

1911  
January 25.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

KANTI CHANDRA MUKERJI, (PLAINTIFF) v. AL-I-NABI AND OTHERS  
(DEFENDANTS)\*

*Act No. IV of 1882 (Transfer of Property Act), section 6—Transfer of expectancy—Compromise between Hindu brothers that property of a brother during without male issue should be divided amongst survivors. —Hindu law—Dayabhaga—Administration—Suit to enforce administration bond—Limitation.*

Held that a provision in a family settlement whereby certain Hindu brothers divided the family property belonging to them amongst themselves and agreed that upon the death of any one of them without male issue his share should pass to the surviving brothers was neither in contravention of Hindu Law nor obnoxious to the provisions of the Transfer of Property Act, section 6(a), as being a transfer of an expectant interest in property. *Ram Nirunjun Singh v. Prayag Singh* (1) followed.

Held, also, that where the assignee of a bond given by an executor for the due administration of the estate sues to enforce the bond, time does not begin to run against him necessarily until the death of the obligor.

THE facts of this case were as follows:—

One Durga Shankar Bhattacharji was one of the executors to the will of one Musammat Shib Kali Debia. He obtained probate from the District Judge of Benares on the 12th of June, 1899. On the 21st of June, 1899, an administration bond was executed by Durga Shankar and the defendants, Syed Al-i-Nabi and Syed Shah Ta adduk Husain, as his sureties for the due administration of the estate of Musammat Shibkali. The plaintiff, who is the step-son of Musammat Shibkali, came into court alleging that the assets of the deceased were misappropriated, and consequently the plaintiff had to apply for letters of administration with the copy of the will annexed, which were granted to him on the 16th August, 1904, by the District Judge of Benares. Therefore the plaintiff applied for assignment of the administration bond, and the bond was transferred to him on the 10th of April, 1907. The plaintiff brought the present suit on the 16th June 1907, to recover from the representatives of Durga Shankar (who had since died), viz., his brother's nephew and widow, and also from the sureties, the

\* First Appeal No. 263 of 1909 from a decree of E. H. Ashworth, District Judge of Benares, dated the 20th of May, 1909.

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amount of the assets which had been misappropriated by Durga Shankar.

The District Judge of Benares decreed the plaintiff's claim as against the sureties and also against the widow of Durga Shankar to the extent of Rs. 4,891-8-0, but dismissed the suit as against the brothers and nephew of Durga Shankar, on the ground that they were neither the legal representatives of Durga Shankar nor in possession of any of his property.

The plaintiff appealed against the decree of the court below dismissing his claim as against the brothers and nephew of Durga Shankar.

Babu *Jogindro Nath Chaudhri* (with him *Dr. Satish Chandra Banerji*, *Babu Satya Chandra Mukerji* and *Babu Surendra Nath Sen*), on behalf of the appellant, contended that the evidence on the record proved that the brothers and nephew are in possession of the assets of the deceased Durga Shankar, that the agreement of compromise, which was on the record, and which was made the subject of a decree of court long before the present suit was brought, in the course of a litigation between Durga Shankar and his brothers, provided that in the event of the death of any of the brothers without male issue, his property would devolve on the surviving brothers in equal shares, subject to certain conditions, and as Durga Shankar had died without male issue, his brothers and nephew were his heirs and legal representatives. He relied mainly on *Ram Nirunjun Singh v. Prayag Singh* (1), and also on the definition of the words "legal representative" as given in section 52 of the Code of Civil Procedure.

*Dr. Tej Bahadur Sapru* (with him *Babu Beni Madhub Ghosh*), on behalf of one of the brothers and the nephew of Durga Shankar contended that the provision in the compromise was repugnant to the Hindu law of succession and that the brothers and nephew of Durga Shankar had not been properly sued, inasmuch as they did not represent Durga Shankar's estate. He further contended that the provision in the agreement of compromise relied on by the plaintiff appellant purported to be a

(1) (1881) I. L. R., 8 Calc., 138.

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transfer of a mere expectancy and was in contravention of section 6 (a) of the Transfer of Property Act.

STANLEY, C. J., and BANERJI J., :—This appeal arises under the following circumstances :—One Musammat Shib Kali Debia of Benares made a will on the 11th of January, 1891, and thereby bequeathed her property for certain purposes and appointed six persons executors. She died on the 8th of April, 1897, and thereupon an application for probate was made by one of the executors, Durga Shankar, now deceased, and probate was granted to him on the 12th of June, 1899. On the 21st of June, 1899, an administration bond was executed by Durga Shankar and the defendants, Syed Ali-i-Nabi and Syed Shah Tasadduk Husain, as his sureties for the due administration of the estate of Musammat Shib Kali Debia. In this bond the executants undertook responsibility for the due administration of the estate by Durga Shankar, and it was provided by it that the obligation under the bond was to remain in force until Durga Shankar had discharged the duties of the administration of the estate. Durga Shankar did not administer the assets as he had undertaken to do, but misappropriated them, and in consequence the plaintiff, who is the step-son of Musammat Shib Kali Debia, applied for letters of administration of her estate with the will annexed, and such letters were granted to him on the 16th of August, 1904. He further applied to the District Judge for an assignment of the administration bond executed by Durga Shankar and his sureties, and this bond was transferred to him on the 10th of April, 1907.

The suit out of which this appeal has arisen was then instituted by the plaintiff to recover from the representatives of Durga Shankar, including his widow, and also from the sureties, the amount of the assets which had been misappropriated by Durga Shankar.

A defence to the suit was filed by both the sureties and also by Bishnu Shankar, one of the brothers of Durga Shankar.

The court below decreed the plaintiff's claim as against the sureties and also as against the widow of Durga Shankar to the extent of Rs. 4,891-8-0. The decree was passed against the defendants 1 and 2 as sureties only and as against the widow of Durga Shankar as his heir. The claim was dismissed as

against the defendants 3—6, who are three of the brothers and a nephew of Durga Shankar.

This appeal has been preferred by the plaintiff, and the contention put forward on his behalf is that the court below was wrong in dismissing the suit as against the defendants, 3 to 6. These defendants, as we have said, are the brothers and a nephew of Durga Shankar, and liability is sought to be fixed on them by reason of the following facts. Prior to the 11th of October, 1890, Durga Shankar and his brothers and a nephew had disputes in regard to family property. They entered into a compromise whereby the ancestral property was divided between them and this compromise was subsequently embodied in a decree. One of the terms of the compromise was that if Durga Shankar or any of his brothers should die without leaving male issue, then the surviving brother would by division in equal shares take possession of and enjoy and appropriate the share of the person so dying. Durga Shankar having died without male issue, the allegation of the plaintiff is that his share of the property comprised in the aforesaid compromise and decree passed to his brother and nephews and that the defendants, the brothers and one of the nephews of Durga Shankar, are actually in possession of Durga Shankar's share of the family property.

In the written statement of Bishnu Shankar it is denied by him that he is in possession of any property left by Durga Shankar. He states that after the death of Durga Shankar he, along with the other members of the family, paid debts due by Durga Shankar and had been paying Rs. 25 per mensem to the widow of Durga Shankar, namely, the defendant, Musamat Sarojini Debia, for her maintenance; and he put forward the defence that if any portion of the property possessed by him were considered to be of the estate of Durga Shankar, having regard to the above facts he could in no wise be held responsible to pay the amount claimed.

The surety Al-i-Nabi was examined, and he in his evidence, which has not been controverted, alleged that the property which belonged to Durga Shankar was still in the possession of his heirs, namely, Bhikari Shankar, Bishnu Shankar, Sarat Shankar, and Addiya Shankar, his brothers,

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and Musammat Sarojini Debi, his widow. This evidence was, as we have said, not controverted, and it shows that the property of Durga Shankar did pass under the compromise upon his death into the hands of his brothers.

The question, then, for our determination is whether or not the court below was right in exempting the brothers and nephew, defendants 3 to 6, from the operation of the decree. It is contended on their behalf that the provision in the compromise which provided that on the death of any brother without male issue his share shall go to the other brothers is repugnant to Hindu Law being repugnant to the ordinary rule of succession to property and that the defendants 3 to 6 have not been properly sued, inasmuch as they do not represent Durga Shankar's estate. It is said that the parties are governed by the Dayabhaga School of law and that the widow of Durga Shankar is his heir, and, as such, entitled to the estate of Durga Shankar. It is further contended that the provision to which we have referred above purports to be a transfer of a mere expectancy and is in contravention of section 6 (a) of the Transfer of Property Act. We are of opinion that there is no force in this contention. Durga Shankar was not dealing with an expectant interest in property. He and the other parties to the agreement of compromise were dealing with the property, which at the time belonged to them, and we are unable to hold that a provision, whereby, upon a family settlement, such as this was, brothers agreed that upon the death of any of them without male issue the share to which he should be entitled, should go to the other brothers, is in contravention of Hindu Law, or obnoxious to the provisions of the Transfer of Property Act.

This case is very similar to the case of *Ram Nirunjun Singh v. Prayag Singh* (1). In that case two of four brothers had disputes in regard to the property of their father. They entered into a compromise for themselves, and one of them also as guardian of his two minor brothers, whereby it was agreed that with the exception of certain trust property the estate of their father should be divided equally between the four brothers,

(1) I. L. R., 8 Cal., 138.

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with this provision superadded that "if any of the brothers should die without any issue, then the surviving brothers should succeed to his heritage in equal shares, none of them having any claim or contention against the other on the score of commensality or joint tenancy." It was contended in that case that this provision was repugnant to Hindu Law and could not therefore be enforced. MITTER and MACLEAN, JJ., held that there was nothing in the Hindu Law which made such an agreement illegal. The provision in the present case is similar to that which was considered in case just cited, and we see no good reason for disagreeing with the views of the learned Judges who decided it. Defendants 3-6 ought not, therefore, to have been exempted from liability as representatives of Durga Shankar.

It may be that they have not received any portion of the assets of Durga Shankar, and it may be that they will not recover any portion of his assets; but if this be so, they will not be damnified by the decree which we propose to pass against them. These defendants are representatives of the deceased Durga Shankar within the meaning attached to that term by the Code of Civil Procedure. A representative means a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of a deceased person. Section 52 of the Code prescribes the mode of execution of a decree against such a representative. A plaintiff has a right to sue the representatives of his deceased debtor and to obtain a decree against them, although it is not proved that assets have come into their hands. It is sufficient to prove that there are assets of which they may become possessed. In this case the existence of assets is not denied. We, therefore, upon this question, overrule the decision of the court below.

The only remaining question is raised in the connected cross appeal. It is an appeal on the part of one of the sureties, Syed Ali-i-Nabi, and the only ground of appeal which has been pressed before us in argument is the first, namely, that the suit is time-barred. The contention of this defendant is that one of the provisions of the bond was that an

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inventory should be exhibited within a certain time, and that on a breach of this condition of the bond time began to run as against the sureties and the suit is time-barred. We do not think that the date on which one of the conditions of the bond was broken is the starting point from which limitation is to be calculated in a case such as the present in which the plaintiff's case is that Durga Shankar in his lifetime failed to administer the assets of the deceased. The bond itself, as we have pointed out, expressly provides that the obligation undertaken in it was to remain in force until Durga Shankar fulfilled the duties of the administration of the estate, probate of which had been granted to him. Durga Shankar died on the 12th July, 1903. Time did not begin to run against the plaintiff until his death, and six years did not elapse between the date of the death of Durga Shankar and the bringing of the suit.

The appeal therefore of Syed Ali-i-Nabi must be dismissed. We vary the decree of the court below, and we give a decree to the plaintiff for Rs. 4,891-8-0 against the defendants 1 and 2 as sureties, to be satisfied by them jointly and severally, and against the defendants 3—7, to be satisfied out of any assets of Durga Shankar which have come to or may hereafter come to their hands. The costs of this appeal will be borne by the defendants 3—6. Those defendants and defendant No. 7 will bear their own costs in both courts. In other respects we affirm the decree of the court below.

*Decree varied.*