

Musammat Vaishno Ditti	-	-	-	-	-	<i>Appellant</i>
						<i>v.</i>
Musammat Rameshri and others	-	-	-	-	-	<i>Respondents</i>
Same	-	-	-	-	-	<i>Appellant</i>
						<i>v.</i>
Same	-	-	-	-	-	<i>Respondents</i>

Consolidated Appeals

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF THE
NORTH-WEST FRONTIER PROVINCE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 18TH MARCH, 1937.

Present at the Hearing :

LORD MAUGHAM.

SIR SHADI LAL.

SIR GEORGE RANKIN.

[*Delivered by* SIR GEORGE RANKIN.]

In this case two appeals have been consolidated. Both arise out of proceedings which followed upon an Order in Council dated 30th July, 1928, made in Appeal No. 84 of 1927. They are brought by Musammat Vaishno Ditti, who on 10th April, 1923, filed her suit in the Court of the District Judge of Peshawar to establish her right to a quarter share in the property left by her maternal grandfather Balmokand and his widow Musammat Kauran. Balmokand had died in 1906 leaving a widow and five daughters of whom one (Ramo) died without issue, so that her share accrued to the others equally. The widow had died in 1909.

The suit having succeeded before the District Judge was dismissed on appeal by the Judicial Commissioner, but by the Order in Council already mentioned the decree of the District Judge was restored "subject to the following modifications:—(a) that the appellant be granted a decree for a one-fourth share of the movable and immovable property and (b) a decree for rendition of accounts as from the 23rd day of June, 1910, with respect to her share with rents, profits and interest with costs here and in the lower Appellate Court." The family belong to the community of Arora Sikhs. The original and substantive dispute was between the plaintiff and her mother's three sisters. It

turned upon the fact that the plaintiff's mother Nikko (who had died in 1911) had been married in the lifetime of her father Balmokand. For this reason, it was contended, she took no share by inheritance, her sisters being preferential heirs. The matter was complicated by the circumstances that Balmokand's property had devolved upon his widow, that she had made a will and that a compromise decree had been obtained in a previous suit before the District Judge. For the purposes of the first of the two appeals now before the Board it is not necessary to say more than that the three daughters of Balmokand—Rameshri Ravelo and Lalo—whose interest it was to exclude the plaintiff, were impleaded by her suit.

Upon His Majesty's order being received in India it became the duty of the plaintiff to apply to the Court of the Judicial Commissioner to enforce it, and the proper order to be made was an order transmitting it to the District Judge to be carried out so far as regards costs and delivery of possession by appropriate steps under O. XXI and so far as regards the account by appropriate steps under O. XX, rr. 16 and 17 of the Civil Procedure Code. The language of rr. 15 and 16 of O. XLV is not well adapted to the case—by no means uncommon—of an Order in Council directing a remand or requiring further proceedings to be taken by the Trial Court as such before arriving at a final determination of the suit. The effect of the Order in Council of 30th July, 1928, so far as regards the direction for accounts was that of a preliminary decree and the same is true of the original decree of the District Judge dated 10th June, 1924. Under the Code of 1908 the proceedings under a preliminary decree for accounts to obtain a final decree for money are proceedings in the suit and are not proceedings in execution in the technical sense of that word as used in the Code.

On 30th July, 1929, the appellant presented to the Court of the Judicial Commissioner an application under O. XLV, r. 15 (2). It asked for attachment of certain property, for possession of her one-quarter share, for payment of costs and for the taking of accounts. The application was meant and was treated as an execution application (though it was partly of a different character), and the order of 7th February, 1930, was: "The application is made over to the District Judge, Peshawar, for execution." On 8th October, 1930, the District Judge directed delivery of possession of the immoveables to be given under O. XXI, r. 35 (2) and took steps to realise the costs by attachment and to ascertain what moveable property existed. He also directed that a commissioner should take the accounts and report. On 27th June, 1932, the commissioner reported that the appellant's share of rents, profits, etc., was Rs.65,243-4-5. Objections having been filed to this report, the Senior Subordinate Judge dealt with them and increased the sum due to the appellant to Rs.71,493-4-5. This he did by order dated 17th August, 1932, and on the same date he recorded another order: "Arguments heard. Decree-holder is entitled

to Rs.71,493-4-5 *vide* order on file. Decree-holder to put up prayer by 29th and pay balance of court-fee." It appears that the appellant had paid court-fee on Rs.44,250 only, this being the sum at which she had valued her claim. On 29th August, 1932, the matter was adjourned to 20th October and on that date another judicial officer, acting as Senior Subordinate Judge, dismissed the appellant's suit with costs by reason that she had not by that time paid the additional court-fee. He purported to act under the second paragraph of section 11 of the Court Fees Act (VII of 1870). A formal decree was drawn up dismissing the suit with costs and an appeal therefrom to the Judicial Commissioner was dismissed on 8th April, 1933. The appellant obtained from the Judicial Commissioner the usual certificate under section 110 of the Code and on this matter comes before the Board as of right.

Their Lordships are not of opinion that the order dismissing the appellant's suit can be maintained. Section 11 of the Court Fees Act is as follows:—

" In suits for mesne profits, or for immovable property and mesne profits, or for an account, if the profits or amount decreed are or is in excess of the profits claimed or the amount at which the plaintiff valued the relief sought, the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits or amounts so decreed, shall have been paid to the proper officer.

" Where the amount of mesne profits is left to be ascertained in the course of the execution of the decree, if the profits so ascertained exceed the profits claimed, the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained, is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed."

Upon this it seems clear that in cases within the first paragraph non-payment of the balance of court-fee merely postpones the date on which the decree can be executed, while the second paragraph is only applicable "where the amount of mesne profits is left to be ascertained in the course of the execution of the decree." Both Courts in India considered that the present case fell within the second paragraph, but the account directed by the Order in Council was not an account of mesne profits nor was it so described. It involved among other things an account of the sums received from a money-lending business. Moreover the amount due to the plaintiff thereon was not "left to be ascertained in the course of the execution of the decree" a phrase which is explained by sections 196 and 197 of the Code of 1859 [cf. sections 47, 211, 212 of the Code of 1882, *Ramgulam Sahu v. Chintaman Singh* (1925) I.L.R. 5, Patna 361, at 385]. Accordingly the second paragraph of section 11 gave no jurisdiction to dismiss the appellant's suit and before the Board this was not contested. It was argued, however, that the concluding sentence of the section applied to the cases mentioned in the first paragraph as well as to

those governed by the second. This argument is contrary to *Perianan Chetti v. Nagappa Mudaliar* (1906) I.L.R. 30, M. 32: and was rejected by Sir Lawrence Jenkins C.J. and Coxe J. in *Ganesh Chandra Mandal v. Promotho Nath Ganguli* (1911) 11 Indian Cases 73. A reference to the Act as printed by the Government printers and published in 1871 confirms this opinion, the sentence appearing as a part of the second paragraph. Their Lordships, agreeing with these decisions, are of the opinion that the learned Subordinate Judge had no jurisdiction to make the order complained of. They are further of opinion that on the merits of the case the order was an improper one. That a suit in which the plaintiff had already established her right to Rs.71,493 and paid court fee on Rs.44,250 should be dismissed for default in payment to Government of some 300 rupees is a result which may be tolerated as *ultima ratio* if it be the consequence of contumacy or wilful and persistent disregard of the rights of the defendants. But the order in the present case was made in no such circumstances—indeed with a minimum of circumspection and no warning. The order of 17th August, 1932, even if it limited a time of payment (which is not clear) was not a peremptory order and on the 29th August the adjournment to 20th October was not a second order limiting a time for payment. At no time was there in existence an order fixing the amount and limiting a time for payment still less was there a peremptory order on the footing that the plaintiff was in default. The statute does not forbid the Court to extend time for payment or require the Court to act unreasonably. Their Lordships are wholly unable to regard the order as a reasonable one and on this ground also consider that it cannot be allowed to stand.

The second matter raised by this consolidated appeal comes before the Board by special leave granted by Order in Council dated 25th July, 1934. The appellant's purpose in this part of her appeal is to establish that two persons called Manmohan Singh and Sardar Kirpal Singh (sons of one Ganga Singh) are personally liable to her for the sums due as a result of the account directed by the Order in Council dated 30th July, 1928, and for the costs thereby awarded.

It may here be explained that in 1911 Ganga Singh was appointed guardian of the property of Ravelo and Lalo under the Guardian and Wards Act (VIII of 1890). He died in 1916 and on 20th February, 1917, the District Judge appointed his sons Manmohan and Kirpal as joint guardians in his stead. Musammat Lalo having died on 30th July, 1925, leaving two minor sons, Kirpal was on 10th October, 1925, allowed by the District Judge to retire from the office of guardian, leaving Manmohan to act singly. Musammat Ravelo came of age in 1929 and in that year Manmohan's guardianship of Lalo's sons would appear to have been terminated. So far as appears both Manmohan and Kirpal are in a position to claim that accounts have been rendered by them and passed by the District Judge under the Act of 1890.

Both attended before the commissioner on the taking of accounts in the present case.

It is necessary on this part of the case to review the history of the appellant's suit. Her original plaint of 10th April, 1923, claimed a declaration only, and this having been held improper, she filed an amended plaint on 26th November, 1923. By this Manmohan and Kirpal were mentioned only as guardians of the minor defendants Lalo and Ravelo, but on 20th December, 1923, an order was obtained making them defendants and they filed a written statement as such on 24th January, 1924. The plaint claimed that they should account as having been trustees of the property of Balmokand and this they disputed, saying that they were guardians only and liable to account only as such. Issue No. 4 was framed: "Whether suit for account lies and if so against whom?" The District Judge in his judgment (10th June, 1924) answered this issue as follows: "*Issue No. 4. . . . All the income was distributed between the defendants and I don't see any reason that the plaintiff should be deprived of bringing her suit against any of them. They are equally responsible and I hold that the plaintiff is entitled to bring a suit for rendition of accounts as against all the defendants.*" The decree as drawn up and signed by the learned Judge did not mention the names of Manmohan or Kirpal as among the defendants, and the ordering portion was "that the plaintiff is granted a decree for one-fourth share of the immovable property and a decree for rendition of accounts with respect to her share." From this decree an appeal was taken to the Court of the Judicial Commissioner by the three daughters of Balmokand in which the plaintiff was the sole respondent. On 26th August, 1925, the Judicial Commissioner's Court allowed the appeal and dismissed the suit with costs. Application for a certificate that the case was fit to be taken on appeal to His Majesty was made by the plaintiff on 15th November, 1925, by a petition headed: "*Mussammata Vaishno Ditti, wife of Surjan Singh versus Mussammata Rameshri, wife of Manmohan Singh, and others*", and a certificate was duly given in August, 1926, intitled in like manner. The plaintiff by her Case named and asked decree against Manmohan and Kirpal as well as the daughters of Balmokand. The respondents' Case was lodged on behalf of the daughters and of Kirpal, but not Manmohan. The judgment of the Board in July, 1928, was in no way directed to the question of the presence, the character, or the liability of either Kirpal or Manmohan, but when the Registrar came to draw up the Order in Council he found that there was a dispute as to the parties to the appeal. To resolve this, as their Lordships would expect, he took the most careful steps. At the joint request of the solicitors on each side he cabled to the Judicial Commissioner for a certificate showing the names of the parties to the appeal at the date of the order admitting the appeal (10th November, 1926). A certificate was in due course received dated 16th November, 1928,

stating that the respondents to the appeal were Rameswari Ravelo and the two minor sons of Lalo—who had died while the appeal was pending before the Judicial Commissioner's Court—the three minors being under the guardianship of Manmohan and Kirpal. This certificate was not given without hearing the parties. The Judicial Commissioner had before him learned counsel for the plaintiff-appellant who admitted that Manmohan and Kirpal were not parties to the Privy Council Appeal in their personal capacity but only as guardians of certain minors. The Order in Council was finally issued accordingly and no application to vary it was made till 1934 when special leave to bring the present appeal was asked from the Board. On 18th July, 1932, however, it appears that the Subordinate Judge as the Trial Court was asked to amend the decree of the District Judge dated 10th June, 1924, by adding the names of Manmohan and Kirpal as defendants liable thereon. This he refused on 27th October, 1932, and on 8th April, 1933, the Judicial Commissioner dismissed the appellant's application in revision to have that order reversed. From this decision special leave to appeal has been given by His Majesty in Council, though no certificate was applied for in India.

Their Lordships are by no means satisfied from the judgment of the District Judge (10th June, 1924) on the fourth issue that he intended to hold Manmohan and Kirpal personally liable to the plaintiff and it is plain that he signed a formal decree which had no such effect. Indeed it would rather appear that he understood the contention of the defence to be that the major defendant only could be made liable and that the rejection of this conclusion was all that he had in mind. This may have been a sad misapprehension but to correct it an appeal was necessary. Neither Manmohan nor Kirpal was made party to the appeal in the Court of the Judicial Commissioner, and no mention of either is to be found in the grounds of appeal or other proceedings to obtain a certificate under section 110 of the Code. The appellant's solicitors in England and counsel in India acquiesced in the view embodied in the Judicial Commissioner's certificate of 16th November, 1928. Had they been minded to challenge it, it was open to them and it was their duty to make formal application to the Board in that behalf and for directions if necessary as to the taking of evidence. In their Lordships' opinion it is out of the question that they should now permit the personal liability of these two parties to be reargued—a course which would involve recasting the decree of the District Judge and either rehearing the appeals that ensued thereon or providing for new appeals to be now brought. The condition of the record in this case is certainly lamentable, and there can be no defence of the lax practice whereby the names of parties are not fully and properly entered in important documents such as decrees and orders admitting appeals. But parties have the remedy in their own hands if the Court fails to draw up

orders properly and should apply at once to have them put right. The matter must now rest upon the terms of the Order in Council of 30th July, 1928. In 1937 it is too late to bring under liability persons who had escaped in 1924 and who have not been parties to the subsequent proceedings.

On this view their Lordships find it unnecessary to discuss any further difficulties of procedure which may confront the appellant in asking the Board to reverse the decision of the Trial Judge refusing to amend the decree of 10th June, 1924. Her case is in no way advanced by the fact that in spite of the terms of the Order in Council she sought to obtain relief thereunder against Manmohan and Kirpal. The respondents in their case complain that the appellant in obtaining special leave failed to disclose important facts and ask that upon this ground the appeal should be dismissed, but as their Lordships did not call upon the respondents' counsel to argue this branch of the case their complaint has not been established, and their Lordships do not treat the appellant or her advisers as in fault on this account.

Their Lordships regret, however, to find themselves obliged to complain of the case lodged on behalf of the appellant which enters at length into matters of accounting and contains charges and injurious suggestions against the respondents and against officials of the Courts in India. It is extravagant in length and displays a poor appreciation of what is required by the rules of the Board or likely to be useful for the decision of the appeal. Conciseness is not always attained, but in this instance it is not aimed at, the sense of relevance being impaired by an undue spirit of contention. The paperbook, moreover, contains many documents of no possible utility upon the hearing of the appeal. Their Lordships are not satisfied with the explanation given at the bar and they find it necessary to take account of these matters in deciding upon the order as to the costs of this appeal.

In their Lordships' view this consolidated appeal must be altogether dismissed as against the respondents Manmohan Singh and Sirdar Kirpal Singh. As against the remaining respondents, Musammat Rameshri, Musammat Ravelo and the two sons of Musammat Lalo (deceased) the appeal should be allowed so far as regards the order and decree of 20th October, 1932, dismissing the suit and the order of the Court of the Judicial Commissioner dated 8th April, 1933, in affirmance thereof. These should be set aside and there should be a direction that the Trial Court do proceed to pass a final decree on the basis of the decision of the Subordinate Judge dated 17th August, 1932, upon the objections to the commissioner's report, it being open to any party to object to such decision by appeal from the final decree. Save as aforesaid this consolidated appeal should

be dismissed. Their Lordships will humbly advise His Majesty accordingly.

As the appellant has succeeded in setting aside the dismissal of her suit she would ordinarily have been entitled to some costs of this appeal, but in view of the costs which her advisers have unnecessarily occasioned to the respondents and of the breach of rules involved, their Lordships will make no order as to these costs. The appellant, however, will get from the respondents, other than Manmohan and Kirpal, her costs of the appeal to the Judicial Commissioner's Court against the Subordinate Judge's order of 20th October, 1932, dismissing her suit. The final decree to be passed by the Trial Court will deal with all questions of costs outstanding in that Court.

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