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MUSAMMAT AHMADI BEGUM v. MUSAMMAT BADRUNNISA

Ziaul Hasan, Hamilton and Radha Krishna, JJ.

BY COURT: ZIAUL HASAN, HAMILTON and RADHA KRISHNA, JJ.:—The answer to the question referred to the Full Bench is as follows:

"A waqf describing the ultimate object of the benefit as 'charitable purposes, highly commendable according to Hanafi School' (*umur-i-khair men jo bamaujib mazhab hanafia zeada munasib hun kharch kare*) is not valid according to the Mussulman Waqf Validating Act (VI of 1913) unless the author of the waqf specifies a particular object and that particular object is recognized by the Mahomedan Law, as religious, pious, or charitable and is of a permanent character. The waqf, in the words of the order of reference, is invalid on the ground of vagueness and uncertainty having regard to the decision of their Lordships of the Privy Council in *Runchordas Vandrawandas and others* v. *Parvatibhai and others* (1)."

FULL BENCH

Before Mr. Justice A. H. deB. Hamilton, Mr. Justice R. L. Yorke, and Mr. Justice Radha Krishna Srivastava

ALI MOHAMMAD AND OTHERS (APPLICANTS) *v.* KHWAJA KHALIL AHMAD (OPPOSITE-PARTY)*

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United Provinces Encumbered Estates Act (XXV *of* 1934), *section* 45(5) *before amending Act* (XI *of* 1939)—*Civil Procedure Code* (*Act V of* 1908), *section* 115—*Revision whether barred under section* 45(5) *Encumbered Estates Act*—*Section* 45(2) *Encumbered Estates Act as amended by Act* (XI *of* 1939), *whether has retrospective effect.*

Clause (5) of section 45 of the United Provinces Encumbered Estates Act, as it stood before the amendment of 1939, bars interference by revision under section 115 of the Code of Civil Procedure with the appellate order or decree of the District Judge under that section.

The provision of a second appeal in clause 2(*a*) of section 45 of the United Provinces Encumbered Estates Act, as it stands after the amendment, has no retrospective effect. *Azizur Rahman* v. *Mst. Prem and others* (2), relied on.

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*Section 46 Encumbered Estates Act Application No. 1 of 1938, for revision of the order of J. R. W. Bennett, Esq., I.C.S., District Judge of Fyzabad, dated the 19th March, 1938.

(1) (1899) L.R., 26 I.A., 71. (2) (1940) I.L.R., 15 Luck., 460.

The case was originally heard by Mr. Justice RADHA KRISHNA SRIVASTAVA, who referred it for decision to a Full Bench, under section 14(1) of the Oudh Courts Act: His order of reference is as under:

RADHA KRISHNA, J.:—Three persons named Baqar Husain, Sajjad Husain and Qazi Rafaqat Husain applied under section 4 of the United Provinces Encumbered Estates Act on the 3rd July, 1936, to obtain the benefit of the Act. The application was received by the Special Judge on the 11th July, 1936. The applicants filed their written statements under section 8 on the 28th September, 1936. A notice under section 9 of the United Provinces Encumbered Estates Act was published in the *Gazette*, dated the 27th March, 1937. In the meantime Baqar Husain and Sajjad Husain, applicants 1 and 2, had died on the 22nd December, 1936, and 22nd November, 1936, respectively. Khwaja Khalil Ahmad, one of the creditors, filed his written statement under section 10 on the 2nd June, 1937.

On the 5th April, 1937, Ali Mohammad, the grandson of Baqar Husain, and Qazi Nurul Huda or Nurul Hasan, the son of Sajjad Husain, applied for substitution of their names in place of Baqar Husain and Sajjad Husain respectively. This application was allowed by the Special Judge but has been refused on appeal by the learned District Judge.

Ali Mohammad, Nurul Hasan and the third applicant Qazi Rifaqat Husain have come up to this Court in revision under section 46 of the United Provinces Encumbered Estates Act against the order of the District Judge.

A preliminary objection has been taken by the learned counsel for the opposite-party to the effect that the present application is not maintainable under the provisions of section 46 of the United Provinces Encumbered Estates Act.

In reply the learned counsel for the applicants asks leave to have this application treated as an application under section 115 of the Code of Civil Procedure or as a second appeal under the provisions of section 45(2)(*a*) as amended by the Local Act XI of 1939 [U. P. Encumbered Estates (Amendment) Act].

Act XI of 1939, by which certain sections of the United Provinces Encumbered Estates Act were amended, came into force on the 30th September, 1939, and the present application was filed on the 16th July, 1938, when under the law as it stood then an appellate order of the District Judge was absolutely final [*vide* clause (5) of section 45 of the United Provinces Encumbered Estates Act as it stood before the Amendment]. Therefore, it is contended that the applicants cannot be given

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the benefit of clause 2(*a*) of section 45 of the United Provinces Encumbered Estates Act because there was no such provision in existence at the time the present application was filed inasmuch as it would be giving a retrospective effect to that provision depriving the opposite-party of the advantages of a final order. Further it is contended that this application cannot be treated as an application under section 115 of the Code of Civil Procedure either because the order of the District Judge has been made final by Statute and to allow a revision application against that order would be destroying its finality. Reliance was placed upon a Full Bench case in *Mahipal Singh* v. *Kamta Prasad* (1) in which a similar provision contained in sub-section (2) of section 5 of the United Provinces Agriculturists' Relief Act, which makes the decision of an appellate court final, was interpreted.

I consider that the questions whether the applicants can be allowed to convert their application into a second appeal as now provided by the amended section 45 of the United Provinces Encumbered Estates Act or into a revision under section 115 of the Code of Civil Procedure, are questions of considerable importance depending upon whether the provision which has been introduced by Amendment in section 45 can be given retrospective effect or not and whether the meaning of the word " final " in clause (5) of section 45 of the United Provinces Encumbered Estates Act is the same as that in subsection (2) of section 45 of the Act.

I, therefore, refer the following questions for decision to a Full Bench under section 14(1) of the Oudh Courts Act:

1. Whether the provision contained in clause (5) of section 45 of the United Provinces Encumbered Estates Act, as it stood before the amendment, which makes the decision on appeal final, bars interference by revision under section 115 of the Code of Civil Procedure or not?

2. Whether the provision of a second appeal in clause (2)(*a*) of section 45 of the United Provinces Encumbered Estates Act, as it stand after the amendment, has retrospective effect or not?

Mr. *Naim Ullah*, for the applicants.

Mr. *Ali Hasan*, for the opposite-party.

HAMILTON, YORKE, and RADHA KRISHNA, JJ.:—The facts leading to this reference are given in the order of

(1) (1939) I.L.R., 15 Luck., 163F.B.

reference, which was passed by one of us, and it is not necessary to repeat them here. The questions referred for decision to this Full Bench are as follows:

"1. Whether the provision contained in clause (5) of section 45 of the United Provinces Encumbered Estates Act, as it stood before the amendment, which makes the decision on appeal final, bars interference by revision under section 115 of the Code of Civil Procedure or not?

"2. Whether the provision of a second appeal in clause (2)(*a*) of section 45 of the United Provinces Encumbered Estates Act, as it stands after the amendment, has retrospective effect or not?"

The answer to question No. 1 depends upon the meaning to be put upon the words "shall be final" occurring in clause (5) of section 45 of the United Provinces Encumbered Estates Act (XXV of 1934), as it stood before the amendment of 1939. Section 45 before the amendment stood as follows:

"45. (1) An appeal against any decision, decree or order of a Special Judge of the first grade under this Act shall lie to the High Court or Chief Court, as the case may be. The period of limitation for appeals under this sub-section shall be ninety days.

(2) An appeal against any decision, decree or order of a Special Judge of the second grade under this Act shall lie to the District Judge. The period of limitation for appeals under this sub-section shall be thirty days.

(3) An appeal against any decision, decree or order of a Collector or Settlement Officer under this Act shall lie to the Board of Revenue. The period of limitation for appeals under this sub-section shall be sixty days.

(4) The provisions of sections 5 and 12 of the Indian Limitation Act, 1908, shall apply to appeals under this Act.

(5) The decision on an appeal under this section shall be final".

Now by section 19(ii) of the Amendment Act (XI of 1939) a new sub-clause (*a*) has been added to clause (2) by which a provision has been made for a second appeal from the appellate decree of a District Judge

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passed under sub-section (2) on the grounds mentioned in section 100 of the Code of Civil Procedure and the old clause (5) has been suitably changed. It is not disputed that before the amendment there was no second appeal from the appellate order or decree of the District Judge but the question is whether a revision could be filed against it under section 115 of the Code of Civil Procedure. The counsel for the applicants argues that clause (5) of the old section finds place in section 45 which deals with appeals and as such the finality provided for in that clause refers to the decision on appeal being not open to any further appeal. His contention in other words amounts to this that the Legislature provided by section 45 for all kinds of appeal under the United Provinces Encumbered Estates, that it was not concerned with other remedies, such as remedy by way of revision, and that, therefore, clause (5) when it provided that "the decision of an appeal shall be final", meant to preclude a second or further appeal, and that there is nothing in the Act anywhere by which the application under section 115 of the Code of Civil Procedure may have been excluded.

On behalf of the opposite-party reliance has been placed upon a Full Bench decision of this Court in *Mahipal Singh, Thakur* v. *Kamta Prasad,* (1), which was given in respect of analogous words occurring in section 5(2) of the United Provinces Agriculturists' Relief Act. Here it is necessary to reproduce the language of section 5(2) of the United Provinces Agriculturists' Relief Act and compare it with that of the old section 45(2) and (5) of the United Provinces Encumbered Estates Act, in order to appreciate the full implication of the Full Bench case mentioned above.

Section 5(2) of the United Provinces Agriculturists' Relief Act runs as follows:

"5(2). If, on the application of the judgment-debtor, the court refuses to grant instalments or grants a number or period of instalments which the judgment-debtor con-

(1) (1939) I.L.R., 15 Luck., 163F.B.

siders inadequate, its order shall be appealable to the court to which the court passing the order is immediately subordinate, and the decision of the appellate court shall be final:"

Section 45(2) and (5) of the United Provinces Encumbered Estates Act, as it stood before the amendment, runs as follows:

> "(2) An appeal against any decision, decree or order of a Special Judge of the second grade under this Act shall lie to the District Judge. The period of limitation for appeals under this sub-section shall be thirty days.
>
> (5) The decision on an appeal under this section shall be final".

In that Full Bench case the argument which has been urged by the applicants' counsel was pressed but not accepted. The learned Judge, who wrote the main judgment in that Full Bench case, remarked as regards the words "and the decision of the appellate court, shall be final" in section 5(2) of the U. P. Agriculturists' Relief Act, as follows:

> "If the intention had only been to provide that no second appeal would lie in a case coming within the purview of sub-section (2) the Legislature would have said as they did in section 23 that 'no appeal shall lie from an appellate order' in such a case."

We have tried to follow the argument of the learned counsel for the applicants but we regret we cannot accept it. The observation quoted above from the previous Full Bench judgment has considerable force. We cannot discover any distinction between "and the decision of the appellate court shall be final" in section 5(2) of the United Provinces Agriculturists' Relief Act and the words "the decision on an appeal under this section shall be final" occurring in section 45(5) of the United Provinces Encumbered Estates Act, as it stood before the amendment of 1939. The finality of an order can be maintained only by holding that not only an appeal would not lie but a revision application is also precluded.

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Our answer to the first question, therefore, is that clause (5) of section 45 of the United Provinces Encumbered Estates Act, as it stood before the amendment of 1939, bars interference by revision under section 115 of the Code of Civil Procedure with the appellate order or decree of the District Judge under that section.

As regards the second question, it is admitted that before the 30th September, 1939, when Act XI of 1939, by which certain sections of the United Provinces Encumbered Estates Act were amended, came into force, the applicants had no right of a second appeal against the appellate order of the District Judge. In other words, the order of the District Judge was with reference to the law standing before the 30th September, 1939, final between the parties. The opposite side had clearly under the old law obtained an unassailable advantage against the applicants. The question is, could that advantage be said to have been taken away by a mere provision of a second appeal after the 30th September, 1939? In our opinion it could not. An appeal is a creature of Statute. The Legislature had not only not provided for a second appeal from the appellate order or decree of the District Judge but had expressly provided that it would be final. In the absence of any words giving retrospective effect to a second appeal in the new section 45 of the United Provinces Encumbered Estates Act we are definitely of opinion that such a provision has no retrospective effect. The question came up although in an opposite shape before a Bench of this Court in *Azizur Rahman* v. *Mst. Prem Piari and others* (1), wherein it held that where an appeal was validly brought under the law as it stood at that time, it would not be fair to hold that it should not be entertained on account of a subsequent amendment of law which does not specifically give retrospective effect to the amendment. The principal of this decision is applicable with greater force to the present case.

(1) (1940) I.L.R., 15 Luck., 460.

In the present case the particular order of the learned District Judge dated the 19th March, 1938, against which this application in revision was filed on the 16th July, 1938, was not appealable at the time it was passed. The present provision for a second appeal came into force from the 30th September, 1939, i.e. about a year and a half of that order.

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On the authority of the case mentioned above and in view of the principle that the right of having an order treated as final vested in a party cannot be taken away by a subsequent enactment in the absence of the express words to that effect, we give the answer to the second question in the following words:

> "The provision of a second appeal in clause 2 (*a*) of section 45 of the United Provinces Encumbered Estates Act, as it stands after the amendment, has no retrospective effect."

Answered accordingly.

APPELLATE CIVIL

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

B. KANHAIYA LAL AND OTHERS (DEFENDANTS-APPELLANTS) *v.* HAMID ALI (PLAINTIFF-RESPONDENT)*

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*Civil Procedure Code (Act V of 1908), section 24—Transfer of case from one court to another—Section 24, whether makes distinction between inherent and other kinds of jurisdictions—Case sent for trial to a court under orders of Privy Council—Section 24, Civil Procedure Code, if applies to such transfer—Suits Valuation Act (VII of 1887), section 11—Under-valuation of suit—Fact that appeal to subordinate court due to under-valuation, whether can be regarded to have affected appeal on merits—Abadi—Wajib-ul-arz—*Riaya *whether not bound by wajib-ul-arz, being no party to it—U. P. Municipalities Act (II of 1916), section 337—Notification that certain locality was notified area, how far affects proprietary rights of residents.*

Under section 24, Civil Procedure Code, the superior court cannot make an order of transfer of a case unless the court

*Second Civil Appeal No. 221 of 1936, against the order of W. Y. Madeley, Esq., I.C.S., District Judge of Lucknow, dated the 18th January, 1936.