REVISIONAL CIVIL.

1920
January, 19.

Before Mr. Justice Piggott and Mr. Justice Walsh.

WAHID-UN-NISSA BIBI (PLAINTIFF) *v.* ZAMIN ALI SHAH AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), *sections* 10 *and* 11—*Stay of suit—Issue common to two suits, but parties not occupying the same positions.*

Z and J brought a suit against W and other heirs of W's deceased husband, claiming certain property in virtue of a deed of gift from the mother of the deceased. This suit was decreed, and the defendant filed an appeal in the High Court. Pending this appeal, W brought a suit against Z and J and another in which she claimed one-sixth of her dower debt, exempting the other heirs of her late husband. In the second suit the deed of gift in favour of Z and J was again brought in question, the plaintiff alleging that it was invalid and inoperative. In this suit the Court, at the instance of the defendants, made an order under section 10 of the Code of Civil Procedure, 1908, staying proceedings until the appeal in the former suit should be decided.

Held, on application by W for revision of the order staying proceedings, that the court below had properly applied section 10 of the Code but it would be necessary, when the hearing of the second suit should proceed, to consider carefully the effect of section 11 of the Code with reference to the facts and circumstances of the two litigations.

THIS was an application in revision against an order under section 10 of the Code of Civil Procedure staying a suit then pending in the Court of the Additional Subordinate Judge of Gorakhpur. The facts of the case are set forth in the judgment of PIGGOTT, J.

Maulvi *Iqbal Ahmad*, for the applicant.

Dr. *S. M. Sulaiman*, for the opposite parties.

PIGGOTT, J.:—This is an application in revision by Musammat Wahid-un-nissa Bibi, widow of Saiyid Wajid Ali Shah. There has been a good deal of litigation about this gentleman's estate since his death. A suit was brought by two persons, Saiyid Zamin Ali and Saiyid Jamshed Ali, in which all the heirs of Wajid Ali Shah, including Musammat Wahid-un-nissa Bibi, were impleaded as defendants, and in which these plaintiffs claimed possession of a one-sixth share in the estate of the deceased, basing their title upon a deed of gift executed in their favour by the mother of the deceased and purporting to convey to them the abovementioned share in the estate. Amongst other pleas taken by Musammat Wahid-un-nissa in resisting this suit was the plea that the deed

*Civil Revision No. 36 of 1919.

of gift was invalid and inoperative. That suit resulted in favour of the plaintiffs and an appeal against the decision is pending in this Court. In the meantime Musammat Wahid-un-nissa has brought another suit in which she impleads as defendants Zamin Ali and Jamshed Ali, already mentioned, together with one Musammat Sughra Begam, who is impleaded as the daughter and heiress of the donor already mentioned. This suit is for recovery of a one-sixth share in the dower-debt alleged to be due to Musammat Wahid-un-nissa Bibi, and the claim is limited to this extent, because the remaining heirs of Wajid Ali Shah are exempted. In the plaint the deed of gift in favour of Zamin Ali and Jamshed Ali is referred to and is once more alleged to be invalid and inoperative. The trial of this suit had commenced and had proceeded to this extent, that the plaintiff Musammat Wahid-un-nissa Bibi had been examined by a commissioner appointed by the Court, when the defendants moved the Court to stay further hearing of the suit under section 10 of the Code of Civil Procedure. They contended that this section was applicable and that the court could not legally proceed further with the hearing of the suit then before it until the previous litigation was brought to a conclusion by an appellate decision of this Court. The trial court accepted this view, although it has penalized the defendants in costs on the ground that the point should have been taken by them at an earlier stage. Against the order staying the trial of the suit this application in revision has been brought.

Putting aside the objection taken on behalf of the opposite party to the effect that no application in revision is entertainable against an interlocutory order of this sort, I prefer to deal with the grounds taken in the application before us. The first ground is that the trial court had no jurisdiction to pass an order under section 10 of the Code of Civil Procedure after it had once commenced the hearing of the suit by causing the plaintiff to be examined on commission. There is obviously no force in this plea. If the court below was right in the view which it took as to the applicability of section 10 aforesaid, the sooner it complied with the provisions of that section by staying further proceedings the better. Another plea taken is that there were parties

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impleaded in the former suit who are not impleaded in the present suit and that defendant No. 3 in the present suit was not a party to the former suit. I think there is no force in this plea, because if the hearing of the suit had to be postponed as between the plaintiff and the first two defendants, it had necessarily to be postponed in respect of all the parties. Nor is it an adequate plea against the order in question to say that there were issues for trial in the former suit which are not in issue in the present suit. The real question is whether the issue as to the validity of the deed of gift requires to be tried in the present suit, and whether it either can or ought to be tried while the appeal is pending in this Court against the decision in the former suit. In this connection a plea is taken on behalf of Musammat Wahid-un-nissa to the effect that she is not in the present suit litigating under the same title as in the former suit, inasmuch as she is now claiming certain reliefs as a creditor of her deceased husband, whereas in the former suit she was impleaded as an heir of her deceased husband. The raising of this plea discloses what I think is the real object of the present application and the true reason why the interference of this Court has been invoked at this stage. If the appeal pending before this Court against the decision in the former suit results in a finding that Zamin Ali and Jamshed Ali hold no valid deed of gift entitling them to any share in the estate of the late Wajid Ali Shah, of course that gentleman's widow will be perfectly satisfied; but in the event of a decision to the opposite effect, she obviously desires to maintain a claim to have the entire question of the validity of the deed of gift litigated over again in the present suit. What she is afraid of is that, when the hearing of this suit is resumed after the decision of this Court on the pending first appeal, she will be told that if section 10 of the Code of Civil Procedure applied when the court declined to proceed with the trial of the present suit, then section 11 of the same Code applies with regard to the effect of the decision of this Court on the question of the validity of the deed of gift. I only mention this matter because I wish to say that I feel a certain amount of difficulty regarding the point raised. The real question which requires consideration is what defences were open to Musammat Wahid-un-nissa Bibi as a defendant in the

former suit. In so far as she contested the deed of gift on any such ground as fraud, or undue influence, or incapacity on the part of the executant or the like, the decision arrived at in that litigation would be binding upon her in a subsequent litigation, even though she might come forward in that subsequent suit with a different claim also based upon her marriage with the late Wajid Ali Shah. I was, however, somewhat impressed by the argument addressed to us on behalf of the applicant, to the effect that the deed of gift might be attacked by Musammat Wahid-un-nissa as a creditor of the estate of her late husband upon some grounds not open to her when she was impleaded in a suit only as one of that gentleman's heirs, as for instance, on the grounds suggested by section 53 of the Transfer of Property Act. I only want to say this much, that while I think we ought not to interfere with the decision of the court below to postpone the hearing of the present suit until the position of the defendants Zamin Ali and Jamshed Ali has been settled by the decision of this Court on the pending first appeal, it should be clearly understood that any question as to the operation of section 11 of the Code of Civil Procedure on the result of the present suit, when the hearing of the same proceeds, will require to be carefully considered with reference to the facts and circumstances of the two litigations, independently of the order now under consideration by us in revision. Subject to these remarks, I would dismiss this application with costs.

WALSH, J. :—I agree that this application must be dismissed. I should have made precisely the same order as the learned Judge has made. It seems to me just one of those cases at which section 10 was aimed. In any case, even if section 10 were not applicable, an order of stay under the court's inherent power was a reasonable order to make, and fully justified by section 151. And if the object of this application is that suggested by my brother in his judgment, there is abundant reason for us to refuse to interfere in revision.

As it is suggested that the application was made for the purpose of raising the question of the title under which these two claims are made and the point has been strenuously argued, I would only say that, as at present advised, I have a clear view that when the

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widow claims to set aside the deed of gift so far as it affected her share as heir of the deceased, and when she claims to establish her right to the dower-debt, she is making both claims under the same title within the meaning of section 10. These words do not refer to the identity of the cause of action. 'Right' and 'title' are often used as synonymous terms, but I think the word 'title' in this section and in section 11 is used in a technical and familiar sense. Whether it is admitted or denied as a fact, the woman's marriage is an essential and fundamental factor in her title. She cannot establish her right to either claim unless she proves, or unless it is admitted, that she was lawfully married.

By THE COURT.—We dismiss this application with costs.

Application dismissed.

REVISIONAL CRIMINAL

Before Mr. Justice Piggott.

EMPEROR *v.* MANNU.*

Act (Local) No. II of 1916 (United Provinces Municipalities Act), sections 298, List 1, G (a) (x), and 318—Dangerous or offensive trades—Licence—Power of municipal board to refuse licence—Remedy of person whose application for a licence has been refused.

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In matters to which section 298, List 1, Heading G, of the United Provinces Municipalities Act, 1916, relates a municipal board is not bound to grant a licence to anyone who is prepared to abide by the prescribed conditions, unless it be found that the necessary licence cannot be granted in respect of the particular site in question without prejudice to the health, safety or convenience of the inhabitants of the municipality.

If an application for such a licence is refused, the remedy of the applicant is by way of appeal under section 318 of the Act

Moran v. *Chairman of Motihari Municipality* (1) and *Queen-Empress* v *Mukunda Chunder Chatterjee* (2) referred to.

THIS was an application in revision of an order convicting the applicant of a breach of certain byelaws of the Cawnpore Municipal Board in that he had used a certain piece of land for the purpose of storing wood without having obtained a licence to use it for the aforesaid purpose, he having in fact applied for such a licence, which had been refused.

* Criminal Revision No. 1435 of 1919, from an order of G. L. Vivian, Magistrate, First Class, of Cawnpore, dated the 26th of June, 1919.

(1) (1889) I. L. R., 17 Calc., 329. (2) (1893) I. L. R., 20 Calc., 654.