgaged their interest in their father's estate to the plaintiffs. In 1923 the plaintiffs filed a suit on the said mortgage against Gokul and his two brothers. After the preliminary and final decrees were passed in this suit, Gokul died in 1925 and his two sons Mono Har Lal and Hari Har were substituted as defendants in their capacity as sons, heirs and legal representatives of Gokul. In March, 1928, a decree under O. XXXIV, r. 6 of the Civil Procedure Code was passed against Mono Har Lal and Hari Har and the said two brothers of Gokul as follows "It is ordered "and decreed that the defendants personally do pay "to the plaintiffs" the sum of Rs. 24,632-12-9, *etc.* During the pendency of this suit, two of the mortgaged properties were acquired by the Calcutta Improvement Trust and the compensation money was invested by the President, Improvement Trust Tribunal, in Government Promissory Notes and in the purchase of two properties in 67B, Raja Naba Krishna Street and 21A, Shib Shankar Mallik Lane and was held on behalf of Uttam Mani Dasi as executrix of Kanai Lal's estate. Uttam Mani died in 1938 and the mortgagees applied for attachment of the judgment-debtors', including Mono Har Lal and Hari Har's interest in these properties and in the Government Promissory Notes in the custody of the President, Improvement Trust Tribunal.

H. C. Majumdar for the applicants. I rely on the words of the decree. By the decree, the liability of all the defendants is personal and unqualified and Mono Har Lal and Hari Har's liability is not confined to their father's assets.

The Court executing a decree cannot go behind the decree and entertain objections to the validity, legality or correctness of the decree. *Kalicharan Singha* v. *Bibhutibhusan Singha* (1); *Kalipada Sarkar* v. *Hari Mohan Dalal* (2).

Gokul had a vested interest in the estate. The testator did not intend to delay the vesting of the son's interest but merely to delay their possession. Indian Succession Act, ss. 111, 119; *Radha Prasad Mallick* v. *Ranimoni Dasi* (3). The Court leans in favour of early vesting of interest. Jarman on Wills, 7th Ed., p. 1331.

P. C. Ghose and *S. K. Basu* for the respondent Hari Har. The Court never intended to decide the personal liability of Hari Har. Through a mistake of the ministerial officer of the Court, the decree was drawn up in that form and the Court has power to correct an error or omission in the decree. Civil Procedure Code, s. 152; In re *Swire. Mellor* v. *Swire* (4); *Karim Mahomed Jamál* v. *Rajoomá* (5); *Bujhawan Prasad Singh* v. *Ram Narayan* (6).

The testator intended that only such sons as will survive his widow will be entitled to a share. The words used in the will are "then in existence." As regards early vesting the principle of the decision in In re *Deighton's Settled Estates* (7) should be applied. Jarman on Wills, 7th Ed., p. 1621. The testator was contemplating the period of vesting as being at a future date, *viz.*, on the death of his wife, hence Gokul had only a contingent interest and the properties are not liable to attachment for his debt.

Majumdar, in reply.

Cur. adv. vult.

McNair J. This is an application by mortgagees for execution of a decree, dated March 20, 1928. The

(1) (1932) I. L. R. 60 Cal. 191.
(2) (1916) I. L. R. 44 Cal. 627.
(3) (1910) I. L. R. 38 Cal. 188.
(4) (1885) 30 Ch. D. 239.
(5) (1887) I. L. R. 12 Bom. 174.
(6) (1921) 65 Ind. Cas. 224.
(7) (1876) 2 Ch. D. 783.

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decretal amount was Rs. 24,632-12-9. The mortgagors were three of the sons of Kanai Lal Mallik, who died on December 31, 1888. Kanai Lal by his will gave a life interest in his property to his widow with remainder to his sons and their heirs. One of the mortgagors, Gokul Lal Mallik died in 1925, and one of his sons, Hari Har Lal, is contesting this application. The widow Uttam Mani died on May 22, 1938. In May, 1930, the mortgagees attached the share of the defendants in the compensation money lying with the President of the Calcutta Improvement Tribunal by reason of the compulsory acquisition of Nos. 33 and 33/2, Ratan Sarkar Garden Street. In September, 1933, the right, title and interest of the judgment-debtors in the compensation money was sold and the proceeds of sale were applied in part satisfaction of the decree. Part of the compensation money was invested in Government Promissory Notes and the balance in landed property in 67B, Raja Naba Krishna Street and 21A, Shib Shankar Mallik Lane and was held on behalf of Uttam Mani as executrix of Kanai Lal's estate. Uttam Mani died in May, 1938, and the decree-holders now seek to attach the judgment-debtors' interest in these properties, and in the Government Promissory Notes in the custody of the President of the Calcutta Improvement Tribunal. Gokul Lal Mallik's sons object to the attachment on the ground that they are only liable to the extent of their father's property which came into their hands as his legal representatives and they contend that Gokul Lal had only a contingent and not a vested interest in his father's estate during the life of Uttam Mani.

Mr. Majumdar for the attaching creditors relies first on the words of the decree. Mono Har and Hari Har are defendants described in the cause title as "sons, heirs and legal representatives of Gokul Lal "Mallik, deceased", and in the body of the decree "It "is ordered and decreed that the defendants personally "do pay to the plaintiffs the said sum, *etc.*" Mr. Majumdar contends that the word "personally"

attaches a personal liability to each and every defendant and being unqualified it cannot be confined to the liability of Mono Har and Hari Har in their representative capacity, and only to the extent of assets that have come into their hands. On the other hand it is suggested that the decree does not express the real order of the Court and I am invited to use my powers under s. 152 to rectify the decree on the ground that the suggested alteration is a correction of what is really a mistake of the ministerial officer by whom the decree or order was drawn up. There is no doubt that the Court has the power under s. 152 to correct an error or omission in the decree and this seems to me to be clearly a case in which that power should be exercised.

There was no judgment delivered in the case, so that it cannot be said that the decree is not in conformity with the judgment, but it is clear from the cause title that Hari Har and his brother have been sued only in their representative capacity, and it is equally clear that in such capacity their liability is limited to the assets which have come into their hands from the person whom they represent. There has, in my opinion, been an accidental omission in the operative part of the decree which provides for personal liability, in failing to limit the liability of Gokul's sons. It has been held both in Bombay and in Lahore that the passing of a personal decree against the legal representatives is an accidental slip, which may be corrected under this section, and, with respect, that is a view in which I concur. The objection is raised that this is an application in execution and that this Court as an executing Court is not entitled to go behind the actual words of the decree even if it has that power under s. 152. In In re *Swire. Mellor* v. *Swire* (1) Bowen L. J. said :—

> Every Court has inherent power over its own records so long as those records are within its power, and it can set right any mistake in them. It seems to me perfectly shocking if the Court could not rectify an error which is really the error of its own minister.

(1) (1885) 30 Ch. D. 239, 247.

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The power to rectify such error can be exercised at any time and although it is true that the present application is an application in execution, yet the Court which is now invited to rectify the error is the same Court which passed the decree.

The decisions in *Kalicharan Singha* v. *Bibhutibhusan Singha* (1) and similar cases are distinguishable. There the question agitated in the executing Court was whether some other Court which had tried the suit had jurisdiction to make the decree and it was held that the executing Court could not go into the merits or the validity of the decree as made. Here there is no question of the validity of the decree of which execution is sought. The decree on the face of it shows that a person sued in his representative capacity has been burdened with a liability which is not consonant with that capacity. The error is obviously that of a ministerial officer. In the circumstances, I fail to see why the Court which made the decree, and which is empowered by s. 152 to rectify its error at any time, should be debarred from exercising its powers under the section merely because that error has been brought to its notice in the course of an application, in which the decree-holder is seeking to execute the decree in a manner which the Court could never have intended when it passed the decree.

Reliance is also placed on the fact that an application for execution of this decree was made in 1930, when Hari Har himself appeared and raised no objection to the form of the decree. This omission does not, in my opinion, operate as *res judicata*, and there is no ground for suggesting that the decree-holder has thereby altered his position to his detriment so as to introduce the doctrine of estoppel.

For the decree-holder it is further argued that all the defendants are liable because under Kanai Lal's will they took a vested interest in his estate at the date of his death.

(1) (1932) I. L. R. 60 Cal. 191.

The testator by his will appointed his widow his executrix. He referred to his six sons by name and having empowered his widow to mortgage his estate for the marriage expenses of his daughters, he directs that such mortgage shall be binding in law upon his sons or their heirs who shall inherit his estate after the death of his wife. This is the first reference to his sons' estate. Later he says :—

> I give and devise my real and personal property.....to my beloved wife ....for life.....and after her death to vest in my sons or their heirs who may then be in existence.

Later again he says :—

> It is my wish that my sons hereinbefore mentioned will not be entitled to my estate during the life time of my said wife.

It will be remembered that only three of the testator's sons were the mortgagors. Hari Har and Mono Har are introduced on the death of their father Gokul and if their father's interest is only a contingent interest, which does not ripen into an estate of inheritance until Uttam Mani's death, it is not liable to attachment.

The general rule of law is in favour of the vesting of an estate, so that in the absence of any contrary disposition the estate of the testator's sons should vest immediately on the testator's death. The words of the will here provide that the sons shall inherit on the death of the testator's widow. The gift is of an estate in futurity and the question is whether the words used by the testator were intended to delay the vesting of the sons' interest or merely to delay their possession. Ordinarily the words "after the death of "the life tenant" operate to vest the estate both in the life-tenant and in the remainderman on the death of the testator. It is argued that the words in the will providing that the sons shall not be entitled to the testator's estate "until" the marriage of the unmarried daughters, or "until" the youngest son attain the age of 25, are evidence of the desire to grant a vested interest and exclude the idea of a contingent gift,

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which would have been conveyed by some such expression as "if and when" in place of the word "until". It is also clear on the authorities that the ordinary meaning of the word "vest" means "vest in interest".

The testator here, by his will, devises his real and personal estate to his wife for life and "after her "death to vest in his sons or their heirs who may be "*then* in existence". The intention seems to me clear that the estate was only to vest (*i.e.*, to vest in interest) after the death of the wife. As was said by James L. J. in In re *Deighton's Settled Estates* (1):

> The Court leans strongly in favour of the early vesting of interests in cases where the effect of holding the share of a child of the testator to be contingent on his living to a future period would be that, if he died before that period leaving a family, his children would take no benefit under the will; but there is no reason for departing from the fair meaning of the words of a testator in order to vest the shares of his children, when he has made a provision for all his descendants living when the fund becomes divisible.

The words "then in existence" strengthen my view that the testator was contemplating the period of vesting as being at a future date, *viz.*, on the death of his wife, and the words later in the will in which the testator expresses his wish that his sons should not be "entitled" to his estate during the lifetime of his wife add further support to this construction. The applicant relies on s. 119 of the Succession Act in support of his contention that the sons' interest is vested in them at the testator's death and that possession alone is postponed; but s. 119, while it provides the general rule following the English law, contains the words "unless a contrary intention "appears by the will", and, in my opinion, Kanai Lal's will contains more than one expression which shows a contrary intention.

Reliance has also been placed on the proceedings in connection with Uttam Mani's application to be appointed guardian of her grand-daughter Uma Shashi, as an indication that the construction for which the applicant now contends has been the

(1) (1876) 2 Ch. D. 783, 785-6.

accepted construction of the will by the members of the family including Gokul. Uttam Mani made the application in 1924 and in paragraph 9 of her petition she stated—

> The abovenamed infant (*i.e.*, Uma Shashi) is entitled to a vested interest in respect of one undivided sixth share in certain houses forming part of Kanai Lal's estate.

Gokul consented to the application, but his consent was only to the prayer of the petition that Uttam Mani should be appointed guardian. It cannot be said that he thereby accepted every statement or submission of law which the petition contained. His action does not, in my view, operate as any kind of estoppel so as to prevent him or his sons from putting forward their present contention as to the construction of the will.

In the result, I hold that Hari Har and Mono Har are not personally liable for the unpaid balance of the mortgage money and their share is not liable to attachment in execution of the decree of March 20, 1928. The attachment will issue as prayed in respect of the interest of the judgment-debtors Naba Kumar Mallik and Baidya Nath Mallik.

The decree will be amended by the addition of the words indicating that Mono Har and Hari Har Mallik are only liable in their representative capacity.

The decree was passed ten years ago and had Hari Har then sought to have it amended it is possible that the present somewhat protracted hearing would have been avoided. In the circumstances, I consider the proper order to be that each party pay his own costs.

Certified for counsel.

The applicant may add his costs to his claim.

The interim orders and undertakings are dissolved.

Attorneys for applicants: *Fox & Mandal.*

Attorney for respondent, Hari Har: *C. C. Bosu.*

A. C. S.