ADMINISTRATOR-GENERAL OF MADRAS v. MONEY.

"the same and the repairs thereof, and any assessment payable "thereon."

This is a bequest to charitable uses, and the will was executed less than twelve months before testator's death. The legacy is therefore void by section 105 of the Indian Succession Act and falls into the undisposed of residue.

There will be a decree declaring the right of the parties in accordance with the above findings. All parties will have their costs out of the estate. Costs to be taxed as between attorney and client and to be paid in the first place out of the undisposed of residue.

Wilson & King, attorneys for plaintiff.

D. Grant, attorney for defendant No. 1.

Branson & Branson, attorneys for defendants Nos. 2 to 7.

Laing, attorney for defendant No. 8.

Barclay, Morgan & Orr, attorneys for defendant No. 9.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Wilkinson.

1892. March 25.

NARASAYYA (DEFENDANT No. 1), APPELLANT,

v.

RAMABADRA AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 2 AND 3), RESPONDENTS.*

Civil Procedure Code, s. 525—Suit on an award—Alternative claim on original consideration—Withdrawal of claim on award.

The plaintiff lent money to two of the defendants, who were partners with the third defendant, for the purposes of the partnership and obtained promissory notes from them. Disputes which arose between them, were referred to arbitrators, who made an award. An application by the plaintiff to have the award made a rule of Court was opposed by defendant No. 1, and the plaintiff was referred to a regular suit. He now brought his suit in the alternative on the award and on the promissory notes. The award was found to be unenforceable. The plaintiff then declared himself satisfied to withdraw his suit as far as the award was concerned, and the Court passed a decree for plaintiff on the merits. Defendant No. 3 alone having appealed, the Court of first appeal held that the plaintiff must succeed or

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* Second Appeal No. 1113 of 1890.

fail on the award, and that the withdrawal of the prayer for a decree on the award altered the nature of the suit, and finding that there was no evidence of misconduct on the part of the arbitrators, he passed a decree in the terms of the award. On a second appeal preferred by defendant No. 1:

Held, that this procedure was right.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 132 of 1889, modifying the decree of M. B. Sundara Rau, Acting Subordinate Judge of Ellore, in original suit No. 30 of 1887.

Suit to recover principal and interest due by the defendants to the plaintiff. The plaint was summarised by the Subordinate Judge as follows:—

"The plaint set forth that the defendants Nos. 1, 2 and 3 were "joint contractors in certain contracts with the Public Works De- "partment and other public bodies; fourth defendant (Gangayya), "was undivided father, and the fifth undivided brother of the "first; that the plaintiff lent to the firm, consisting of first, "second and third defendants for its common purposes, Rs. 2,000 "once on a promissory note marked A, dated 11th December "1885, executed by the first defendant, and another Rs. 2,000, "on three promissory notes marked B, C and D, executed by "the second on the 5th and 21st October and 2nd December 1885, "respectively, at an interest of 12 per cent. per annum; that "defendants had not paid the amount due to him, notwithstand- "ing several demands made by plaintiff; that the joint contracts "carried on by the first defendant were for the benefit of the joint "family of defendants Nos. 1, 4 and 5; that the cause of action "for the promissory notes arose on the dates of the notes; that "the said disputes between the plaintiff and the defendants Nos. 1, "2 and 3 were referred to an arbitration, and the arbitrators by "the award found the defendants severally liable in sums men- "tioned in the award filed with the plaint, and that plaintiff's "application for filing the award under section 525 of the Civil "Procedure Code was rejected by this Court on the first defend- "ant's objection."

The further facts of the case are stated above sufficiently for the purposes of this report.

Defendant No. 1 preferred this second appeal.

Pattabhirama Ayyar and *P. Subramanya Ayyar* for appellant.

Subramanya Ayyar and *Sundara Ayyar* for respondent No. 1.

Srirangachariar for respondents Nos. 2 and 3.

NARASAYYA v. RAMABADRA.

JUDGMENT.—We think that the preliminary objection raised by the plaintiff (respondent) must prevail and that first defendant, who did not appeal against the decree of the Court of First Instance, is not entitled to argue that the suit ought to have been dismissed. It is then contended for the first defendant (appellant) that the procedure adopted by the District Judge was irregular and illegal. The facts are as follows:—Plaintiff lent money on promissory notes to defendants Nos. 1 and 2. They, with third defendant, were partners or joint contractors, and the money was advanced for their work. Disputes having arisen, the matters in dispute were referred to arbitrators who made an award. Plaintiff applied to the Court under section 525 of the Code. First defendant objected and the then Subordinate Judge referred the plaintiff to a regular suit. Plaintiff then instituted the present suit and prayed in the alternative either for a decree on the award or on the promissory notes. The first defendant pleaded that, as there was an award, no suit would lie on the merits and contended that the award was bad for misconduct of the arbitrators. Defendants Nos. 2 and 3 pleaded that the award was binding. An issue was accordingly framed as to the validity of the award. At the hearing, the Subordinate Judge appears to have been of opinion that the award "could not be held a valid decision for enforcement," and the plaintiff thereupon was content to withdraw his suit, so far as the award was concerned. First defendant then maintained that plaintiff could only succeed upon the award. The Subordinate Judge, however, decided the case on the merits and gave the plaintiff a decree against all three defendants. From that decree, third defendant alone appealed on the ground that the withdrawal of the prayer for a decree on the award altered the nature of the suit, and that he had always maintained that the plaintiff must succeed or fail on the award. The District Judge took this view, and the first defendant having adduced no evidence as to the misconduct of the arbitrators, amended the decree of the Court of First Instance by giving plaintiff a decree in the terms of the award. We think that the procedure of the Judge was perfectly regular. The plaintiff could not be allowed to withdraw that portion of his prayer which related to the award, so long as any of the defendants objected to his doing so. The decision of the Judge was correct. As to costs, we think that the Judge was right in

making first defendant liable for all the costs hitherto incurred, as it was entirely due to his conduct that the suit was instituted and remanded. The second appeal fails and is dismissed with costs, two sets.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

GNANAMBAL (DEFENDANT), APPELLANT,

v.

PARVATHI (PLAINTIFF), RESPONDENT.*

1892. March 23, 29.

Civil Procedure Code, ss. 13, 279, 280, 283—*Party to proceedings in execution—Order in execution—Estoppel*—Res judicata.

A claim in execution to a house which had been attached was dismissed, and the claimant now sued the decree-holder to establish her title to it. It appeared that the house had been previously attached in execution of another decree obtained against the same judgment-debtor and his father (since deceased); that the present plaintiff had then preferred a claim, which was allowed; that the judgment-debtor had taken no steps to have the order allowing the claim set aside: and that a suit filed by the decree-holder with that object had been dismissed:

Held, that the plaintiff's claim was not *res judicata*, and the defendant was not estopped from contesting it.

SECOND APPEAL against the decree of J. A. Davies, District Judge of Tanjore, in appeal suit No. 577 of 1890, reversing the decree of A. Kuppusami Ayyangar, District Munsif of Kumbakonam, in original suit No. 447 of 1889.

Suit for a declaration that a certain house was the property of the plaintiff, and that it was not liable to be sold in execution of the decree in original suit No. 325 of 1888 in the Court of the District Munsif of Kumbakonam obtained by Gnanambal Ammal, the present defendant, against Rangasami Ayyan. The plaintiff had preferred a claim in execution without success. It appeared that Rangasami Ayyan was the plaintiff's husband, and that his father Subbayyan (deceased) was her maternal grandfather. The above decree was obtained on a bond executed by Subbayyan.

In original suit No. 31 of 1884 in the Court of the District Munsif of Kumbakonam, one Naranappa obtained a decree against

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* Second Appeal No. 1050 of 1891.