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BISHENMUN SINGH v. THE LAND MORTGAGE BANK OF INDIA.

desire that the Registrar shall disallow all such as have been occasioned by the introduction of irrelevant matter.

Solicitor for the appellants : Mr. *T. L. Wilson.*

Solicitors for the respondents : Messrs. *Freshfields and Williams.*

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice O'Kinealy.

1885 *January* 26.

HARA SUNDARI DEBI (ONE OF THE DEFENDANTS) *v.* KUMAR DUKHINESSUR MALIA (PLAINTIFF) AND OTHERS (DEFENDANTS.)*

Agreement of Parties—Compromise—Decree on Compromise—Appeal—Code of Civil Procedure, Act XIV of 1882, *s.* 375.

After suit filed by the plaintiff against several defendants, one of whom was an infant, a petition of compromise entered into between the adult parties was filed in Court. The petition stated the terms of arrangement, and also that an application would be made by the guardian of the minor praying the Court to allow the compromise to be carried out on his behalf. Ten days after the petition of compromise was filed, the first defendant and the plaintiff presented petitions to the Court withdrawing from the compromise, and praying that the suit should proceed. The second defendant presented a petition praying that the compromise should be recorded, and a decree passed according to its terms. The Court made a decree in accordance with the prayer of the second defendant's petition. The first defendant appealed.

Held, that an appeal lay, and that the lower Court was wrong in enforcing the compromise at the instance of the second defendant.

Semble, that s. 375 of the Code of Civil Procedure merely covers cases in which all parties consent to have the terms entered into, carried out and judgment entered up.

Ruttonsey Lalji v. *Pooribai* (1) questioned.

GOBIND PROSAD PUNDIT died on the 30th of December 1861, leaving him surviving his widow Darimba Debi, who died in 1872, and three daughters—Shama Sundari, who died in 1870; Hara Sundari, the defendant No. 1; and Uttum Coomaree, the defendant No. 3, who was a childless widow at the death of her mother.

* Appeal from Original Decree No. 39 of 1884, against the decree of Baboo Jogesh Chunder Mitter, Subordinate Judge of Burdwan, dated the 29th of November 1883.

(1) I. L. R., 7 Bom., 304.

Hara Sundari had five sons—Bireshur Malia (who died in 1879, leaving him surviving one son, Promothonath Malia, defendant No. 4), Ramessur Malia, the defendant No. 2, Surbeshur Malia, who died in 1865, Dukhinessur Malia, the plaintiff, and Songeshwar Malia who died in 1865.

On the 17th of June 1858, Gobind Prosad made and published his last will and testament, whereby he, after declaring he had endowed a certain idol with his entire estate, made certain charitable bequests, gave certain legacies, and laid down rules as to the maintenance of his family. On his death in 1861, the executors appointed by the will refused to act, and his widow Darimba Debi took out a certificate under Act XXVII of 1860, and administered the estate, describing herself as *shebait* of the idol. From the death of Darimba in 1872, the defendant Hara Sundari managed the estate. On the 19th of October 1881, Uttum Coomaree, who claimed to be entitled to an eight-anna share of the property of Gobind Prosad, on the ground that the family was governed by Mitakshara law, assigned all right, title, and interest in the same to the plaintiff. On the 9th of February 1882, the plaintiff filed the present suit, claiming to be entitled to, and to possession of an eight-anna share of the property left by Gobind Prosad, asking to have the will construed, and alleging that the majority of its provisions were bad in law as tending to create a perpetuity and secure perpetual accumulation of the bulk of the income. The defendant Hara Sundari contended that the will was valid; that under it she was solely entitled to the management of the estate, and that the plaintiff had no cause of action. Ramessur Malia's defence was to the same effect, save that he charged Hara Sundari with having committed breaches of trust in order to assist the plaintiff in his present claim. Uttum Coomaree supported the plaintiff. Promothonath Malia, an infant of the age of twelve years, adopted the written statement of Ramessur Malia.

On the 10th of August 1883, a petition of compromise, signed by the adult parties, was filed in the Court of the Subordinate Judge, stating the terms upon which the parties had agreed to settle all their disputes; stating also that a deed embodying the terms and executed by all the parties

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should be filed in Court, and that the guardian of the minor would make a formal application to the Court for an order allowing him to enter into the compromise. On the 22nd of August 1883, Hara Sundari filed a petition withdrawing her assent to the compromise, on the grounds that, when the terms of the compromise were read over to her, she was weak and ill; that she had no advice as to what she ought to do; and that she had not been able to understand the meaning of the compromise. On the same day, the plaintiff also presented a petition to the Court withdrawing his assent to the compromise, and praying that the suit should proceed, while Ramessur Malia, the defendant No. 2, presented a counter-petition praying that a decree might be passed in terms of the compromise of the 10th of August. On the 28th of August 1883, the Subordinate Judge, following the case of *Syud Mehndi Alli Khan* v. *Konwar Ramchunder Bahadoor* (1) passed an order directing the suit to proceed for trial on the merits. Thereupon Ramessur Malia obtained a rule from the High Court calling upon the other parties to show cause why that order should not be set aside, and why a decree should not be entered up in terms of the compromise. On argument, this rule was discharged with costs on the 12th of September 1883, but the Subordinate Judge was recommended to investigate the circumstances under which the compromise was entered into (during the trial of the other parts of the case), so as to enable the Court to deal fully with the whole case on appeal.

On the 2nd of November 1883, the Subordinate Judge fixed the following additional issue: "Whether the Maharani, defendant No. 1, did agree to the petition of the 10th of August 1883, and whether it is binding on the parties to the suit." And on the same day the guardian of the minor presented a petition to the Court praying that the compromise would be carried out. On the hearing the Judge found that the Maharani did agree to its terms, and he held that it was binding on the parties to the suit on the authority of *Ruttonsey Lalji* v. *Pooribai* (2). The defendant Hara Sundari appealed to the High Court. On the hearing a preliminary objection was taken

(1) S. D. A. 1851; p. 381. (2) I. L. R. 7 Bom., 304.

by Mr. *Bonnerjee* for Ramessur Malia that no appeal lay under s. 375 of the Code of Civil Procedure, the judgment of the lower Court having been passed in terms of the compromise, but the Court held that the appeal was not barred in a case like the present, where the question was whether the circumstances warranted the application of s. 375—*Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee* (1); *Boonjad Mathoor* v. *Nathoo Shahoo* (2).

Mr. *Evans*, Baboo *Mohesh Chunder Chowdhry*, Baboo *Chunder Madhub Ghose*, Baboo *Taraprosono Sen*, for appellants, contended that s. 375 was never intended to refer to any case except where the consent was given and existed up to recording the compromise in Court. This was really a suit for specific performance of a compromise, that compromise being a breach of trust on the part of the defendant Hara Sundari; that the plaintiff with whom it was made did not seek to enforce it, and it could not be enforced at the instance of the second defendant. *Ruttonsey Lalji* v. *Pooribai* (3) is not in point.

Mr. *Bonnerjee*, Baboo *Gurudas Bannerjee*, Baboo *Jugut Chunder Bannerjee*, Baboo *Pran Nath Pundit*, and Baboo *Ratnessur Sen* for the respondents contended that s. 375 did apply; that the compromise was a proper one to be carried out as a fair family arrangement come to after long discussion. 2 White and Tudor's Leading Cases in Equity, 5th ed., p. 860; *Stewart* v. *Stewart* (4).

The judgment of the Court was delivered by

PIGOT, J.—This is a suit by one Kumar Dukhinessur Malia against Maharani Hara Sundari Debi for possession of certain property.

The circumstances out of which this suit has arisen are as follows: The property in dispute admittedly belonged to Baboo Gobind Prosad Pundit, and was disposed of by his will, dated the 4th Asar 1265, in which he purported to dedicate it to an idol, Sri Dâmudor Chunder Jew. On the death of Baboo Gobind Prosad Pundit, his widow entered into possession of

(1) 8 B. L. R., 315.
(2) I. L. R. 3 Calc., 375.
(3) I. L. R., 7 Bom., 304.
(4) 6 Cl. & Fin., 911.

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this property as *shebait;* and after her, her second daughter Maharani Hara Sundari Debi, defendant No. 1 in the cause. Plaintiff asserts that neither the deceased Baboo Gobind Prosad Pundit, nor his widow, dealt with the property as the property dedicated to the idol, but as family property. Further he submits that the will is void and inoperative, except so far as the religious and charitable and other gifts contained therein are concerned, and he claims in his own right, and as assignee of one of the heirs under Mitakshara law, to have the will construed, his rights declared, and possession given to him of the property in dispute.

In answer, the defendant Hara Sundari Debi, asserts that the whole property has been validly endowed by Gobind Prosad Pundit, and that she holds as *shebait;* and she denies that the family is governed by the Mitakshara law.

The written statement of the defendant No. 2, Kumar Ramessur Malia, supports her answer. In paragraph No. 4 of his written statement he asserts that the will created a valid dedication of all the property to the idol. In paragraph 7 he denies the allegation in the plaint that there never was any actual dedication of the estate to the idol Damudor Chunder Jew. And in paragraph 11, after asserting that the Maharani is acting as *shebait* under the will, he goes on to say that she "has at various times committed breaches of trust in order to assist the plaintiff in his present claim."

On these pleadings, ten issues were raised by the lower Court.

While the case was under trial, the parties came to a compromise, which is to be found at page 112 of the paper book.

In this compromise it is recited as follows:

"There are serious doubts as to whether the will of the late Baboo Gobind Prosad Pundit, dated the 4th Asar 1265 B.S., will be valid and binding in its entirety, and the opinion of most of the vakeels and counsel is, that provisions contained in the said will as to the *sheba* and worship of Iswar Damudor Chunder Jew and public charity, &e., &c., and the expenses required for the purposes thereof, are proper charges on the estate of the said pundit; and that the residue of the properties and the surplus income thereof have not been appropriated to *Deb-sheba,*

(service of the Deity) or public charities or any other purposes according to the will aforesaid; and that they are inheritable by his legal heirs. However, it being highly necessary to save trouble and expense of all parties amongst ourselves, and to settle the rights of one another, and to remove all uncertainty regarding them, we all thus decide the abovementioned suit, and settle and define our several rights to the estate left by the late Gobind Prosad Pundit in the manner following."

Under the settlement, Rs. 20,000 was set apart to defray the expenses of the worship of the idol; Promothonath Malia, not a party to the suit, was given 2½ annas of the residue; and the remaining 13½ annas were divided between Kumar Ramessur Malia, defendant No. 2, and Kumar Dukhinessur Malia, plaintiff.

The Maharani retained the management of the property during her lifetime.

This petition of compromise is dated the 10th August 1883. On the 22nd August, that is to say, twelve days later, the Maharani presented a petition in the Court of the Subordinate Judge, saying that she had entered into the compromise under pressure, did not understand its contents, and asked to be relieved. This petition was subsequently verified.

On the 28th August 1883, the case coming on for hearing before the Subordinate Judge, he held, on the strength of a ruling of the Sudder Dewani Adawlut in the year 1851, that the defendant was entitled to recede from the compromise before it had been completely carried out by the sanction of the Court and judgment recorded.

The case then came before this Court on motion, asking that the Subordinate Judge be directed to exercise jurisdiction, and give judgment according to the terms of the compromise.

The rule which was issued on that motion was discharged. But the Judges pointed out that the Court below, when dealing with the whole cause, would exercise a wise discretion in determining whether the document was binding upon the lady or not, in order that when the case came before this Court, the whole might be tried out once for all.

After the rule was discharged, the Subordinate Judge, instead of doing what he ought to have done, namely, deciding all the

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issues in the cause, restricted his inquiry to the fact whether the Rani was bound by the terms of compromise or not, and decreed the suit accordingly. We think it is to be regretted that he should have done so.

The Maharani now appeals, urging that under the circumstances the compromise should not be the basis of a decree under s. 375 of the Code of Civil Procedure. The plaintiff supports the allegation, and as a fact receded from the compromise before the judgment had been entered up in the lower Court. The person who insists on the compromise being carried out is Kumar Ramessur Malia, defendant No. 2, and his contention is, that the compromise having been effected under s. 375 of the Code, no appeal lies. In support of that he has cited the case of *Ruttonsey Lalji* v. *Pooribai* (1) in which an agreement out of Court from which one of the parties wished to recede was enforced on motion under s. 375 of the Code. That section runs as follows :— "If a suit be adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise or satisfaction shall be recorded, and the Court shall pass a decree in accordance therewith, so far as it relates to the suit, and such decree shall be final, so far as it relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction."

This section is not new, but an amendment and modification of a corresponding section in Act VIII of 1859, and, as at present advised, it appears to us clear, with great deference to the opinion expressed in the Bombay case, that it merely covers cases in which all parties consent to have the terms entered into, carried out, and judgment entered up; and does not cover a case like the present in which the parties or some of them have declined to carry out the agreement before the judgment has been recorded. In the first place the section states that the decree shall be final, so that if it be applied to cases where the agreement is sought to be enforced against an unwilling party, the Court would have no power to refuse specific performance, although if it had been

(1) I. L. R. 7 Bom., 304.

sought to be enforced in a regular suit, specific performance might never be obtained. Again, in the one case, the decree is final: in the other case, it is subject to appeal. These considerations lead us to the conclusion that s. 375 of the Code was never intended to cover cases in which one of the parties is unwilling to have the judgment entered up. In such a case the decree must be considered as a decree for specific performance and not under s. 375 of the Code.

We think, therefore, that the preliminary contention of the respondent that no appeal lies cannot be sustained.

Even, assuming that s. 375 of the Code is applicable to a case in which an adjustment has been repudiated by either plaintiff or defendant before the decree has been recorded, still we find reasons for concluding that that decree should not be allowed to stand. The Maharani is in possession of the property. It is against her that the plaintiff claims relief. He has receded from the compromise, and so did she; the party seeking to enforce it is the second defendant. So that we have this peculiar circumstance that, in a suit between the plaintiff and the defendant, the second defendant is endeavouring to enforce by motion the agreement against his co-defendant. In other words, he is seeking to do what was decided in the case of *Piercy* v. *Young* (1) he cannot do, namely, to take the conduct of the case out of the plaintiff's hands.

Again, the statement of the lady and the second defendant as to the position which this lady holds towards the property, raises a question of importance. As we understand, the first duty of a trustee is to carry out the directions of the settlement, except such as are illegal, and if he has once acknowledged himself to be a trustee he cannot set up a title adverse to that of the beneficial owner. Here the party who seeks to enforce the compromise, and the party who objects, both admit that the lady has no beneficial interest in the land, and that she holds solely on behalf of an idol. The only ground in the recital of the compromise for partitioning the property among the family is that the trustee and others have some doubts whether the trust is valid.

(1) L. R. 15 Ch. D., 475.

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Then, again, the lady asserts that the compromise was obtained from her by pressure and by mistatement of facts.

Looking then at the whole case, we think that, even if it were one in which specific performance should be given, which we are far from saying, the defendant Ramessur Malia must seek such performance in a regular suit.

We are, therefore, of opinion that the decree of the lower Court must be set aside, and the case must be remanded for retrial upon the original issues.

Decree set aside and case remanded.

Before Mr. Justice O'Kinealy and Mr. Justice Trevelyan.

1885 *February 3.*

LALA DILAWAR SAHAI AND OTHERS (DEFENDANTS) *v.* DEWAN BOLAKIRAM AND ANOTHER (PLAINTIFFS).*

Mortgagor and Mortgagee—Priority—Marshalling of Securities—Purchaser for value.

Where the owner of certain property mortgages it to *A*, and afterwards sells a portion of the mortgaged property to *B*, it is not incumbent on *A* in suing to enforce his mortgage to proceed first against that portion of the property which has not been sold by the mortgagor.

IN this case the plaint stated that the defendants No. 1, Lala Dilawar Sahai and others, by two deeds, bearing date the 18th of April 1876 and the 5th of January 1877 respectively mortgaged to the plaintiffs a two annas share in eighteen villages; that, on the 19th of July 1878, the plaintiff obtained a mortgage decree on their mortgage, and in execution of this decree they attached the mortgaged properties. The defendants filed various objections, but the only one material for the purposes of this report were those filed by the defendants No. 2, the Panray defendants, who claimed as purchasers of two of the 18 villages under a deed of sale, dated the 30th of April 1878; and they claimed to have priority over the plaintiffs on the ground that their purchase-money was applied in payment of a prior mortgage on those villages which had been executed in the year 1871. The plaintiffs' claim was disallowed, and they

* Appeal from Appellate Decree No. 2837 of 1883, against the decree of H. L. Oliphant, Esq., Judicial Commissioner of Chota Nagpore, dated the 27th of August 1883, affirming the decree of E. G. Lillingston, Esq., Deputy Commissioner and Sub-Judge of Hazaribagh, dated 23rd of November 1882.