Calcutta High Court
Radhika Mohan Munshi vs Sudhir Chandra Sanyal And Ors. on 7 August, 1936
Equivalent citations: AIR 1937 Cal 10
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JUDGMENT Jack, J.

1. This appeal has arisen out of a suit for recovery of Rs. 1,174-14-0 claimed as arrears of monthly allowance on a deed of annuity with interest. The deed was executed by one Radharaman Munshi whose estate has now devolved upon the defendant according to a will made by him. The deed was executed in 1298 in favour of Harish Chandra Sanyal and his brother Ramesh Chandra Sanyal. Harish has married the daughter of Radharaman. Harish's wife died before the date of the deed leaving two minor daughters. Harish married again and had two sons of whom plaintiff 1 is one and plaintiff 2 is the widow of the other, while plaintiff 3 is the brother of Harish. By the annuity deed Radharaman granted an allowance of Rs. 25 per month to Harish and Ramesh and to their heirs and made the amount charge upon some of his properties. Plaintiff 1 and plaintiff 3 and the two beneficiaries under the deed brought the suit alleging that the allowance for the period from Baisak 1332 to Ashar 1335 is in arrears and they prayed for a decree for the amount claimed chargeable on two of the properties left by Radharaman. The defence is that this deed of annuity is void for want of consideration and that the conditions on which the annuity was granted were not fulfilled. In the trial Court it was held that the plaintiffs were not entitled to enforce the charge inasmuch as it had not been shown that the bond had been properly attested and inasmuch as all the properties out of which the payment was to be made were not included in the plaint. But the Court held that the plaintiffs were entitled to recover the amount out of the assets of the deceased Radharaman which came into the hands of the defendants. The lower appellate Court, on appeal, held that the defendant was not personally liable but was liable only to the extent of those properties which were made liable for such payment by the will. But the learned Judge held that the plaintiffs were entitled to realise the decretal amount out of the assets in the hands of the defendant left by Radharaman except those which were exempted by the annuity deed and the will, namely, from Dihi Damdighi, Lot Bishnupur, Satingram, Lot Nowadaboga, Lot Nimarpur, Dihi Ulipurrand, Dihi Rajapur.

2. In this appeal the points urged are, (1) that since the trial Court found that no decree declaring a charge could be passed and there was no appeal against that part of the decree it was not proper for the lower appellate Court to find that the decree could be enforced against the defendant by a charge and that since the lower appellate Court found that there was no personal liability of the defendant, the suit should have been dismissed. The other points raised were that Section 25, Contract Act, does not apply inasmuch as the parties were not standing in a near relationship to each other and that otherwise there was no consideration. It is clear from the terms of the bond that there was consideration. The consideration was the condition that the donees would keep the grand-daughters in the custody of their maternal grand-father until they were married and that they would reside in the village and it is stated that the donor gave the annuity out of the love and affection which he bore to the plaintiff Harish as his son-in-law and the husband of his only daughter. There can be no doubt that the relationship contemplated by Section 25, Contract Act, existed. It remains then to be considered whether, when the trial Court had found that no decree declaring a charge could be passed and when there was no appeal preferred against this part of the trial Court's decision, the

lower appellate Court was entitled to decree the suit making the arrears of allowance realisable as a charge upon the properties. On the one hand it is contended that the Court was entitled to pass such an order under the provisions of Order 41, Rule 33, Civil P.C., which lays down that the appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require and that this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

3. The contention here is that because there was no cross-objection in the lower appellate Court to the finding of the trial Court that the amount was not realisable as a charge, the lower appellate Court had no right to decree the suit declaring a charge upon the properties. It is clear from the plain wording of the Section that it is quite competent in a case like this for the appellate Court to make the order that has been passed. But it is urged that there are a number of decisions to the effect that the power given to the Court under Order 41, Rule 33 can only be applied in certain limited cases and that it was only when the lower Court had passed a decree in favour of the appellant that an order under Order 41, Rule 33 can be passed. This contention is supported by the decision in Gangadhar Muradi v. Banabasi Padihari AIR 1914 Cal 722, where it is stated that although the language of Rule 33, Order 41, Civil P.C., is widely expressed, ordinarily the exercise of the power conferred thereby should be limited to cases where, as a result of the appellate Court's interference in favour of the appellants, further interference is required to adjust the rights of the parties in accordance with justice, equity and good conscience. To the same effect is the decision in Abjal Majhi v. Intu Bepari AIR 1916 Cal 250.

4. The pronouncement of Sir Lawrence Jenkins, J. was followed by Sir Asutosh Mukherji, J. who added that the provisions of Order 41, Rule 33 are not to be applied to enable a party litigant to ignore the other provisions of the Code or the provisions of statutes like those which relate to limitation or payment of court-fees. This was followed by a similar decision of the same learned Judge in Akimannessa Bibi v. Bepin Behary Mitter AIR 1916 Cal 261 in which it was held that the provisions of Order 41, Rule 33 should also apply to a case where the plaintiff had not appealed to the appellate Court against the decree of the Court below dismissing the suit as against him, where the plaintiff was not entitled under the provisions of Order 41, Rule 33 to appeal to the Privy Council. The next case cited by the appellant is the case in Kshum Chand Bhaturia v. Ghane Mahammad Saha AIR 1917 Cal 343 which is much in the same terms as the case referred to above and one of the Judges is the same. Finally the case in Dinanath Chandra v. Sudhanyamani Dasi was referred to in which it was held that where in a suit for enhancement of rent, the trial Court awarded enhancement at a certain rate and the defendants appealed but there was no appeal or cross-objection on behalf of the plaintiff and the lower appellate Court further enhanced the rent, the lower appellate Court had no power to do so under the provisions of Order 41, Rule 33, Civil P.C. These cases are distinguishable from the present case.

5. In the present case a decree had been passed by which the plaintiffs were entitled to recover the amount they had claimed out of the assets of the deceased. The plaintiff's being satisfied with the decree had no necessity to appeal against the finding that they were not entitled to enforce the

charge. They were therefore in not making any cross-objection or appeal not seeking to avoid payment of court-fees or to evade the provisions of any other statute such as the Limitation Act. So that the references to which our attention has been drawn to this possible misuse of Order 41, Rule 33 have no application in the present case. All that these rulings have really laid down is that the power which is given to the Court by Order 41, Rule 33 should be exercised with discretion in order to do justice between the parties. In Kesho Prasad Singh v. Narayan Dayal AIR 1925 Pat 285 it was laid down that:

The object of 0. 41, Rule 33 is, speaking generally to enable the appellate Court where its decision interferes with or modifies or extends the decision of the lower Court, to give effect to that decision by interfering, if necessary, even with the rights and liabilities of those who are not, in fact, appealing from the decision of the trial Court.

6. The learned Judges held that unless it was necessary in the interest of justice to give effect to the appellate Court's decision by interfering in some way or other with the rights of those parties which are not the subject of appeal, that the lower appellate Court has no right to interfere. This decision has a direct bearing upon the facts and circumstances of this case. The effect of the decision of the learned Subordinate Judge that the defendant was not personally liable was to alter the decree of the trial Court which was to the effect that no charge was maintainable so that no relief at all could be given to the plaintiffs although obviously they were entitled to the annuity. He therefore found it necessary to alter the decision of the trial Court so as to charge the properties. The documents on which the plaintiff relied were, the will of Radharaman and an annuity bond executed by him. The annuity bond states addressing Harish Chandra Sanyal and Ramesh Chandra Sanyal:

I make a provision of Rs. 300 per annum at the rate of Rs. 25 per month for your maintenance.

7. It further states that all the properties except certain properties mentioned in it would remain liable for the monthly allowance:

If the ascertained monthly allowance be not amicably paid to you from month to month then you and your heirs will be entitled to realize your claim of monthly allowance from the properties by instituting regular suits.

8. In the will it is stated:

I executed a deed of monthly allowance yesterday promising to pay monthly allowance at the rate of Rs. 25 per month to my son-in-law, Harish Chandra Sanyal, and his brother Ramesh Chandra Sanyal, and to their heirs. Any person enjoying the properties left by me will be bound to pay the monthly allowance according to the terms of the said document. And the aforesaid monthly allowance will be regarded as a permanent charge upon the properties described in schedule (ka) and also upon all my other properties except Dihi Rajapur and Dihi Ulipur.

9. It is therefore quite clear that the plaintiffs were entitled to realize the annuity allowance as a charge upon the properties. The only difference in the two deeds appears to be that whereas by the

will the amount realizable was a charge on all the properties except the above mentioned two properties, under the annuity bond it was realizable as a charge against all the properties except these two and some others. This case is similar to the case which has been referred to us, namely the case in Charubala Dasi v. Nihar Kumari Dassi , in which it was held that Rule 33, Order 41, Civil P.C., is primarily intended for a contingency such as when there are two alternative prayers made by the plaintiff he may be well satisfied with one of the reliefs obtained by him, but if on appeal that relief is denied to him, in justice the plaintiff ought to be given the other alternative relief if the findings arrived at by the lower appellate Court justify such a decree. In this case the plaintiffs appear to have been satisfied with the decree which they had obtained in the trial Court. But in view of the findings arrived at by the lower appellate Court that Court was entitled to modify the findings of the trial Court so as to justify the decree which it passed.

10. The ground on which the trial Court held that the plaintiffs were not entitled to enforce the charge is that the bond was not properly attested. The plaintiffs not having called any attesting witness to prove it and not having adduced any evidence to show that the attesting witnesses were dead, it was held that the plaintiffs had failed to prove proper attestation. It appears that the bond was 30 years old and that it came from the custody of the heirs of Radharaman. In these circumstances under Section 90, Evidence Act, the genuineness of the signature can be presumed and there was no need to examine the attesting witnesses. So that it does not appear that the trial Court was right in finding that the plaintiffs were not entitled to enforce the charge because the bond was not properly attested. As regards the other ground on which the trial Court held that the plaintiffs were not entitled to enforce the charge, i. e., that two of the properties out of which the amount of the maintenance should have been realized were not included in the plaint, it is stated on behalf of the plaintiff's that they were not aware of these properties and that therefore they were quite satisfied to realize the amount of charge from the properties of which they knew. In the circumstances we think that there will be no prejudice to the defendant if we allow at this stage the plaint to be amended so as to include the other properties which the plaintiff's are entitled to charge according to the terms of the annuity bond. There is a cross-objection in this case to the effect that the learned Subordinate Judge erred in law in refusing to declare the charge on the properties. In view of the cross-objection we think that it should be specifically declared that the plaintiffs are entitled to a charge on the properties as noted in the annuity bond, and so far as the appellate Court's order does not clearly direct that the properties are to be charged, the decree of the lower appellate Court will be modified in the manner indicated above. Otherwise this appeal is dismissed with costs. The application for amendment be made within one month from this date failing which the cross-objection will stand dismissed with costs.

Edgley, J.

11. I agree with my learned brother in thinking that the plaintiffs are entitled to succeed and that they should be allowed relief to the extent indicated in the order of the lower appellate Court subject to this modification: that the money to which they are entitled should be deemed to be a charge on the properties mentioned in the order of the lower appellate Court. There is no doubt, in my mind, that the annuity deed, Ex. 1, was admissible in evidence under Section 90, Evidence Act, irrespective of the fact that no attesting witness has been called to prove it. In any case, however, the plaintiffs

are also entitled to succeed having regard to the terms of the will of the late Radharaman Munshi. Para. 8 of this will recites the fact that the testator had executed & deed whereby a monthly allowance would be payable to Haris and Ramesh and it also referred to the terms of the annuity deed. Further, the testator clearly states that if the monthly allowance is not paid it will be regarded as a permanent charge not only upon the properties mentioned in the annuity bond but also upon his other properties with the exception of two items only. In effect, therefore, by reason of the will, an independent charge was created upon all the items of the testator's property except Dihi Rajapur and Dihi Ulipur. So even if the plaintiffs had not been able to recover their dues by virtue of the annuity bond they were nevertheless entitled to relief under the terms of the will.

12. With regard to the argument put forward by the learned advocate for the appellants with reference to Order 41, Rule 33, it must be remembered that what the lower appellate Court did, having regard to the view which the learned Subordinate Judge took of the case out of which this appeal arises, was to prevent the decree of the first Court from becoming completely infructuous. In the Court of the learned Munsif the plaintiffs had obtained relief to the extent that they obtained a decree for the amount claimed against the assets of Radharaman which had come into the hands of the defendant. The lower appellate Court held that the defendant was not personally liable to the plaintiffs. The result of this finding would, therefore, have been to exonerate the defendant from any liability whatsoever unless some sort of charge could be created in respect of the property of the deceased testator which had actually come into his hands. Although the learned Subordinate Judge does not expressly mention the word "charge" in his order, in effect he has decreed that the money due to the plaintiffs should be deemed to be what really amounts to a charge upon certain items of Radharaman's property which had come into the hands of the appellant. It has been pointed out by Sir Dinshaw Mulla in his commentary on the Civil Procedure Code that the object of Order 41, Rule 33 of the Code is to empower the appellate Court to do complete justice between the parties. In my opinion the learned Subordinate Judge in the circumstances of this particular case could not have done otherwise than he did in applying the provisions of Order 41, Rule 33, and I think he was quite justified in doing so. In this connexion it has been pointed out by Sir Dawson Miller, C.J. in Kesho Prasad Singh v. Narayan Dayal AIR 1925 Pat 285 that recourse should not be taken to this particular section unless it is necessary in the interests of justice to interfere in some way or other with the rights of those parties who have not actually appealed. His Lordship further states that:

The object of Order 41, Rule 33 is, speaking generally, to enable the appellate Court where its decision interferes with or modifies or extends the decision of the lower Court to give effect to that decision by interfering, if necessary, even with the rights and liabilities of those who are not, in fact, appealing from the decision of the trial Court.

13. In the case which is now before us there can be no doubt that the principle enunciated by Sir Dawson Miller, C.J., has been rightly applied as it was necessary for the appellate Court to take action under Order 41, Rule 33 in order to prevent the decree of the first Court from becoming infructuous. I, therefore, agree that there is no force in the argument which has been put forward in this connexion on behalf of the appellants.