1937

DHARAM SINGH v. BISHAN SARUP

In our opinion, the view taken by the trial court was correct. We accordingly allow this revision, and modifying the decree of the lower appellate court restore that of the court of first instance. The applicant will have his costs from the respondent, but only on the scale of Rs.500 throughout.

APPELLATE CIVIL

1937
August. 27

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Harries

ABDUL LATIF KHAN (JUDGMENT-DEBTOR) *v.* SIKANDAR BEGAM (DECREE-HOLDER)*

Civil Procedure Code, section 51 ; *order XL, rule* 1—*Appointment of receiver in execution of decree for money—Wakf property—Mutwalli to perform certain religious duties and entitled to a balance remaining after the expenses—Receiver of such property can not be appointed—Discretion of court.*

In execution of a decree for money a receiver was sought to be appointed of certain wakf property in the possession of the judgment-debtor as mutwalli thereof; under the terms of the deed of wakf the mutwalli was to perform certain religious duties, which could not be performed by any other person until such other person was appointed mutwalli; the mutwalli was only entitled to a certain amount which remained over after the expenses; he had no proprietary interest in the property itself:

Held, that the court could not appoint a receiver to take possession of such property; and, in any case, the court would not exercise its discretionary power under order XL, rule 1 to appoint a receiver, as it would not be "just and convenient" to appoint a receiver of such property.

Mr. *Mushtaq Ahmad,* for the appellant.

Mr. *Shiva Prasad Sinha,* for the respondent.

SULAIMAN, C.J., and HARRIES J.:—This is an appeal by a judgment-debtor arising out of execution proceedings. A simple money decree was passed against the appellant, and in execution of that decree certain properties were sought to be attached. The judgment-debtor objected that the property was wakf property and

*First Appeal No. 197 of 1935, from a decree of M. M. Seth, Civil Judge of Budaun, dated the 19th of January, 1935.

1937

ABDUL LATIF KHAN v. SIKANDAR BEGAM

was not liable to attachment and sale. The court below has held that the disputed property is dedicated property under a deed of wakf-alul-aulad, dated the 12th of August, 1920. It has, therefore, come to the conclusion that the property could not be attached and sold, but has appointed a receiver of the property.

A preliminary objection is taken to the hearing of the appeal that no appeal lies. It is argued that the judgment-debtor in setting up a trust is resisting execution in a capacity different from that which he occupied as the judgment-debtor, and that therefore section 47 of the Civil Procedure Code is inapplicable. Reliance is placed on the case of *Kartick Chandra Ghose* v. *Ashutosh Dhara* (1). That ruling has no application to the present case. Here an order for the appointment of a receiver has been actually passed by the court. It is an order under order XL, rule 1, and an appeal from this order is expressly provided for under order XLIII, rule 1(*s*). The objection is, therefore, overruled.

The deed of wakf was executed professedly under Act VI of 1913, and it provided that neither the property nor its income would be attachable and saleable in execution of any decree for money, including a dower debt, against the mutwalli, nor would the usufruct be liable for his debts. The present decree is a decree for dower debt.

Section 51 of the Civil Procedure Code is a general section, prescribing the powers of a court to enforce execution, and it is made subject to the conditions and limitations prescribed by the rules in the schedule. Under order XL, rule 1(2) a court is not empowered to remove from the possession or custody of the property any person whom any party to the suit has not any present right so to remove.

In *Lachhmi Narain* v. *Piarey Lal* (2) this Court held that no receiver could be appointed as manager of the

(1) (1911) I.L.R. 39 Cal. 298. (2) [1932] A.L.J. 516.

entire partnership property when the judgment-debtor was one of the partners. Following the earlier cases of this Court in *Gobind Ram* v. *Jwala Pershad* (1) and *Makhan Lal* v. *Mushtaq Ali* (2) a Full Bench of this Court in *Ram Swarup* v. *Anandi Lal* (3) held that a receiver could not be appointed in the case where the decree is for realisation of the amount by sale of the mortgaged property. Recently it has been held in *Aminuddin* v. *Panchaiti Akhara Bara Udasi* (4) that an execution court cannot order execution of a decree by appointing a receiver for realising the income from the occupancy and exproprietary tenancies of the judgment-debtor. Learned counsel for the respondent relies strongly on the ruling of their Lordships of the Privy Council in *Rajindra Narain Singh* v. *Sundara Bibi* (5). The facts in greater detail are to be found in the judgment of the High Court in the same case, *Sundar Bivi* v. *Raj Indar Narain Singh* (6). The High Court had pointed out that the nearest definition of the precise interest of the judgment-debtor was that of an annuitant subject to certain defined charges, with a reversionary interest in the corpus upon the death of his brother. The judgment-debtor was to possess and enjoy the immovable property mentioned in the list, without power of transfer during the lifetime of his brother, undertaking to pay certain public exactions and other dues to his brother. He was not to be deprived of the possession of the villages but during the lifetime of his brother was to be entered on a sub-khewat to his brother without power of transfer, but was to become the absolute owner with power of transfer after his brother's death. The arrangement was, however, said to be in lieu of maintenance. The High Court held that the property was clearly saleable, and considered that the arrangement was not covered by the expression "a right to future maintenance". But the learned Judges doubted

(1) (1917) 43 Indian Cases, 533.
(2) A.I.R. 1927 All. 419.
(3) (1936) I.L.R. 58 All. 949.
(4) I.L.R. [1937] All. 542.
(5) (1925) I.L.R. 47 All. 385.
(6) (1921) I.L.R. 43 All. 617.

1937

ABDUL LATIF KHAN v. SIKANDAR BEGAM

whether it was desirable to attempt to put an interest of that kind up for sale in the ordinary way, and suggested that the appropriate remedy was the equitable execution or indirect execution by the appointment of a receiver. Their Lordships of the Privy Council considered that under the compromise decree the judgment-debtor had been declared to have a right of maintenance and that such right of maintenance in point of law was not attachable and not saleable. Their Lordships then observed that the remedy lies in a fitting case in the appointment of a receiver for realising the rents and profits of the property, paying out of the same a sufficient and adequate sum for the maintenance of the judgment-debtor and his family and applying the balance, if any, to the liquidation of the judgment creditor's debt. It will thus appear that the circumstances of that case were quite different. The property itself was saleable and the judgment-debtor was for all practical purposes in actual possession and effective enjoyment of the property in his own right, and was to appropriate the net income with only one restriction that he was not to transfer the property during the lifetime of his brother, though he could do so after his death.

In the present case the property is wakf property and is not liable to be attached or sold at all. There are provisions in the deed of wakf enjoining upon the mutwalli the performance of certain religious duties. Those duties cannot be performed by any other person until the mutwalli has been removed and such person has been appointed in his place. The appointment of a receiver to take charge of the entire property, which does not belong to the judgment-debtor, would be contrary to the provisions of order XL, rule 1(2) of the Civil Procedure Code and would amount to a dispossession of the trustee. The trustee is only entitled to a certain amount which remains over after the expenses. The court cannot, therefore, appoint a receiver to take possession of the entire property itself.

The case is somewhat analogous to the case of *Bishen Chand Basawat* v. *Nadir Hossein* (1) and the observations of their Lordships in that case apply with equal force to the present case although there the question really was one of attachment and sale and not of appointment of a receiver. At pages 339-340 their Lordships observed:

> "If the whole property is to be sold, it must be taken out of the hands of the trustee altogether and put into the hands of a purchaser. That purchaser might be a Christian, he might be a Hindu, or he might be of any other religion. It surely cannot be contended that property, devised by a Muhammadan lady to a Muhammadan trustee with the object of providing for certain Muhammadan religious duties, could be taken out of the hands of that trustee and sold to a person of any other religion, and that the purchaser should become the trustee for the purpose of performing or seeing to the performance of those religious duties. If property is to be sold and alienated from the trustee whom this lady appointed, or the trustee who was subsequently appointed by him to succeed him as trustee, the purchaser, of whatever religion he might be, would have to see to the execution of the trusts. Is it possible that the law can be such that a Hindu might become the purchaser of the property for the purpose of seeing to the performance of certain religious duties under the Muhammadan law? For example, that a Hindu might be substituted for a Muhammadan trustee for the purpose of providing funds for the Moharram, and taking care that it should be duly and properly performed, when it is well known what disputes and bitter feeling frequently exist between Hindus and Muhammadans at the time of the Moharram. The High Court says: 'If there was a margin of profit, that margin of profit might possibly have been attached.' Their Lordships cannot in this suit, in which all parties interested are not before it, decide as to the extent of the religious trusts, or whether any surplus profit after the performance of those trusts would belong to Mahomed Ali or the trustee substituted by him. The corpus of the estate cannot be sold, nor can any specific portion of the corpus of the estate be taken out of the hands of the trustee because there may be a margin of

(1) (1887) I.L.R. 15 Cal. 329.

1937

ABDUL LATIF KHAN v. SIKANDAR BEGAM

profit coming to him after the performance of all the religious duties."

It seems to us that, as the judgment-debtor has no proprietary interest in the property itself and is only entitled to the maintenance allowance out of the residue, no receiver can be appointed.

In any case, under order XL, rule 1 the court has discretion, where it appears to it to be just and convenient, to appoint a receiver. The provisions are not mandatory. We are, therefore, clearly of the opinion that in a case where the property is dedicated property, and under the terms of the document has to be managed by a trustee, who is enjoined to perform certain religious duties as trustee, it would not be just and convenient to appoint receiver of such property.

We, therefore, allow this appeal and setting aside the order of the court below dismiss the application of the decree-holder.

REVISIONAL CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Harries

1937 *August*, 31

DEOKI NANDAN (PLAINTIFF) *v.* RAM CHANDRA TEWARI AND OTHERS (DEFENDANTS)*

Jurisdiction—Civil and revenue courts—Fixed rate tenancy belonging to joint Hindu family—"Tenant" is the family and not individual members—Alienation by some members—Suit by other members for declaration that alienation is not binding on family, and for possession—Cognizable by civil court—Agra Tenancy Act (Local Act III of 1926), sections 99, 121—Not applicable to such suit—Civil Procedure Code, section 115—Question of jurisdiction—Revision of decision of first court, though confirmed by decision of appellate court from which revision is not maintainable—Amendment of plaint—Whether court can allow where it holds that the suit is not cognizable by it.

Where a fixed rate tenancy belongs to a joint Hindu family, rent is payable by the family as such and it is the family that should be considered to be collectively the tenant in respect

*Civil Revision No. 376 of 1936.