

APPELLATE CIVIL.

1908
July 22.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
CHANDAR SHEKHAR (PETITIONER) v. KUNDAN LAL AND ANOTHER
(OPPOSITE PARTIES). *

Partition—Compromise—Right of co-owners to partition—Effect of agreement to remain joint.

By a compromise entered into in the course of proceedings for partition it was agreed that the share of the applicant for partition alone should be partitioned, that of the non-applicants remaining joint. *Held* that although such compromise might prevent the non-applicants from obtaining partition in the course of the proceedings during which it was entered into, it could not prevent either of them from subsequently making a fresh application for partition *inter se*.

THE facts of this case are as follows:—

Sheo Ram, Sheo Shankar, Kesho Ram and Sewak Ram were four brothers jointly entitled to certain property. Sheo Shankar died childless, and upon his death the three surviving brothers became entitled equally to the property in question. Kesho Ram in the year 1904 applied for partition of the property and also brought a suit for partition in the Civil Court, the defendants to that suit being Kundan Lal and Kanhaia Lal, the sons of Sheo Ram, and the present plaintiff Chandar Shekhar, the son of Sewak Ram. It was agreed in that suit that Kesho Ram's one-third share should alone be partitioned, and that the shares of the defendants should remain joint. On the 2nd of March 1906, the plaintiff Chandar Shekhar made an application for partition of his share, which application was rejected on the ground that it was barred by the terms of the compromise entered into in the previous suit. It was held by the Assistant Collector that inasmuch as the plaintiff, or his guardian on his behalf, agreed on the former application that his share should remain joint, it was not open to him to institute proceedings for partition. Against this decision the applicant for partition appealed to the High Court.

Munshi Gokul Prasad, for the appellant.

The respondents were not represented.

STANLEY, C.J., and BANERJI, J.—This appeal is against an order of an Assistant Collector whereby he rejected the application

* First Appeal No. 285 of 1906, from a decree of Asghar Ali, Assistant Collector of Meerut, dated the 24th of July 1906.

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of the plaintiff for partition of certain property. There were four brothers jointly entitled to certain property. They were Sheo Ram, Sheo Shankar, Kesho Ram and Sewak Ram. Sheo Shankar died childless, and upon his death the three surviving brothers became entitled equally to the property in question. Kesho Ram in the year 1904 applied for partition of the property and also brought a suit for partition in the Civil Court, the defendants to that suit being Kundan Lal and Kanhaia Lal, the sons of Sheo Ram, and the present plaintiff Chandar Shekhar the son of Sewak Ram. It was agreed in that suit that Kesho Ram's one-third share should alone be partitioned, and that the shares of the defendants should remain joint. On the 2nd of March 1906, the plaintiff made the application out of which this appeal has arisen for partition of his share, and his application has been rejected on the ground that it is barred by the terms of the compromise entered into in the previous suit. It was held by the Assistant Collector that, inasmuch as the plaintiff, or his guardian on his behalf, agreed on the former application that his share should remain joint, it is not open to him to institute proceedings for partition. We may mention that the plaintiff in the previous proceedings applied for partition of his share under section 110 of Act III of 1901, but his application was rejected on the ground that it had not been brought within 60 days, the period allowed for such application. So far as regards the former proceedings, no doubt, the plaintiff could not take advantage of the order for partition and obtain partition of his share, but this only applied to the proceedings then pending. It in no way prevented him from instituting a fresh application for the separation of his share, and the partition of the property remaining joint. The right of a co-owner to have partition of his share is incident to the right of ownership, and an agreement not to partition for an indefinite period would be contrary to that right and therefore not enforceable. In the present case there was no agreement not to claim partition. Therefore in our opinion the learned Assistant Collector was wrong in rejecting the plaintiff's claim. As he disposed of the case upon a preliminary point, we set aside his order and remand the case to him under the provisions of section 562 of the Code of Civil Procedure, with directions

that it be reinstated in the file of pending applications and be disposed of according to law. The plaintiff appellant will have the costs of this appeal. All other costs will abide the event.

Appeal decreed and cause remanded.

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July 24.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
LALTA PRASAD (PLAINTIFF) v. SALIG RAM AND ANOTHER (DEFENDANTS).*

Will—Construction of document—Persona designata.

By the terms of a will the testator gave all his property to his wife for her life, and then declared that after her death Lalta Prasad, his adopted son, should be owner of the property. The testator's wife predeceased him. Held that after the death of the testator Lalta Prasad took as a *persona designata*, whether in fact his adoption was valid or not. *Nidhoomoni Debya v. Saroda Pershad Mookerjee* (1) followed.

THE facts out of which this appeal arose are as follows :—

One Kedar Nath died on the 3rd of September 1904 leaving a will, dated the 22nd of June 1888. By this will the testator gave all his property to his wife for her life, and then declared that after her death Lalta Prasad, his adopted son, should be the owner (*malik*) of the property. The testator's wife predeceased him, and upon the death of the testator his sister's sons took possession of the property. Lalta Prasad then brought the present suit to recover the estate of Kedar Nath as sole legatee thereof. The Court of first instance (Munsif of Pilibhit) held that the plaintiff was entitled as *persona designata*, whether he was or was not in fact the adopted son of Kedar Nath, and accordingly decreed the claim. This decree was, however, reversed by the Subordinate Judge of Bareilly upon the ground that the gift to the plaintiff was made to him as adopted son and that he had failed to prove his adoption. The plaintiff thereupon appealed to the High Court.

Dr. Satish Chandra Banerji, for the appellant.

Munshi Gulzari Lal, for the respondents.

STANLEY, C. J., and BANERJI, J.—The meaning of a gift in the will of one Kedar Nath is the only question in this appeal. Kedar Nath made a will on the 22nd of June 1888.

* Second Appeal No. 971 of 1907 from a decree of Giraj Kishor Datt, Subordinate Judge of Bareilly, dated the 4th of July 1907, reversing a decree of Raman Das, Munsif of Pilibhit, dated the 8th of September 1906.