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[448] ORIGINAL CIVIL.

Before Mr. Justice Woodroffe.

AMRITA BIBEE v. KANHIA LAL AGARWALLA.*

[6th January, 1905.]

Trust, administration of, by Court—New trustees, appointment of—Concurrent sanction of Court.

Where a suit has been instituted for administration of a trust and a decree has been made, that attracts the Court's jurisdiction, and a trustee cannot afterwards exercise a power of appointment without the concurrent sanction of the Court.

In such a case a trustee having a power of appointment of new trustees is not excluded from the right of nomination, but the sanction of the Court is necessary to his choice.

In re Hall (1) distinguished.

THE facts of this case were as follows:—

One Babu Lal Agarwalla, who died in October 1873, by his will dated the 6th August 1873, directed his executors and trustees, *inter alia*, to erect a *mandir* or temple and suitable buildings for the reception of members of his family and for poor and homeless people at Brindaban. Probate of this will was duly obtained by Jugal Kishore Agarwalla, Kali Prasad Agarwalla and Madho Prasad Agarwalla, the executors and trustees appointed thereunder.

In the said will it was provided that if any of the trustees appointed by the testator, or any of the trustees to be appointed in the manner provided for, should die or desire to be discharged or refuse to or become incapable of acting, the trustee or trustees so dying or desiring to be discharged or refusing to act, might appoint any other person or persons to be trustee or trustees in his or their place and that upon such appointment the estate should vest in the trustee or trustees so appointed.

[449] The plaintiff in this suit, who was a beneficiary under the will and had together with others been appointed a manager of the *mandir* to be erected at Brindaban, instituted a suit, No. 548 of 1878, on the 5th September 1878, alleging that the terms of the will, particularly with regard to the said *mandir*, had not been carried out and praying, amongst other reliefs, for the construction of the testator's will, for administration of the estate, for the removal of the old trustees and executors and appointment of others in their place, and for the framing of a scheme for the erection of the said *mandir*.

A preliminary decree was passed in that suit on the 27th June 1879, directing the trustees, *inter alia*, to carry out the trusts in respect of the erection of the said *mandir* forthwith.

By a further decree made on the 13th September 1882, it was ordered and decreed that the temple and buildings should be erected and completed without delay by the executors and trustees, and that the executors and trustees should continue in charge of the testator's estate until the further order of the Court and should pass their accounts half-yearly before the Court.

The plaintiff in the present suit alleged in her plaint that on the 23rd of August 1884, one of the trustees and executors, Jugal Kishore Agarwalla,

* Original Civil Suit No. 702 of 1903.

(1) (1835) 54 L. J. Ch. (N. S.) 527.

without the sanction of the Court and without having obtained his discharge from his office as such trustee and executor, had purported to appoint his son Bilashi Ram, since deceased, as a trustee in his place under the power provided in the will, and that Bilashi Ram by his will had purported to appoint his son, Thakursi Das, since deceased, to be a trustee in his place.

It was further alleged that notwithstanding the appointment of Thakursi Das, Jugal Kishore had continued to act as trustee and had in fact taken the most active part in the management of the estate. Jugal Kishore died on the 16th September 1900, having some time before that date appointed by deed his grandson the defendant, Chatterbhuj, trustee in his place. Of the remaining trustee, Kali Prosad Agarwalla died in 1899 without having appointed any one in his place, and Madho Persad died in 1900, having by will appointed his son the defendant, Kanhia Lal, trustee in his stead. It was admitted that [450] Kanhia Lal had become an insolvent on the 3rd of March 1903, and had lost in his insolvency certain sums out of the trust funds.

The plaintiff further alleged that in spite of the directions of the decree of 1882, the executors and trustees had neglected to carry out the trust relating to the erection of the *mandir*, and that the plaintiff had accordingly entered into an agreement on the 10th September 1890 with Madho Persad and Kali Prosad and also with Bilashi Ram, whom she then believed to be a trustee, by which she agreed to erect the *mandir* at a cost of Rs. 37,000 in consideration of her being paid the expenses in connection therewith in the manner provided by the agreement.

On the 29th July 1895, the plaintiff applied in the suit No. 584 of 1878 for an order that Jugal Kishore should be removed from his office as trustee on the ground that the terms of the said agreement had not been carried out, and also on the ground of waste and misappropriation, and thereupon an order was made that the executors and trustees should file and pass their accounts in pursuance of the directions contained in the decree of the 13th September within two months, and should continue to file and pass subsequent accounts every half year.

In the same suit further proceedings were had and orders made from time to time by which certain sums were directed to be paid out of the funds then standing to the credit of the suit to enable the plaintiff to complete the erection of the *mandir* and buildings.

By a further order, dated the 29th of May 1903, the suit was revived against the heirs and legal representatives of Jugal Kishore and Madho Persad.

The plaintiff now prayed for a declaration that the appointments of Kanhia Lal and Chatterbhuj as trustees were void and inoperative, and that in any event they should be removed, for the appointment of new trustees and for the framing of a scheme to carry out the trusts of the will, and other reliefs.

The Advocate-General (Mr. O'Kinealy) (Mr. Chakravarti with him, for the plaintiff. The appointment of Chatterbhuj was bad inasmuch as a decree having been made in suit No. 548 of 1878, [451] Jugal Kishore, the appointing trustee, could not exercise his power of appointment without the concurrent sanction of the Court. The rule on this point will be found in Lewin on Trusts, 10th Edition, page 733. The Court will control the trustee in the exercise of his power to elect new trustees: *Webb v.*

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Earl of Shaftesbury (1). The ground for the rule is that the administration is the administration of the Court. The power can only be exercised after decree subject to the supervision of the Court : *In re Gadd* (2); it is not taken away from the trustees, but the Court will not allow improper persons to be appointed : *Tempest v. Lord Camoys* (3), *Bethell v. Abraham* (4). In this case the Court has expressly retained the administration of the estate as it has stipulated for the filing of accounts. In any event, it is submitted that Jugal Kishore having once made an appointment has exhausted his power and could make no further appointment. The appointment of Kanhia Lal was void by reason of his insolvency and breach of trust.

Mr. A. Chaudhuri (Mr. A. N. Chaudhuri with him) for the defendant, Kanhia Lal, submitted that his appointment was valid. The power of appointment remains in the original trustees. This is shewn by the cases cited. They also cited *In re Hall* (5).

Mr. A. M. Dunne (Mr. S. P. Sinha and Mr. B. C. Mitter with him), for the defendant Chatturbhuj, contended that the appointment was valid. The effect of the rule is that the trustee must not make an improper appointment; in that case the Court will interfere, but the power of appointment is not taken away : *Tempest v. Lord Camoys* (3). There is nothing in the rule as to coming to Court to obtain sanction. Further, the rule in *Webb v. Shaftesbury* (1) has not been followed in these Courts.

Mr. Avetoom and Mr. U. P. Roy, for the other defendants, supported the Advocate-General.

The Advocate-General, in reply.

WOODROFFE, J. This is a suit which is sought to be, and may be treated, as supplemental to suit No. 584 of 1878, which was [452] instituted for administration of the estate and trusts of the will of one Babu Lal Agarwalla.

The testator died in October 1873 after having made his will dated the 6th August 1873, of which he appointed three persons, Jugal Kishore Agarwallah, Kali Prosad Agarwalla and Madho Prosad Agarwalla, his executors and trustees. By that will he gave certain legacies and devised the residue of his estate to certain religious and charitable uses.

He directed that his executors and trustees should erect a temple and suitable buildings for the residence of members of his family and for the reception of poor and homeless persons at Brindaban, and he appointed one Mundra Bibee, since deceased, his sister-in-law, one Buldeo Agarwalla, since deceased, and who is now represented by the defendant, Lalla Makhan Lal Agarwalla, and the plaintiff, managers of the temple, and directed that from and out of the rents and income and profits arising from his estate certain sums should be remitted monthly by his executors and trustees to the managers of the temple to be by them expended in the performance of certain *pujas*, maintenance and support of the members of his family, and feeding of the poor. He also directed that the surplus left after certain expenditure in Calcutta, should also be sent to the managers to be applied by them in the same way as the monthly remittance.

As regards the trustees, the testator provided that, if any of the trustees appointed by him or any of the trustees to be appointed in the manner by the will provided for the time being, should die or desire to be discharged or refuse to or become incapable to act, then the trustee or

(1) (1802) 7 Ves. 450.

(2) (1883) L. R. 28 Ch. D. 184.

(3) (1892) L. R. 21 Ch. D. 571.

(4) (1878) L. R. 17 Eq. 24.

(5) (1885) 54 L. J. Ch. (N. S.) 527.

trustees so dying or desiring to be discharged, or refusing to act, might appoint any other person or persons to be trustee or trustees in his or their place.

Probate was obtained by the executors and trustees on the 27th December 1873, and it having been alleged that the directions of the will, particularly the directions as regards erection of the temple, had not been carried out, the plaintiff on the 5th September 1878, instituted the suit which I have mentioned, *viz.*, suit No. 584 of 1878, for construction of the testator's will, for administration of his estate, for an account, for removal of the trustees and executors and for appointment of new trustees, and for the framing of a scheme for the erection of the temple.

[453] A preliminary decree was made on the 27th June 1879, and on the 13th September 1882, it was amongst other things ordered and decreed that the *mandir* and the buildings, to be erected at Brindaban as directed by the will of the testator, should be erected and completed without delay by the executors and trustee under the scheme to be framed by the Court or otherwise as the Court might direct, with liberty to the parties to apply to the Court in respect thereof, and it was further ordered and decreed that the executors and trustees should continue in charge of the testator's estate until the further order of this Court, and should pass their accounts half-yearly before the Court.

The preliminary decree ordered and decreed amongst other things that the defendant's executors and trustees should forthwith carry out the trusts of the will as to the erection of the *mandir* and the buildings at Brindaban.

It is alleged in the plaint, that on the 23rd August 1884 the trustee Jugal Kishore, without having obtained sanction of the Court and without obtaining his discharge from his office as trustee, purported to appoint his son, one Bilashi Ram, since deceased, as trustee in his place and stead under the powers conferred upon him by the will, and the plaintiff further alleges that Bilashi Ram by his will purported to appoint his son Thakursi Dass, who is also now dead, to be a trustee in his place and stead.

It is further alleged that in spite of this appointment of Thakursi Dass, Jugal Kishore, the trustee, continued to act not only as one of the trustees to the will, but took the most active part in the management of the estate and held custody of all the title-deeds and books of account and papers connected with the estate.

As regards the alleged appointment of Bilashi Ram, the defendant Chaturbhuj states that he has no personal knowledge of it and does not admit such appointment, and states that as a matter of fact Bilashi Ram did not act as trustee of the will of the testator, but that he used to assist Jugal Kishore in matters connected with the trust, always acting under the immediate control and supervision of Jugal Kishore, who never ceased to act as trustee under the will until the appointment of the defendant Chaturbhuj as trustee.

[454] It is alleged that in spite of the directions contained in the decree of 1882, the executors and trustees did not carry out the trusts relating to the erection of the temple and the buildings, and that thereupon the plaintiff on the 10th September 1890 entered into an arrangement with Kali Prosad and Madho Prosad, two of the original trustees, and also with Bilashi Ram, whom the plaintiff states that she then under a mistaken belief supposed to be a trustee, and by this agreement the plaintiff agreed to erect the temple and buildings which were estimated to cost a sum of

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Rs. 37,000 on her being paid the expenses therefor in the manner provided by the agreement.

On the 29th July 1895 the plaintiff applied in the suit No. 584 of 1878 on certain grounds amongst others that the terms of the agreement of the 10th September 1890 had not been carried out and also on ground of waste and misappropriation, for an order that Jugal Kishore should be removed from his office of trustee, and thereupon on the 29th July 1895 an order was made that the executors and trustees should file such of their accounts in pursuance of the directions contained in the decree of the 13th September 1882 within two months from date of order as had not then been filed, and it was also ordered that they should pass the accounts already filed by them and not passed, and that they should continue to file their subsequent accounts every half-year and pass the same, and they were further directed to make certain payments to the plaintiff, as appear in that order.

In the same suit further proceedings were had and certain orders made on the 14th March 1896 and the 23rd April 1896, by which certain sums were directed to be paid out of the funds then standing to the credit of the suit to enable the plaintiff to complete the erection of the temple and the buildings. Since the 23rd April 1896 the plaintiff has completed the erection and decoration of the temple and the installation of the Thakur.

In 1891 the trustee, Kali Prosad, died without having appointed any one in his stead, and in 1900 the trustee Madho Prosad died after having appointed by will (without having obtained his discharge) the defendant Kanhia Lal Agarwalla as a trustee in his stead. Then on the 16th September 1900, the surviving trustee, Jugal Kishore, by a deed of that date purported [455] to appoint his grandson, the defendant Chatterbhuj, to be a trustee of the will in his place and stead without obtaining sanction of this Court and without obtaining his discharge, and this defendant Chatterbhuj on his appointment took over possession of the estate of Jugal Kishore, and he and the defendant Kanhia Lal Agarwalla, who claim to be trustees by virtue of the appointments I have mentioned, are stated to be in possession of the estate of Babu Lal Agarwallah. It is stated that they have not duly filed accounts in respect of their dealings with that estate, which they are alleged to have mismanaged.

On the 5th April 1902 further proceedings were taken in suit No. 584 of 1878, and application being made to have the suit revived by bringing on the record the heirs and representatives of Jugal Kishore and Madho Prosad, and by an order dated the 29th May 1903 the suit was revived against their heirs and legal representatives.

On the 23rd September 1903 the present suit was instituted for a declaration that the appointment of the defendants Kanhia Lal Agarwalla and Chatterbhuj Agarwalla as trustees of the will of Babu Lal is void and inoperative, and that in any event they should be removed, for the appointment of fit and proper persons as trustees, for an enquiry to ascertain what the estate now consists of, for an account as against the defendants Kanhia Lal and Chatterbhuj on the basis of wilful neglect and default, for the framing of a scheme to carry out the trusts of the will of Babu Lal and for other relief.

The matter now comes before me upon settlement of issues, and as such must, I think, be dealt with upon such facts as are admitted by the pleadings of the parties or otherwise admitted by them. This being so, and the charges of mismanagement being denied, that portion of the case,

as also the prayer to have the accounts taken upon the basis of wilful neglect and default, must be taken to be abandoned.

As regards the question of appointment of trustees, there are at present two persons who claim to be such, *viz.*, the defendants Chatterbhuj and Kanhia Lal. It is agreed by all the parties that the original number of trustees should be maintained and there must therefore be an enquiry to ascertain, who is a fit and proper person to be appointed as the third trustee under this will.

[456] It is clear that whether or not the defendant, Kanhia Lal Agarwalla, was validly appointed, he is not a fit person to be a trustee of this estate. He is admittedly an insolvent, who states that certain monies of the estate came to his possession and were lost by his insolvency, and that since the date of his insolvency he has not taken any part in the management of the estate and has filed no accounts.

The real question therefore in this suit is as to the appointment of the defendant Chatterbhuj. Two objections have been taken to that appointment. It is said in the first place that assuming that Jugal Kishore had power after and notwithstanding the decree of the 13th September 1882 to appoint a trustee, he had in fact exhausted such power in appointing Bilashi Ram, and that upon the appointment of Bilashi Ram only the latter or his heirs could appoint a trustee in succession to him. As I have already stated, I can only deal with this case upon the facts admitted by the parties, and inasmuch as the appointment of Bilashi Ram is not admitted and it is alleged that he in fact never acted as trustee, I am unable to give effect to the objection which has been raised by the plaintiff on this point. It was suggested that I should refer the question of the appointment of Bilashi Ram, but I do not think that when the matter comes, as this does before me, upon settlement of issues, I should refer any question of fact which is necessary for the determination of an issue, which has to be decided by the Court.

The learned Advocate-General has next argued that having regard to the terms of the decree of the 13th September 1882 and to the fact that the estate was being administered and is still now being administered by the Court, Jugal Kishore, the trustee appointed under the will, was not entitled to exercise the power of appointment given by that will without the sanction of this Court.

This matter resolves itself into a consideration of the question, whether the decree of 1882 was a final decree and whether the Court has relinquished the administration which it assumed under the preliminary decree of 1879, and also as to whether the effect of the express directions contained in the decree of 1882 that the executors and trustees should continue in charge of the estate [457] until further orders of Court and should pass their accounts half-yearly before the Court did not preclude an appointment by the trustee. I think that having regard both to the terms of the decree of 1882 and also to the proceedings thereafter taken, it cannot be said that that decree was a final decree in this suit. Further, on the 29th July 1895, on the 14th March, on the 23rd April 1896, on the 5th April 1902 and on the 29th May 1903, proceedings were taken subsequent to the decree in that suit which I have referred to and which are mentioned in the 13th, 14th and 29th paragraphs of the plaint, and all those proceedings it was assumed, and orders of Court were passed on the basis, that there was a pending suit. No application was made for discharge of the trustees or for appointment of new trustees or to remove the trust

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from the administration of the Court. Under those circumstances I think the case comes within the rule as stated at page 733 of the 10th edition of Lewin on Trusts, that where a suit has been instituted for administration of the trust, and a decree has been made, *that* attracts the Court's jurisdiction, and the trustee cannot afterwards exercise the power without the concurrent sanction of the Court.

It has been argued that concurrent sanction is not necessary to the validity of the appointment of the trustees, that the matter is merely one of control, and that the Court will not interfere provided that it is not shewn that the person appointed was not a proper one and that, if that be not shewn, the appointment stands.

Reliance has been placed on the case of *In re Hall* (1). It is, however, to be observed that the circumstances of that case are very different from those which are cited in support of the general rule to which I have referred. In that case which deals with the effect of Order 55, Rule 3, directing certain enquiries, including an enquiry whether previous trustees had been appointed and what steps should be taken for appointment of new trustees, no general order for administration had in fact been made such as has been made in this case.

It is further to be observed that in the present case there is the express direction contained in the decree that the trustees should continue in charge of the testator's estate until the further order [458] of this Court, and it seems to me that the execution of the power of appointment by the trustees under such circumstances must necessarily conflict with that order.

I hold, therefore, that it was not open to the trustees Jugal Kishore and Madho Prosad to appoint the defendants Kanbia Lal and Chatturbhuj without sanction of this Court which was admittedly not applied for and that they were not validly appointed. Inasmuch, however, as the fact of the decree does not take away the right of nomination which Jugal Kishore possessed, the deed of appointment by him may, I think, be recognized as such nomination, and it will be referred to the Official Referee to enquire whether the defendant Chatturbhuj is a fit and proper person to be appointed a trustee. For the purpose of such enquiry it will not be open to the plaintiff or any other party to enter into any question of alleged mismanagement since the date of the deed purporting to appoint him. If Chatturbhuj is a fit and proper person he must be appointed a trustee.

There will also be a reference to enquire as to what two other persons are fit and proper persons to be appointed as trustees of this will.

Then as regards the other prayers of the plaint, there will be an enquiry in terms of prayer (e) of the plaint and an account must be taken in terms of the prayer (f) except that the account is not to be on the basis of wilful neglect or default. There will be a direction that a scheme be framed for the purpose of carrying out such of the trusts of the will of the testator, including the erection of a *dharamsala* as have not been already carried out.

There will be a decree in terms of clause (i) of the plaint. There will be a direction to frame a scheme in respect of the management of the *mandir*, if such a scheme be necessary, it being open to the plaintiff to establish before the Referee that no such scheme is necessary. There must

(1) (1885) 54 L. J. Ch. (N. S.) 527.

be also, I think, a direction to the managers of the *mandir* to render accounts of their management.

Attorneys for the plaintiff : *Wilson & Co.*

Attorneys for the defendants : *S. C. Mookerjee ; Manuel & Agarwalla ; P. N. Sen.*

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[459] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Holmwood.

HARI CHARAN FADIKAR v. HARI KAR.*

[6th February, 1905.]

Limitation—Suit for damages—Fictitious distress—Standing crops—Limitation Act (XV of 1877), Sch. II, Arts. 29, 36—Immoveable property.

The defendants under fraudulent and fictitious proceedings of distraint between a fictitious landlord and a fictitious tenant, seized standing crops belonging to the plaintiff :—

Held, that a suit for damages for the crops so seized, not being specially provided for in the Act, was governed by Art. 36 of Schedule II of the Limitation Act (XV of 1877).

Standing crops are immoveable property within the meaning of the Limitation Act.

[Appr. 36 Cal. 141 ; Fol. and Ref. 9 C. L. J. 100=12 C. W. N. 1090; Dist. 17 C. W. N. 308=17 C. L. J. 206=18 I. C. 253 ; Ref. 14 M. L. T. 225=25 M. L. J. 447=1913 M. W. N. 869=21 I. C. 213 (F.B.) ; 18 N. L. R. 96.]

APPEAL by Hari Charan Fadikar, the plaintiff, under s. 15 of the Letters Patent.

The plaintiff brought the suit in the Court of the Munsif at Tamluk for recovery of damages on the following allegations : That the plaintiff held a certain plot of land under the zemindars, Gopal Lal Seal and others ; the defendant No. 1 having failed in a suit brought by him against the said zemindars to establish his title to the said land, colluded with defendants Nos. 2 to 8 and caused an application for distraint to be made to the third Court of the Munsif at Tamluk in respect of the land by putting forward defendant No. 8 as the malik and defendant No. 9 as the tenant, and in pursuance of the order made thereon the defendants cut away the paddy grown on the land by the plaintiff and misappropriated the same in Agraphayan 1309. The plaintiff alleged that the defendants [460] had no right to or interest in the land, and that the defendant No. 9 was an imaginary person.

The defendants Nos. 2 to 8 appeared and filed written statements pleading, *inter alia*, that the suit was triable not by the Munsif but by the Court of Small Causes, that the suit was barred by limitation, that the land belonged to defendant No. 8 and that the defendant No. 9 was the tenant. At the hearing defendants 1 and 2 only appeared ; they disclaimed all interest in the land setting up title in defendants Nos. 8 and 9, and denied having cut the crops.

The Munsif held that the suit came under cl. (j), Art. 35 of the Second Schedule of the Provincial Small Cause Courts Act. On the merits he found in favour of the plaintiff, but he dismissed the suit holding that it was barred by limitation under Art. 2 of the Second Schedule of the Limitation Act.

* Letters Patent Appeal No. 61 of 1904, in appeal from Appellate Decree No. 1815 of 1903.