APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan and Mr. Justice H. G. Smith

1937 *November*, 9

NAWAB SHAHANSHAH BEGAM (DECREE-HOLDER-APPELLANT) *v.* CHAUDHRI AKBAR HUSAIN (JUDGMENT-DEBTOR-RESPONDENT)*

Civil Procedure Code (Act V of 1908), section 52(2)—Profits arising after death of last owner, whether property of deceased and liable for debts of deceased.

Profits arising after the death of the last owner form part of the property of the deceased and are liable to execution for the debts of the deceased.

Messrs. *Radha Krishna Srivastava, Bishambhar Nath Srivastava, Abid Husain, S. M. Naqi and Taashuq Mirza*, for the appellant.

Messrs. *Hyder Husain* and *Mohammad Ayub*, for the respondent.

1937 *November*, 8

SMITH, J.:—This is an appeal against an order made by the learned Subordinate Judge of Lucknow in connection with execution proceedings by one Nawab Shahanshah Begam against Chaudhri Akbar Husain and others. The facts are not fully stated in the order of the learned Subordinate Judge, but they appear to be as follows:

On the 16th of January, 1917, one Mohammad Husain, (he seems also to have been known as Chaudhri Mohammad Husain, and Chaudhri Shaikh Mohammad Husain), executed a mortgage-deed for Rs.45,000, carrying interest at 12 annas per Rs.100 per mensem, in favour of Nawab Shahanshah Begam. She afterwards sued on the basis of this mortgage-deed in the year 1921, and obtained a preliminary decree on the 21st of February, 1922, in the court of the Subordinate Judge of Lucknow.

Mohammad Husain had died on the 20th of December, 1917, and the main defendant was Chaudhri Akbar

*First Execution of Decree Appeal No. 86 of 1935, against the order of Babu Bhagwat Prasad, Civil Judge of Lucknow, dated the 2nd of February, 1935.

1937

NAWAB SHAHAN-SHAH BEGAM v. CHAUDHRI AKBAR HUSAIN

Smith, J.

Husain, his grandson, who had succeeded to the taluqa. Along with him were impleaded various parties who were said to be entitled to maintenance allowances under an alleged will of Mohammad Husain dated the 18th of January, 1913. A decree absolute was passed on the 5th of May, 1923. An appeal against the preliminary decree was decided by the late Court of the Judicial Commissioner on the 12th of September, 1923. The operative part of the decision in appeal is as follows:

> "The appeal is allowed to the extent that the respondent will not be permitted to proceed against the Ghazipur property. She is only permitted to execute her decree by the sale of Jabri and if the proceeds of this are insufficient, she may execute it as a simple money decree against the estate of the mortgagor for the balance still unrecovered. The period of six months for payment of the decretal amount will be calculated from the date of the decree of this Court. In other respects the decree of the lower court will stand. The plaintiff-respondent will get her costs in the lower court. Parties will bear their own costs in this Court."

The decree-holder afterwards bought the mortgaged property, Jabri Khurd in 1926, and Ghazipur in 1929, and she also bought the superior proprietary rights in another village, called Khalilabad, in 1932. These purchases, however, fell very far short of satisfying the entire amount due to the decree-holder, and on the 9th—18th April, 1934, she made an execution application out of which these present proceedings have arisen. The amount stated in the application to be still outstanding was Rs.96,927-5. It was alleged in the statement of facts appended to the application that Chaudhri Akbar Husain had been in possession of certain villages for various periods after the death of Chaudhri Mohammad Husain, and had appropriated the income from them to the extent of Rs.46,855-5-9½, and this amount, it was suggested, he was bound to pay to the decree-holder. The prayer was that his pay be attached (Chaudhri Akbar Husain is a member of the Indian Civil Service), and the amount in question be in that way realised.

Chaudhri Akbar Husain put in objections raising a number of points. The learned Subordinate Judge referred to a case reported in *Kishan Lal Atal (Pandit)* v. *Nawab Ummat-ul-Fatima Begam and others* (1), for the proposition that the rents and profits of the property of a deceased person accruing after the property has devolved on his heirs cannot be taken by a creditor of the deceased till the sequestration of the property by attachment or otherwise, nor can those heirs be made personally liable to the extent of those profits prior to the sequestration. Such profits, according to that decision, cannot be treated as the estate of the deceased, and the heirs of the deceased are entitled to appropriate them. The learned Subordinate Judge distinguished decisions reported in *Kadirvelusami Nayagar* v. *The Eastern Development Corporation, Ltd., London* (2) and *Kishan Chand* v. *Mauj Din and another* (3). The result was that this preliminary objection was allowed, and the execution application was ordered to be consigned to records. Against that order this appeal has been preferred by the decree-holder.

The section of the Code of Civil Procedure, that has to be considered, is section 52, more particularly the second sub-section, in view of the fact that the corpus of the property has already been put to sale by the decree-holder, and has been purchased by her herself. The learned counsel for the appellant relied on a number of decisions. The first of these is contained in *Oolagappa Chetty* v. *Hon. D. Arbuthnot and others* (4). The decision is a long one, and with it is connected a decision beginning at page 282 of that same volume. The relevant portion of the judgment in the case of *Oolagappa Chetty* v. *Hon. D. Arbuthnot and others* (4) is contained in page 315, and is as follows:

> "*Prima facie* the polliem was hereditary. If it was hereditary and descended to the minor son as the heir of his

(1) (1914) 17 O.C., 207.
(2) (1923) I.L.R., 47 Mad., 411.
(3) (1930) A.I.R., Lah., 204.
(4) (1874) L.R., 1 I.A., 268.

1937

NAWAB SHAHANSHAH BEGAM v. CHAUDHRI AKBAR HUSAIN

father, the income of the zemindary was liable to pay the debts incurred by the deceased zemindary."

(A "polliem" appears to be a special form of zamindari tenure in southern India, the holder of it being known as a "poligar".)

The next case is reported in *Aseemoonnissa* v. *Ameeroonnissa Khatoon* (1). It was there held, to quote from the head-note,:

Smith, J.

> "When a party is proceeded against as the representative of a deceased judgment-debtor, and it is proved that property which belonged to the deceased judgment-debtor has come into his hands, it lies upon him to account for such property, and to include in his account mesne profits whether accruing in the shape of rents or of interest."

Next comes the decision reported in *Kadirvelusami Nayagar* v. *The Eastern Development Corporation, Ltd., London* (2). That was a Full Bench decision. In his judgment the learned Chief Justice said that the case referred to above *Oolagappa Chetty* v. *Hon. D. Arbuthnot and others* (3) is a direct authority for the proposition that the income of landed property which has passed from one zamindar to the next, the property being an impartible "Raj", is liable to execution for the debts of the deceased zamindar. A similar view was taken by a Bench of the Madras High Court in a decision reported in *The Rajah of Kalahasti* v. *Sree Mahant Prayag Dossjee Varu* (4). That decision referred with approval to the decision mentioned above in *Aseemoonnissa* v. *Ameeroonnissa Khatoon* (1).

Next there is a case of our own Court in *Sharaf Jahan Begam, Nawab* v. *Mohammad Sadiq Ali Khan, Nawab Mirza* (5). It was there said that rents and profits are legal incidents of immovable property, and must bear the same character as the property itself. That decision followed the decisions mentioned above in *Oolagappa Chetty* v. *D. Arbuthnot and others* (3) and *Kadirvelu-*

(1) (1871) 15 W.R., 285.
(2) (1923) I.L.R., 47 Mad., 411.
(3) (1874) L.R., 1 I.A., 268.
(4) 30 M.L.J., 391.
(5) (1926) I.L.R., 2 Luck., 408.

sami Nayagar v. *The Eastern Development Corportation Limited, London* (1).

Lastly the learned counsel for the appellant relied upon the case reported in *Kishan Chand* v. *Mauj Din and another* (2). It was there said, to quote from the head-note:

> "Where the heirs inheriting the property of the judgment-debtor do not show that they have applied the income of the land towards the payment of the debts due by the judgment-debtor, the decree can be executed personally against them."

With reference to the decision in *Kishan Lal Atal* v. *Nawab Ummatul Fatma Begam* (3) upon which the learned Subordinate Judge based his decision, the learned counsel maintained that that case stands alone, and he has pointed out to us that in the commentary on the Civil Procedure Code by Chitaley and Annaji Rao this case is submitted to have been wrongly decided (*vide* the commentary, Volume I, page 478. The case is there cited as 1914 Oudh, 233, but that is the same decision that is reported in 17 O. C., 207).

On the other side the learned counsel for the respondent relied upon a case reported in *Jafri Begam* v. *Amir Muhammad Khan* (4), for the proposition that upon the death of a Muhammadan intestate, who leaves unpaid debts, whether large or small with reference to the value of his estate, the ownership of such estate devolves immediately on his heirs, and such devolution is not contingent upon, and suspended till, payment of such debts. A decision in *Mohammad Ahmad and others* v. *Ansar Mohammad and others* (5), was also referred to by the learned counsel, but he admitted that it is not directly in point.

Next he referred us to the definition of mesne profits contained in section 2(12) of the Code of Civil Procedure and contended that profits received by lawful heirs

(1) (1923) I.L.R., 47 Mad., 411. (2) (1930) A.I.R., Lah., 204.
(3) (1914) 17 O.C., 207. (4) (1885) I.L.R., 7 All., 822.
(5) (1920) 23 O.C., 62.

1937

NAWAB SHAHANSHAH BEGAM v. CHAUDHRI AKBAR HUSAIN

Smith, J.

do not come within that definition, and that once such profits reach the hands of such heirs, they become their own property. He also referred us to a passage contained at pages 588 and 589 of Volume I of Krishnamachariar's "The Law of Execution in British India", but the passage in question is merely a reproduction of the substance of the decision in *Kishan Lal Atal* v. *Nawab Ummat-ul-Fatima Begam* (1).

The learned counsel also referred us to a decision reported in *Rani Kanno Dai* v. *B. J. Lacy* (2), in which it was said, to quote from the head-note:

> "A court executing a simple money decree obtained against a sonless separated Hindu was not competent to appoint a receiver of the rents, accruing since his decease, of the judgment-debtor's immovable property, then in the hands of his widow as her widow's estate, such rents not being assests of the deceased, but the personal movable property of the widow, and this even if the decree-holder had not, as in fact he had, agreed for consideration not to execute his decree against the movable property of the widow."

The learned counsel contended that the view taken in *Kishan Lal Atal* v. *Nawab Ummat-ul-Fatima Begam* (1) is good law, and has never expressly been dissented from in Oudh.

With reference to the cases cited by the learned counsel for the appellant, the learned counsel for the respondent contended that the case in *Oolagappa Chetty* v. *Hon D. Arbuthnot* (3) is not decisive upon the point at issue. The case in *Aseemoonnissa* v. *Ameeroonnissa Khatoon* (4), he urged, uses the expression "mesne profits", which, he says, were in earlier Codes not defined in the same way as they are in the present Code. The case reported in *Kadirvelusami Nayagar* v. *The Eastern Development Corporation, Ltd., London* (5), he contended, is distinguishable, because there a receiver had

(1) (1914) 17 O.C., 207.
(2) (1897) I.L.R., 19 All., 235.
(3) (1874) L.R., 1 I.A., 268.
(4) (1871) 15 W.R., 285.
(5) (1923) I.L.R., 47 Mad., 411.

been appointed. The case of this Court reported in *Sharaf Jahan Begam* v. *Mohammad Sadiq Ali Khan* (1), he pointed out, was based upon the cases in *Oolagappa Chettey* v. *D. Arbuthnot* (2) and *Kadirvelusami Nayagar* v. *The Eastern Development Carporation, Ltd.*, (3). As to the case in *Rajah of Kalahasti* v. *Sree Mahant Prayag Dossjee Varu* (4), he urged that the general principales of Mohammadan Law as to the vesting of property in heirs were not considered in that case, and the case, he contended, does not fully support the contention raised on behalf of the appellant. He also referred to a case of the Madras High Court reported in *Angavalathammal* v. *Janaki Ammal and another* (5), in which the effect of the decision in *Rajah of Kalahasti's case* (4), and other decisions was considered. There does not appear, however, to be anything in this last-mentioned decision that is particularly helpful in deciding the precise point that is before us.

In his reply, the learned counsel for the appellant contended that the learned counsel on the other side had not been able to rebut the general principle that profits arising after the death of the last owner form part of the property of the deceased. Property, he argued, consists of the corpus plus the usufruct. The principle laid down in the decision in *Jafri Begam* v. *Amir Muhammad Khan* (6), he submitted, is not against the appellant, and she is not concerned to dispute it. Lastly, he argued that the decision in *Kishan Lal Atal* v. *Ummat-ul-Fatima Begam* (7), cannot be reconciled with the decision in *Sharaf Jahan Begam* v. *Mohammad Sadiq Ali Khan* (1), and this last-mentioned decision fully supports the appellant.

In my opinion the contention of the learned counsel for the appellant must be accepted. It is true that the decision in *Kishan Lal Atal's* case (7), does not stand quite alone, but derives support from the decision in *Rani*

(1) (1926) I.L.R., 2 Luck., 408. (2) (1874) L.A., 1 I.A., 268.
(3) (1923) I.L.R., 47 Mad., 411. (4) 30 M.L.J., 391.
(5) (1923) 79 I.C., 894. (6) (1885) I.L.R., 7 All., 822.
(7) (1914) 17 O.C., 207.

1937

NAWAB SHAHANSHAH BEGAM v. CHAUDHRI AKBAR HUSAIN

Smith, J.

Kanno Dai v. *B. J. Lacy* (1) upon which, in fact, it is based. The decision in *Oolagappa Chetty's* case (2), *Kadirvelusami's* case (3), and in the case of *Sharaf Jahan Begam* v. *Mohammad Sadiq Ali Khan* (4), do not relate to mesne profits as that term is defined in section 2(12) of the Code of Civil Procedure, so that I can see no force in the contention of the learned counsel for the respondent in that respect. The first two of the above-mentioned three decisions both speak quite generally of the "income" from landed property, and the third case speaks equally generally of "rents and profits". The distinction sought to be drawn by the learned counsel for the respondent between income from property that has actually reached the hands of the heirs of a deceased owner, and income that has not so reached them, as for example in cases where a receiver has been appointed, seems to me to derive no support from the above decisions, but to be based upon the principles enunciated in the case reported in *Kishan Lal Atal* v. *Ummat-ul-Fatima* (5). I agree with the learned counsel for the appellant that that decision cannot be reconciled with the decision reported in *Sharaf Jahan Begam* v. *Mohammad Sadiq Ali Khan* (4), which follows the other two cases above-mentioned.

The result is that in my opinion the learned Subordinate Judge was wrong in the view he took on the preliminary point. There were a number of other points raised in the respondent's objection before the learned Subordinate Judge, including questions as to the amount of the profits realized during the period concerned, and as to limitation. Those points have not been considered at all as yet, and I would accordingly send the case back to the learned court below for the disposal of the remaining points. The costs of the appellant in this present appeal before us should, in my opinion, be borne by the respondent, other costs to abide the result.

(1) (1897) I.L.R., 19 All., 235. (2) (1874) L.R., 1 I.A., 268(315)
(3) (1923) I.L.R., 47 All., 411. (4) (1926) I.L.R., 2 Luck., 408.
(5) (1914) 17 O.C., 207.

1937
November, 8

NAWAB SHAHANSHAH BEGAM v. CHAUDHRI AKBAR HUSAIN

ZIAUL HASAN, J.—Although the argument of the learned counsel for the appellant seemed to me to logically lead to the proposition that a dead person is capable of owning property, yet in view of the consensus of authority on the question and especially of the decision of their Lordships of the Privy Council in *Oolagappa Chetty* v. *Hon. D. Arbuthnot* (1), I agree with my learned brother SMITH, J. that the present appeal should be decreed and the case sent back to the court below for a decision of the other points raised in the respondent's objection.

1937
November, 9

BY THE COURT (ZIAUL HASAN and SMITH, JJ.):—The appeal is decreed with costs, and the case sent back to the court below for decision of the other question raised by the respondent in his objection. Costs other than those of this Court will be borne by the parties according to the result of the objection.

Appeal allowed.

1937
September, 8

APPELLATE CIVIL

Before Mr. Justice G. H. Thomas and Mr. Justice Ziaul Hasan

RAM BHAROSE AND OTHERS (DEFENDANTS-APPELLANTS) *v.* DEWAN RAMESHWAR PRASAD SINGH (PLAINTIFF-RESPONDENT)*

Oudh Estates Act (I of 1869) (before its repeal in 1910), sections 11, 17 and 22(11)—Widow of taluqdar—Power of widow of taluqdar to transfer the estate—Gift by taluqdar to his son—Death of son—Widow of son relinquishing taluqa in favour of her father-in-law—Relinquishment, validity of—Gift by taluqdar before repeal of Oudh Estates Act in 1910, requisites of—Acceptance by donee, if necessary—Words "ordinary law" in section 22(11) Oudh Estates Act, meaning of—Gift in favour of minor—Acceptance how made—Adverse possession against Hindu female, whether binding on reversioners—Evidence Act (I of 1872), sections 11 and 92—Statement in deeds regarding fictitious nature of a document, admissibility of, in evidence.

From paragraph 1 of section 11 of the Oudh Estates Act and the definition of the term "Heir" in section 2 of the Act, it is

*First Civil Appeal No. 64 of 1935, against the decree of Saiyed Abid Raza, Civil Judge of Partabgarh, dated the 25th of March, 1935.

(1) (1874) L.R., 1 I.A., 268.