(1923) 05 CAL CK 0036

Calcutta High Court

Case No: None

Raja Peary Mohun Mukherjee		APPELLANT
	Vs	
Monohar Mukherjee		RESPONDENT

Date of Decision: May 9, 1923

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 2(2)
- Limitation Act, 1908 - Section 10

Citation: 74 Ind. Cas. 373

Hon'ble Judges: Rankin, J; Asutosh Mookerjee, J

Bench: Division Bench

Judgement

1. this is an appeal from an order for account made in a proceeding supplemental to a suit instituted by the respondent against the appellant, for the administration of a debutter estate, for the removal of the trustee, fro the appointment of new trustee or Receiver fro declaration that an execution sale of a portion of the trustee estate when it was purchased by the trustee in the name of his son was invalid and inoperative for proper investment of a sum of Rs. 11,500 alleged to form part of the trust estate and for other incidental reliefs. The suit was dismissed by the Trial Court. On appeal to this Court the judgment was asset aside and the suit was decreed in the following terms:

It is declared that the sale of Bahirgora held on the 14th January 1913 is not operative against the debuttet estate, but the first defendant (the shebait) is entitled to be reimbursed, the precise amount recoverable by him to be investigated by the Court below. Steps will be taken forthwith to place the debutter estate in the hands of a Receiver to be appointed by this Court and the first defendant will cease to be shebait from the date when the Receiver takes possession: Manohar Mockerjee v. Peary Mohan Mookerjee 54 Ind. Cas. 6 : 30 C.L.J. 177 : 24 C.W.N. 478.

2. On appeal to the Judicial Committee this decision was affirmed: Peary Mohan Mukerji v. Mgnohar Mukerji 62 Ind. Cas. 76 : 48 I.A. 258 : 34 C.L.J. 86 : 41 M.L.J. 68 : 14 L.W. 104 : 23 Bom. L.R. 913 : (1912) M.W.N. 554 : 19 A.L.J. 773 : 2 P.L.T. 725 : 26 C.W.N. 133 : 30 M.L.T. 24: AIR (1922) (P.C.) 235 : 48 C. 1019 (P.C.). The judgment of the Judicial Committee concluded as follows:

An order must be made declaring that the purchase by the second appellant (son of the shebait) was invalid and that proper and necessary steps should be taken to secure the property, and that the first appellant (the shebait) is entitled, subject as herein mentioned, to re-payment of the purchase-mony. An account should be directed showing what, if anything, is due from the first appellant (the shebait) to the estate, and such money should be deducted from the purchase-moneys, the balance, if any, of the moneys in Court to be paid out and the first Appellant (the shebait) to have a charge on the estate for such sum.

3. On the basis of this order of the Judicial Committee, the Subordinate Judge has made an order which defines the extent and character of liability of the shebait to render an account, and specifies the mode, the period, and the properties. The shebait has appealed against this order.

4. The plaintiff-respondent has raised an objection of the competency of the appeal on the ground that the order is not one of those expressly made appealble as an order by the Code of Civil Procedure. The appellant has urged that the order is in essence a decree-within the meaning of Section 2(2) of the Civil Procedure Code, 1908. The term "decree" is defined as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of it is final when such adjudication completely disposes of the suit. A decree, may be partly preliminary and partly, final. There has been some evidence of judicial opinion as to the, tests to be applied for ascertaining whether a particular decision constitutes an, adjudication on the rights of the parties with regard to any of the matters in controversy in the, suit. It was held at one time by the High Court of Bombay that a decision that a suit is not bad for misjoinder or that it is not barred by limitation or a decision that the Court has jurisdiction to entertain a suit was a preliminary decree; Sidhanath Dhonddev Garud v. Ganesh Govind Garud 17 Ind. Cas. 637 : 37 B. 60 : 14 Bom. L.R. 916; Narayan Balkrishna Kulkarni v. Gopal Jiv Ghadi 23 Ind. Cas. 889 : 38 B. 392 : 16 Bom. L.R. 206. This extreme view was disapproved in this Court in the case of Kamint Debt v. Promotho Nath 27 Ind. Cas. 317 : 20 C.L.J. 476 : 19 C.W.N. 755, and has subsequently been abandoned in the Bombay High Court itself; see the Pull Bench decision in Chanamalswami Rudraswami v. Gangadharappa Baslingappa 26 Ind. Cas. 885 : 39 B. 339 : 16 Bom. L.R. 954 (F.B.). which was applied in Bharma Shidappa Pujari v. Bhamagavda Shivagavda 28 Ind. Cas. 461 : 39 B. 421 : 17 Bom.

L.R. 271. and Municipal Committee, of Nasik v. Collector of Nasik 28 Ind. Cas. 589 : 39 B. 422 : 17 Bom. L.R. 324. According to the view, now adopted in Bombay, the word "matter" in the definition means the actual subject-matter of the suit with reference to which some relief is sought, and the word "right" means substantive rights of the parties, which directly affect the relief to be granted, or which, in the words of the definition, relate to all or any of the matters in controversy. Tested from this point of view, there is really no room for dispute that the order under appeal is a decree. This view is supported by the decision of the Judicial Committee in Bhup Indar Bahadur v, Bljai Bahadur Singh 27 I.A. 209 : 23 A. 152 : 2 Bom. L.R. 978 : 5 C.W.N. 52 (P.C.), where Lord Hobhouse held that an adjaication that mesne profits were recoverable in respect of a defined period was in its nature a decree within the meaning of the Code. This is not inconsistent with the decision in Bhartendu v. Yaqub Husain 18 Ind. Cas. 701 : 35 a. 159 : 11 A.L.J. 120. and Gulu sam Bivi v. Ahmadsa Rowther 51 Ind. Cas. 140 : 42 M. 296 : 9 L.W. 541 : (1919) M.W.N. 284, and is in accord with the view adopter in Kamtni Debi v. Promotho Nath 27 Ind. Cas. 317 : 20 C.L.J. 476 : 19 C.W.N. 755,. It may be conceded that the legislature contemplated that, ordinarily, there should be one preliminary decree and one final decree in a suit; the preliminary decree ascertains what is to the done, while the final decree states the result achieved by means of the preliminary decree. But as observed by Piggott, J., in Yakuh Husain v. Bharat Indo 16 Ind. Cas. 372 : 11 A.L.J. 120. there may be exceptions, and the case before is furnishes an instance. Here the original suit was for removal of the shebait, for cancellation of the judicial sale, and for recovery of the trust property. The decree made in the suit has directed the removal of the shebait and the cancellation of the stile subject to investigation of accounts to be rendered by the shebait a supplementary proceeding. The order which has now been made is in essence a preliminary decree in the supplementary preceding and Civil lead up to the final decree to the made therein. It is not essential that an adjudication should be covered by one of the specific cases of preliminary decrees mentioned in Order XX of the Code in order that it may form the basis of a final decree; those cases are illustrations of preliminary decrees and help us in determining the true meaning of the definition of the term "decree". Whether the order made by the Judge possesses the qualities of a decree, preliminary or final or party preliminary and partly final, clearly depends upon its contents. We ate of opinion that the order now under appeal is a decree and that the objection to the competency of the appeal cannot be sustained.

5. The objections urged against the order made by the Subordinate Judge may be grouped, substantially, under two heads, namely, period of account and method of account, The Subordinate Judge has directed the shebait to render an account or the period which has elapsed since the death of his father on the 19th July 1888. As stated in the judgment of this Court, the appellant assumed the office of shebait immediately on the death of his father, though he diet not become lawfully entitled, thereto till his two uncles, Naba Krishna and Bijoy Krishna, had been removed from

the scene by death, the former on the nth September 1890 and the latter on the 29th January 1894. This plainly does not make any difference in the liability of the appellant. It is well settled that if a person, by mistake or otherwise, assumes the character of trustee when it really does not belong to him and so becomes a trustee de son tort, he may be called to account by the cestuique trust for the moneys he received under color of the trust, such a person cannot be heard to say for his own benefit that he had no right to act as a trustee; see the judgment of the Earl of Selborne in Lyell v. Kennedy (1889) 14 App. Cas. 437 59 L.J.Q.B 268 : 62 L.T. 77 : 38 W.R. 353, where Rackham v. Siddall (1850) 1 Mac. & G. 607 at. P. 621 : 41 E.R. 1400 : 2 H. & Tw. 44 : 84 R.R. 194. and Life Association of Scotland v. Siddall (1861) 3 De G.F. & J. 58 at. p. 69 : 4 L.T. (N.S.) 311 : 7 Jur. (N.S.) 785 : 9 W.R. 541 : 45 E.R. 800 : 130 R.R. 28. were approved. Nor does any question of limitation arise. No accounts have ever been demanded or rendered, and we are not called upon to consider what period of limitation would be applicable if a suit for accounts were now to be instituted. But we may observe that the decision in Dhanpat Singh v. Mohesh Nath Teari 57 Ind. Cas. 8051: 24 C.W.N. 752. is an authority for the proposition that under the Indian Limitation Act, 1908, a suit for accounts in respect of trust property falls within the scope of Section 10 and a trustee de son tort stands in the same position as an express trustee.

6. As regards the method of accounting, the Subordinate Judge has held that the Commissioner will enquire it any loss has been occasioned to the debutter estate by the wilful neglect or misconduct of the appellant during the period that he was in charge thereof as shebait, de facto or de jure, and the amount will be added to his liability. The appellant has urged that this direction is erroneous. To test the validity of this contention, we may usefully recall that, as explained by Kindersley, V.C. in Partiugton v. Reynolds (1858) 4 Drew. 253 : 27 L.J. Ch. 505 : 4 Jur. (N.S.) 200 : 6 W.R. 388 : 113 R.R. 360 : 62 E.R. 98, there are two forms of account which can be claimed by a cestui que trust against the trustee. One is an account of all such of the moneys or funds comprised in the trust-deed or from time to time subject to the trust thereof as has been possessed or received by the trustee or by any person by his order or for his use. The other is an account, in addition to the former account, of the moneys or funds comprised in the trust deed or from time to time subject to the trust thereof, which might, without the wilful neglect or default of the trustee, have been so possessed or received; see the judgment of Lord Gotten ham, I.C. in Terrell v. Matthews (1841) 1 Mac & G. 433 n : 11 L.J. Ch. 31 : 5 Jur. 1074 : 84 R.R. 120 : 41 E.R. 1333. The, former is the common account and is given as of course when a decree is made for general administration. In taking the common account, the cestui que trust cannot charge the trustee with anything beyond his actual receipts and it is note permitted to show that there is some part of the trust funds which the trustee should have got in and has failed to get in; Dowse v. Gorton (1891) A.C. 190 at. p. 202 : 60 L.J. Ch. 745 : 64 L.T. 809 : 40 W.R. 17. But a trustee, where a common account is being taken, can properly be charged with a breach of trust which arises

on the accounts themselves; he stands charged with his receipts and if he seeks to discharge himself by improper payments, the discharge is disallowed; In re Stevens, Cooke v. Stevens (1898) 1 Ch. 162 at. p. 172 : 67 L.J. Ch. 118 : 77 L.T. 508 : 46 W.R. 177 : 14 T.L.R. 111. On the other hand, in order to obtain an account on the footing of wilful default against a trustee, the cestuique trust mast allege and prove at least one instance of wilful default. He must consequently prove that there is some part of the trust funds which should have, been received but was not. When an account is ordered in this form he is thus liable not only for rent actually received but also for net letting the property if possible or not obtaining the full rent obtainable, Noyes v. Pollock (1886) 32 Ch. D. 53 at. p. 61 : 55 L.J. Ch. 513 : 54 L.T. 437at. p. 475 : 34 W.R. 383, In re Symons, Luke v. Tonkin (1882) 21 Ch. D. 757 at. p. 760 : 52 L.J. Ch. 709 : 46 L.T. 684 : 30 W.R. 874. An order on the footing of wilful default is a very strong one to make against an accounting party and is not made unless there has been a loss of assets received or assets which might have been received; In re Stevens Cooke v. Stevens (1897) 1 Ch. 422 at. p. 432 : 66 L.J. Ch. 155 : 76 L.T. 18 : 45 W.R. 284, In re Stevens, Cooke v. Stevens (1898) 1 Ch. 162 at. p. 172 : 67 L.J. Ch. 118 : 77 L.T. 508 : 46 W.R. 177 : 14 T.L.R. 111, In re Wright-son Wright-son v. Cooke (1908) 1 Ch. 789 at. p. 799 : 77 L.J. Ch. 422 : 98 L.T. 799. It is plain that wilful default is a relative term, and, in the words of Bowen, L. J., in Noyes v. Pollock (1886) 32 Ch. D. 53 at. p. 61 : 55 L.J. Ch. 513 : 54 L.T. 437 at. p. 475 : 34 W.R. 383, simples an existing duty on the part of the accounting party in which default has been made and may consist in knowingly doing what he ought not to do or knowingly omitting to do what he ought no do. In re Owens Jones v. Owens (1883) 47 L.T. 61 at. p. 64. (Cotton, L,.J.); In re Young and Harston''s Contract (1886) 31 Ch. D. 168 at. p. 174 : 54 L.J. Ch. 1144 : 53 L.T. 837 : 34 W.R. 84 : 50 J.P. 245. (Bowen, L.J.). Unless there is sufficient proof, it is net right to insert in a judgment any declaration of liability or even an enquiry as to liability based upon supposed breach of duty. In re Stevens, Cooke v. Stevens (1898) 1 Ch. 162 at. p. 172 : 67 L.J. Ch. 118 : 77 L.T. 508 : 46 W.R. 177 : 14 T.L.R. 111. (Lindley, L.J.) It was observed by Stirling, J., In re Barclay Barclay v. Andrew (1899) 1 Ch. 674 at. p. 681 : 68 L.J. Ch. 383 : 80 L.T. 702, that the rule as to wilful default is not now so strict as it was before the Judicature Acts, and in a proper case, it is competent for the Court, upon the further consideration of an action to charge trustees with interest on balances although no case of wilful default has been raised by the pleadings and the question of interest was not referred to in the judgment. Shaw v. Turbett. 13 Ir. Ch. R. 324. Under, the former practice, if the cestui qui trust discovered in the course of the suit that the trustee had teen guilty of misconduct, his remedy was by filing, with the leave of the Court, a supplemental bill adapted to the state of. circumstances. Hodson v. Ball (1842)1 Ph. 177 : 12 L.J. Ch. 80 : 7 Jur. 475 : 65 R.R. 366 : 41 E.R. 399; In re Youngs, Doggett v. Revett (1885) 30 Ch. D. 421 at. p. 431 : 53 L.T. 682 : 33 W.R. 880. Under the present practice where the cestui, que trust his charged wilful default in his pleadings, either originally or as amended, but has not obtained a judgment on that footing, the Court can at any stage of the proceedings order an account to be taken on that footing, if evidence of wilful default is adduced. Thus, if

in the prosecution of enquiries under an ordinary judgment, facts come out which, if proved at the trial, would have enabled the cestui que trust to have then obtained an enquiry as to wilful default that enquiry will be added. Coope v. Carter. (1852) 2 De G.M. & G. 292 : 95 R.R. 111 : 21 L.J. Ch. 570 : 42 E.R. 884; In re Fryer Martindale v Picquot (1857) 3 K. & J. 317 : 112 R.R. 160 : 26 L.J. Ch. 398 : 3 Jur. (N.S.) 485 : 5 W.R. 552 : 69 E.R. 1129; Brooker v. Brooker (1857) (sic) Sm. & G. 475 : 107 R.R. 155 : 26 L.L. Ch. 411 : 3 Jur. (N.S.) 381 : 5 W.R. 382 : 65 E.R. 743; In re Symons Luke v. Tonkin : (1882) 21 Ch. D. 757 at. p. 760 : 52 L.J. Ch. 709 : 46 L.T. 684 : 30 W.R. 874; In: re Youngs. Doggett. v. Revett (1885) 30 Ch. D. 421 at. p. 431 : 53 L.T. 682 : 33 W.R. 880. We are of opinion that this course may, be appropriately followed, in. the present proceedings. The suit was not expressly framed as a suit for accounts on the footing of wilful default throughout; the accounts directed; unavoidably extend over a long period of time, as there has been no adjustment of. accounts between the shebait and the debutter estate at any time, and the shebait cannot make good his claim o an indemnity unless the balance is determined on a scrutiny of the accounts for the whole, period, In these circumstances, we are or opinion that the direction for account on the footing of wilful default should be expunged and a common account taken as explained above. liberty Mill, however, be reserved to the plaitin; or other party interested in the taking of the account, to apply, when the accounts have been lodged, for a direction that the Commissioner should take the account on the footing of wilful default, either in respect of any particular matter or generally. It may be pointed out that an account on the footing of wilful default may be taken in two ways, first, the Court may think that the instances of wilful default broughty forward are not sufficient to justify a general account upon the footing of wilful default, and in such a case the Court will direct special enquiries only with regard to the particular transactions in question, or, secondly, although only one or two cases of wilful default are proved, they may be of such a character as to induce the Court to direct an account generally on the footing of wilful default, applying to all the acts of the trustee Coope v. Carter. (1852) 2 De G.M. & G. 292 : 95 R.R. 111 : 21 L.J. Ch. 570 : 42 E.R. 884; In re Stevens Cooke v. Stevens (1897) 1 Ch. 422 at. p. 432 : 66 L.J. Ch. 155 : 76 L.T. 18 : 45 W.R. 284.; Sleight v. Lawson (1857) 3 K. & J. 292 : 26 L.J. Ch. 553 : 5 W.R. 589 : 112 R.R. 1565 : 60 E.R. 1119; Harvey v. Bradley (1867) 4 Eq. 13 : 15 W.R. 527. It would act be right to anticipate at this stage what cirectiors may be found necessrry. But we may add "that the lower Court will have to give effect to the views previously expressed by this Court upon the question of the rum of Rs. 11,500 and the costs of the previous litigation. We are further of opinion that the '' direction given by the Subordinate Judge that if the accounts show, a balance in favour of the debutter estate, there will be a personal decree against the shebait, should be expunged. It is needless to decide this question hypothetically and in advance before the facts have been ascertained. We are further of opinion that when the accounts pre taken, notice should be given to the new shebait or if there is n dispute as to the succession to the shebaithip, to the, Receiver who may be appointed in a suit in spitted for that purpose. The death of the shebait during the pendency of this

appeal does not obviously affect the terms upon which his person estate can claim an indemnity from the debutur estate, and the decision in Kumeda Charan Bala v. Asutosh Chattopadhya 16 Ind. Cas. 742 : 17 C.W.N. 5 : 16 C.L.J. 282. does not touch the matter. We may add, finally, that there is no substance in the technical objection that the order of the Subordinate judge is ultra vires, because he dealt with the matter before the order of His Majesty in Council had been formally transmitted by this Court to his Court.

7. In view of the nature of the questions which may require consideration, we reserve liberty to the parties to apply to this Court, should any real difficulty arise in giving effect to our orders; ordinarily, however, applications should be made to the Subordinate Judge for further directions as to the accounts.

8. Subject to the modifications indicated above, the order of the Subordinate Judge will stand confirmed and each party will pay his costs in this. Court.