1935

RAGHUNATH PRASAD, R. B. v. THE LUCKNOW SUGAR WORKS, LIMITED

Cawnpore Flour Mills in making a joint tender on the 3rd of August, 1935. It is argued that the joint tender by the two companies was not made until after the time prescribed and therefore should not be taken into consideration. We are not prepared to accept this contention. We do not think that it was beyond the powers of the Company Judge to take into consideration a tender even though it might have been made after the 15th of June. Supposing that no adequate tenders were received within that time we think that it would have been quite open to him to issue fresh advertisements calling for fresh tenders. In our opinion the learned Company Judge was acting within his authority in taking into consideration the tender although the joint tender was not made until after the 15th of June.

King, C.J. and Ziaul Hasan, J.

It has been suggested that no appeal lies against the order in question but this point has not been seriously argued and we assume for the purpose of this appeal that an appeal does lie under section 302 of the Indian Companies Act.

The result is that we dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Sir C. M. King, Knight, Chief Judge and Mr. Justice Ziaul Hasan

1935
October 10

PARSHADI LAL AND OTHERS (DEFENDANTS-APPELLANTS) *v.* BRIJ MOHAN LAL AND OTHERS, PLAINTIFFS, AND OTHERS DEFENDANTS (RESPONDENTS)*

Charge—Will—Endowment—Bequest by Hindu that portion of income of his property be devoted to expenses of a temple—Will, whether creates charge in favour of temple—Liability of persons holding property charged, whether joint—Persons

*Second Civil Appeal No. 159 of 1934, against the decree of Pandit Tika Ram Misra, District Judge of Lucknow, dated the 15th of May, 1934, reversing the decree of Babu Bhagwat Prasad, Subordinate Judge of Malihabad at Lucknow, dated the 21st of May, 1932.

1935

PARSHADI LAL v. BRIJ MOHAN LAL

holding property, whether liable personally for income enjoyed—Interest—Person keeping another out of his dues, whether liable to pay interest—Appeal—Point of law abandoned in lower court, if can be raised in second appeal.

A question of law can be raised for the first time in appeal but it cannot be so raised after once having been abandoned in the lower Court. *Raj Krishna* v. *Saheb Bakhsh Singh* (1), and *Abid Husain* v. *Ram Nidh* (2), relied on.

Where a Hindu by will bequeaths all his immovable property to his heirs but makes a provision that one-fourth of the income of that property should be spent over a temple the will creates a charge in favour of the temple. *Surja Kunwari* v. *Har Narain Ram* (3), and *Har Narain* v. *Surja Kunwari* (4), relied on. *Har Narain Das* v. *Bibi Rup Kuar* (5), referred to.

A charge is in the nature of a mortgage and the charge holder is entitled to recover the amount due to him from whichever portion of the property that he chooses. If the property is held by transferees they are jointly liable for the charge holder's claim. The question how far each of them is liable is a question of contribution among themselves and does not concern the charge holder.

Ordinarily a person who keeps another out of his dues is liable to pay interest to the latter.

Where the expenses of a temple are charge upon certain property, the holders of the property who have enjoyed the income without paying the charge are also personally liable for it. *Har Narain Das* v. *Bibi Rup Kuar* (5), referred to.

Mr. *Data Prasad Khare*, for the appellants.

Messrs. *Radha Krishna Srivastava* and *Ram Bharose Lal*, for the respondents.

KING, C.J. and ZIAUL HASAN, J.:—The questions raised in this second appeal against a decree of the learned District Judge of Lucknow relate to the genuineness, validity and effect of the will of a Hindu named Janki who was by profession a *halwai* (confectioner). The will in question was executed by Janki on the 1st of October, 1915. By clause (1) of the will he bequeathed all his immovable property without any

(1) (1926) 3 O.W.N., 937. (2) (1930) 7 O.W.N., 523.
(3) (1917) I.L.R., 39 All., 311. (4) (1921) I.L.R., 43 All., 291.
(5) (1931) 9 O.W.N., 291.

power of alienation to his wife Musammat Janaka and his minor son Jagannath Prasad. By clause (2) he bequeathed all his movable property to the said two legatees and made them full owners thereof. Clause (3) provided that whatever might be realised from the immovable property after defraying necessary charges, e.g., repairs, etc., four out of the sixteen annas of the income should be devoted to the expenses of the *thakurdwara* situated in Amaniganj, Lucknow, and the remaining twelve annas should be enjoyed by the legatees. Clause (5) provided that in any case the expenses of the offerings and the celebrations of festivities of Sri Thakurji Maharaj of the Amaniganj *thakurdwara* would not be less than Rs.20 per mensem and that these expenses would be met out of the income of the immovable property. Clause (8) named five persons and cast upon them the duty of seeing to the fulfilment of the testator's wishes with regard to the *thakurdwara*. In clauses (10) it was laid down that in case the testator's progeny failed, the whole of the immovable property would be considered to be the property of the deity named above and would be an endowment or *waqf* to the Thakurji and that in that case the five persons named as well as every Hindu would have a right to spend half of the income of the immovable property on the *thakurdwara* and deposit the other half in any of the Government Banks or purchase other property out of it on behalf of the deity. The other clauses of the will are immaterial so far as the present appeal is concerned.

The testator died, according to the plaintiffs-respondents, on the 2nd of October, 1915, and after his death his widow, Musammat Janaka, managed the property and spent the income according to the provisions of the will. She died on the 6th of June, 1921, when Jagannath defendant-respondent No. 6 was still a minor. One Bhagwandin was appointed guardian of his person

1935

PARSHADI LAL v. BRIJ MOHAN LAL

King, C.J. and Ziaul Hasan, J.

and a certain Mr. Sailendra Nath Roy, pleader, was appointed guardian of his property by the District Judge. In 1927, Jagannath was declared a major and soon after that he sold to the present appellants three out of the five houses, the subject of Janki's will. By this time two out of the five persons appointed by the will as supervisors had died and two others refused to act, so that one Girdhari Lal alone remained out of the five persons named in the will to take any action in the matter. In 1930 the said Girdhari Lal together with Nikai Ram, plaintiff-respondent No. 2 and Gauri Shankar, plaintiff-respondent No. 3, filed a suit under section 92 of the Code of Civil Procedure in the Court of the District Judge, Lucknow, against the present appellants and Jagannath. The appellants were however discharged subsequently and Jagannath admitted the claim. In that suit the will was held proved, the temple was declared a public trust, Jagannath was removed from trusteeship and a scheme of management was drawn up by which the present plaintiffs-respondents were appointed trustees to manage the property and the temple. It was by these trustees that the suit from which this appeal arises was brought for recovery of Rs.2,016-10-9 from the defendants, as income owing to the temple from November, 1927 to February, 1932, by enforcement of the charge against the property, the subject of the will of the 1st of October, 1915.

A large number of pleas were raised by the defendants to the suit on which the trial Court, the learned Subordinate Judge of Mohanlalganj, struck sixteen issues. All the issues except one were decided in favour of the plaintiffs but the learned Subordinate Judge dismissed the plaintiffs' suit on the one issue as to the genuineness of the will in question, holding that the genuineness of the will was not proved. The plaintiffs went in appeal to the learned District Judge

who concurred with the findings of the trial Court on all the issues except on the issue relating to the genuineness of the will. He held the will to be genuine and therefore decreed the plaintiffs-respondents' suit in part with costs.

The defendants, who are transferees from Jagannath, bring this appeal and four or five points have been urged before us in support of the appeal.

King, C.J. and Ziaul Hasan, J.

We first take up the question of the genuineness of the will. It was conceded that the finding of the learned District Judge that the will in question was genuine was a finding of fact but it was sought to get over this finding on two grounds. The first was that the learned District Judge had assumed that after Janki's death his widow Musammat Janaka managed the property and carried out the terms of the will. This, however, is not correct. The learned District Judge's remark is borne out by the evidence of the *pujari* of the temple. It was said that Musammat Janaka managed the property not under the will of the 1st of October, 1915, but under the *shankalapnama* (exhibit D10) that had been executed by Janki in 1904. This *shankalapnama* related to one house and as Musammat Janaka was not appointed a trustee or manager under that *shankalapnama* it cannot in our opinion be said that she was managing the property, which consisted of five houses, under that deed and not under the will in question. The second ground urged was that the learned District Judge had made a wrong assumption in respect to a document (exhibit M1) produced by the appellants to show that Janki died on the 1st of October, 1915, and not on the 2nd of October, 1915. This document is an extract from the register of births and deaths and shows that the death of one Janki, whose father is named as Ram Lal *halwai*, occurred on the 1st of October, 1915. The learned District Judge was of opinion that there was probably a mistake about the date given

1935

PARSHADI LAL v. BRIJ MOHAN LAL

King, C J. and Ziaul Hasan, J.

in this entry. This was by no means an unjustified assumption seeing that Janki deceased was shown as a female not only in one but in three columns of the register. This was said to be a mistake on the part of the clerk who made the entry, but a mistake in three columns is more improbable than a mistake in one. The learned District Judge has carefully considered the question of the genuineness of the will and has thoroughly discussed the points that could be urged against its genuineness. So far from being misled by any error of law or procedure he has, in our opinion, come to a very correct finding in holding that the will was genuine.

The next point urged was that the will offended against the rule of perpetuity and was therefore invalid. This contention was the subject of issue 6 in the trial Court and the learned District Judge's judgment shows that this point was not pressed before him. It was said, however, that the point raised was a point of law and could be urged in this appeal. We cannot, however, accept this argument. No doubt a question of law can be raised for the first time in appeal but this does not mean that it can be so raised after once having been abandoned in the lower Court. It has been held more than once by this Court that it is not open to a party in second appeal to raise again a point which was abandoned before the lower appellate Court even if that point is a pure point of law—vide *Raj Krishna* v. *Saheb Bakhsh Singh* (1), and *Abid Husain* v. *Ram Nidh* (2). In view of these decisions we cannot allow the appellants to raise this question again in this Court. Moreover, the point raised relates to clause (10) of the will under consideration but the plaintiffs-respondents' suit is based on clause (3) and not on clause (10) of the will so that it is not at all necessary in this case to consider the effect of clause (10).

(1) (1926) 3 O.W.N., 997. (2) (1930) 7 O.W.N., 523.

1935

PARSHADI LAL v. BRIJ MOHAN LAL

Next it was argued that the will created no charge in favour of the deity and that the provision about one-fourth of the income of the immovable property being spent over the temple was only in the nature of a direction to the legatees. Taking all the provisions of the will into consideration, we are of opinion, however, that the Courts below were right in holding that the will did create a charge in favour of the temple. The disposition in question clearly comes within the purview of paragraph 408A of Mulla's Hindu Law, 7th edition (page 473) which runs as follows:

King, C.J. and Ziaul Hasan, J.

"Where by the grant a mere charge or trust is created in favour of an idol, the dedication is said to be partial or qualified. In such a case the property descends and is alienable and partible in the ordinary way; but subject always to the trust or charge in favour of the idol."

In the case of *Surja Kunwari* v. *Har Narain Ram* (1), the provisions of the will under consideration were, except in one respect, very similar to those of the will in question and it was held that the will created a charge on the estate for the expenses of the idols. In that case also the bulk of the income was assigned to the maintenance of the heirs of the testator and the expenses of the religious rites and ceremonies amounted only to about Rs.500 per annum out of Rs.7,000 the annual income of the property. This decision was upheld by their Lordships of the Privy Council in *Har Narayan* v. *Surja Kunwari* (2). The learned advocate for the appellants sought to distinguish this case on the ground that in it there was a clear dedication of the property to the idols but it was not on this ground that the will was held to create a charge on the property in favour of the idols. It was by reason of the fact that only a portion of the income was reserved for the expenses of the idols that it was so held. In the case of *Har Narain Das* v.

(1) (1917) I.L.R., 39 All., 311. (2) (1921) I.L.R., 43 All., 291.

1935

PARSHADI LAL v. BRIJ MOHAN LAL

King, C.J. and Ziaul Hasan, J.

Bibi Rup Kuar (1), in which an agreement in the nature of a family settlement made provision for certain maintenance allowances which were to be paid from "*riyasat taluqa*", it was held that the agreement created a charge upon the income of the estate.

We are therefore of opinion that the Courts below were right in holding that there was a charge in favour of deity to the extent of one-fourth of the income of the immovable property. It was also contended in this connection that the will made no provision about any portion of the income being spent over the *thakurdwara* after the death of the legatees but we consider it unnecessary to express any opinion on the point in this case as Jagannath one of the legatees is still alive.

Another point taken was that the appellants who obtained transfers from Jagannath on different dates should not have been held jointly liable for the plaintiffs' claim and that the different transferees should have been held liable only with regard to the period during which they have been respectively in possession of the property. We see no force in this contention. A charge is in the nature of a mortgage and the charge holder is entitled to recover the amount due to him from whichever portion of the property that he chooses. The question how far each of the defendants is liable is a question of contribution among the defendants themselves and does not concern the charge holder.

It was also said that no interest should have been decreed to the plaintiffs on the amount claimed but we do not agree with this contention. Ordinarily a person who keeps another out of his dues is liable to pay interest to the latter and we see no reason why the plaintiffs-respondents should not get interest on the amount which ought to have been spent on the temple but was not for several years. No doubt the will in question is an unregistered document but the learned Subordinate Judge

(1) (1931) 9 O.W.N., 291.

1935

PARSHADI LAL v. BRIJ MOHAN LAL

has shown how the transferees-appellants took advantage of the weakness of Jagannath's intellect.

Objection was also taken to the Court below passing a personal decree against the appellants but in veiw of the circumstances attending the transfers in favour of the appellants, we are not prepared to say that the plaintiffs are not entitled to a personal decree against the appellants. In the case of *Har Narain Das* v. *Bibi Rup Kuar* (1), above referred to, it was held that if the holder while in enjoyment of the income of the entire taluqa, fails to pay the maintenance allowances, he must be regarded as a debtor to the persons entitled to such allowances and is personally liable to make them good out of the profits enjoyed by him. On this principle also the appellants are personally liable.

King, C.J. and Ziaul Hasan, J.

Lastly it was contended that the plaintiffs' suit having been decreed for only a portion of the amount claimed, only proportionate costs should have been awarded to the plaintiffs. This plea is not without force and we allow it.

The appeal is allowed only to this extent that we modify the decree of the lower appellate Court with regard to costs only, namely, that the plaintiffs-respondents will get costs in all the Courts proportionate to the amount decreed in their favour. The defendants-appellants will bear their own costs throughout.

Appeal partly allowed.

MISCELLANEOUS CIVIL

Before Sir C. M. King, Knight, Chief Judge and Mr. Justice Ziaul Hasan

HARI KISHEN LAL MANUCHA (APPLICANT) IN THE MATTER OF HIS ENROLMENT AS AN ADVOCATE*

1935 *October* 14

Indian Bar Councils Act (XXXVIII of 1926), sections 2(a) and 9—Oudh Civil Rules, Chapter VII, rule 285—Advocates—

*Civil Miscellaneous Application No. 740 of 1935, for enrolment as an Advocate of the Hon'ble Court.

(1) (1931) 9 O.W.N., 291.