

MISCELLANEOUS CIVIL

Before Sir C. M. King, Kt., Chief Judge, and Mr. Justice
E. M. Nanavutty

RAJA BAHADUR BISHWA NATH SARAN SINGH
(APPELLANT) v. MR. BISHAMBHAR NATH
SRIVASTAVA AND OTHERS (RESPONDENTS)*

1936
May 1

Civil Procedure Code (Act V of 1908), order XL, rule 1(a) and order XLIII, rule 1(s)—Receiver—Order appointing receiver without application for appointment of receiver, if appealable—Embezzlement or mismanagement on part of proprietor, whether necessary for appointment of receiver—Trusts Act (II of 1882), section 48—Execution of trust—Executant appointing himself as a trustee—Executant, whether can oust co-trustees for misfeasance anticipating result of suit for removal of trustees before filing suit.

An order appointing receiver under order XL, rule 1(a), Civil Procedure Code, even where no application for appointment of a receiver has been made is appealable under order XLIII, rule 1(s), Civil Procedure Code.

It is not necessary for the appointment of a receiver that proof should be forthcoming of any embezzlement or mismanagement on the part of the proprietor, one of the trustees of the trust property. The appointment of a receiver is a matter of discretion and should be made where it is just and convenient.

If a trust deed is executed by a person in respect of his property appointing himself and certain other persons as trustees, it is illegal on the part of the executant to oust the co-trustees anticipating result of a suit, before filing the suit for removal of co-trustees on the basis of alleged acts of misfeasance, it being not open to him as one of the trustees to act singly under section 48 of the Trusts Act.

Messrs. J. Jackson, Satyanand Roy and Azizuddin, for the appellant.

Mr. Bhagwati Nath Srivastava, for the respondent.

KING, C.J. and NANAVUTTY, J.:—This is an appeal against an order, dated the 14th of April, 1936, made by a learned single Judge of this Court appointing a receiver of the trust property of the Tiloi estate.

*Miscellaneous Appeal No. 35 of 1936, against the order of The Hon'ble Mr. Justice G. H. Thomas, Judge, Chief Court of Oudh, dated the 14th of April, 1936.

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The appeal is on behalf of the Raja Bahadur, the plaintiff in the suit. A preliminary objection has been made by the trustees, who are the opposite party, to the effect that no appeal lies against this order. The trustees made an application to the learned single Judge under section 34 of the Indian Trusts Act stating that the Raja had taken forcible possession of the trust property in contravention of the terms of the trust deed and that they were therefore unable to carry out their duties as trustees and they prayed for advice and directions. The learned single Judge after hearing the parties came to the conclusion that it would be just and convenient to appoint a receiver of the trust property and accordingly appointed the Deputy Commissioner of Rae Bareli under order XL, rule 1(a) of the Code of Civil Procedure as a receiver of the entire property.

It may be conceded that no appeal lies against an order passed under section 34 of the Indian Trusts Act, but the order for the appointment of a receiver was passed by the learned single Judge under order XL, rule 1(a) of the Code of Civil Procedure as he himself mentioned in his order. It has been objected that no application had been made under order XL, rule 1(a) for the appointment of a receiver and therefore no appeal lies against the order. We think there is no force in this contention because the language of order XL, rule 1 shows that it is not necessary for the court to act upon an application made for the appointment of a receiver. The court can appoint a receiver whenever it appears to the court to be just and convenient. We think that it is clear that the order must be deemed to have been passed under order XL, rule 1(a), as the learned single Judge himself states, and therefore the order is appealable under order XLIII, rule 1(s).

It has also been urged that the present appeal is infructuous because the order is for the appointment of the Deputy Commissioner of Rae Bareli as a receiver whereas the said Deputy Commissioner has announced that it is

not open to him to accept the appointment and, therefore, by a subsequent order, dated the 30th of April, 1936, the learned single Judge has, at the suggestion of Mr. S. Roy and with the consent of Messrs. John Jackson and others, modified his previous order and has appointed Mr. H. G. Walford, Barrister-at-law, as receiver.

It is contended for the opposite party that the appointment of Mr. Walford was made with the consent of both parties and therefore it is not open to the appellant to appeal against the order as it now stands. We think this contention is due to some misapprehension. It is true that the counsel for both parties consented to the appointment of Mr. Walford as receiver, if a receiver was to be appointed. The counsel for the appellant did not concede that the order of the learned single Judge of the 14th of April, 1936, was correct in so far as it ordered the appointment of a receiver. We must take it therefore that the only question for consideration in this appeal is whether the learned single Judge was justified in ordering the appointment of a receiver. If that question is answered in the affirmative, then the parties are agreed that Mr. Walford should be appointed as the receiver.

It is argued on behalf of the appellant that the Raja of Tiloi was forced to take possession of the trust property on the 4th of May, 1935, because of certain acts of misfeasance committed by the co-trustees. It is urged that the co-trustees transferred the possession of a large portion of the trust property to certain creditors under usufructuary mortgages and that such action was highly prejudicial to the interests of the estate. Whether the action of the co-trustees was or was not justified is not a question for our consideration in this appeal. Those questions will no doubt come up for determination in the suit itself. It is sufficient to say that the Raja of Tiloi admittedly took possession of the trust property in direct contravention of the terms of the trust deed which he himself executed. It is perfectly clear that his act was entirely illegal. He has filed his suit for removal of the

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trustees but has anticipated the result of the suit by ousting the trustees before filing the suit. It is quite clear that the co-trustees being deprived of possession of the trust property are unable to discharge their duties as trustees. Reference has been made to sections 26, 27, 47 and 48 of the Indian Trusts Act for showing that the co-trustees are bound to discharge their duties and to protect the interests of the beneficiaries and it is not open to them to delegate their functions to one co-trustee (such as the Raja) unless the beneficiaries consent. In the present case some attempt seems to have been made to obtain the consent of the beneficiaries but the attempt proved unsuccessful. Under section 48 it is not open to the Raja as one of the co-trustees to act singly. Such a course is also in direct contravention of the terms of clause 10 of the trust deed itself.

It has been urged on Raja's behalf that it has not been shown that he committed any misappropriation of the property or that he is mismanaging the property in any way. He even claims credit for having paid large sums of arrears as Government revenue. In short he claims to be an admirable manager of the estate in whom his co-trustees can place full confidence. We do not think that the co-trustees can reasonably divest themselves of their responsibility even if it were legally open to them to do so. The Raja, when proprietor of the estate, has certainly managed to incur debts of very large amounts and we do not think that the trustees can be reasonably expected to place full confidence in the Raja and to stand aside and take no action to discharge their own duties. They may incur heavy liabilities if it be found that the Raja has committed or will commit in future any acts of misfeasance to the detriment of the beneficiaries.

It is not necessary for the appointment of a receiver that proof should be forthcoming of any embezzlement or mismanagement on the part of the Raja. We think that it is certainly just and convenient that a receiver should be appointed in the present case. Such action will be

for the benefit of the beneficiaries and will not cause any loss to any of the parties concerned. The appointment of a receiver is, after all, a matter of discretion and we see no reason whatever to interfere with the discretion exercised by the learned single Judge. We uphold his order for the appointment of a receiver of the entire trust property including the properties in the possession of the four creditor mortgagees.

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We therefore dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice Ziaul Hasan

JANG BAHADUR (PLAINTIFF-APPELLANT) v. RANA UMA
NATH BAKHSH SINGH (DEFENDANT-RESPONDENT)*

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September 3

Hindu Law—Family arrangement—Father and son executing joint deed—Father relinquishing his rights in favour of son on certain conditions accepted by son—Son executing same day another deed undertaking to pay some cash and a village to illegitimate son of his father—Transaction evidenced by both deeds, whether one—Arrangement, whether gift, settlement, family arrangement or trust—Stranger, if can take benefit under family arrangement—Dispute in presenti, if essential for family arrangement—Settlement, essential elements of—Trusts Act (II of 1882), section 5—Trust, how created—Executed and executory trust, distinction between—“Thereby” in section 6, meaning of—Beneficiary given particular village or another village of same quality and profits—Trust property, if uncertain—Contract between A and B—B agreeing to pay a sum to C—C’s right to sue on the contract.

A taluqdar had two sons by her legally married wife and two illegitimate sons by his mistress. He with his two sons executed a deed by which he relinquished all his rights in all the property, movable and immovable, in favour of his elder son upon certain conditions, who agreed to abide by those conditions. The younger son bound himself by this deed not

*First Civil Appeal No. 71 of 1934, against the decree of Babu Avadh Behari Lal, Subordinate Judge of Rae Bareilly, dated the 28th of April, 1934.