

APPELLATE CIVIL

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

1937
January, 11

PANDIT MATHURA PRASAD (PLAINTIFF-APPELLANT) v.
THE DEPUTY COMMISSIONER OF KHERI, MANA-
GER, COURT OF WARDS, MAHEWA ESTATE (DE-
FENDANT-RESPONDENT)*

United Provinces Court of Wards Act (IV of 1912), sections 17, 20 and 21—Claim filed under section 17, Court of Wards Act—Suit on that claim, if barred under Court of Wards Act—Civil Procedure Code (Act V of 1908), section 35—Costs—Appellate Court, when should interfere with order as to costs.

There is nothing in section 21 or any other section of the Court of Wards Act to justify the conclusion that the filing of a claim under section 17 of the Act bars the institution of a suit in the civil court on that claim.

Costs being in the discretion of the trial court should not generally interfere with trial court's order about costs. But when the discretion exercised by the court below is based on an erroneous view of the law it is the duty of appellate court to interfere with that court's order about costs.

Messrs. *Ali Mohammad and Sita Ram*, for the appellant.

The Government Advocate (Mr. *H. S. Gupta*), for the respondent.

NANAVUTTY and ZIAUL HASAN, JJ.:—This is a first appeal against a decree of the learned Civil Judge of Kheri in a suit in which the plaintiff-appellant's claim on a promissory note was decreed against the Deputy Commissioner of Kheri as Manager of the Court of Wards, Mahewa estate, but in which no costs were allowed to the plaintiff.

The promissory note in question was executed on the 26th of September, 1931, by Thakur Jai Indra Bahadur Singh, taluqdar of Mahewa, in favour of the plaintiff. The estate came under the management of

*First Civil Appeal No. 69 of 1935, against the decree of Babu Mahabir Prasad Varma, Civil Judge of Kheri, dated the 14th of February, 1935

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the Court of Wards on the 17th of May, 1934. A notice under section 17 of the Court of Wards Act was published on the 16th of June, 1934, and on the 25th of July, 1934, the plaintiff gave notice of his claim under section 54 of the Court of Wards Act. No reply to this notice was given to him and the plaintiff after waiting for a reply up to the 26th of September, 1934 and not getting any brought the suit on that date. The claim was admitted by the Court of Wards but it was pleaded that the plaintiff was not entitled to his costs. This plea found favour with the learned Civil Judge who decreed the suit without costs.

On behalf of the appellant, two points have been urged before us. The first is that the learned Civil Judge was wrong in not awarding costs to the plaintiff and the second, that interest *pendente lite* should have been allowed at 12 per cent. per annum instead of 6 per cent. per annum. The learned Judge of the court below held that a suit against a ward of the court was barred by the provisions of the Court of Wards Act and that therefore the plaintiff was not entitled to recover his costs of the suit. We have carefully considered the judgment of the court below and the argument of the learned Government Advocate but are wholly unable to uphold the finding of the learned Judge. No provision of the Court of Wards Act has been pointed out to us on which it can be held that a suit in a civil court is barred after a claim has been lodged with the Collector under section 17 of the Act. Reliance is placed by the learned Government Advocate on section 21 of the Court of Wards Act but we find nothing in that section to justify the conclusion that the filing of a claim under section 17 of the Act bars the institution of a suit in the civil court on that claim.

Section 21 in fact deals with execution of decrees only as the very heading of it shows, and has nothing to do with the institution of suits in the civil court. It was

further argued that sub-section 3 of section 21 saves limitation in case of claims lodged with the Collector under section 17 but here again we cannot accept the contention of the learned Government Advocate. Sub-section 3 also manifestly refers to applications for execution of decrees and not to suits and only provides that in computing the period of limitation prescribed by the Indian Limitation Act or section 48 of the Code of Civil Procedure, for any *application for the execution of a decree*, proceedings in which have been stayed or temporarily barred under sub-section (1), the time from the date of notice or of the decree if it was passed subsequently to the publication of notice, to the date when the Collector's decision under section 19 is confirmed by the Court of Wards, shall be excluded. There is not a word in this sub-section which can in our opinion refer to the institution of suits.

It was also argued that the Court of Wards Act allowed the institution of a suit only under section 20 in which it is provided that "nothing in sections 18 and 19 shall be construed to prevent any person from instituting or continuing in any competent court any suit or proceeding in respect of any claim which has been disallowed in whole or in part by the Collector under section 18 or by the Court of Wards under section 19(1)".

This section only enables a person to institute or continue in the civil court a suit or proceeding in respect of a claim which has been disallowed by the Collector or the Court of Wards and by no logic can it be argued that it bars the general legal right of a person to bring a claim in the civil court.

Reliance was also placed on section 15(2) of the Indian Limitation Act but though under that provision of the law the period of notice prescribed by the Court of Wards Act will be excluded in computing the period of limitation for a suit, it cannot in our opinion be made

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the basis of an argument that a suit is barred in every case in which notice is prescribed by the Court of Wards or any other Act. We are therefore quite unable to agree with the learned Judge of the court below that the provisions of the Court of Wards Act bar the present suit either expressly or impliedly and must therefore hold that the learned Judge was in error in not allowing costs to the plaintiff.

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It was also urged that costs being in the discretion of the learned trial Judge, this Court should not interfere with that court's order about costs. Generally this is so, but as the discretion exercised by the court below is based on an erroneous view of the law we think it is our duty to interfere with that court's order about costs.

On the question of the rate of interest *pendente lite* we are not prepared to increase it from 6 to 12 per cent. per annum.

The appeal is allowed in part and the lower court's decree modified so as to award costs to the plaintiff in both the courts in proportion to success. In other respects the decree of the lower court will stand.

Appeal partly allowed.

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IMDADUL RAHMAN *alias* LALLAN AND ANOTHER (DEFENDANTS-APPELLANTS) *v.* PURBI DIN AND OTHERS (DEFENDANTS-RESPONDENTS)*

Mahomedan Law—Will—Consent of heirs, requisites of—Motive of consent, how far material—Rule of justice, equity and good conscience, applicability of.

The question whether the consent to a will of a Muslim by his heirs is valid has to be decided according to the Mahomedan law and not according to rules of justice, equity and

*Second Civil Appeal No. 161 of 1935. against the decree of R. F. S. Baylis, Esq., I.C.S., District Judge of Bara Banki, dated the 23rd of March, 1935, modifying the decree of Syed Qadir Hasan, Additional Judge of Bara Banki, dated the 18th of April, 1934.