1890

SHIB SINGH v. SITA RAM.

lature had intended that, whilst a debt was under attachment, the person to whom the debt was originally owing should be barred from bringing a suit in respect of it, we would expect the Legislature to have used some such words as:—"During the existence of the attachment no suit shall be brought by the creditor against the debtor in respect of the debt attached." What s. 268 prohibits is the recovery of the debt and the payment of it by the debtor to the creditor. The debtor had an easy course provided for him under s. 268, as under that section he could have paid the money into Court and thus have avoided liability in this suit. That was not done here. Mr. *Chaudhri* contends, and we think with force, that if his client, the plaintiff, had not brought the suit when he did, a suit subsequently brought might be barred by limitation. On the other hand, Mr. *Reid* for the defendant-appellant says that the case would come within s. 15 of the Limitation Act. We do not think the case would be within s. 15 of the Limitation Act. We think it would be to read a good deal into s. 268 of the Code of Civil Procedure if we were to hold that an order of attachment under that section was equivalent to an injunction or an order staying a suit. The point seems to be a novel one, and, giving it our best attention, that is the opinion at which we have arrived. We express no opinion as to what may be the result of any proceedings in execution. We dismiss the appeal with costs.

Appeal dismissed.

1889
May 20.

Before Mr. Justice Mahmood.

SOHNA (OBJECTOR) *v.* KHALAK SINGH AND ANOTHER (PETITIONERS).

Jurisdiction—Exercise by Subordinate Judge of jurisdiction of District Court—Appeal—Bengal Civil Courts Act (XII of 1887), *ss.* 23, 24—*Power of appellate Court to add respondent—Limitation—Civil Procedure Code, s.* 559—*Minor—Guardian—Bengal Minors Act (XL of* 1858), *s.* 7.

The words in s. 24 of the Bengal Civil Courts Act (XII of 1887) "subject to the rules applicable to like proceedings when disposed of by the District Judge," include the rules relating to appeals. Therefore orders passed under that section by a Sub-

* First appeal No. 167 of 1888 from an order of Maulvi Shah Ahmadullah Subordinate Judge of Cawnpore, dated the 18th August 1888.

ordinate Judge in proceedings under the Bengal Minors Act (XL of 1858) transferred to him under s. 23 (2) (*b*) of the former Act, are appealable to the High Court and not to the Court of the District Judge.

The power of an appellate Court to make a person a respondent, under s. 559 of the Civil Procedure Code, is not affected by the Limitation Act (XV of 1877).

In exercising its powers under s. 559 of the Civil Procedure Code, an appellate Court is competent to make a person a respondent who, in the original suit, was arrayed on the same side with the appellant.

The grant of a certificate under s. 7 of the Bengal Minors Act (XL of 1858) should not be based exclusively on considerations of propinquity of relationship without regard to the other circumstances of the case affecting the interests of the minor and the fitness of the person appointed.

The facts of this case are stated in the judgment of the Court.

Pandit *Moti Lal Nehru*, for the appellant.

Munshi *Madho Prasad*, for the respondents.

MAHMOOD, J.—This is a first appeal from order arising out of a litigation commenced under the Minors Act (XL of 1858) in respect of the guardianship of the person and property of a minor girl, Musammat Bakhtawari, daughter of one Sirdar Singh, deceased. The proceedings began with an application made by one Khalak Singh on the 8th September 1887, praying that he might be appointed guardian of the person and property of the minor. The application was opposed by one Bachcha Singh who claimed the certificate of guardianship in preference to the petitioner, Khalak Singh, and, his objection being allowed, the certificate was granted to him on the 7th January 1888, by the Subordinate Judge of Cawnpore, to whom the case appears to have been transferred under s. 23 of the Civil Courts Act (XII of 1887).

From the order of the Subordinate Judge an appeal was presented to this Court by Khalak Singh (case No. 19 of 1888) and it came on for hearing before me sitting here as a single Judge, and was disposed of by me on the 26th April 1888. For the reasons stated by me in my judgment of that day, I decreed the appeal, and, setting aside the Subordinate Judge's order of the 7th January, 1888, remanded the case to his Court for trial *de novo*. On that occasion I held *inter alia* that the Subordinate Judge had misapprehended

1889

SOHNA v. KHALAK SINGH.

the relative propinquity of the parties to the minor, and that in granting the certificate of guardianship to Bachcha Singh he had omitted to notice the salutary rule contained in s. 27 of the Act prohibiting "the appointment of any person other than a female as the guardian of the person of a female."

The case having thus been sent back to the Subordinate Judge's Court, two female objectors appeared on the scene desiring to take part in the litigation as objectors to Khalak Singh's application, and as claimants of the guardianship of the minor girl Musammat Bakhtawari. One of these objectors-claimants was Musammat Batasia, a sister of Khalak Singh, and the other was Musammat Sohna, both of whom appear to have been made parties to the litigation which (as Mr. *Moti Lal* on behalf of the appellant has put it) then stood arrayed representing the original petitioner Khalak Singh as the plaintiff, and the original objector Bachcha Singh as the opposite party along with Musammat Batasia and Musammat Sohna. The parties being thus arrayed, the learned Subordinate Judge by his order of 18th August 1888, granted the certificate of guardianship to Musammat Batasia, and disallowed the claims of the petitioner Khalak Singh, and also of the objectors Bachcha Singh and Musammat Sohna.

It is from this order that this appeal was preferred only by Musammat Sohna on the 6th November 1888, and to the appeal she made only Khalak Singh a party respondent. But on the 9th February 1889, she applied to this Court that the name of Musammat Batasia might be added as a party respondent to the appeal, and notice having been issued, this Court directed that the name of Musammat Batasia be added as a party respondent to the cause subject to such objections as to limitation as she might be advised to take when the appeal came on for disposal. This order was made on the 15th March 1889.

The case having thus come on for hearing before me, Mr. *Madho Prasad*, who appears for Musammat Batasia, has raised three preliminary objections to the effect that, so far as Musammat Batasia is concerned, the appeal is not maintainable. The first of

these objections is that inasmuch as the case had been transferred to the Subordinate Judge and has been disposed of by him, this appeal from his decision could lie only under s. 28 of the Minors Act (XL of 1858), and that it therefore lay to the District Judge and not to this Court under the purview of that section. The second objection is that the judgment now under appeal being dated the 18th August 1888, and the appeal being preferred only against Khalak Singh on the 6th November 1888, the appellant's application of the 9th February 1889, praying for the addition of Musammat Batasia as a party respondent to the appeal was barred by limitation, and that the order of this Court dated the 15th March 1889, could not therefore be passed, and can be contested at this stage. The third objection is that inasmuch as in the lower Court, after the remand of the case, both Musammat Sohna the present appellant and Musammat Batasia were arrayed on the same side as objectors to the application of Khalak Singh, they cannot be arrayed opposite to each other in appeal.

All these points are contested by Mr. *Moti Lal*, on behalf of the appellant, and I wish to dispose of them before entering upon the merits of the case.

Upon the first point I am of opinion that the effect of the transfer of the case to the Subordinate Judge was to invest him with the same jurisdiction as that possessed by the District Judge in whose Court the application for certificate was originally filed. The terms of s. 28 of Act XL of 1858, like some other parts of that enactment, are not specifically clear, but the interpretation which I put upon them is that they do not in themselves intend to lay down any rules as to the tribunals which are to hear appeals under that section, but leave the matter to other provisions of the law regulating jurisdiction as to hearing of appeals. In the present case such provision is to be found in the Civil Courts Act, XII of 1887, and s. 24 of that enactment lays down, after referring to the previous section (which includes clause (*b*) relating to transfer of proceedings under Act XL of 1858) goes on to say that such proceedings shall be disposed of by the subordinate Court "*subject to the rules ap-*

1889

SOHNA v. KHALAK SINGH.

plicable to like proceedings when disposed of by the District Judge." I am of opinion that the words which I have just quoted and emphasized, include the rules relating to appeals, and since an appeal from a District Judge would lie to this Court, therefore an appeal from an order of the Subordinate Judge, when proceedings under Act XL of 1858 have been transferred to him, also lies to this Court, and not to the Court of the District Judge. I am fortified in this view by the significant circumstance that in the proviso to the first clause of s. 24 of the Civil Courts Act (XII of 1887) the Legislature has specially provided that appeals from the order of a Munsif when such proceedings are transferred to him, shall lie to the District Judge, subject again to an appeal to this Court under clause (2) of the same section. The Legislature could not therefore have intended that proceedings transferred to a Subordinate Judge should stand upon the same footing, for purposes of appeal, as those of a Munsif. Nor can I hold that if the appeal lay to the District Judge, the Legislature intended that the judgments or orders passed upon such appeal should be final and exempt from appeal to this Court. The present appeal was therefore rightly instituted here.

Upon the second point, which relates to the question of limitation, Mr. *Madho Prasad* relies upon the ruling of this Court in the case of *Ranjit Singh* v. *Sheo Prasad Ram* (1), where Stuart, C. J., and Spankie, J., in interpreting s. 32 (read with s. 582) of the Civil Procedure Code (Act X of 1877), whilst holding that the appellate Court was competent to add a respondent to the appeal, laid down the rule that such appellate Court was not competent to pass a decree against such added respondent if the appeal with reference to the date of the addition of such respondent was barred under s. 22 of the Limitation Act (XV of 1877). The learned pleader also relies upon the ruling of the Calcutta High Court in *The Corporation of the Town of Calcutta* v. *Anderson* (2) where it was held, *inter alia*, that the fact that the plaintiff's attorney on being served with notice of appeal failed to notice that a party who had been a defendant in the Court below had not been made a respondent in

(1) I. L. R. 2 All. 487. (2) I. L. R. 10 Calc. 445.

the appeal, coupled with the fact that the application made by the plaintiff to make such defendant a party respondent after the period of limitation had expired, was not made at the earliest opportunity possible, is not a sufficient ground under s. 5 of the Limitation Act for non-prosecution of the appeal within the period allowed. On the other hand, Mr. *Moti Lal* argues that the present case is not governed by s. 32 of the Civil Procedure Code, but by s. 559 which is independent of s. 32, and that the ruling of this Court in *Ranjit Singh* v. *Sheo Prasad Ram* (1) does not apply, because it does not deal with the provisions of s. 559. The learned pleader also argues that the provisions of s. 559 impose a duty or confer a power upon the Court, and any action under that section is therefore exempt from any limitation such as that contemplated by the Limitation Act (XV of 1877), and that therefore the order of this Court dated the 15th March 1889, adding Musammat Batasia as a party respondent to the appeal, though made after the lapse of the period of limitation, was not *ultra vires*, being an action which the Court could have taken *suo motu* irrespective of the appellant's application. Further, the learned pleader argues upon the authority of a ruling of my brethren Brodhurst and Tyrrell in *Jamna* v. *Ibrahim* (2) that even if the order of 15th March 1889, whereby Musammat Batasia was made a respondent to the appeal, be taken to be the date of the appeal against her, the provisions of s. 5 of the Limitation Act (XV of 1877) would entitle her to the benefit of the discretionary power, as here the circumstances of the case indicate that the name of Khalak Singh was by a mere clerical error and accident entered in the memorandum of appeal as respondent, instead of the name of Musammat Batasia in whose favour the lower Court had passed the order granting the certificate of guardianship complained of in this appeal.

I am of opinion that so far as the question of limitation in this case is concerned, it rests upon the solitary question whether the action of a Court of justice under s. 559 of the Civil Procedure Code, is subject to any such rule of limitation as would fall within the purview of the Limitation Act (XV of 1877). Now I entertain no

(1) I. L. R., 2 All. 487. (2) Weekly Notes, 1888, p. 58.

1889

SOHNA v. KHALAK SINGH.

doubt that the powers under s. 559 of the Code of Civil Procedure may be exercised by a Court *suo motu*, so long as that Court is seized of the case, and is empowered by the Civil Procedure Code to secure that the parties to the appeal are properly arrayed. That section occurs in the appellate Chapter XLI, and is independent of s. 32 of the Code.

In the case of *Dhan Singh* v. *Basant Singh* (1) in dealing with a cognate question (which related to the action of the Court under s. 206 of the Civil Procedure Code), I, referring to the ruling of this Court in *Gaya Prasad* v. *Sikri Prasad* (2), went on to say :—

"On a former occasion in the case of *Raghunath Das* v. *Raj Kumar* (3) I respectfully expressed my inability to accept that ruling, holding, as I did then, and still do, that under a proper interpretation of the preamble and s. 4 of the Limitation Act (XV of 1877) the rule of limitation is confined to the litigants and is inapplicable to acts which the Court may or has to perform *suo motu*. And I think that this view is supported by the principle upon which the rulings in *Roberts* v. *Harrison* (4), *Vithal Janardan* v. *Vithojirav Putlajirav* (5) and *Kylasa Goundan* v. *Ramasami Ayyan* (6) proceeded. S. 206 of the Civil Procedure Code empowers a Court of its own motion to amend its decree, and the mere fact that one of the parties has made an application asking the Court to exercise that power, will not, in my opinion, render the action of the Court subject to the rule of limitation."

To the rulings which I then cited I may now add the case of *Manickya Moyee* v. *Boroda Prosad Mookerjee* (7) where McDonell and Field, JJ. concurred in holding that the discretionary power of directing a person to be made a respondent conferred on the appellate Court by s. 559 of the Civil Procedure Code, is not limited by any provision of the Limitation Act, XV of 1877. The question of principle was however more fully discussed by Wilson, J. in *The Oriental Bank Corporation* v. *J. A. Charriol* (8) where that learned

(1) I. L. R. 8 All. 519.
(2) I. L. R. 4 All. 23.
(3) I. L. R. 7 All. 276.
(4) I. L. R. 7 Calc. 333.
(5) I. L. R. 6 Bom. 586.
(6) I. L. R. 4 Mad. 172.
(7) I. L. R. 9 Calc. 355.
(8) I. L. R. 12 Calc. 642.

Judge made an analysis drawing a distinction between those provisions of the Civil Procedure Code which enable parties to take action for purposes of the array of parties, and those provisions which enable a Court to secure that any particular cause is properly arrayed with reference to the parties concerned. I fully agree in all that was said by Wilson, J. in that case as to the distinction which led him to the conclusion that no question of limitation can arise with respect to the Court's power to make an order adding a party defendant to a suit. The learned Judge, after showing that such powers vested in the Court as distinguished from the action of the parties, went on to say :—

"For the exercise of these powers and those conferred by other sections upon Courts, no period of limitation is provided, and they are to be exercised in my opinion whenever the necessity for doing so is made apparent so long as the case is *sub judice*. Any other view would, I think, lead to disastrous consequences. It was suggested in the present case that though the Court might act at any time of its own motion, it could not act on the application of any person if the right of that person to claim relief was barred. I do not think that is so. I do not see how the fact of any person making an application, whether in time or out of time, can take away from the Court a power given to it to act at any time either upon or without application."

This view of the law was accepted by Garth, C. J., and I accept it also, though I cannot help feeling that the *ratio* so far as it relates to the matter of principle is opposed to the Division Bench rulings of this Court in *Ranjit Singh* v. *Sheo Prasad Ram* (1) *Gaya Prasad* v. *Sikri Prasad* (2) and *Jamna* v. *Ibrahim* (3). I hold therefore that the order passed by me on the 15th March 1889, directing that Musammat Batasia might be made a party respondent to this appeal, was not subject to any objection upon the ground of the rules of limitation, and therefore I disallow the preliminary objection upon this point.

(1) I. L. R., 9 All. 487. (2) I. L. R., 4 All. 23
(3) Weekly Notes, 1888, p. 58.

1889

SOHNA v. KHALAK SINGH.

I now pass on to the third preliminary objection raised by Mr. *Madho Prasad* against the appeal. The learned pleader, relying upon a ruling of my brethren Straight and Tyrrell in *Atma Ram* v. *Balkishen* (1) argues that because in the cause as it stood arrayed in the Court below, both Musammat Sohna, appellant, and Musammat Batasia, were arrayed as opposite parties to the application of Khalak Singh, therefore as a matter of procedure Musammat Sohna, the appellant, and Musammat Batasia, the respondent, could not be arrayed on opposite sides in this appeal. So far as this point is concerned I may say that the ruling of my learned brethren is not in conformity with the conclusions arrived at by another Division Bench of this Court in a case which I have already cited, namely, *Ranjit Singh* v. *Sheo Prasad Ram* (2), where the power of the appellate Court to transpose the appeal on opposite sides was distinctly recognized, though that ruling took no notice of s. 559 of the Civil Pro- cedure Code.

Under this state of things I think I must arrive at my own conclusions upon the question of law. I have already said enough about the question of limitation to preclude my being understood to hold that either s. 5 or s. 22 of the Limitation Act has any application to a case such as this. The matter really rests solely and entirely upon the interpretation to be placed upon a specific provision of the statute law, namely, s. 559 of the Code of Civil Procedure. In interpreting that section as in interpreting others, where in the Civil Procedure Code general terms are employed, I have uniformly adhered to the view that the words of the statute when perfectly clear and devoid of qualifications, should not be subjected to any qualifications which the Legislature itself has not thought fit to express. In s. 559 of the Code there is no qualification rendering it illegal for an appellate Court to make any party to the "*suit*" a party to the appeal as respondent. If there is any restriction it consists of not being able to exercise the power of making a party to the "*suit*" an *appellant* as distinguished from a *respondent*. Analogical reason for such a restriction is to be found in the second

(1) I. L. R. 5 All. 266. (2) I. L. R., 2 All. 487.

paragraph of s. 32 of the Code, which lays down that no person shall be added as a *plaintiff* without his consent.

The case here is not one of making a person a party *appellant*, but only one in which Musammat Batasia has been made party *respondent*, and I hold that s. 559 of the Civil Procedure Code gave ample power to justify an order whereby Musammat Batasia was made respondent to this appeal where her interests are opposed to those of the appellant.

The result of these views is that all the three preliminary objections raised in this appeal by Mr. *Madho Prasad* on behalf of the respondent Musammat Batasia fail, and I have now to consider the merits of the case.

Upon the merits of the case I am of opinion that the learned Judge of the lower Court has not fully gone into the facts and circumstances of the case, and has limited his adjudication as to the rights of Musammat Batasia, the respondent, before me, to the circumstance of her relative position with reference to the minor Musammat Bakhtawari. I do not say that the circumstance of propinquity of relationship is not a circumstance to be taken into account for the purpose of deciding disputes, any more than I would say that the rules of Hindu law which indicate the relative position of the parties with reference to the rights as to property should not be taken into account. But I think the learned Judge of the Court below has dealt with the matter entirely with reference to the pedigree which his judgment contains, and with reference entirely to the question of propinquity of relationship, and he has not dealt with any other matter as to fitness which requires consideration under s. 7 of Act XL of 1858.

It seems to me that although the enactment is far from being complete so as to indicate the policy of the Legislature in framing the enactment, it contains enough to indicate that the grant of certificate of guardianship, should not proceed upon mere questions of relationship, and that the Court is in each case required to consider the circumstances thereof, and to consult the interests of

1889

SOHNA v. KHALAK SINGH.

the minor in connection with the appointment of guardians, and issue of certificates under the enactment. It does not necessarily follow that the nearest relative is the best guardian to the minor, and mere propinquity of relationship would not therefore entitle the person *ipso facto* to be entitled to hold the certificate under the Act. This view I think is apparent from the whole enactment, but the case has not been regarded by the lower Court in this light at all. It misunderstood my judgment whereby the case was remanded on the former occasion by interpreting it to mean that I laid down the rule that mere propinquity of relationship was quite enough to satisfy the requirements of the statute.

In the present case there is a further difficulty than the one which I have already indicated, arising from the argument addressed to me by Mr. *Moti Lal* on behalf of the appellant. The difficulty is that the learned Judge of the lower Court has mixed up two duties which he had to perform under the statute, one being the appointment of the guardian of the person of the minor Musammat Bakhtawari under s. 11 of the Act, read with s. 27, and the other being the duty of appointing some one under s. 7 to manage the property of which she, the minor, was the owner. These two aspects of the case have not been clearly kept in view by the lower Court, and I think Mr. *Moti Lal* is entirely within his right when he contends that the appellant Musammat Sohna might possibly be a better guardian of both the person and property of the minor Bakhtawari.

I regret therefore that I find it necessary again to remand the case by setting aside the order of the lower Court, and to require that Court to deal with the questions raised with reference to the observations which I have made.

I decree the appeal, and setting aside the decree of the lower Court, remand the case under s. 562 of the Civil Procedure Code, read with s. 647 of the Code, and direct that costs will abide the result.

Cause remanded.