PRIVY COUNCIL

Smt. Brij Indar Kuar

Vs.

Thakur Jai Indar Bahadur Singh

P.C.A.No. 56 of 1930
(Lord Russell Of Killowen, J. Sir George Lowndes Andsir Dinshah Mulla JJ.)

09.05.1932

JUDGMENT

SIR DINSHAH MULLA . J.

1. *Thakur Rajindra Bahadur Singh* died on 18th October 1912, leaving a will dated 14th June 1907, and a codicil dated 4th October 1912. By his will he bequeathed the residue of his estate to his nephew, who is the respondent before this Board. By his codicil he left a monthly sum of Rs. 200 to the appellant, Rs. 500 to his widow, Rs. 300 to another daughter and Rs. 30 to a female servant, and charged certain properties with the payment of the annuities.

2. All the annuities fell into arrears, and on 30th January 1920, the appellant, who was then a minor, brought the suit out of which the present appeal arises against the respondent to recover the arrears of the annuity due to her, for the administration of the estate of the testator, and for the appointment of a receiver. The other annuitants' were joined as defendants to the suit.

3. Two other suits were also filed, one by the appellant's sister and the other by the servant, to recover the arrears of the annuities due to them.

4. All three suits were heard by the District Judge of Lucknow, and on 14th October 1922, a preliminary decree was passed for the administration of the estate. *Babu Brijmohan Dayal,* a pleader of the Court, was appointed receiver without security, with power to sell the properties, and a, scheme was framed for the payment of past as well as future annuities to all the four annuitants. A schedule of the properties charged with the payment of the annuities was appended to the decree.

5. Against this decree the respondent appealed to the Court of the Judicial

Commissioner of Ouch, proposing an alternative scheme for the payment of the arrears, which up to 18th October 1923, had amounted to Rs. 73,950-8-0, and for the payment of future annuities. The Judicial Commissioner considered that the scheme was reasonable, and passed a decree on 13th December 1923, declaring that the appellant was entitled to Rupees 26,400 for arrears up to 18th October 1923, and to a further payment of Rs. 200 per month for her life, and providing for the payment of the Rupees 73,950-8-0 out of two sums, one of Rs. 47,668-15-6, being the aggregate of four of the items specified in the schedule to the decree, and the other of Rupees 26,281-8-6 which the respondent was ordered to pay into Court to make up the Rs. 73,950-8-0. The four items referred to above were :

	Rs. a. p
Estimated value of cattle in the possession of the receiver...	3,498 0 0
Represented by War Bonds purchased out of Rs. 20,000 paid into Court by the Court of Wards under a decree for Rs. 1,00,000 and deposited for safe custody with the Allahabad Bank Lucknow.....	27,929 4 7
Price of cattle sold by receiver...	1,746 10 11
Government promissory notes also deposited with the Allahabad Bank.....	14,500 0 0
Total...	47,668 15 6

6. It would appear that the respondent was restrained by an injunction from realizing the decree for Rs. 1,00,000 against the Court of Wards. It was directed by the decree that if the respondent paid into Court Rs. 26,281-8-6 and executed certain hypothecation deeds on or before 12th March 1924, the injunction should be dissolved, otherwise the appeal should be dismissed, The decree also contained a clause providing that :

> " all the annuitants shall be entitled to recover their annuities from the properties " specified in the decree. As regards future payments, it was directed that they should be made every six months instead of every month. The respondent paid the Rs. 26,281-8-6 into Court, and filed the hypothecation deeds within the time fixed by the Court, and the injunction was removed by an order made on 18th March 1924.

7. Subsequently the receiver complained to the Court that no cattle had come into his possession nor had any been received by him, and that the value of the War Bonds and the Notes had been over-estimated. Thereupon the respondent undertook to pay into Court the two cattle items and the deficiency, if any, that might arise on a sale of the securities. In July 1924, the receiver obtained possession of the securities from the Allahabad Bank, and he absconded in September 1925. It is not known what he did with the securities, nor is it known how much he paid to the other annuitants.

8. After several fruitless attempts to recover the annuity due to her, the appellant presented an application to the District Judge on 5th April 1928, for execution of the decree by sale of the properties charged with the payment of the annuities under the decree. She stated that in addition to the Rs. 26,400 awarded to her by the decree, a further sum of Rs. 3,600 had become due to her from 19th October 1923, up to 18th April 1925, and that nothing had been paid to her. She also complained that the respondent had failed to pay into Court the several sums which he had undertaken to pay.

9. To this the respondent filed a reply raising various contentions as regards his undertaking. He also alleged that he had paid to the receiver three six-monthly instalments of Rs. 6,180, Rs. 6,000 and Rs. 6,180 on account of annuities due from 19th October 1923 to 18th April 1925 and contended that if the receiver misappropriated the money and the securities the loss should be borne by the appellant and the other annuitants. The District Judge found against the respondent on all points, and by his order dated 4th July 1928, he directed execution to issue.

10. Against this order the respondent appealed to the Chief Court of Oudh. The learned Judges agreed with the District Judge that the respondent had failed to carry out his undertaking, but they held differing from him that the payment by the respondent of the three sums to the receiver was proved. The question as to who should suffer for the receiver's defalcations was they thought, one of great importance, and they referred the following question to a Full Bench :

> "Where the judgment-debtor is proved to have paid money, due from him under a decree passed by the Court, to the receiver appointed by the Court for realizing certain sums of money and making payments to the decree-holder or decree-holders, or other money or property is proved to have come to his hands and the receiver is found to have misappropriated the money and the property, on whom should the loss fall? Should the loss fall on the judgment-debtor or on

the judgment-creditor?"

11. The answer given by the Full Bench was that the loss should be borne by the judgment-creditor that is, the appellant.

12. After receipt of the opinion the learned Judges delivered their judgment. They held that, having regard to the opinion of the Full Bench, the only liability of the respondent was to pay what he had undertaken to pay into Court, which they fixed at Rs. 13,621-14-10. Accordingly, they passed a decree on 1st March 1929, declaring that the respondent was liable to pay Rs. 13,621-14-10, out of which the appellant was entitled to only a proportionate share, based apparently on the supposition that the other annuitants were in like case with the appellant, as to which there was no evidence. They also directed that unless the respondent paid the amount into Court on or before 1st June 1929, a sufficient portion of the properties should be attached and sold, but they seem to have given no direction as to the disposal of the sale proceeds in that event. From this decree the appellant has brought the present appeal to His Majesty in Council.

13. It was urged before their Lordships on behalf of the appellant that the charge created by the decree was not affected by the defalcations of the receiver, and that no payment having been made to her, she was entitled to be paid the full amount claimed by her out of the properties charged with the payment of the annuities. On the other hand, the respondent contended that except in respect of Rs. 13,621-14-10 which the appellate Court had ordered him to pay, the charge had been satisfied and the properties freed from all liability to the appellant except for future installments of her annuity. Their Lordships are unable to accede to this contention. In their opinion, the charge created by the codicil and affirmed by the decree was in no way affected or impaired by the embezzlement of the receiver. The decree provides in express terms that all the annuitants are entitled to recover their annuities from the properties charged. The appellant has admittedly received no part of the annuity due to her. She is therefore entitled to recover it by sale of the properties and that is all she has asked. She makes no claim against the respondent personally.

14. As regards the three half yearly installments, their Lordships think that it is clear that the respondent paid them to the receiver at his own risk. Counsel for the respondent have been unable to point to any order of the Court under which the respondent paid or even was authorized to pay these sums to the receiver and it would be impossible to hold that he was the agent of the appellant with authority to receive payment on her behalf. The analogy relied on by the Full Bench of payment by a

judgment-debtor to a bailiff charged with the execution of a warrant of arrest or attachment is fallacious, as every such warrant empowers the bailiff in express terms to receive payment from the judgment-debtor.

15. Their Lordships cannot conclude this judgment without referring to what seems to have been a grave dereliction of duty on the part of the Court which appointed the receiver in this case. It may be that under the Civil Procedure Code the Court has discretion to appoint a receiver without security but it should obviously be done only in the most exceptional circumstances. In the present case all the parties to the suit, except the respondent were females and the appellant was until recently a minor. Under such circumstances their Lord-ships are unable to understand upon what ground the receiver could have been appointed without giving adequate security and have been allowed to have the apparently unfettered control of money and securities to a large amount. Their Lordships think that the matter should be taken into consideration by the Chief Court and some very definite means devised whereby the recurrence of such a blot on the administration of justice may be avoided.

16. In the result their Lordships will humbly advise His Majesty that this appeal should be allowed that the decree of the Chief Court dated 1st March 1929 should be set aside and the order of the District Judge dated 4th July 1928, restored, subject to the variation that the properties should not be sold if the respondent pays Rs. 30,000 into the Chief Court within eight weeks from the date of the service upon him of a copy of the Order in Council. The respondent must pay the costs of the appellant in the Chief Court and before this Board. Their Lordships granted a petition of the appellant for the admission of further documents. The respondent must also pay the appellant's costs of this petition and the supplemental record.

Appeal allowed.