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LAL BAHADUR v. KANHAIYA LAL.

will constitute my estate on my death and which are my self-acquired properties."

In the view which their Lordships take of this case, there were no properties of Durga Prasad at the time of his death which, according to Hindu law, could be classified as self-acquired, and the will is therefore inoperative to defeat the claim of the younger sons to a share in the family estate. They will therefore humbly advise His Majesty that the appeal ought to be allowed and the judgment of the High Court reversed with costs, and that the decree of the Subordinate Judge of Bareilly, dated 30th March 1898, ought to be confirmed. The respondent must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants :—*T. C. Summerhays & Son.*

Solicitors for the respondent :—*Barrow, Rogers & Nevill.*

J. V. W.

APPELLATE CIVIL.

1906
November 30.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

PREONATH MUKERJI (PLAINTIFF) *v.* BISHNATH PRASAD (DEFENDANT).*

Civil Procedure Code, section 43—*Suit for fees for medical attendance —Fees partly secured by a promissory note—Separate suits upon the promissory note and for the unsecured balance—Latter suit barred.*

A, a doctor, agreed with *B* to accompany *B* to Hardwar as his medical attendant on a fee of Rs. 100 a day. After seven days *B* gave *A* a promissory note for Rs. 700, representing seven days' fees. *B*, who was a vakil, also promised to assist A professionally in certain litigation. *B*, however, died before he could fulfil his agreement to render professional services. *A* sued B's son upon the promissory note first, and subsequently in a separate suit for the balance of his fees for attendance at Hardwar under the alleged agreement and for fees for later attendance at Benares. *Held* that the second suit was barred by the provisions of section 43 of the Code of Civil Procedure so far as the fees for attendance at Hardwar were concerned, though not in respect of the other fees claimed.

IN this case the plaintiff had been the medical attendant of the father of the defendant. The plaintiff alleged that in June

* Second Appeal No. 705 of 1905, from a decree of G. A. Paterson, Esq., District Judge of Benares, dated the 6th of June 1905, confirming a decree of Babu Hira Lal Sinha, Munsif of Benares, dated the 13th of February 1905.

1903, when his patient Raghunath Prasad was seriously ill, he accompanied him to Hardwar as medical attendant on the express agreement that he would receive as remuneration Rs. 100 per diem. The plaintiff says that he treated Raghunath Prasad at Hardwar for 13 days, and, therefore, according to the contract, in respect of this attendance he was entitled to a sum of Rs. 1,300. He alleges that on the 13th of July 1903, Raghunath Prasad executed a promissory note in his favour for Rs. 700 in respect of the fees for seven days and undertook to act as his pleader in certain legal proceedings instituted by the plaintiff in lieu of the fees, amounting to Rs. 600, for the remaining six days. Raghunath Prasad died on the 26th of October 1903, and so was unable to render any legal assistance to the plaintiff in the suit in question. After the death of Raghunath Prasad, the plaintiff instituted a suit against his son Bishnath Prasad, the present defendant, to recover the amount due on the promissory note abovementioned. The present suit was brought to recover fees for the remaining six days at Hardwar, as well as for subsequent attendance at Benares from the 21st October 1903 to the 26th October 1903. The Court of first instance (Munsif of Benares) gave the plaintiff a decree in one suit for Rs. 700 on the promissory note, but dismissed the other suit on the merits. On appeal the District Judge confirmed the Munsif's decree in the second (the present) suit holding that sections 43 and 45 of the Code of Civil Procedure barred the claim. The plaintiff appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellant.

Mr. *W. Wallach* and Babu *Satya Narain*, for the respondent.

STANLEY, C.J., and BURKITT, J.—This appeal arises out of a suit which was instituted by the plaintiff to recover fees alleged to be due to him by the defendant in respect of the medical treatment of the late Babu Raghunath Prasad, the father of the defendant, and also fees for the treatment of the defendant. The Courts below have dismissed the suit on the ground that an earlier suit was instituted, which is said to have been in respect of the same cause of action. That was a suit for Rs. 700 for fees for seven days out of thirteen days in which the plaintiff attended at Hardwar upon Raghunath Prasad. The lower appellate Court held

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that the claim now put forward, which is in respect of fees for the remaining six days of the thirteen and for fees of later attendances, ought to have been put forward in the former suit, and not having been put forward in that suit, it is barred by the provisions of section 43 of the Code of Civil Procedure. That section provides that every suit shall include the whole claim which the plaintiff is entitled to make in respect of the cause of action. The facts as alleged by the plaintiff are, that in the month of June 1903, when Raghunath Prasad was seriously ill, he accompanied him to Hardwar as medical attendant on the express agreement that he would receive as remuneration Rs. 100 per diem. The plaintiff says that he treated Raghunath Prasad at Hardwar for thirteen days, and therefore, according to the contract, in respect of this attendance he was entitled to a sum of Rs. 1,300. He alleges that on the 13th of July 1903, Raghunath Prasad executed a promissory note in his favour for Rs. 700 in respect of the fees for seven days and undertook to act as his pleader in certain legal proceedings instituted by the plaintiff in lieu of the fees amounting to Rs. 600 for the remaining six days. Raghunath Prasad died on the 26th of October 1903, and so was unable to render any legal assistance to the plaintiff in the suit in question. The plaintiff now claims in the present suit the recovery of the Rs. 600 remaining unpaid, as also fees in respect of subsequent attendance at Benares upon Raghunath Prasad and the defendant from the 21st of October 1903 to the 26th of October 1903. The lower appellate Court has, as we have said, held that suit is barred by the provisions of section 43.

As regards the claim in respect of the Rs. 600 which is alleged to be payable under the agreement entered into for the treatment of Raghunath Prasad at Hardwar, we think the lower appellate Court was right. The cause of action which is set up in this case, so far as regards the attendances at Hardwar, is the same cause of action as gave rise to the earlier suit. The cause of action was in reality the breach of the agreement alleged in the second paragraph of the plaint to pay a fee of Rs. 100 per day for the attendance of the plaintiff on Raghunath Prasad at Hardwar. It is true that Raghunath Prasad executed a promissory note to secure the payment of Rs. 700 on account of fees for seven days, but the

fact that this security was given does not take the case out of section 43 because of the proviso to that section, which is in the following terms :—" For the purposes of this section an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action." The contention, therefore, that the cause of action on the promissory note is one cause of action, and the cause of action for the recovery of the balance of Rs. 600 forms another cause of action, is not well founded. The cause of action is in reality, as we have said, the breach of the agreement to pay Rs. 100 per diem for attendance at Hardwar. When then the plaintiff instituted his suit for the recovery of the amount of the promissory note he ought in our judgment, to have included in his claim a claim for the balance of Rs. 600. Owing to the death of Raghunath Prasad the agreement which he had entered into to appear as a pleader for the plaintiff in satisfaction of portion of the claim, became incapable of being fulfilled, and this occurred before the institution of the plantiff's first suit. At that time the plaintiff was in a position to fall back upon the provisions of the agreement as it originally stood. We therefore think that as regards this portion of the claim the appeal must fail.

The claim, however, includes a claim for fees for attendance at Benares in the month of October 1903. This attendance was not provided for in the agreement which is set forth in paragraph 2 of the plaint. The same considerations, therefore, do not apply to it. It really is a claim for reasonable remuneration for services rendered by the plaintiff to Raghunath Prasad and his family and does not come within the purview of the earlier agreement. In respect of this matter it would appear that a separate cause of action arose. This indeed the learned counsel for the defendant respondent admits.

We therefore must allow the appeal as regards this portion of the claim for medical attendance at Benares from the 21st of October to the 26th of October 1903. This portion of the claim the learned District Judge has not considered. He has peremptorily disposed of it as being obnoxious to the provisions of section 43. We think that that section does not preclude the plaintiff from pressing this portion of his claim. We, therefore, so far as this portion of the claim is concerned, set aside the decree of the lower

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appellate Court and remand the appeal to that Court with directions that it be re-admitted on the file of pending appeals in its original number and be disposed of on the merits. In all other respects the appeal is dismissed. We think that under the circumstances the respondent is entitled to half the costs of this appeal, and we so direct. We say nothing as to the costs of the plaintiff appellant.

Decree modified.

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December 18.

Before Mr. Justice Sir George Knox.

PIRBHU NARAIN SINGH (DECREE-HOLDER) v. BALDEO MISRA (JUDGMENT-DEBTOR).*

Act No. IV of 1882 *(Transfer of Property Act), section* 90—*Mortgage—Mortgaged property totally incapable of being sold—Decree under section* 90 *not obtainable.*

Where property mortgaged was property which the mortgagee could by no possibility bring to sale in execution of a decree under his mortgage, it was *held* that no decree over under section 90 of the Transfer of Property Act, 1882, could be granted. *Kedar Nath* v. *Chandu Mal* (1) distinguished.

THIS was an application by a mortgagee for a decree over under section 90 of the Transfer of Property Act, 1882, based upon the ground that inasmuch as the property mortgaged had been found not to belong to the mortgagor at all, the mortgagee was entitled to the remedy sought. The Court of first instance (Munsif of Benares) dismissed the application, and this order was affirmed by the District Judge on appeal. The decree-holder appealed to the High Court, which remitted an issue as to the interest possessed at the time of the mortgage and at the time of the application under section 90 by the mortgagor in the mortgaged property. The finding returned was that the mortgagor had no rights in the holding mortgaged at either time.

The Hon'ble Pandit *Sundar Lal* and Munshi *Gokul Prasad*, for the appellant.

The respondent was not represented.

KNOX, J.—The finding to the issue sent down is to the effect that the property mortgaged is an occupancy holding of which the

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* Second Appeal No. 290 of 1905, from a decree of G. A. Paterson, Esq., District Judge of Benares, dated the 13th of January 1905, confirming a decree of Babu Hira Lal Sinha, Munsif of Benares, dated the 1st of October 1904.

(1) (1903) I. L. R., 26 All., 25.