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his plaint by strong *primâ facie* evidence which there is nothing to rebut. It is said that the defendant's advisers had not a full opportunity of inspecting the books, and that they were taken by surprise when the books were produced and put in at the trial. They did not, however, ask for a postponement on that ground; nor have they since discovered anything in the books which has been brought to our notice which would help the defendant. In truth, on the merits this suit was undefended, and upon the merits we think it ought to have been decided.

The decree must be varied by making a decree in the terms of paragraphs (A) and (B) of the prayer of the plaint, and the defendant Bhugwándás must pay the costs of the suit throughout.

We have not referred to the set-off; it follows from our judgment that Bhugwándás has no claim under it.

Attorneys for the plaintiff:—Messrs. *Bháishankar and Kánga.*

Attorneys for the defendant:—Messrs. *Ardesir, Hormasji and Dinha.*

ORIGINAL CIVIL.

Before Mr. Justice Starling.

1895. August 13.

DINSHAW NOWROJI BODE, PLAINTIFF, v. NOWROJI NASARWA'NJI BODE AND PEROZSHAW DINSHAW BODE, DEFENDANTS.*

Trust—Trustees—Trustees raising money by mortgage of trust property—Sanction of Court.

A testator by his will devised property in Bombay to trustees on certain religious and charitable trusts. The income of the property was more than was required for the purposes of the trust, and the trustees had a surplus of Rs. 19,000 in their hands. They were obliged to pull down a certain chawl which stood upon the land for the purpose of rebuilding upon it, and they proposed, with a view to improve the property, to erect a larger and more substantial building than the former one. They expended the surplus of Rs. 19,000 which was on their hands, but found that to complete the work a further sum of Rs. 20,000 was necessary. This they proposed to rai by mortgaging the trust property. They calculated that the whole mortgage-debt would be paid off out of the surplus rents of the trust property within three years. They filed this suit, praying that the Court would sanction the proposed mortgage. The Court, however, refused its sanction, and dismissed the suit.

* Suit, No. 331 of 1895.

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SUIT by trustees to obtain the sanction of the Court to raise money by mortgage of trust property.

The plaintiff stated that one Hormusji Dorábji, a Pársi inhabitant of Bombay, died, in January, 1833, leaving a will whereby he devised two immoveable properties situate in Bombay to trustees upon trust to receive the rents and profits, and after defraying all expenses for taxes and repairs, or for rebuilding of the same when necessary, to pay and appropriate the balance for the performance of certain religious rites and charities.

The material parts of the will are as follows :—

"I give, devise and bequeath unto my cousins Dinshawbhoy Nowroji, Nasarwánji Nowroji and Dáráshaw Nowroji, their heirs and assigns, the two following properties or estates, *viz.*, an oart with six buildings standing thereon situate without the Fort in the city of Bombay, in Hanumán Gully, belonging to me, and one range or chawl of seven compartments situate in Jugjivan Kika Street, without the Fort of Bombay, also belonging to me, upon trust to receive the rents and profits of the same two properties, and after discharging out of the said rents all necessary charges for taxes, repairs and the like, hereby directing the said properties to be kept in thorough repairs and to be rebuilt when necessary, to pay and appropriate the balance of the moneys arising from the said rents in the performance of the following religious ceremonies and dinners :—Twelve Jasan ceremonies, one ceremony for the dead called Furvardin, one ceremony of Rapitan, one annual ceremony called Rojgár; and I hereby will and direct that my said trustees shall not have any power to sell or mortgage the said properties, or any part thereof, for any purpose whatever."

The plaint stated that the plaintiff and the defendants were then trustees of the said properties, that they had duly performed the said trusts from time to time, and that after all necessary expenses on that behalf had been defrayed, a surplus of Rs. 19,000 remained in their hands.

The plaint then continued :—

"The plaintiff and the defendants have lately been obliged to pull down one of the chawls or buildings standing upon the Hanumán Lane property by the said will bequeathed, with a view to rebuilding the same. The said chawl formerly produced a monthly rental of Rs. 56, but the plaintiff and defendants were advised that, having regard to the advantageous position of the said property, it would be of great benefit to the said trusts to erect a larger and more substantial building on the site thereof, and the plaintiff and defendants have accordingly commenced so to do, and have already erected the ground floor and one upper storey of such building and have expended thereon the larger part of the aforesaid sum of Rs. 19,000, but a further sum of Rs. 20,000 or thereabouts will be required for the completion of the same.

"The plaintiff is now desirous of borrowing the said sum of Rs. 20,000 from one

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Nemchand Melápchand, who has offered to lend the same at the rate of 6 per cent. per annum upon a security of the mortgage of the same building, and the defendants are willing that the sum of Rs. 20,000 should be so raised, but the plaintiff and the defendants are so advised that it is doubtful whether, having regard to the terms of the said will, they have power so to mortgage any part of the said property, and that their proper course under the circumstances hereinbefore set out is to file this suit for the purpose of obtaining the sanction of this Honourable Court thereto.

"The plaintiff submits that the mortgage now proposed by him will greatly benefit the said trust properties, inasmuch as the building now being erected will when completed yield a monthly rental of at least Rs. 400, and the plaintiff believes that it will be possible to repay the whole of the said sum of Rs. 20,000 out of the surplus rents of the said properties within a period of three years, as by the statement of estimated receipts and expenditure hereto annexed will appear."

The prayer of the plaint was as follows :—

"That it may be declared by this Honourable Court that the accumulated surplus rents and profits of the trust properties hereinbefore referred to have been or may be properly expended upon the new building in the fourth paragraph hereof mentioned.

"That for the purpose of completing the said new building the plaintiff and the defendants as trustees of the said properties may be permitted under the sanction of this Honourable Court to raise the sum of Rs. 20,000 and to secure the repayment of the same, together with interest thereon at a rate not exceeding 7 per cent. per annum by a mortgage or charge upon the said new building."

Macpherson (Acting Advocate General) for the plaintiff:—He cited *Conway* v. *Fenton*[1]; *Jesse* v. *Lloyd*[2]; *In re Leigh's Estate*[3]; *Drake* v. *Trefusis*[4]; *In re Venour's Settled Estates*[5]; *Vyse* v. *Foster*[6]

Lowndes for the defendants.

STARLING, J.:—In this case the testator by his will devised property in Bombay to trustees on certain religious and charitable trusts. It is not necessary for me to give any opinion as to the validity of these trusts. I have been referred to a decree passed by the late Supreme Court on the 21st November, 1856, in which this will is mentioned. I do not find, however, that there is any declaration in that decree that the trusts are valid. They are merely recited, and one of the properties devised by the will is ordered to be sold. The validity of these trusts, therefore, remains to be determined, if at some future time the question should be raised.

(1) 40 Ch. D., 512.

(2) 48 L. T., N. S., 656.

(3) L. R., 6 Ch., 887.

(4) L. R., 10 Ch., 364.

(5) 2 Ch. D., 522.

(6) L. R., 7 H. L., 318.

The trustees, however, now desire to build a chawl. This they clearly have power to do under the express terms of the will, and they may expend for that purpose the money in their hands. But they seek for something more. They ask the sanction of this Court to raise a large sum of money by mortgage of the trust property over and above the sum which has accumulated in their hands, for the purpose of erecting the new building, and the question is whether this sanction ought to be granted. The Advocate General has cited several cases and has urged that they are authorities upon which the Court may act. I have carefully considered those cases, but I do not think they are applicable here. They are cases in which the proposed outlay would benefit the estate, and by that I mean would be for the advantage of present and future beneficiaries. In this case, however, there is no person who would be benefited by the outlay. The only result would be that the trustees would have a larger income in their hands over and above what is necessary for the trusts, because the income is now larger than is necessary for the purposes mentioned in the will. What is to be done with the surplus I do not know. The religious charities cannot be carried out more effectually so there is no reason to require more money to be expended out of the rents for that purpose, still less for authorising a mortgage of the trust property in order that more rent may be obtained and the unnecessary surplus still further increased. A mortgage would be a burden on the property, and although no doubt at present it seems probable that it might be very rapidly paid off, the Court cannot allow the trust property to be the subject of speculation. It is impossible to foresee events. Circumstances might happen which would greatly depreciate house property generally in Bombay, or this property in particular. A mortgage might in that case become a burden too great for it, and the mortgagee would then have a right to come in and sell the property in order to realise his mortgage-debt. The Court would thus by its sanction have enabled the trustees to destroy the trusts created by the will. If I were to grant this application I would be making a precedent which might possibly be followed hereafter in other cases in which there would be greater risk to the trusts. I must

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dismiss this suit without prejudice to any question as to the intended application by the trustees of the trust funds already accumulated in their hands.

Suit dismissed.

Attorneys for plaintiff and defendants:—Messrs. *Nanu and Hormasji.*

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

1894. *September* 27.

GIRDHARLA'L HARGOVANDA'S (ORIGINAL PLAINTIFF), APPLICANT, *v.* LALLU JAGJIVAN (ORIGINAL DEFENDANT), OPPONENT.*

Practice—Procedure—Plaint, presentation of—Return of plaint for presentation to proper Court—Jurisdiction—High Court, power of, to interfere under Regulation II of 1827, *Sec.* 5, *Cl.* 2.†

A Second Class Subordinate Judge returned a plaint for presentation in the proper Court on the ground that the subject-matter exceeded his pecuniary jurisdiction. The First Class Subordinate Judge to whom the plaint was then presented, also returned it for presentation in the proper Court on the ground that the subject-matter was below his pecuniary jurisdiction. The plaintiff thereupon presented the plaint to the successor of the Second Class Subordinate Judge who had originally returned the plaint. That Judge held that he had no jurisdiction to review the order passed by his predecessor. The plaintiff appealed, and the Judge rejected the appeal, holding that no appeal lay against an order refusing to grant a review.

The plaintiff applied to the High Court under its extraordinary jurisdiction.

Held, that the case was one in which the High Court ought to interfere under clause 2, section 5 of Regulation II of 1827.

The order of the Second Class Subordinate Judge was set aside with a direction that he should admit the plaint as of the date of its original presentation.

APPLICATION under the High Court's extraordinary jurisdiction (section 5, clause 2, of Regulation II of 1827) against the order of Gilmour McCorkell, District Judge of Ahmedabad.

The applicant presented a plaint to the Second Class Subordinate Judge of Viramgám, who on the 31st August, 1892, returned

* Application No. 51 of 1894 under the extraordinary jurisdiction.

† Section 5, clause 2, of Regulation II of 1827:—

Second.—It shall be competent to the said Court (Sudder Dewanny Adawlut) to call for the proceedings of any Subordinate Civil Court, and to issue such orders thereon as the case may require.