[ORIGINAL CIVIL.]

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Norman.

1870
March 21.

HIRALAL MULLICK (PLAINTIFF) *v.* MATILAL MULLICK AND OTHERS (DEFENDANTS).

Relief—Prayer for General Relief.

See also 14 B.L.R. 338.

Under a prayer for general relief, a plaintiff is not entitled to any relief which is inconsistent with his plaint; therefore, where a plaintiff brought a suit to set aside his father's will, on the ground that he had no power to dispose of his property, but that the plaintiff was entitled as eldest son and heir-at-law according to Hindu law, the suit should have been dismissed with costs, and no account should have been decreed to the plaintiff in respect of his interest in a portion of the property, the bequest of which was, in the opinion of the Court below, void for remoteness.

THIS suit was brought by the eldest son of Dwarkanath Mullick, deceased. The plaint set out that the deceased died leaving the plaintiff, his eldest son and heir-at-law, and other sons and daughters, and considerable property; that the deceased made his will (which was recited), and thereby left all his property to others than the plaintiff, with the exception of a small sum for maintenance.

In the will was the following provision :—

"The residue of my personal estate and moveable property, after making the payments above mentioned, shall be divided into six equal parts, and one of such equal parts shall be paid and transferred to each of my five younger sons, Matilal Mullick, Chunilal Mullick, Ramlal Mullick, Lutulal Mullick, and Girish Chandra Mullick; and the remaining one equal sixth part shall be retained by my executors, and the income thereof accumulated and invested in Government securities, until the son or sons of my eldest son, Hiralal Mullick, if he shall have any son, shall attain full age, and shall thereupon be paid and transferred to such son or sons if more than one, in equal shares; but no such payments or transfer shall be made to such son or sons, until the youngest of them, if more than one, shall have attained his full age; and in case no son be born of my said eldest son, Hiralal Mullick, or no son shall attain full

age, then the last mentioned sixth equal part of my residuary personal estate shall, on the death of the said Hiralal Mullick, be divided equally among such of my other five sons as shall then be living, and the male issue of such of them as shall then be dead; the male issue taking the share of a deceased son."

It was further stated in the plaint as follows:

"That the plaintiff submits that the Hindu laws regulate and dispose of the succession to landed and immoveable property of all deceased Hindus: and that by such laws, the said Dwarkanath Mullick could not legally or validly make any will to affect the ancestral landed and immoveable property, of which he was possessed at the time of his death, to the prejudice of the plaintiff, or in derogation of his rights; and the plaintiff further submits that the said will is void in law, and that the bequests made therein to plaintiffs prejudice are not valid. Plaintiff submits that, notwithstanding the said will, plaintiff is entitled under the Hindu law to all such ancestral immoveable property and to all landed property acquired by his father by the use of the rents and profits of such ancestral immoveable property; and that plaintiff is also entitled to the said moveable and personal property, or to a share or portion thereof. But should this Honorable Court consider such will not controlled, and not rendered nugatory and of no effect, by the laws of Hindus, as is above respectfully submitted, then plaintiff further submits that the testator has in the said will created perpetual trusts and perpetuities in reference to the landed or immoveable property, as also in reference to most of the personal or moveable property dealt with in the said will; and that the several devises and bequests of such property are also void in law for remoteness and uncertainty; and that all the said bequests are contrary to public policy and contrary to Hindu as well as to English laws, and that the said Dwarkanath Mullick has, in respect of said landed and immoveable property, and to the greater part of the said moveable property, died intestate, and that plaintiff is entitled to the ownership, as the eldest son of Dwarkanath Mullick, and to the possession of all said landed property, and to a share or portion of the said immoveable property.

"That the plaintiff submits that, as far as the said will purports or professes to pass any ancestral estate of the said Dwarkanath

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Mullick away from the plaintiff, it is wholly void; and that the limitations sought to be created by the said will are inoperative and void, and cannot take effect. The plaintiff also submits to this Honorable Court that he is also entitled to a share of the personal property of which the said Dwarkanath Mullick died possessed, and that the bequests of the same are void in law.

"That the plaintiff submits that, in case the said will is valid to any extent, then plaintiff is entitled to a share of all the said properties, to reasonable maintenance out of the said estate; and that the maintenance mentioned in the said will is insufficient; and that the plaintiff is entitled to be paid, pending this suit, the maintenance mentioned in the said will, without prejudice to his right to maintain and continue this suit to set aside the said will as aforesaid.

"The plaintiff prays as follows:—

"*Firstly*.—That it be declared that the testator had no absolute power of disposing by will of his entire estate, and particularly of his ancestral estate, to the exclusion of the plaintiff, and that it be declared that the plaintiff as eldest son or heir-at-law is entitled to the same.

"*Secondly*.—That it be declared that the trusts and limitations in and by the said will declared, in reference to the immoveable and landed estate of the said testator, and in reference to the residue of his personal estate, are wholly void and invalid; and that the plaintiff is entitled to the said landed estate and immoveable property, and to the residue of the said personal estate discharged from the trusts and devises, and the bequests thereof in the said will mentioned; and that it be declared that the testator has died intestate in respect to the said landed estate, and in respect of the said residue of his personal estate and immoveable property; that in case the Court be of opinion that the plaintiff is not entitled to the relief above asked for, it may be declared that he is entitled to a more adequate maintenance than that specified in the said will; and that the amount of such maintenance be ascertained by the Honorable Court, and the payment thereof directed out of the estate of the said testator; and that, in the meantime, and whilst this suit and plaint is being decided upon by this Honorable Court, the plain-

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tiff may have maintenance assigned to him of such amount as this Honorable Court may seen fit to order ; and further that, pending this suit, and if necessary, a receiver be appointed to receive the rents, issues, and profits of the said immoveable property, and to collect and manage, and pay into Court, to the credit of this suit, the said moveable property, or that part thereof which has not been validly bequeathed by the said will, and to which the plaintiff is entitled.

" *Thirdly.*—And that the plaintiff may have such other and further relief in the premises as to this Honorable Court shall seem meet, and the facts and justice of the case may require."

In this written statement, the plaintiff stated that he adopted his plaint as part of his written statement, and he further submitted, that if he (the plaintiff) " be not entitled as eldest son to the property of his father which may be held not to be validly disposed of by the said will, then that, at all events, he is entitled to a share thereof, both of moveable and immoveable property." And the plaintiff further stated, that he should submit to the Court that he was entitled to have an account from the executors.

The defence was that the plaint disclosed no cause of action ; that the eldest son is not heir according to Hindu law, but that the sons succeed jointly, unless, as was done by the father's will in this case, the father has otherwise disposed of his estate ; that the defendants took possession of the testator's property as executors, and are in possession as such ; and that the will was good and valid.

Issues were fixed ; and the following decree was made by PHEAR, J , on 4th January 1870 :

" It is declared that this suit, so far as it seeks to have it declared that the testator in the pleadings named had no absolute power of disposing by his will of his entire estate to the exclusion of the plaintiff, and that the plaintiff as eldest son or heir-at-law is entitled to the same, and also so far as it seeks to have it declared that the plaintiff is entitled to a more adequate maintenance than that specified in the will of the said testator, be, and the same is hereby, dismissed. And it is declared that the gifts of the interest on the Government Securities, specifically mentioned in the said will of the said testator, to his three daugh-

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ters for life, are good and valid in law, and that the other gifts of the moveable property to living persons are also good and valid in law. And it is further declared, that the direction in the will of the said testator to accumulate the income of one-sixth part of the residue of his moveable property and the other directions for the disposition both of the income and corpus of such one-sixth part of the residue of the said moveable property are void in law. And it is further declared that the said one-sixth part of the residue of the said moveable property is undisposed of by the will of the said testator, and that the plaintiff, as one of the sons of the said testator, is entitled to one equal sixth part thereof, and that the other sons of the said testator are entitled in equal shares to the remaining five equal sixth parts thereof. And it is further declared, that the said will, except as to the directions hereinbefore declared invalid, ought to be established and the parts thereof performed, and doth order and decree the same accordingly; and it is ordered and decreed that the defendants, the executors and trustees of the will of the said testator, do, out of the one-sixth of the estate of the said testator, pay to the plaintiff his costs of this suit (to be taxed by the Taxing Officer of this Court under the heading "Class 2, Ordinary Causes") with the interest thereon at the rate of 6 per cent. per annum from the date of taxation to the date of realization."

In the judgment upon which the decree proceeded were the following passages:—

PHEAR, J.—I need hardly say that the claims preferred by the plaintiff, under the first and second heads of his prayer, must have been framed in ignorance of the fundamental principles of Hindu law with regard to inheritance. The mistake which is thus made so seriously affects the plaintiff's cause of action against his brothers, that I cannot help thinking it is matter to be regretted that the plaint was allowed to be filed in its existing form.

The written statement, too, of the plaintiff is irregular, for it is not so much a statement of the facts upon which the plaintiff relies for the support of the cause of action disclosed in the plaint, as it is a correction of the plaint itself, in regard to the faulty particular to which I have just referred, together with a further

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claim to relief additional to those contained in the prayer. In truth, it is essentially an amendment of, and addition to, the plaint.

On this basis, however awkwardly composed as it is, issues have been framed and fully argued before me. My present decision, therefore, ought not to have reference to anything outside the matters of dispute thus raised. * * * *

As to costs, I must adhere to the usual rule, and the plaintiff must have all his costs out of the estate, for I don't see how I can separate from the bulk any portion of costs and say that they are attributable to the faultiness of the plaint and written statement of the plaintiff.

From this decree the plaintiff appealed.

Mr. *Creagh* (Mr. *Macrae* with him) for the appellant, referred to the Dayabhaga, Chapter I, section 36, and Chapter III, section 15, to show that the plaintiff, being the eldest son of the testator, was not wrongly described as his heir-at-law; and contended that the devise of one-sixth of the personal property was void for remoteness, and that the appellant was entitled to a sixth part of that one-sixth.

Mr. *Kennedy* and Mr. *Branson* for the respondent were not called on.

PEACOCK, C. J.—This suit is brought by Hiralal Mullick to set aside the will of his father, Dwarkanath Mullick, and it is framed upon the ground that the plaintiff is the eldest son and heir-at-law according to Hindu law, of his father. It appears to me to be clear beyond all doubt that, according to Hindu law, the eldest son is not the heir-at-law of his father, nor do the authorities which have been cited by Mr. Creagh from the Dayabhaga show that the plaintiff can be looked upon or treated as the heir-at-law of his father.

After setting out the will of the testator, the plaintiff submitted that the will was not valid; but that if it was valid to any extent, then the plaintiff was entitled to reasonable maintenance.

Now the first prayer in the plaint is, "that it be declared that the testator had no absolute power of disposing by will of his entire estate to the exclusion of the plaintiff." I have no hesi-

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tation in stating that, in my opinion, the plaintiff is not entitled, in point of law, to any such declaration.

It then proceeds "that it may be declared that the trusts and limitations in and by the said will declared, in reference to the immoveable and landed estate of the said testator, and in reference to the residue of the personal estate, are wholly void and invalid; and that the plaintiff is entitled to the said landed estate and immoveable property, and to the residue of the said personal estate discharged from the trusts and devises, and the bequests thereof, in the said will mentioned; and that it be declared that the testator died intestate in respect of the said landed estate, and in respect of the said residue of his personal estate and immoveable property."

There can be no doubt that the meaning of that prayer is, that it may be declared that the testator died intestate, upon the ground that he had no power to make a will, and not on the ground that any portion of the devise, in respect of the moveable property, was bad for remoteness.

The plaintiff then prays that "it may be declared that he is entitled to a more adequate maintenance than that specified in the said will, and that the amount of such maintenance be ascertained by this Honorable Court, and the payment thereof directed out of the estate of the said testator; and that, in the meantime, and whilst this suit and plaint is being decided upon by this Honorable Court, the plaintiff may have maintenance assigned to him."

The third prayer is "that the plaintiff may have such other and further relief in the premises as to this Honorable Court shall seem meet, and the facts and justice of the case may require."

The question is whether, under the prayer for general relief, looking to the plaint as filed, contending that the testator had no power to make a will, and that he died intestate, the plaintiff is entitled to have an account taken of the personal property, on the ground that the devise of one-sixth of the personal property to accumulate until the son or sons of the plaintiff, if he shall have any son, shall attain full age, is bad for remoteness.

On the appeal being preferred, an objection was made by the respondent that the decree ought not to have declared the will

to be valid with the exception of the particular bequest as to one-sixth of the personal property.

I take it that, under a prayer for general relief a plaintiff is not entitled so any relief which is inconsistent with his plaint. Here the plaintiff says in his plaint that his father had no power to make a will; but it is now contended that the will being valid, the devise of one-sixth of the personality is bad on the ground of remoteness, and that therefore the plaintiff is entitled to one-sixth of that one-sixth.

In Story's Equity Pleadings, paragraph 40, it is said:—"The "usual course is for the plaintiff in this part of the bill to make a "special prayer for the particular relief to which he thinks him-"self entitled, and then to conclude with a prayer for general "relief at the discretion of the Court; the latter can never be "properly and safely omitted; because, if the plaintiff should "mistake the relief to which it is entitled in his special prayer, "the Court may yet afford him the relief to which he has a "right, under the prayer of general relief, provided it is such "relief as is agreeble to the case made by the bill."

In paragraph 41 of the same work it is said "that it has been "said that a prayer of general relief, without special prayer of the "particular relief to which the plaintiff thinks himself entitled, "will be sufficient, and that the particular relief which the case "requires may at the hearing be prayed at the bar. This, a "a general rule, may be true; but it is not universal. Thus, for "example, an injunction will not ordinarily be granted under "prayer for general relief; but it must be expressly prayed, "because the defendant might, by his answer, make a different "case under the general prayer from what he would if an in-"junction were specifically prayed."

Paragraph 42 says:—"But even when a prayer of general relief "is sufficient, the special relief prayed at the bar must essentially "depend upon the proper frame and structure of the bill; for "the Court will not ordinarily be so indulgent as to permit a bill "framed for one purpose to answer another, especially, if the "defendant may be surprised or prejudiced thereby. Thus, if "a bill is brought for an annuity or rent charge of £10 per "annum left under a will, and the counsel for the plaintiff

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"pray at the bar that they may drop the demand of the annuity "or rent charge, and insist upon the land itself out of which the "annuity or rent charge issues, the Court will not grant it; for "it is not agreeable to the case made by the bill."

The plaint in this case being to declare that the testator had no power to make a will, and to declare that he died intestate, it is now contended that the will is good, except as to the bequest of one-sixth of the personal property. The decree declares that the will is valid, except as to that bequest; whereas the plaintiff's prayer was to have the will set aside altogether. It appears to me therefore that, under the prayer for general relief, the plaintiff is not entitled to have an account taken of the personal estate, in order to ascertain the portion of the personal estate to which he would be entitled as one of six sons, that is, to see whether he is entitled to one-sixth of one-sixth, or one-thirty-sixth part of the personal property. I think that the decree ought not to have decreed an account of the personal property, but that it should have dismissed the plaintiff's suit altogether.

It appears to me then, on the whole of this case, that, as the plaintiff has not made out his case that his father was not entitled to dispose of his property, whether ancestral or self-acquired, or that he, as the eldest son, is entitled as heir-at-law to succeed to the property, his suit ought to have been dismissed, and that an account ought not to have been ordered of the personal property, in order to find out what was the plaintiff's one-sixth of the one-sixth share of that property which was devised to the plaintiff's eldest or other son.

Then the question arises whether the plaintiff, having brought a suit on the ground that he was entitled, as the eldest son and heir-at-law, to succeed to the property, and having failed in his suit, has a right to charge the estate with the costs of this suit. I am clearly of opinion that he had no such right, and that his suit having altogether failed, he should pay the costs of this unnecessary litigation. I also think it clear that the plaintiff is not entitled to any higher maintenance than that which has been awarded to him in the will.

The decree of the learned Judge will therefore be amended,

by dismissing the suit of the plaintiff with costs. The plaintiff will also pay the costs of this appeal.

Decree amended.

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Attorney for the appellant : Baboo *Girishchandra Ghose.*

Attorney for the respondent : Mr. *Thomas.*

[FULL BENCH.]

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Kemp, Mr. Justice L. S. Jackson, and Mr. Justice Phear.

ANAND CHANDRA PAL (DEFENDANT) *v.* PANCHILAL SARMA (PLAINTIFF.)*

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Official Assignee—Vesting Order—Sale in Execution of Decree—Auction purchaser—Priority—Act XXIII of 1861, *s.* 15—*Act VIII of* 1859, *ss.* 221, 232, 240, 242, *and* 351—*Insolvent Act* (11 & 12 *Vict., c.* 21), *ss.* 7 *and* 49

In September 1867 A. obtained a decree against B., and on 12th January 1868 caused a piece of land to be attached in execution. On 17th April 1868 it was sold by order of the Zilla Judge, and bought by C. Before this, however, the judgment-debtor B had filed his petition in the Insolvent Court and on the 6th March 1868 a vesting order was made. On 24th July 1868 the Official Assignee sold the premises by the order of the Insolvent Court.

See also 15 B. L. R. App. 13. 13 B.L.R. 207

The purchaser at the last mentioned sale now sued to recover the property from the purchaser at the sale in execution of A.'s decree.

Held,—*per* COUCH, C. J., BAYLEY, KEMP, and JACKSON, JJ.,—that the vesting order passed the property to the Official Assignee, subject to being divested by a sale in execution of the decree; that the sale in execution by order of the Zilla Judge was legal, notwithstanding the vesting order; that the purchaser at the sale in execution of the decree acquired a good title to the property, and the purchaser at the sale by order of the Insolvent Court had no right to recover it from him. The attaching creditor had a right to have the attached property sold, and the money realized by the sale paid to him.

Per PHEAR, J.—The jurisdiction of the Zilla Judge to order the sale was not affected by the vesting order; but before making the order for sale, the Official Assignee should be heard; and unless special reason be shown upon the Official Assignee's application the execution proceedings should be stayed or set aside. In the present case it must be assumed that the Judges made the order for sale in due course, and consequently that sale operated to pass the property out of the hands of the Official Assignee into those of the auction-purchaser.

THE question in this case was referred to a Full Bench, under

* Regular Appeal, No. 193 of 1869, from a decision of the Subordinate Judge of the 24-Pergunnâs, dated the 25th May 186 .