

it," as was held in *Sookhmoy Chunder Dass v. Srimati Monohurri Dasi* (1). Assuming the above devise to be void, the Division Court held that there would be a gift of an estate of inheritance in Gordhandas, or Gordhandas and Vullubhdas jointly, or, at any rate, that the [364] intention, as it was said, to create an estate of inheritance of some sort might be effectuated. This argument must, we think, fail, as it did in *Kumar Tara-keswar Roy v. Kumar Shoshi Shikhaheswar* (2), for reasons similar to those given in that case. The circumstance that the estate is vested in trustees, and that the income is expressed to be given as maintenance, forbids the estate given to Gordhandas and Vullubhdas, or either of them, being construed to be an absolute estate; and, moreover, as such an estate would admit females in the course of succession, this construction would not give effect to the intention of the testator, but would be making a new will for him.

We must, therefore, hold the proper construction of the will to be that Gordhandas is not entitled to an absolute estate, but is entitled to be paid by the parties the income for his life, to be assigned by him as mentioned in the will; and the decree must be varied accordingly.

Appellant to have his costs of this appeal. The trustees to have their costs of this appeal between attorney and client, to be paid, in the first instance, by the plaintiff, with liberty to apply to recover them from the respondent Gordhandas.

Attorneys for the appellant (defendant): Messrs. *Payne, Gilbert and Sayani*.

Attorneys for the respondents (plaintiffs): Messrs. *Jefferson, Bhatshankar and Dinsha*.

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[365] ORIGINAL CIVIL.

Before Sir Charles Sargent, *Kt.*, Chief Justice, and Mr. Justice Bayley.

THUCKER VUSSONJI MOWJI AND ANOTHER (Plaintiffs) v. CANJI PURBHUT AND OTHERS (Defendants).* [27th June, 1890.]

Practice—Appeal—Leave to appeal after time expired—Sufficient cause—Limitation Act XV of 1877, s. 5—Two suits brought at same time by executors raising same questions of construction in respect of the same will—Similar decision in both—Appeal by a defendant in one suit and decree of Court of first instance reversed—Consequent application by plaintiffs for leave to appeal in second suit.

The plaintiffs filed the present suit (No. 317 of 1888), at the same time with suit No. 316 of 1888 (*supra* 14 B. 360). They filed both suits as executors of the will of one Damodhar Madhowji. In suit No. 316 of 1888 they sued the two sons (Gordhandas and Vullubhdas) of their testator for the purpose of having his will construed and of ascertaining the shares of his property taken under it by his said two sons respectively. The present suit (No. 317 of 1888) was filed by them against Gordhandas, one of the said sons of the testator, and against three other persons to whom he had mortgaged his interest in his father's estate. They alleged that the said Gordhandas had made over possession of the whole of his father's estate to the mortgagees, and that they refused to give it up. The plaintiffs submitted that, under the mortgage, no charge was created, save upon Gordhandas' individual interest in the estate, and they prayed for a declaration

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as to the extent of the mortgage, for an order for possession, for an account, &c., &c. Suit No. 316 of 1888 was heard and decided on the 15th August, 1889, and, after argument, the Court of first instance, construing the will, held that the fourth defendant, Gordhandas, was entitled absolutely to certain property situate Girgaum Back Road in Bombay.

Immediately after the said decree was made, the present suit was called on for hearing before the same Judge. As the questions raised in both suits were the same, a decree in this suit was passed at once, without argument, in accordance with the construction put upon the will in suit No. 316 of 1888.

Against the decree in suit No. 315 of 1888, Vullubhdas (one of the defendants therein) appealed, and on the 27th February, 1890, the Appeal Court reversed the decree of the Court below, and held that Gordhandas was not entitled to an absolute estate in the above-mentioned property, but was entitled only to be paid the income thereof for his life. The plaintiffs in the present suit, being executors and not personally interested, had taken no steps to appeal from the decree of the 15th August. As soon, however, as the decree in suit No. 316 was reversed, they proposed to have the decree in the present suit amended, so as to be in accordance with the construction put upon their testator's will by the Appeal Court. The defendants refused to consent, and the plaintiffs now moved for leave to file an appeal, although the time limited for appealing had expired. It was contended that the fact that they were executors and trustees and, as such, could not appeal, [365] save at their own risk, was "sufficient cause", under s. 5 of the Limitation Act XV of 1877 for their delay until the appeal in the other suit had been decided.

Held, refusing the application, that no sufficient cause was shown for the plaintiffs' delay. The two suits were quite independent of each other. The plaintiffs thought proper to bring this second suit against the mortgagees, and they got a decision. If they were not satisfied, they should have appealed within the proper time. There was nothing in their position, as executors, to entitle them to any special consideration.

[F., 17 C.L.J. 596 = 20 Ind. Cas. 513.]

MOTION by plaintiffs for leave to file an appeal, the time for appeal having expired.

The plaintiffs, Thucker Vussonji Mowji and Lalbhai Gulabdas, were two of the executors of the will of one Damodhar Madhowji. The fourth defendant (Gordhandas Damodhar) was a son of the said Damodhar Madhowji and a co-executor with the plaintiffs. The first three defendants (*viz.*, Canji Purbhut, Devji Purbhut and Chapsy Purbhut), were the mortgagees of the fourth defendant's interest in a father's estate.

In the plaint the plaintiffs complained that the fourth defendant, who had at first been allowed to manage the testator's property, had wasted it, and they had been obliged to interfere. They stated that he had mortgaged his interest in the said estate to the first three defendants for Rs. 7,000, and had made over the possession of the whole estate to them, and that they refused to give it up. The plaintiffs submitted that under the mortgage no charge was created, save upon the fourth defendant's own individual interest in the property under his father's will.

The plaint prayed for a declaration as to the extent of the mortgage; for an order for possession; for an account, &c., &c.

This suit was filed at the same time as suit No. 316 of 1888 (see *supra*, 14 B. 360), which the plaintiffs, as executors of Damodhar Madhowji, brought against the present fourth defendant and his brother Vullubhdas Damodhar for the purpose of having the will of their father (Damodhar Madhowji) construed, and of ascertaining their interests, respectively, in his estate under the said will. The two suits were on the board for hearing on the same day (15th August, 1889). Suit No. 316 of 1888 was heard and decided first; and Parsons, J., held (*inter alia*) that, under the

will of Damodhar Madhowji, the fourth defendant Gordhandas Damodhar [367] was entitled absolutely to a certain property situate at the Girguam Back Road in Bombay.

Immediately after the said decree was made, the present suit, No. 317 of 1888, was called on for hearing. Both cases depended upon the construction to be given to the will and upon the decision as to the interest taken under it by Gordhandas Damodhar. As the questions, therefore, raised in suit No. 317 were the same as those which had just been decided in the other suit, a decree was passed at once, without further argument, in accordance with the construction put upon the will by Parsons, J., in suit No. 316. Counsel for the executors (plaintiffs) suggested that, in view of a possible appeal in suit No. 316, the decree in suit No. 317 should contain a declaration that the interest of Gordhandas in the estate of his father should be as decided in suit No. 317. But, the Judge refused to insert this declaration and the decree was made without any reference in it to the other suit.

Against the decree in suit No. 316, Vullubhdas Damodhar appealed, and on the 27th February, 1890, the appeal Court reversed the decree of Parsons, J., and held that Gordhandas was not entitled to an absolute estate in the property, but was entitled only to be paid the income thereof for his life. (See *supra*, p. 364.)

The plaintiffs being merely executors, and not personally interested, had not questioned the construction placed by Parsons, J., upon their testator's will or taken any steps to appeal from his decree in the present suit, No. 317 of 1888. As soon, however, as the decree in suit No. 316 was reversed, they wrote to the attorneys for the first three defendants with reference to the amendment of the decree in the present suit. On the 28th March they wrote to them to ask "whether your clients will consent to an application being made to the Honourable Mr. Justice Parsons to review his Lordship's judgment herein; and to direct that the decree, so far as it declares the interest of the defendant Gordhandas Damodhar, be amended so as to make it in accord with the decree made in the said suit No. 316 of 1888, and appeal No. 666. Unless your client consents to this course, our clients have been advised to apply for leave to appeal in this suit."

[368] The defendants' attorneys refused to consent, and the plaintiffs accordingly now moved for leave to appeal.

Macpherson (Advocate-General) for the plaintiffs (executors):—The decree in this suit was in accord with the decree passed on the same day by Parsons, J., in suit No. 316, and adopted the same construction of the will. The plaintiffs were the same in both suits. They were wholly uninterested, and did not appeal from either decree. They were executors and trustees, and could not appeal, except at their own risk: *Lewin on Trusts*, (8th ed.), p. 350. The Court had construed the will for them, and they could not safely do more. But one of the defendants (Vullubhdas) in suit No. 316 did appeal, and succeeded and the appeal Court has put a different construction on the will—a construction which limits the interest of Gordhandas in the property, the subject-matter of this second suit, and which must affect the accounts and other proceedings to be taken in it. The plaintiffs, therefore, think it their duty, as executors, to ask for leave to appeal, in order that the estate may be administered in accordance with the will as construed by the appeal Court. They could not appeal before without a risk which they were not bound to incur. They can appeal now with safety. The circumstances of this case

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constitute "sufficient cause" within s. 5 of the Limitation Act XV of 1877. If no appeal is allowed, there will be two conflicting decisions of this High Court as to the construction of the same will. Counsel referred to *In re Manchester Economic Building Society* (1); *In re New Callao* (2); *In re The Normanton Iron and Steel Company (Limited)* (3).

Lang (*Inverarity* with him), for the defendants :—The appeal cannot now be admitted. Time for appeal has long ago expired. The decree was passed in August, 1889. The suit was quite independent of suit No. 316 of 1888. Separate issues were raised and decided. The first three defendants in this suit were not parties to that suit. They declined to be bound in any way by the decree in that suit. The present suit was decided at the same time, and we abide by the decision. We have relied on it since August. Why should we now be affected by the [369] fact that the decree has been reversed in the other suit to which we were not parties?—*Madho Das v. Rukman Sevak Singh* (4).

Inverarity on the same side.

JUDGMENT.

SARGENT, C. J.—We think we cannot now allow leave to appeal. No sufficient cause has been shown to bring the case within s. 5 of the Limitation Act XV of 1877. The two suits are quite independent of each other. One is by executors of a will against the sons of the testator for the purpose of obtaining the construction of the will, and the other is by the executors against outsiders, who are mortgagees of part of the estate impugning the mortgage. There is no connection at all between them. The executors thought proper to bring this second suit, No. 317 of 1888, against the mortgagees. If they were not satisfied with the decision, they should have appealed within the proper time. There is nothing in their position, as executors, to entitle them to any special consideration. There was no agreement that the decision of this suit should abide by the decision of the other, and the defendants here decline to be bound by it. There does not appear, therefore, to be any reason why the executors should not be bound by the decree in suit No. 317 of 1888, against which they have not appealed.

Motion refused with costs.

Attorneys for the plaintiffs:—Messrs. *Jefferson, Bhaishankar and Dinsha.*

Attorneys for the defendants:—Messrs. *Payne, Gilbert, and Sayani.*

(1) L. R. 24 Ch. D. 488.

(3) 29 W. R. 300.

(2) L. R. 22 Ch. D. 484.

(4) 2 A. 287.