

APPELLATE CIVIL.

1877
May 3.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spinkie.

HURST (PLAINTIFF) v. THE MUSSOORIE BANK (DEPENDANT).*

Real Property—Legacy—Husband and Wife.

C, a married woman, was entitled, under her father's will, to certain money "absolutely for her sole use and benefit, free from the control, debts, and liabilities of her husband," and under such will such money was payable to her "on her sole and personal receipt." While so entitled *C* borrowed from her husband the purchase-money of certain real property, on the understanding that she would pay him back such money when she obtained her legacy. The conveyance of such property was made to *C*, but not to her separate use. *C* subsequently assigned her legacy by sale, and out of the money obtained by such assignment repaid her husband the purchase-money of the property purchased. *Held* that the conversion by *C* of her legacy did not alter its character and conditions, and that the property purchased was her own separate property and was not subject to the debts or liabilities of her husband.

IN November, 1868, Joseph Hurst agreed to purchase a village called Mohkampur. At his request the property was not conveyed to him but to his wife Charlotte. The purchase-money was stated in the deed of sale which was dated the 14th November, 1868, to be Rs. 6,000, Joseph Hurst paid the purchase-money by a cheque on the Mussoorie Bank for Rs 6,350 drawn against a cash credit loan he had with the Bank. When the deed of sale was registered a power of attorney executed by Mrs. Hurst was also registered, which appointed Joseph Hurst manager of the property on her behalf. In 1876 Joseph Hurst and his wife were in pecuniary difficulties. In a suit registered as No. 155 of 1874 the Mussoorie Bank held a decree against them both. In another suit registered as No. 185 of 1874 the same Bank held a decree against Joseph Hurst and his brother-in-law, Robert Henry Heseltine, and in a third suit, registered as No. 56 of 1876, brought by one Khushal Rai and another person, a decree had been made against Joseph Hurst and his wife. In execution of the decree in suit No. 155 of 1874 the village of Mohkampur was attached on the 31st March, 1876. On the 4th April, 1876, an order was made for the sale of the property on the 20th May, 1876. On the application of Joseph Hurst and his wife,

* Regular Appeal, No. 107 of 1876, from a decree of R. Alexander, Esq., Subordinate Judge of Dehra Dún, dated the 15th September, 1876. Reported under a special order of the Hon'ble the Chief Justice.

and on their satisfying the decree in part, and executing an agreement to pay the balance, this sale was postponed *sine die*. On the 9th June, 1876, Mohkampur was again attached in the execution of the decree obtained by Khushal Rai. No further proceedings were taken in this case till the 6th October, 1878. Mohkampur was again attached on the 13th July, 1876, in execution of the decree obtained by the Mussoorie Bank against Joseph Hurst and Robert Henry Heseltine. On the 17th July, 1876, an order was made for the sale of the property on the 20th September, 1876. Charlotte Hurst objected to the sale, claiming the property as her own. Her objection was disallowed on the 9th August, 1876. The property was eventually sold on the 20th September, 1876, and was purchased by one Charles Edward Beresford, with notice of Charlotte Hurst's claim.

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In the meantime on the 18th August, 1876, Charlotte Hurst instituted the present suit against the Mussoorie Bank in the Court of the Subordinate Judge of Dehra Dún. The plaintiff claimed in her plaint the reversal of the order of the 9th August, 1876, and all subsequent acts and orders made under that order, a declaration of her right to the possession of the property as full proprietor, and possession of the property in full proprietary right. She based her suit on the deed of sale dated the 14th November, 1868. She alleged that, being entitled under her father's will at the time of the sale to a legacy of Rs.12,000, she had purchased the property in suit, together with an estate called Ashton Cottage, arranging with her husband that he should advance the purchase-moneys of these properties, and promising to pay him back such moneys when she obtained her legacy; that she had subsequently sold the legacy to one Charles Frederick Vaughan for Rs. 7,875, receiving the purchase-money by a cheque for that amount, and that she had endorsed this cheque to her husband, paying the balance due to him, Rs. 125, in cash out of money of her own. The defence to the suit was that the money paid to the vendor of Mohkampur by Joseph Hurst was his own money, and not money paid in pursuance of any such agreement as alleged by the plaintiff, and that the conveyance of the property was made to the plaintiff with the object of protecting it from Joseph Hurst's creditors, Joseph Hurst being

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in pecuniary difficulties at the time of the purchase. The defendant further alleged that from November, 1868, to July, 1876, Mohkambar had been held and enjoyed by Joseph Hurst as his own property, that the plaintiff's name never appeared in any transaction connected with the management of the estate, that the patwaris of the village were ignorant of her name, and her name did not appear in any revenue record as connected with the village, that in February, 1872, Joseph Hurst and the plaintiff had mortgaged the village jointly to a Mrs. Dick, styling the property as "their" property, and that in February, 1875, Joseph Hurst had given evidence in a certain suit to the effect that he had purchased the property and held it as proprietor, and that he was the proprietor of it.

It was not alleged in defence to the suit that the property had been attached and sold in the execution of a decree to which the plaintiff was a party.

The Subordinate Judge fixed as an issue, among others, Was Rs. 6,400, the price paid for Mohkampur, part of the plaintiff's legacy under her father's will or not? This issue was alone considered by the Judge, and on it he dismissed the suit, holding that the money paid for the purchase of Mohkampur was Joseph Hurst's money, and that there was no connection between it and the sum of Rs. 7,875 received by the plaintiff from Vaughan and made over to her husband by the plaintiff.

The plaintiff appealed to the High Court against the decree of the Subordinate Judge, contending that the property was her own separate and absolute property, and the Court of first instance had erred in finding that her husband was the true owner.

Messrs. *Ross and Conlan*, for the appellant.

Messrs. *Hill and Quarry*, for the respondent.

The following judgments were delivered by the Court:

STUART, C.J.—This is a regular appeal from a decree of the Subordinate Judge of Dehra Dún dismissing the plaintiff's claim to property called the estate of Mohkampur in virtue of her separate and exclusive right as a legatee under her father's will, and by which he bequeathed to her a sum of Rs. 12,000. The will was dated the 16th February, 1864, and there was a codicil dated

the 24th February, 1865. The testator, J. N. Heseltine, the plaintiff's father, died on the 8th March, 1865. The nature and terms of the will had been the subject of a previous suit with respect to a mortgage directed by it to be made, in which the plaintiff's rights as a legatee came to be considered. This suit came up in regular appeal to this Court, and was heard by Oldfield, J., and myself, and determined by our dismissing the appeal and suit on grounds and for reasons which we fully explained in our judgments (1).

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The record in that previous suit containing the proceedings in the lower Court and this Court was put in as evidence in the present suit, and it thus appears that the facts which gave rise to the present litigation are these: On the 14th November, 1868, Mrs. Hurst, the plaintiff, purchased the estate of Mohkampur from one Mary Wood, the price, as stated in the sale-deed (and correctly stated, for there can be doubt on this point), being Rs. 6,000. This sum was not at once paid down in cash by the plaintiff, although it does not appear to be disputed that she, and she alone, was the actual vendee, the money having been found by Mr. Hurst, the plaintiff's husband, she, the plaintiff, claiming that it was on the credit of her legacy that the sale to her took place. Subsequently to this purchase, that is, on the 25th November, 1869, the plaintiff purchased from a Mrs. Walsh a certain property called Ashton Cottage, the consideration being Rs. 2,000, which had apparently been raised in the same way as the previous Rs. 6,000 for the purchase of Mohkampur. The two sums amounted to Rs. 8,000, which sum Mrs. Hurst swears in her deposition she repaid to her husband, first by endorsing over to him a draft for Rs. 7,875, being the sum, as explained by the plaintiff, to have been netted for her legacy, and by a cash payment from herself of Rs. 125. The Subordinate Judge appears to sneer at and discredit this last circumstance, although it is not apparent why he should do so. For myself I do not see why it should be considered an "odd circumstance" that the plaintiff, situated as she was, could not command Rs. 125 on her own account, and there is not a particle of evidence to show that it was not her own money. The poor woman had suffered in pocket sufficiently already, for she tells us, and the fact plainly appears in the record of the

(1) See *ante*, p. 723.

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other suit to which I have adverted, that after a good deal of negotiation she disposed of her legacy of Rs. 12,000 to Mr. Vaughan, one of the executors of her father's will, for Rs. 8,000. This, as remarked by me in the previous suit, was a very improper transaction on Mr. Vaughan's part, and it might have been set aside if she had been so minded and it had been worth her while, but no question of the validity of this transaction arises in the present case. I only now allude to the circumstance for the purpose of showing that the sum she thus obtained for the legacy was the precise amount of her purchase of Mohkampur and Ashton Cottage, and the question as to the identity of that payment, as regards its legal character as well as its amount, with her legacy, or whether the payment had been made by her husband from his own resources or what must be taken to be such, is the first question that has to be considered. The next question is one of law, *viz.*, whether, if the money was her's, and not her husband's, it could be used and dealt with by him in the way stated by the Subordinate Judge.

The Subordinate Judge correctly states that the first of these is the one important question, although very inconsistently with that he thus expresses himself in his judgment: "That he (the plaintiff's husband) got the legacy money there is no doubt, but there is equally no doubt in my mind that he received it as any other husband would do money coming to his wife," adding, with apparent inconsistency, that "the issue drawn which need be considered is, Was this Rs. 6,000, the price paid for Mohkampur, part of Mrs. Hurst's legacy under her father's will or not?" and he decides that it was the husband's money and not the plaintiff's. There is a confusion of mind and want of legal knowledge in all this on the part of the Subordinate Judge which I by no means desire to rebuke, for Mr. Alexander has done his best according to his light, although I could have wished that he had not been so dogmatical in the expression of his views. He ought to have known that Mr. Hurst could not deal with the legacy "as any other husband would do with money coming to his wife," and that he could not defeat her rights under her father's will by any transaction of his own. His judgment appears to me to be altogether beside the case, and shows that he totally misapprehended the plaintiff's position and her rights under her father's will.

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That the Rs. 6,000 paid for Mohkampur was her money and not her husband's is I think very plain. In the first place the Subordinate Judge himself says that Mr. Hurst got hold of the legacy money, in the next place the respondents, defendants, argued their case here, as they appear to have done in the Court below, on the assumption that it was her legacy that had been used in raising the purchase-money for Mohkampur, but that by conversion into cash it had changed its character and came under the control of her husband. Such a contention was totally unfounded in law, and I only refer to it now for the purpose of pointing out that, on the defendant's own showing, the money raised and paid by Mr. Hurst was really the plaintiff's and not his. But the plaintiff herself was examined in the Court below, and her evidence is before us. The Subordinate Judge puts his gloss upon it, but I feel bound to reject this as altogether uncalled for. The plaintiff's evidence is not in any way contradicted or disputed, and I see no reason whatever for disbelieving it. It will be seen that it is clearly compatible and consistent with all we know of the facts. We have seen that her father made his will in 1864 and died in 1865, and the time that elapsed between the date of the purchase of Mohkampur is amply accounted for by the litigation and negotiations which had in the meantime been going on, and which prevented the payment to her of her legacy until the time mentioned by the Subordinate Judge. She states in her deposition as follows: "My husband paid the money for me: I was negotiating the sale of my legacy with Mr. Vaughan, the executor: Mr. Vaughan sent me a cheque for the amount, viz., Rs. 7,875, on the Delhi Bank, and I endorsed the whole of it over to my husband: after this receipt I concluded the sale-negotiations for Ashton Cottage, which I had been carrying on for some time previously: the price of Ashton Cottage was Rs. 2,000: I paid Rs. 7,875 to my husband by the cheque, and Rs. 125 in cash: I sold my legacy for Rs. 8,000, and Mr. Vaughan made me go shares in the expenses, so I only got Rs. 7,875." And further on in cross-examination she says, "I bought the village (Mohkampur) in anticipation of my legacy money."

Then as respects the Mussoorie Bank's bond she says: "Mr. Hurst signed the deed shown me because the loan was to him, not because he had any right in the property." And in regard to Mrs.

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Dick's mortgage she deposes : "The deed shown me was signed by Mr. Hurst and myself : I never read the deed in question, so I cannot tell how the words 'moveable and immoveable' came into it : I did not get the loan, Mr. Hurst got the loan." The Subordinate Judge makes some unfavourable comments on this evidence, but it is, I consider, unsafe to argue, as he does, against the conduct of a wife situated, as the plaintiff was, under the influence and control of a needy husband. I believe she spoke the truth when she said she had not read this deed, and I also believe that she was totally unaware that she was transferring by it any rights of hers acquired by means of her legacy. In fact she could not legally have joined in any such mortgage-deed without making the usual acknowledgment required of married women before the officer appointed by law for that purpose (see Act XXXI of 1854, ss. 3, 4, and 5), and it is not pretended that any such formality was observed on the occasion.

From all these considerations I conclude and thoroughly believe that the Rs. 6,000 paid for Mohksampur was raised on the security of, and was in fact paid out of, the plaintiff's legacy, and from no other source; and that being so the plaintiff's legal rights are not as stated by the Subordinate Judge. I have looked into the record of the previous suit, and I find it there recorded that the bequest of the legacy to the plaintiff in her father's will and codicil is expressed in these terms : "I do hereby give and bequeath to my daughter Charlotte, wife of my said son-in-law Joseph Hurst, and mother of my said grand-children Joseph and Isabella Hurst, the sum of Rs. 12,000 absolutely for her own sole use and benefit free from the control, debts, and liabilities of her present or of any future husband with whom she may hereafter intermarry : and I direct such said sum of Rs. 12,000 to be paid to my said daughter Charlotte on her sole and personal receipt from and out of the sum of Rs. 16,000 charged upon my Ellenborough hotel estate." The effect of such a testamentary disposition is to give the plaintiff not only separate and exclusive use of the legacy money but sole and absolute control over its disposal. The law on this subject is clearly stated by Mr. Joshua Williams, Q. C., in his "Principles of the Law of Real Property," 7th ed., 1865, p. 207 (an able and reliable work of great authority in England, although the author is still

alive), as follows: "Not only the income but also the corpus of any property whether real or personal may be limited to the separate use of a married woman. Recent decisions have established that a simple gift of real estate, either with or without the intervention of trustees, for the separate use of a married woman, is sufficient to give her in equity a power to dispose of it by deed or will without the consent or concurrence of her husband. The same rule had long been established with respect to personal estate." Property is thus sometimes settled to wives so as to prevent even its anticipation by them. But it will be observed that there is no such clause in the will of the plaintiff's father. She did anticipate the legacy by accepting the Rs. 6,000 her husband raised for her on its security, and she was entitled to do this, nor by so anticipating did she in any way change the legal character and conditions of the legacy itself, for that as I have said could in no wise be defeated by any contrivance on the part of her husband or any of his creditors.

The facts and evidence to which I have adverted, and which bring me irresistibly to this conclusion, appear to me to be clear beyond any doubt, and I see no necessity for a remand.

I have only to add that, if the plaintiff's husband took his loan from the Mussoorie Bank either in ignorance of or with the knowledge of plaintiff's exclusive rights under her father's will, he and the Bank must settle it between themselves, but in no case can the one or the other make any claim on the plaintiff, or make use of her money, should they succeed in getting it into their hands without her own deliberate consent given in the manner required by law.

I would allow the appeal and reversing the judgment of the Subordinate Judge decree the plaintiff's claim. No other conclusion could satisfy not only the legal necessities but the justice of the case. The respondents must of course pay all the costs, those of the lower Court as well as the costs of this appeal.

SPANKIE, J.—The subject-matter of the dispute between the parties and the facts of the case are clearly set forth by the Subordinate Judge. The lower Court considered that the first issue laid down by him decided the case. That issue was, Was the sum of Rs. 6,000, the

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price paid for Mokhampur, part of Mrs. Hurst's legacy under her father's will or not? Ordinarily speaking, the Judge remarks, when we look at a transaction like the one which took place between Mr. and Mrs. Hurst, we should say that the husband had bought the estate, entered his wife's name as purchaser for reasons of his own, and that the endorsement of a cheque or draft made over to him some eighteen or nineteen months afterwards had nothing to do with the matter whatever. The lower Court comes to the conclusion that the money was Hurst's own, and had no connection with the Rs. 7,875, the proceeds of the legacy, paid over to him nineteen months after the purchase. The Subordinate Judge comes to this finding on the evidence of Mrs. Hurst which he considers contradictory and improbable. He holds also that Mr. Hurst got possession of the legacy as any other husband would do money coming to his wife.

It is contended in appeal that mauza Mohkampur is the separate and absolute property of the appellant, Charlotte Hurst, and the Court was wrong in finding that her husband, Hurst, was the true owner. Secondly, that the purchase-money of the village in question, though paid in the first instance by appellant's husband, was eventually paid by appellant, who made over her legacy of Rs. 8,000 to her husband in satisfaction of the loan by means of which the said village had been originally purchased by her. Thirdly, that it is not shown that the legacy was paid for any other purpose. Fourthly, that the reasons by the lower Court for its decision are fallacious and erroneous, and do not support the conclusion upon which that decision is based. Fifthly, that the amount entered in the lower Court's decree as pleader's fee is improperly calculated.

The suit appears to me to have been insufficiently tried, and Charlotte Hurst's evidence to have been set aside on apparently too slight grounds. There is no reason to doubt that she had the legacy in prospect when the purchase was made, a legacy to herself, and for her own use and benefit and quite independent of her husband's control. With this prospect before her it was not unlikely that she might contemplate the purchase of immoveable property, and it was not improbable that her husband should have found the money for her in the first instance, and have received it back from her on payment of the legacy. She stated that, when the village was bought, they were well off as compared with their present po-

sition, and were then perfectly solvent. She appears to have given her evidence freely. It was not damaged in cross-examination or by the Court when the Judge examined her. She may have been flurried by the Court, but I certainly do not trace in her evidence confused and contradictory statements. These statements at least remain uncontradicted. The other party produced no evidence at all. If the lower court thought that Charlotte Hurst's evidence was not satisfactory, she should have been allowed the opportunity of bringing forward some proof in corroboration of it. It would seem, however, that the Subordinate Judge was of opinion that the husband must needs have the control of the legacy, and that it was paid to him as any other money coming to his wife would be paid. This in fact was doubtless pressed upon him at the hearing, and indeed was contended here by respondent's pleader, Mr. Quarry. There is no doubt that, when from the terms of the gift, settlement or bequest, the property is expressly, or by just implication, designed to be for a woman's separate and exclusive use (for technical words are not necessary), the intention will be fully acted on, and the rights and interests of a wife sedulously protected in equity. There is no difficulty in this case as to the words used. The will of J. N. Heseltine gives the money to Charlotte Hurst "absolutely for her sole use and benefit, free from the control, debts, and liabilities of her present or any future husband." The money is to be paid to her "on her sole and personal receipt." These words exclude the marital rights of a woman's husband, and the property will be regarded as being for her exclusive use.

So far then Charlotte Hurst, having certainly the exclusive control of this money left to her, might not unreasonably, as remarked above, have entertained the idea of buying Mohkampur, and as her statements remain uncontradicted there was *primâ facie* no reason to doubt the truth of the claim. There are, however, alleged to be certain circumstances, such as the condition of Hurst's affairs for some time past, and the fact that he had treated Mohkampur as his own, regarding which it would have been desirable that further inquiry should have been made. Hurst himself should have been examined, and he should have been questioned regarding the alleged advance to his wife of the sum necessary to pay for Mohkampur, and also respecting the mortgage of that village, amongst other proper-

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ties to Mrs. Dick. On the other hand the defendant should have the opportunity of showing from any other evidence that he could produce that the money used was not Mrs. Hurst's. The defendant indeed should have had evidence ready on this point, as it was in issue on the day fixed for trial. I do not understand why it was not produced if at hand, and if this suit were dismissed now the defendant would have himself to blame. But I would prefer, having regard to the fact that there are some suspicious circumstances in the case, that there should be further inquiry, and would remand the case to the Subordinate Judge in order that he should try and determine whether the purchase of Mohkampur was made by Charlotte Hurst on her own account, and with money advanced by Hurst as a loan, which she subsequently repaid to him, or whether Hurst was the real purchaser and owner, and the money paid was his own.

The determination of this issue in a satisfactory way would I think dispose of the case. The remand might be under s. 354, Act VIII of 1859. On return of the finding a week might be allowed for objections, and on the expiration thereof the appeal would be disposed of.

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July 22.

Before Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Pearson.

BERESFORD (PLAINTIFF) v. CHARLOTTE HURST AND ANOTHER (DEFENDANTS).*

Real Property—Legacy—Husband and Wife.

C, a married woman, was entitled, under her father's will to certain money "absolutely, for her sole use and benefit, free from the control, debts, and liabilities of her husband," and under such will such money was payable to her "on her sole and personal receipt." While so entitled *C* borrowed from her husband the purchase-money of certain real property, on the understanding that she would pay him back such money when she obtained her legacy. The conveyance of such property was made to *C* but not to her separate use. *C* subsequently assigned her legacy by sale, and out of the money obtained by such assignment repaid her husband the purchase money of the property purchased. *C* and her husband were married before Act X of

* First Appeal, No. 43 of 1878, from a decree of F. Bull $\&$ k, Esq., Subordinate Judge of Dehra Dún, dated the 3rd December, 1877. Reported under a special order of the Hon'ble the Chief Justice.