PRIVY COUNCIL.

P. C.*
1912
May 8, 9, 10.
June 13.

SAJJAD HUSAIN AND ANOTHER (PLAINTIFFS) v. WAZIR ALI KHAN AND OTHERS (DEFENDANTS).

[On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.]

Parda-nashin lady—Execution of deed depriving herself of nearly all her property—Burden of proof—Requisites to be proved—Concurrent findings on facts that burden had not been discharged—First court's decision on that point affirmed by appellate court—Finding sufficient to dispose of case.

A parda-nashin lady, separated from her husband, unable to read or write, and without independent legal advice, created an endowment of practically her whole property by a deed of which she appointed the appellants (plaintiffs) trustees. In a suit for a declaration that the property was waqf and for possession of it.

Held that, as they relied upon the deed, the onus was on the appellants to show that the nature and effect of it had, at the time of its execution, been explained to and understood by the executant.

Shambati Koeri v. *Jago Bibi* (1) followed.

Upon the question whether that onus had been discharged, the appellate court in India affirmed the decision of the first court to the effect that it had not; but nevertheless allowed an appeal to His Majesty in Council under section 596 of the Civil Procedure Code (XIV of 1822) on the ground that the judgement of the lower court had not been *wholly* affirmed.

Held that the findings of the Courts below amounted to concurrent findings of fact which could not be disturbed on appeal, and there being no "substantial question of law" the appeal must be dismissed. *Karuppanan Servai* v. *Srinivasan Chetti* (2) followed.

Appeal from a judgement and decree (27th March 1907) of the Court of the Judicial Commissioner of Oudh, which varied a decree (30th March 1906) of the Subordinate Judge of Lucknow, by which the appellants' suit was wholly dismissed.

The suit was brought to obtain a declaration that the property specified in three deeds, dated respectively the 4th of December, 1886, the 7th of March, 1898, and the 13th of November, 1902, was waqf (endowed property), and for separate possession of all the properties as against the first defendant, Nawab Abid Husain Khan, or in the alternative, joint possession of the properties with him. The plaintiffs' claim was dismissed by the Subordinate Judge, but the Court of the Judicial Commissioner, on appeal, while affirming the decree as regarded the deed of the 13th

* *Present* :—Lord SHAW, SIR JOHN EDGE, and MR. AMEER ALI.

(1) (1902) I. L. R., 29 Calc., 749 ; L. R. 29 I. A., 127.

(2) (1901) I. L. R., 25 Mad., 215 : L. R. 29 I. A., 38.

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of November, 1902, reversed it with respect to the property included in the deeds of the 4th of December, 1886, and the 7th of March, 1898. The plaintiffs obtained in India leave to appeal to His Majesty in Council against that portion of the judgement and decree of the Appellate Court which affirmed the decree of the Subordinate Judge. The present appeal therefore related only to the portion of the case with which the deed of the 13th of November, 1902, was concerned.

The *facts, shortly stated*, were that the deed of the 4th of December, 1886, was a waqf-nama, or deed of endowment, which was executed by one Madad Ali and dedicated the properties mentioned therein for the maintenance of a tomb erected by him in the city of Lucknow, and for other purposes. He appointed two ladies, Sardar Begam and Mehdi Begam, trustees of the properties, giving them power to nominate their successors. Sardar Begam died in December, 1889, and Mehdi Begam continued to manage the property alone. On the 7th of March, 1898, Mehdi Begam executed a deed by which she added property to the endowment, and appointed Mirza Sajjad Husain, the first plaintiff, and Nawab Abid Husain Khan, the first defendant, to be trustees of the whole of the endowed property.

On the 13th of November, 1902, Mehdi Begam executed another deed by which she added other property of the value of about Rs. 43,000 to that already endowed, and appointed herself Mirza Sajjad Husain and Nawab Wazir Ali Khan, and the second defendant Basti Begam to be the trustees.

Mehdi Begam died in February, 1903, and Nawab Abid Husain Khan succeeded, as the brother and heir of the deceased, in obtaining possession from the Revenue Court of all her property. On the 27th of April, 1904, Umrao Mirza, the second plaintiff, was appointed a trustee of the endowed property by Basti Begam, the second defendant, who retired from the trust.

The main defence to the suit was contained in the written statement of the first defendant, and so far as it related to the deed of the 13th of November, 1902, was to the effect that that deed was not executed by Mehdi Begam; and that she was, at the time of the alleged execution by her, infirm and incapable of understanding it, and that she had no independent advice.

As to that the Subordinate Judge said :—

"There is on this record no evidence except that of Babu Salig Ram, and it is not specific and connected with the transaction in question, that Mehdi Begam took independent advice before she executed the deed of November, 1902. The evidence of Mathura Prasad and of the others who were present at the registration of the document also falls short of the required standard. It does not satisfy me that Mehdi Begam intelligently understood the deed on which she was placing her seal and knew at the time its effects upon her rights as owner of the property comprised in the deed.

"Although on the whole there is no sufficient ground for holding that Mehdi Begam did not execute the document, the original of exhibit No. 3, its intelligent execution by her has not been proved. In my opinion the document is not such as should be given effect to. Proof of a mere formal execution by an illiterate parda-nashin in favour of her mukhtar is wholly insufficient."

On appeal the Court of the Judicial Commissioner (MR. E. CHAMIER, First Additional Judicial Commissioner, and MR. J. SANDERS, Second Additional Judicial Commissioner).said :—

"I now come to the question whether intelligent execution of the deed of the 13th of November, 1902, was proved. Mehdi Begam was an illiterate parda-nashin woman separated from her husband under circumstances which are stated in *Suleman Kadr* v. *Mehdi Begum Surreya Bahu* (1). The effect of the deed of 1902, if valid, appears to have been to strip her of almost all her property, for it left her in possession of some movable property not shown to be of any great value, and a wasika and pension which brought her in less than Rs. 40 per mensem. The deed was registered not at her house where she lived with her brother but at the *Rauza*. Under these circumstances any one who relies upon the deed must prove that she understood its effect upon her position and probably also that she had independent advice."

And after discussing the evidence, the judgement concluded thus :—

"The learned pleader for the plaintiffs frankly stated that he could not ask us on the oral evidence alone to hold that Mehdi Begam understood the waqf-nama. He relied on what he called the circumstantial evidence. He contended that Mehdi Begam had proved herself capable of managing the affairs of the *Rauza* for many years and he pointed out that it was admitted that she had executed the waqf-nama of 1898, and it was not suggested that she had not understood it. But the deeds differ greatly from each other ; one dealt with a small portion of her property, the other disposed of practically the whole of it. We know nothing of the management of the affairs of the *Rauza* by the Begam, and it is impossible to say how much was done for her by the first plaintiff. There is a provision in the deed of November, 1902, by which the first plaintiff and second defendant are authorized to appoint their successors, but this power is withheld from the first defendant, though he is the brother of the Begam.

"It has not been proved that when Mehdi Begam executed the waqf-nama she understood its provisions or its effect upon her interests. The deed of 1898

(1) (1893) I. L. R., 21 Calc., 135 : L. R., 20 I. A., 144.

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was revocable and she may well have understood that the deed of 1902 also was revocable, and it is impossible to say whether she would have executed it had she known that she was stripping herself irrevocably of practically the whole of her property.

"For the above reasons I would confirm the decree of the Court below as regards the waqf-nama of November, 1902."

Leave to appeal from the above decision to His Majesty in Council was given by the Court of the Judicial Commissioner (MR. L. G. EVANS, First Additional Judicial Commissioner, and MR. H. D GRIFFIN, Second Additional Judicial Commissioner) on the ground "that the decision of the Court below was not wholly affirmed by this Court, although the applicants only propose to appeal against that portion of the judgement which affirms the decision of the Court below."

On this appeal—

Sir *Erle Richards*, *K. C.*, and *Ross* for the appellants contended that the Court of the Judicial Commissioner had wrongly held that the intelligent and proper execution of the deed of 13th November, 1902, by Mehdi Begam had not been proved by the appellants, and that the deed was consequently invalid; and it was submitted that in the absence of any rebutting evidence on the part of the respondent, the evidence given by the appellants was sufficient to prove their case. Under the circumstances with regard to the position of the lady the onus was on the respondent to impeach the deed. Reference was made to *Suleman Kadr* v. *Mehdi Begum Surreya Bahu* (1); *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan* (2); *Ashgar Ali* v. *Delroos Banoo Begum* (3); *Sudisht Lal* v. *Mussamut Sheobarat Koer* (4); *Mahomed Buksh Khan* v. *Hosseini Bibi*; (5) *Hakim Muhammad Ikram-ud-din* v. *Najiban* (6); and *Shambati Koeri* v. *Jago Bibi* (7).

The finding of the Judicial Commissioner's Court was not a finding of fact, but a mere statement that the onus had not been discharged, and the onus had been placed on the wrong party.

(1) (1893) I. L. R., 21 Calc., 135; L. R., 20 I.A., 144.

(2) (1874) L. R., 1 I. A., 192 (204).

(3) (1877) I. L. R., 3 Calc., 324 (328).

(4) (1881) I. L. R., 7 Calc., 245 (250): L. R., 8 I. A., 39 (43).

(5) (1888) I. L. R., 15 Calc., 684 (694, 698, 699): L. R., 15 I. A., 81 (83, 86, 90).

(6) (1893) I. L. R., 20 All., 447; L. R., 25 I. A., 137.

(7) (1902) I. L. R., 29 Calc., 749: L. R. 29 I. A., 127.

De Gruyther, K. C., and *Cowell* for the respondent Basti Begam contended that the onus was on the appellants and they had failed to discharge it. The case was in the nature of an action in ejectment in which the plaintiff had to prove his title. No case decided on facts could be an authority on another case on facts: each case must be decided on its own facts. Reference was made to *London Joint Stock Bank* v. *Simmons* (1), where the argument of Sir H. Davey to that effect was accepted by Lord Halsbury, L. C., and to *Shambati Koeri* v. *Jago Bibi* (2), where it was laid down, following the case of *Sudisht Lal* v. *Sheobarat Koer* (3), that in the matter of deeds executed by parda-nashin ladies it is requisite that those who rely upon them should satisfy the Court that they had been explained to and understood by those who execute them. The appellants were here relying on the deed, and the onus was on them. The question whether the Court was satisfied was a pure question of fact, namely, whether on the evidence given the party on whom the onus lay had discharged it or not. There was no evidence to show that the deed of 1902 was read out and explained to Mehdi Begam, and she had no independent legal advice before executing it, and yet the deed purported to get rid of her whole property. There were, on the other hand, concurrent findings of fact that she did not understand the provisions of the deed, nor its effect upon her interests. The rule as not disturbing the concurrent findings of fact of the Courts below should be applied in this case. Reference was made to *Ram Anugra Narain Singh* v. *Chowdhry Hanuman Sahai* (4), *Karuppanan Servai* v. *Srinivasan Chetti* (5) and *Allen* v. *Quebec Warehouse Company* (6). It was not necessary that the appellate Court should affirm the decision of the first Court on every question of fact, and there was no "substantial question of law" within the meaning of section 596 of the Civil Procedure Code, 1882.

Sir *Erle Richards, K. C.*, in reply contended that there had been an error in the way the facts had been dealt with by the first Court.

(1) (1892) L. R., A. C., (201, 203, 208.)

(2) (1902) I. L. R., 29 Calc., 749 (757): L. R., 29 I. A., 127 (130, 131.)

(3) (1881) I. L. R., 7 Calc., 245 (250): L. R., 8 I. A., 39 (43).

(4) (1902) I. L. R., 30 Calc., 303; L. R., 30 I. A., 41.

(5) (1901) I. L. R., 25 Mad., 215 (219) L. R., 39 I. A., 38 (39).

(6) (1886) L. R., 12 A. C., 101 (104, 105).

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The Subordinate Judge ought to have considered the conduct of Mehdi Begam in relation to the trust created, and not having done so he had misdirected himself. In saying that the sole question was as to the execution of the deed the Court had also misdirected itself. The point of law here was that in considering the question of Mehdi Begam's understanding a document which she executed, the position, ability, knowledge and habits of the lady were not taken into consideration as should have been done. Reference was made to *Mahomed Buksh Khan* v. *Hosseini Bibi* (1) where the result of all the cases was summed up.

1912, *June 13th* :—The judgement of their Lordships was delivered by LORD SHAW :—

This is an appeal from a judgement and decree of the Court of the Judicial Commissioner of Oudh, dated the 27th March, 1907, modifying a decree of the Subordinate Judge of Lucknow, dated the 30th March, 1906. The suit was brought on the 1st April, 1905.

It prayed for a declaration that all the property comprised in three deeds of endowment was waqf, that is to say, was endowed property, and the plaintiffs (the present appellants) as trustees under these deeds prayed for possession. The claim in short was, as stated, a "claim for possession of waqf property by right of trusteeship."

The claim of the appellants was dismissed by the Subordinate Judge in its entirety. Upon appeal, the appellate Court upheld this decree with respect to the property comprised in one of the three deeds of endowment, viz., that of the 13th of November, 1902, and reversed it with respect to the property included in the other two deeds. That is to say, the endowments under these two deeds were held good.

The only question raised in the present appeal has reference to the last endowment, viz., that constituted by the deed of 1902. The preceding deeds, one dated in 1886 and one in 1898, were somewhat limited in their character, and the defendants' contention under which these deeds were attacked is not now further insisted on.

Many years ago a tomb, or, more properly speaking—as their Lordships are informed—a mausoleum, was erected in the city of Lucknow by one Madad Ali, now dead; and in 1886 he made a waqf of certain property for the upkeep of the mausoleum and the

(1) (1888) I. L. R., 15 Calc., 684 (698, 699) : L. R., 15 I. A., 81 (92, 93.)

performance of religious observances in connection therewith. By the deed of endowment, Mehdi Begam was appointed one of two trustees, and upon the death of her co-trustee in 1899 she continued to manage the property alone. In March, 1898, she executed a document whereby she purported to add to the endowment, and she appointed the first plaintiff and her brother, the first defendant, to be trustees of the original and added property. There appears to be no doubt that Mehdi Begam was much interested in the mausoleum and in its endowment, its upkeep and its services. She died on the 4th of February, 1903, having on the previous 13th day of November executed another deed—that with regard to which the parties are now in contention.

Mehdi Begam was a parda-nashin woman; she was separated from her husband; she was unable to read or write, and she was possessed at the date of the deed which is questioned of a fortune of about Rs. 50,000. It is not disputed that in the ordinary case of a deed granted by a parda-nashin lady, it rests upon those founding upon the document to establish that she understood its effect and that the deed was intelligently and properly executed by her.

The waqf is undoubtedly of a comprehensive character. It proceeds upon the following narrative:—

"Whereas this world is unstable and no reliance can be placed on this borrowed life, and after death there remains no trace either of soul or body, and whosoever has come to this world from non-existence will be completely annihilated one day, according to the proverb 'all that lies over it is mortal'; but through good and charitable deeds, or from one's male issue, if he is good and obedient, the continuance of one's name is possible. I, the declarant, have no issue of any kind from whom I may hope for the endurance of my name, consequently it seems proper to incline myself to the performance of good deeds."

The deed thereupon proceeds to endow:—

"With possession in the name of the undermentioned places in my lifetime in connection with the *Rouza* and for its maintenance, stability, and expenses, and also for sending people to Karbala and other holy places, as detailed below my personal, movable and immovable property, as specified hereafter, valued at Rs. 50,000."

She constituted herself as *mutawalli*, that is, as the manager of the religious endowment, and she appointed her brother and her general agent as trustees. Among the succeeding clauses the following appears to be important:—

"That the trustees shall in my lifetime, as well as after my death, continue to manage the undermentioned things just like myself, and the carrying out of

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the undermentioned things and of the above conditions shall also be binding and incumbent on me, as it is incumbent according to the *Imamia* law. And for my livelihood my *wasika* and pension are sufficient."

That pension amounted, as is admitted, to somewhere under Rs. 40 per month. Power is given for collection of the income of all property conveyed, such collection to vest only in the general agent, who was one of the trustees.

The document may be described shortly as an *inter vivos* conveyance, taking effect *de presenti* and stripping the lady of all her possessions, except to the extent of the reservation made to herself of her pension of Rs. 40 per month. It appears to their Lordships that the deed accordingly is of a character justifying a strict and careful application of the rule operating for the protection of *parda-nashin* women and demanding affirmative proof on the subject of their intelligent understanding and execution of deeds attributed to them. This view is strengthened by the marked contrast which exists between this document of 1902 and the previous deed of endowment of 1898, which was limited in its scope, was purely testamentary, and expressly reserved powers of management of all the affairs of the endowed property to the lady herself, with power of amending and cancelling the endowment.

"According to the principles which have always guided the Courts in dealing with sales or gifts made by ladies in such a position (*parda-nashin* ladies), the strongest and most satisfactory proof ought to be given by the person who claims under a sale or gift from them, that the transaction was a real and *bonâ fide* one and fully understood by the lady whose property is dealt with."

This is the language of Sir Montagu Smith in *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan* (1) and is still the law. In the words of Sir Andrew Scoble in *Shambati Koeri* v. *Jago Bibi* (2)—

"It is a well-known rule of this Committee that in the case of deeds and powers executed by *parda-nashin* ladies, it is requisite that those who rely upon them should satisfy the Court that they have been explained to and understood by those who executed them."

Accordingly, the one and only question in this case is:—the burden of proof being thus placed, has it been discharged by the party upon whom it rests? In their Lordships' opinion, Mr. *De Gruyther* was justified in founding upon the concurrent findings

(1) (1874) L. R., 1 I. A., 192 (206); 13 B. L. R., 427 (430, 431).

(2) (1902) I. L. R., 29 Calc., 749; (757) L. R., 29 I. A., 127 (131).

on fact of the Courts below. The Subordinate Judge, having heard the evidence, says :—

"It does not satisfy me that Mehdi Begam intelligently understood the deed on which she was placing her seal, and knew at the time its effects upon her rights as owner of the property comprised in the deed."

It is unnecessary to go into the details as to the alleged execution of the document in the zenana, as to whether certain witnesses knew the voice of the executant, as to whether the deed in point of fact was read, or was read in circumstances giving any indication of its appreciation by the grantor. The finding of the Subordinate Judge is as stated. In the judgement passed by the Court of the Judicial Commissioner of Oudh the opinion expressed was as follows :—

"It has not been proved that when Mehdi Begam executed the waqf-nama she understood its provisions or its effects upon her interests."

By section 596 of the Civil Procedure Code (Act XIV of 1882) it is specifically provided as follows with reference to appeals to His Majesty the King in Council :—

"Where the decree appealed from affirms a decision of the Court immediately below the Court passing such decree, the appeal must involve some substantial question of law."

Their Lordships put to the learned counsel for the appellants what question of law was here involved, and it was replied that, while the findings of fact were concurrent, the judgement of the Subordinate Judge showed that he had misdirected himself. It turned out that this was rested upon the ground that in the course of a long judgement certain materials for arriving at a conclusion had not been set out in the narrative which the judgement contains. These materials were of the most elementary character and their Lordships are of opinion that there is no ground for the suggestion that the Subordinate Judge had not taken them into account. It would be to misconstrue entirely the provisions as to concurrent findings on fact if the Judges of India were to have impliedly the duty laid upon them of making their narrative of the circumstances minutely and completely exhaustive, under the penalty that if they failed to do so, the absence from their mind of elementary considerations might be presumed.

The Courts below accordingly having concurrently found that the facts which it lay upon the appellants to establish were not proved, it appears to their Lordships that this is to all intents and

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purposes a concurrent finding on a matter of fact, and that accordingly such a finding cannot be disturbed. The rules so clearly laid down by Lord Macnaghten in *Karuppanan Servai* v. *Srinivasan Chetti* (1) should be followed.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants.—*W. W. Box & Co.*

Solicitors for the respondent, Basti Begam.—*T. L. Wilson & Co.*

J. V. W.

APPELLATE CIVIL.

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March 20.

Before Mr. Justice Sir Henry Griffin and Mr. Justice Chamier.

JAGGI LAL AND OTHERS (PLAINTIFFS) *v.* SRI RAM AND OTHERS (DEFENDANTS).*

Act No. XV of 1877 (*Indian Limitation Act*), *schedule II, articles* 110, 116—*Suit to recover rent on a registered lease—Limitation.*

Held that a suit for the recovery of rent based upon a registered lease is governed as to limitation not by article 116, but by article 110, of the Indian Limitation Act, 1877. *Ram Narain* v. *Kamta Singh* (2) followed.

This was a suit for recovery of arrears of rent based upon a registered lease executed on the 1st of December, 1883, and registered on the 31st of December of the same year. The plaintiffs claimed arrears for six years. The court of first instance gave them a decree for three years' arrears only, holding that as regards the remainder of the claim the suit was barred by limitation. The plaintiffs appealed to the High Court.

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

Mr. *M. L. Agarwala* and Munshi *Gokul Prasad*, for the respondents.

GRIFFIN and CHAMIER, JJ.—This appeal arises out of a suit for arrears of rent based on a registered lease executed on the 1st of December, 1883, and registered on the 31st of December, 1883. The plaintiffs claim six years' arrears. The court below has given them a decree for three years' arrears, holding that the claim for three years is barred by limitation.

* First Appeal No. 103 of 1911 from a decree of Hari Mohan Banerji, Additional Subordinate Judge of Cawnpore, dated the 23rd of January, 1911.

(1) (1901) I. L. R., 25 Mad., 215 (219): L. R., 29 I. A., 38 (39).

(2) (1903) I. L. R., 26 All., 138.