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the appellant. Granting that the general provisions of the Limitation Act apply to the Insolvency Act, the very wording of section 5 limits the applicability of that section to *appeals* and *applications* of a certain character. An application under section 22 of the Insolvency Act does not come in any way within the category of such applications. It is urged that the application to the District Judge against the act of the receiver is really an appeal as is contemplated by section 5 of the Limitation Act. Clause (2) of section 52 of the Insolvency Act is quoted, which runs as follows :— " Subject to the appeal to the court provided for by section 22, any order made or act done by the Official Receiver in the exercise of the said powers shall be deemed the order or act of the court." It seems to us clear that the word ' appeal ' in this clause is not used in the strict legal meaning of the word. The very wording of the section shows this. Section 22 is perfectly clear. The proviso says :—" Provided that no application under this section shall be entertained after the expiration of twenty-one days from the date of the order or decision complained of." The right of appeal is given in section 46 of the Act. In our opinion an application under section 22 of the Act against an " *act* " of the receiver is not and cannot be an " appeal " such as is contemplated by section 5 of the Limitation Act. It is clear, therefore, that section 5 of the Limitation Act does not apply and the court below was, therefore, bound to reject the application made to it and this appeal must fail. It is dismissed. We make no order as to costs, as the other side is not represented.

Appeal dismissed.

FULL BENCH

1913
May, 9.

Before Sir *Henry Richards*, *Knight*, *Chief Justice*, *Mr. Justice Banerji* and *Mr. Justice Lyle*.

SONA DEI AND ANOTHER (PLAINTIFFS) *v.* FAKIR CHAND AND OTHERS (DEFENDANTS)*

Maha-Brahman—Agreement as to distribution of offerings—Construction of agreement.

The members of a family of Maha-Brahmans entered into an agreement amongst themselves whereby certain members of the family were to take the

*Second Appeal No. 1173 of 1912 from a decree of L. Johnston, District Judge of Meerut, dated the 30th of July, 1912, affirming a decree of Mohan Lal Hukku, Subordinate Judge of Meerut, dated the 10th of May, 1912.

offerings made on certain days of the month, and the other members of the family the offerings made on the other days.

Held by BANERJI and LYLE, JJ. (RICHARDS, C. J., dissenting) that such an agreement as above described would not prevent a person who wished to do so from making a special individual gift to a member of one branch of the family, even on a day which was appropriated by the agreement to the other branch, and that a claim for such gift by a member of the other branch was not maintainable.

Per RICHARDS, C. J. If the offering was of a nature which was included in agreement between the parties, the wishes of the donor could not regulate the rights of the parties, but the recipient of such an offering on a day which did not belong to his branch of the family was bound to account for it to the branch to which the day belonged. *Doorga Pershad* v. *Badree* (1) and *Oochi* v. *Ulfat* (2) referred to.

THE facts of this case were as follows :—

The parties belonged to a family of Maha-Brahmans. By an arrangement made between the members of the family, the offerings made on certain days in the month were to go to one Nanda, the husband of the plaintiff Sona Dei, while those made on other days were to go to the defendants. Nanda died, leaving the plaintiff as his heir. On the day which fell to the share of the plaintiff one Debi Singh died. Debi Singh's son refused to make the offerings to the widow, as she was a female, and gave property of some value to Fakir Chand, defendant. The plaintiff, thereupon, brought this suit for recovery of the offerings or their value. The defendant pleaded that the gift was a personal gift to Fakir Chand and no suit lay for recovery of such offerings. The courts below sustained this contention and dismissed the suit. The plaintiff appealed to the High Court.

The appeal was argued on the 7th of May, 1913, before RICHARDS, C. J., and LYLE J., and then, upon an order made by the Chief Justice, was re-argued before the present Bench.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Pandit *Rama Kant Malaviya*) for the appellant: —

The members of the family had made an arrangement by which certain members were to receive the offerings on certain days, and others on other days. The defendant received offerings on the day which was the plaintiff's day. The donor admits that he knew that it was the plaintiff's day and made the gift to the defendant; but the defendant was under an obligation not to accept that gift or, if he did, to make it over to the plaintiff. Having accepted the gift, he must be deemed to have received it for the use and

(1) (1874) 6 N-W. P., H. C. Rep., 189 (191). (2) (1898) I L. R., 20 All., 234.

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benefit of the plaintiff. The donor could not be compelled to make the gift to the plaintiff, but the defendant, having entered into a contract not to receive the gift on that day, must be deemed to have acted as a trustee for the plaintiff and is bound to make it over to her, who would be in the position of *a cestui qui trust*. The present case is similar to a case where two doctors entered into an agreement that one of them would not treat patients within a certain area. If a patient goes to the doctor who has agreed to refrain from so practising, he will be bound to make over any fee that he may receive to the other doctor. In this case a trust was created, inasmuch as the gift was made (1) on a day which belonged to the plaintiff, (2) in connection with funeral ceremonies by which the family would have been entitled to benefit, (3) to a man who was bound by the contract. He relied on *Doorga Pershad* v. *Budree* (1), *Oochi* v. *Ulfat* (2), Godefroi on Trusts, 221, 226.

Dr. *Satish Chandra Banerji*, for the respondents :—

There can be no doubt that the gifts made by Raghubir Narain were voluntary gifts. The plaintiff could not bring a suit for an injunction to restrain the making or receiving of such gifts, against either the donor or the donee. It has been held that there is no legal cause of action to recover such offerings even as against the donee. The other side contends that the defendant, having received the gift on the plaintiff's day, in good conscience ought to make it over to the plaintiff, but there would be no such equity, unless the original contract was that even in cases where the gift was made personally to one individul, the gift would go to the person whose turn it would be to take it. The gift would be *personal*, not because it was handed over to the donee *physically*, but because it was so handed to him *intentionally* by the donor with the object that he alone should take it and nobody else. The object of the partition was, no doubt, to put an end to disputes, but all that the parties had in contemplation was to divide that property only that would or might be divisible. Where the property was given to one member individually it would not be divisible among the parties to

(1) (1874) 6 N.-W. P., H. C. Rep., 189 (191).

(2) (1898) I. L. R., 20 All., 234.

the arrangement. All would be in the same position, equally entitled to appropriate wholly personal gifts and divide those only which were not personal. Upon any other view, the members would be placed under a disability and disqualified from acquiring any separate property.

The Hon'ble Dr. *Tej Bahadur Sapru* replied.

RICHARDS, C.J.—This appeal arises out of a suit in which the plaintiff claimed to recover from the defendants certain offerings which had been made on the occasion of the death of one Rai Bahadur Debi Singh. It appears that the plaintiff and the defendant are both members of the same family of Maha-Brahmans, the common ancestor of which was one Dhan Singh. Both the courts below have found that an arrangement had been come to between the members of the family with a view to the division of the offerings. Certain members of the family were to have certain days of the month and certain other members, other days. Both the courts below have found that the offerings in question were made on a day which belonged to the plaintiff. But the plaintiff's suit was dismissed upon the ground that the offerings in question were personal offerings, made to Fakir Chand, the defendant.

It is admitted that so far as the donor of these offerings is concerned, no court could interfere to compel him to make the offerings to any particular individual. On the other hand, it has been admitted that an arrangement between the Maha-Brahmans as to the division of the offerings between themselves is perfectly legal. This has been decided in two cases [see *Doorga Pershad* v. *Budree* (1) and *Oochi* v. *Ulfat* (2)]. It seems to me that the whole case turns upon the nature of the agreement and the nature of the gift. There cannot be the least doubt that unless the gift in question was within the scope of the arrangement which the courts below have found existed between the parties, the plaintiff cannot succeed. The agreement was not in writing. It is stated in somewhat general terms in the plaint and evidently the court below accepted the statement in the plaint as being the terms of the agreement. The object of the agreement was beyond doubt to prevent disputes as to the division of the offerings. As the family

(1) (1874) 6 N.-W. P., H. C. Rep., 189, (191).

(2) (1898) I. L. R., 20 All., 234.

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increased, some such agreement was obviously very necessary. In my opinion the only fair interpretation to give to the agreement is that the descendants of Dhan Singh agreed amongst themselves that all the offerings that were made upon the occasions of death to any members or member of the family should be divided in accordance with the agreement. As the learned advocate for the plaintiff said in the course of the arguments, the agreement amounted to this, namely, that each member or branch of the family agreed to refrain from taking the offerings on the days assigned to the other member or branch. It is said that this agreeement could only apply to offerings that were made to the family as such. This seems to me to be rather a restricted view to take. If it was open to the members of the family to exclude from the scope of the arrangement all gifts which any individual might prevail on the donor to say was to be his, it would mean that the agreement would be practically futile. While, on the other hand, if the agreement is interpreted to include all gifts that were made to any of the members of the family of Dhan Singh, it might reasonably carry out the object of the arrangement, namely, to avoid disputes.

I next come to the nature of the gift. It must at once be admitted that if this gift was made for a purpose disconnected with cremation ceremonies, the plaintiff would have no right. But reading the evidence of Raghubir Narain Singh it seems to me perfectly clear that this gift was a gift directly in connection with cremation ceremonies, that it was made to one of the members of the family of Dhan Singh, and that the only reason why it was made to Fakir Chand instead of the plaintiff was because the donor has been informed that it would be more efficacious if the gift was not divided and if it was not given to a female. It seems to me that if the offering was of a nature which was included in the agreement between the parties the wishes of the donor could not regulate the rights of the parties to the present suit. Fakir Chand might have refused to take the gift if the donor coupled the donation with the condition that he must keep it entirely for himself. I think that so long as the agreement continued to exist, Fakir Chand having taken the gift was bound to make it over to the plaintiff in accordance with the agreement. For these reasons I think the

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decision of the court below was erroneous, and I would allow the appeal.

BANERJI, J.—I regret I cannot agree with the learned Chief Justice in the conclusion at which he has arrived. I fully agree with him that the whole case turns upon the nature of the contract, a breach of which is the foundation of the plantiff's suit, and also on the nature of the gift made by Raghubir Narain Singh on the occasion of his father's death. It is alleged in the plaint that Dhan Singh, the ancestor of the family, was the Maha-Brahman of the particular village in question and that offerings made to this family of Maha-Brahmans were offerings to the members of the family as such. In order to prevent disputes between the members of the family as to the division of the offerings, they entered into an arrangement by which individual members of the family were to take offerings given on certain dates, but it seems to me from the nature of the offerings which, according to the plantiff's own case, were agreed to be divided, that the offerings which were to be divided were the offerings made to individual members of the family as such members and not offerings made personally to individual Maha-Brahmans who were members of the family. If the contract between the parties was that they were to divide the offerings given on a particular date to any member of the family, whether as representing the family, or in his individual capacity as a Maha-Brahman, the plaintiff would of course be entitled to the offerings received on the particular day which was the day on which her turn for receiving offerings accrued. In the present case neither of the courts below has found that the contract between the parties was of the wide nature just now mentioned, and as I have already said, it was not the plaintiff's own case, as laid in the plaint.

If then the contract related to offerings made to the family as such, any present made to an individual member of the family in his personal capacity would not fall within the scope of the contract. In the present case, according to the evidence of Raghubir Narain Singh and according to the findings of both the courts below, the present made by him was a present individually to Fakir, defendant, and the donor distinctly stated at the time of the gift, that the offerings were not to be divided among the Maha-Brahmans and they were

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not to go to a female member of the family. It is clear from his evidence, which I think has been rightly interpreted by the court below, that the offerings in question were made to Fakir in his individual capacity, and not as representing the Maha-Brahman family of which the parties were members. That being so, I think the plaintiff is not entitled to the offerings claimed and her suit has been rightly dismissed. I would dismiss the appeal.

LYLE, J.—I concur with the judgement of Mr. Justice Banerji. There can be no doubt that where there is an agreement among Maha-Brahmans, that offerings shall be taken by a particular man on a particular day, the agreement is one which will be enforced in law. But in the absence of any special stipulation, such an agreement can only refer to offerings made to the general body or to the whole family, as the case may be, of Maha-Brahmans. Where a client wishes to benefit a particular Maha-Brahman by making him a special gift, there is nothing to prevent his doing so, and in such a case no other Maha-Brahman can claim any share in the gift. It seems to me as clear as possible in this case that it was the deliberate wish of the donor not only to benefit the defendant but to exclude the plaintiff. I do not think it is necessary to consider what the motives were that animated him. It is sufficient to say that he knew that if the gift were made to the whole family the plaintiff might get a share of it. Not wishing that she should, he deliberately elected to make the gift, not to the whole family, but to the defendant individually. No doubt the gift was what might be called a funeral gift, but it was open to anyone to make a funeral gift either to a family of Maha-Brahmans, or to an individual Maha-Brahman as he might wish. In this case, I think, he made his offering to an individual Maha-Brahman, and the plaintiff is, therefore, not entitled to any share. I would, therefore, affirm the decrees of the lower courts and dismiss the appeal.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.