APPELLATE CIVIL.

1916
January, 24.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

MURLIDHAR AND OTHERS (DEFENDANTS) *v.* DIWAN CHAND AND OTHERS (PLAINTIFFS).*

Will—Construction of document—Dedication of property for worship—Devisees to divide profits after paying expenses—Trust.

A testator who owned two houses left one house to one of his two nephews for his own use and as to the other made by his will the following disposition :—

"In the other dwelling house consisting of three sections of Thakurdwara including the staircase both the executors aforesaid should reside, put up pilgrims and attend on them jointly and from the income thereof daily perform the usual worship of the gods Murli Dhar, Raj Rajeshri and Mahadeo and the worship on *Basant Panchimi*, *Ram Naumi*, *Janam Ashtami*, *Naurati*, *Shivarati*, *Dhanurmas* and *Sami* festivals and look after its repairs. After this is done both the executors should make a receipt and disbursement account of the income annually and after deducting the above expenses should divide the profits between them in half and half and should grant receipts and acquittances as between themselves. . . . None of the executors shall in any way be entitledto transfer, mortgage or sell this house, and if they do so it will be utterly null and void."

Held, that the will created a trust and the only beneficial interest given under the will to the nephews was the right to take the surplus profits, if any, after the worship had been performed and the festivals duly observed.

THIS was a suit for a declaration that a certain house was saleable in execution of a decree passed in favour of the predecessor in title of the plaintiffs.

The only question at issue in the High Court was whether the terms of the will of one Jaypur Krishna Aiyar, the late owner of the house, created an endowment. After stating that he was owner of certain property and during his life-time wished to remain as owner, he states :—

"After my death Subrai aforesaid shall be the absolute owner of one of my two houses bounded as below and shall be entitled to do with it whatever he likes. In the other dwelling house consisting of three sections of Thakurdwara including the staircase both executors aforesaid should reside, put up pilgrims and attend to them jointly and from the income thereof daily perform the usual worship of the gods Murli Dhar, Raj Rajeshri and Mahadeo and the worship on *Basant Panchimi* etc., etc., and look after its repairs. After this is done, both the executors should make

* First Appeal No. 178 of 1914, from a decree of Bans Gopal, Additional Subordinate Judge of Benares, dated the 26th of March, 1914.

a receipt and disbursement account of the income annually and after deducting the above expenses should divide the profits between them in half and half and should grant receipts and acquittances as between themselves. . . . None of the executors shall in any way be entitled to transfer, mortgage or sell this house."

The court below held that no endowment was created by the will and that the property was given to the executors to be enjoyed as their own property. It decreed the suit. The defendants appealed to the High Court.

Dr. *Surendra Nath Sen*, for the appellant :—

No express words were necessary to create a valid endowment. It was enough to show that the intention was to make an endowment. The nearest approach to the present case was the case of *Benode Behari Maulik* v. *Sita Ram Naik Daji Kalia* (1). It was urged in the court below that the house, the subject-matter of this suit, was transferred by one of the two executors. The mere fact of one trustee committing a breach of trust would not change the nature of the property if it is proved that it was *waqf* property; *Debnarain Bose* v. *Sreemutty Comulmonee Dossee*, (2) *Bishen Chand Basawat* v. *Nadir Hossein*, (3).

Mr. *B. E. O'Conor* (with him Babu *Harendra Krishna Mukerji*), for the respondents :—

The terms of the will only showed that the testator intended to give the property to the two executors and to create a perpetuity in their favour. He nowhere created an endowment. The profits were to go to the two persons in proportion of half and half.

Dr. *Surendra Nath Sen*, was not heard in reply.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This appeal arises out of a suit in which the plaintiffs sought a declaration that a certain house was the property of the defendant No. 3 and was liable to be sold in execution of the decree against him. It appears that at one time the house belonged to a man called Krishna Aiyar, a Madrasee Brahman. He made a will, dated the 7th of September, 1886, in which he dealt with a considerable amount of property. The will recited that he had two nephews

(1) (1900) 6 A. L. J. 444. (2) (1873) 20 W. R., C.R., 89.

(3) (1887) I. L. R., 15 Calc.,

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Ganpati and Subrai. His will provided that after his death Subrai should be the absolute owner of one of two houses he mentioned in his will. The will then proceeds :—

"In the other dwelling house consisting of three sections of Thakurdwara including the staircase both the executors aforesaid should reside, put up pilgrims and attend on them jointly and from the income thereof daily perform the usual worship of the gods Murli Dhar, Raj Rajeshri and Mahadeo and the worship on *Basant Panchimi*, *Ram Naumi*, *Janam Ashtami*, *Naurat'ri*, *Shivaratri*, *Dhanurmas* and *Sami* festivals and look after its repairs. After this is done both the executors should make a receipt and disbursement account of the income annually and after deducting the above expenses should divide the profits between them in half and half and should grant receipts and acquittances as between themselves. . . . None of the executors shall in any way be entitled to transfer, mortgage or sell this house, and if they do so it will be utterly null and void."

"In this connection the members of my community and every body shall be entitled whenever they come to know that either of these persons or their heirs have in any way sold the said house, to make an application immediately and get the transfer set aside."

The house with which the present suit is conversant is this last mentioned house. The lower court has held that the defendants, or the persons who represent the original devisees, hold the house subject to a charge for the worship of the gods and the observance of the religious festivals, and has so far decreed the claim holding that the house can be sold subject to the charge. The defendants appeal. The case really turns upon the view we should take as to the true construction of the will we have mentioned. It will be seen at once that he draws a sharp contrast between the two houses. One he leaves absolutely to Subrai. He places no restriction on Subrai dealing with the house left to him as he should think fit. Idols of the various deities had been set up in different parts of the second house. It is absolutely clear that if a Muhammadan or Christian or even a Hindu other than a Brahman became the purchaser of this house, such purchaser could not possibly carry out the provisions of the will. The chief profits that would arise to the nephews of the testator and their descendants would be offerings made by the pilgrims. In other words the nephews would profit by the opportunity of getting offerings from the pilgrims. These offerings would, of course, be personal to themselves. In our opinion the will created a trust. The only beneficial interest

given under the will to the nephews was the right to take the surplus profits, if any, after the worship had been performed and the festivals duly observed. We have no reason for holding under the circumstances of the present case that the bequest was merely colourable and that the intention of the testator was in reality to confer an absolute interest free from any trust upon his nephews. Some point has been made in the court below upon the dealings with the property by the two nephews. In our opinion such dealings can in no way affect the question which we have to decide, namely, as to whether the nephews took the house as a trust or for their own benefit. The facts of the present case closely resemble the facts in the case of *Benode Behari Maulik* v. *Sita Ram Naik Daji Kalia* (1) and in the case of *Debnarain Bose* v. *Sreemutty Comulmonee Dossee* (2). We allow the appeal, set aside the decree of the court below and dismiss the plaintiff's suit with costs in both courts.

Appeal allowed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

RAM HARAKH (DEFENDANT) v. RAM LAL (PLAINTIFF) AND JAGANNATH AND OTHERS (DEFENDANTS).*

1916 *January*, 24.

Civil Procedure Code (1908), *order II, rule 2—Partition—Separate suits for property in different districts—Cause of action.*

The plaintiff as a member of a joint Hindu family brought a suit for partition of certain property in the district of Sultanpur. He admitted that he was not in possession of this property, and paid an *ad valorem* court fee on his plaint. This suit was settled by a compromise.

Subsequently the plaintiff brought a separate suit in Allahabad for partition of some of the joint family property situated in that district; but in this suit he alleged that he was in joint and undivided possession and paid a court fee of Rs. 10 as on an ordinary partition suit.

Held that the omission of the Allahabad property from his suit in Sultanpur was not a bar to the plaintiff's second suit and that the case did not fall within order II, rule 2, of the Code of Civil Procedure. *Mansa Ram Chakravarty* v. *Ganesh Chakravarty* (3), *Ukha* v. *Daga* (4) and *Subba Rau* v. *Rama Rau* (5) referred to.

THE facts of this case were as follows :—

The plaintiff, a member of a joint Hindu family, instituted a suit in Sultanpur, for partition and recovery of possession of his share of the joint family property, situate in the Sultanpur district.

* First Appeal No. 154 of 1915 from an order of S. R. Daniels, District Judge of Allahabad, dated the 16th of September, 1915.

(1) (1909) 6 A. L. J., 444. (3) (1912) 16 Indian Cases, 383.

(2) (1873) 20 W. R., C. R., 39. (4) (1882) I. L. R., 7 Bom., 182.

(5) (1867) 3 Mad. H. C., Rep., p. 376.