1911

DASONDHAY v. MUHAMMAD ABU NASAR.

For the above reasons we allow the appeal in part and in lieu of the decree for possession of the property we declare that the transfers made by the Muhammadan defendants in favour of the Hindu defendants are invalid. As the appeal has in substance failed and the point on which the decree has been modified was not taken in the grounds of appeal, we direct that the appellants pay the costs of the respondents.

Appeal dismissed.

1911

May 18.

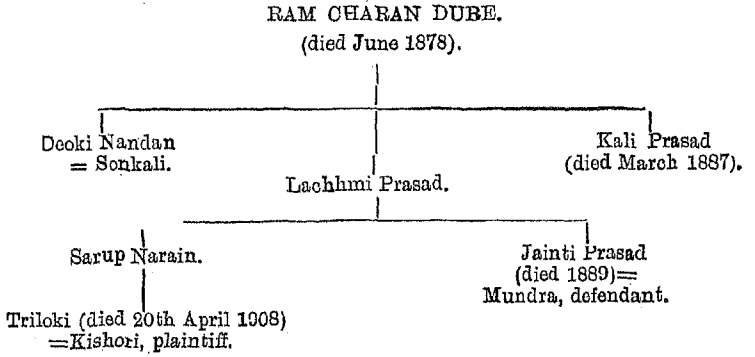
Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

KISHORI DUBAIN (PLAINTIFF) *v.* MUNDRA DUBAIN AND ANOTHER (DEFENDANTS).*

Construction of document—Will—Gift—Property given to two brothers who were joint—Nature of estate taken by brothers—Hindu law.

Where property is given or devised, without specification of the individual interests of the recipients, to persons who are members of a joint Hindu family, it does not follow that they take such property as joint property, the principle of joint tenancy being unknown to Hindu law save in connection with the joint Hindu family. *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (1), *Bai Diwali* v. *Patel Bechardas* (2) and *Gopi* v. *Jaldhara* (3) referred to. *Mankamna Kunwar* v. *Balkishan Das* (4) doubted.

THE following pedigree explains the position of the parties to this appeal and other persons to whom reference will be made:—



Deoki Nandan died in his father's lifetime. Kali Prasad was alleged to have become a fakir, but he returned and filed a suit

* Second Appeal No. 930 of 1910 from a decree of F. D. Simpson, District Judge of Gorakhpur, dated the 29th of August, 1910, reversing a decree of Guru Prasad Dube, Additional Subordinate Judge of Gorakhpur, dated the 23rd of March, 1910.

(1) (1896) I. L. R., 23 Calc., 670.
(2) (1902) I. L. R., 26 Bom., 445.
(3) (1910) I. L. R., 33 All. 41.
(4) (1904) I. L. R., 28 All., 38.

1911

KISHORI DUBAIN v. MUNDRA DUBAIN.

for partition, in which a decree was made on the 6th of June 1874, giving him a one-third share. Jainti Prasad died in 1889, and after him Sarup Narain continued in possession. He was succeeded by his son Triloki, and the latter by his widow Kishori. Mundra, the widow of Jainti Prasad, executed a lease of two villages, Misraulia and Gular Bahar, claiming that they were her husband's self-acquisition. She set up a gift by Ram Charan and a will of Kali Prasad in favour of the two brothers. Musammat Kishori then filed the present suit to have the lease set aside, alleging that these documents had never been given effect to, and that the brothers had taken the estate jointly in the natural course. The court of first instance held that Jainti Prasad and Sarup Narain were joint; that the gift was of no operation, as Ram Charan was joint with them, and that they were the natural heirs of Kali Prasad. The defendant appealed, alleging that the brothers were not joint, as they used to live separately. The District Judge held that the property had been held in severalty, as there had been a gift. As mutation did not correspond to the actual shares, there must have been family exchanges and transfers of the property. The plaintiff appealed.

The Hon'ble Pandit *Sundar Lal* (with him Dr. *Satish Chandra Banerji* and Munshi *Govind Prasad*, for the appellant:—

The whole property was joint and ancestral. The will and the deed of gift were executed, but had never been given effect to. The property had devolved in the natural course. The will of Kali Prasad merely declared his natural heirs to be heirs. It simply said '*jo bhatijyan hamare hain waris apna qayam karke likh dete hain.*' The gift by Ram Charan was invalid because the property was joint family property. There was no specification of shares even. There was no evidence as to any partition in the family save that about Kali Prasad's. This was comprised in the decree of the 6th of June, 1874, which merely defined his share as one-third. This partition could only be effective as between the brothers, but would not affect the brother's sons. Therefore Sarup Narain and Jainti Prasad continued to be joint.

There may have been partition as between Kali Prasad and Ram Charan, but there was no partition *inter se* between Ram Charan Lachhmi Prasad and his sons. Probably Lachhmi Prasad was alive on the date of the gift by Ram Charan. There can be only two theories in the case. Either on the partition by Kali Prasad, the rest of the family continued joint, or there was also a division between them consequent on the partition. Assuming that there was this fresh partition, Lachhmi Prasad would have got his share of the property, and that share would be joint as between him and his two sons, and Ram Charan's own share would descend to them as joint property. The decree of the 6th of June, 1874, was also in the plaintiff's favour, because it also did not specify any shares except that of one-third awarded to Kali Prasad.

The question is whether Jainti Prasad and Sarup Narain were joint when Jainti Prasad died. No actual partition between them was proved as a matter of fact. The court of first instance found that they were joint. The lower court did not go into the question at all. If there was no actual evidence of partition, there was no inference of partition in law. Assuming that Ram Charan and Lachhmi Prasad got one-third each, Lachhmi Prasad's one-third share would be joint as between Sarup Narain and Jainti Prasad. There was no proof even that Sarup Narain and Jainti Prasad were born at the time of the partition suit. Therefore Lachhmi Prasad and his sons were joint, and as between the sons there was no partition.

Lachhmi's interest was inherited jointly by his sons and became joint property. In any case, the two villages, Misraulia and Gular Bahar, would be joint property, and these very villages had been leased out by the respondent. There was no specification of shares in the will by Kali Prasad. The whole property was therefore given jointly to two members of a joint family, and would descend to them as joint property; *Venkayyamma Garu* v. *Venkataramanyyamma Bahadur Garu* (1). This was a very strong case, and it did not accept the Allahabad ruling on the point, though the latter was so reasonable. The

(1) (1902), I. L. R., 25 Mad., 678 (85).

1911

KISHORI DUBAIN v. MUNDRA DUBAIN.

Privy Council held that under an intestacy, daughter's sons would take jointly. Not only the sons of one daughter, but the sons of several daughters residing in several families at several places would all hold a joint estate in any property that descended to them, and that property would possess all the incidents of joint family property. Their Lordships of the Privy Council overruled *Jasoda Koer* v. *Sheo Pershad Singh* (1), which had laid down that if any property that was not joint property came into the possession of joint members of a family, it would not be joint property.

This ruling applies if there is no separate specification of shares, i.e. if the gift or sale be made jointly. I may refer to the case of a joint purchase. This is the case of a joint gift. These are modes of acquisition of property. The ordinary presumption of Hindu Law is in favour of jointness. The instance of the funds being separate only rebuts that presumption. If there are six members in a joint family property given only to three or four, would it be joint as between these three or four. There is no getting out of the Privy Council case. The facts are almost parallel. Property is held here jointly. Sons and nephews may not be co-owners, yet they hold it jointly. The contrary must be shown by him who alleges separation. No difference can be made, because persons in the ascending or descending line do not share in the joint property; *Rudhabai* v. *Nanarav* (2), *Mankamna Kunwar* v. *Balkishan Das* (3), *Durga Dei* v. *Balmakund* (4) and *Ram Pershad Singh* v. *Lakhpati Koer* (5).

The course of conduct later on in the family would show the devolution of the property. It was not necessary for the plaintiff to prove adverse possession. She succeeded to it in the natural course. It was alleged that there was no denial of defendant's title before suit. It was unnecessary, because defendant was not in possession, and it only became necessary when she executed this lease. If Ram Charan, Lachmi Prasad, and

(1) (1889) I. L. R., 17 Calc., 33.
(2) (1879) I. L. R., 3 Bom., 151 (153).
(3) (1905) I. L. R., 28 All., 38.
(4) (1906) I. L. R., 29 All., 93.
(5) (1902) I. L. R., 30 Calc., 254 (264).

his sons were joint, the latter succeeded to the property by inheritance and held it jointly. If partition was assumed, the interest of Lachhmi Prasad was still joint with that of his sons, and the share of Ram Charan came to them jointly; as also did Kali Prasad's interest in his share. The villages under lease were covered neither by the gift nor by the will. They devolved on the plaintiff, and the defendant had no title. The lease was invalid in law.

Babu *Surendra Nath Sen* (with him the Hon'ble Pandit *Moti Lal Nehru*) for the respondents :—

The decree of the 6th of June, 1874, was not a mere declaratory decree, as it contained a partition of revenue-paying property. The terms of that decree themselves show that it was a partition decree. It was passed on two suits for partition, one against Ram Charan and one against Lachhmi Prasad and the widow of Deoki Nandan. A decree for one-third would never have been passed unless there had been persons in the suit representing particular units of the family. The nature of the tenancy was converted from joint tenancy to tenancy in common as soon as the court had to determine a share. It was not necessary for the decree to separate Lachhmi Prasad and his two sons. The ruling in 29 Allahabad does not affect the case. So long as Ram Charan's share was not determined, Kali Prasad's could not be found. Hence the shares of both Ram Charan and Lachhmi Prasad had to be found. In 29 All., 93, half had been given to uncle and half to his brother's two joint sons, it was not necessary there to determine the shares of the two sons. They were treated merely as members of one branch. The same principle applies here; *Balkishen Das* v. *Ram Narain Sahu* (1). Kali Prasad did not continue joint even after the decree, because the will declared that he was the sole and absolute owner, and he executed a sale deed to Ishri Prasad of one-third of his own one-third share on the 14th of August, 1874.

I would invite the attention of the Court to the gift of Ram Charan. The gift militates against the theory of jointness. What could be the ostensible object of making a gift to his natural heirs, who were already members of a joint family ? The

(1) (1903) I. L. R., 30 Calc., 738 (750).

1911

KISHORI DUBAIN v. MUNDRA DUBAIN.

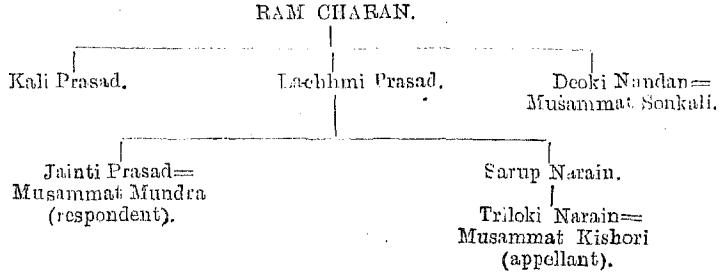
parties to the decree constituted the aggregate units of the joint family; *Pursotum Rao* v. *Radha Bai* (1). As to the case of daughters, the general rule was that daughters took a joint estate, and if one of them died, her sons could not succeed as against the others. There was no question of Hindu Law, but entirely of construction; *Sreenuthy Soorjeemoney Dassu* v. *Denobundoo Mullick* (2). One should look to the surrounding circumstances only if there was an ambiguity in construction. In 1873, the testator could have no anticipations that Jainti Prasad would die young, because if Jainti Prasad would have left any children, they would not inherit. A presumption of joint tenancy existed in Hindu Law but not in English Law. It would be a question of construction in each case, and would not be held joint merely because the donees happened to be joint; *Vydinadu* v. *Nagammal* (3). There was a conflict of judicial opinion on this point, till *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (4), which overruled 11 Mad., and held that documents were to be subject to natural interpretation and not to technical rules of English law. *Rewun Persad* v. *Mussumat Radha Beeby* (5), *Mankamma Kunwar* v. *Balkishan Das* (6), *Gopi* v. *Jaldhara* (7), *Bhoba Tarini Debya* v. *Parry Lall Sanyal* (8), *Bai Diwali* v. *Patel Bechardas* (9) and *Karuppai Nachiar* v. *Sankarana-rayanan Chetty* (10) were also cited.

As to the argument that the documents had not been given effect to, there was a clear finding of fact in the judgement of the lower court, and this ground could not be urged in second appeal. The two villages of Misraulia and Gular Bahar were merely reclaimed jungle and so had not been mentioned by name in the deeds. Their Lordships had to look at the deed of gift only by itself; *Zahuran* v. *Rahim* (11). Mere continuity of possession was not adverse possession. The latter had not been proved.

Munshi *Govind Prasad*, in reply.

(1) (1910) 7 A. L. J., 451, (456).
(2) (1857) 6 Moo., I. A., 526 (550).
(3) (1888) I. L. R., 11 Mad., 258.
(4) (1896) I. L. R., 23 Calc., 670.
(5) (1846) 4 Moo., I. A., 137.
(6) (1905) I. L. R., 28 All., 38.
(7) (1910) I. L. R., 33 All., 41.
(8) (1897) I. L. R., 24 Calc., 646, (652).
(9) (1902) I. L. R., 26 Bom., 445.
(10) (1903) I. L. R., 27 Mad., 300.
(11) (1909) 8 A. L. J., 247.

CHAMIER, J.—The following pedigree explains the position of the parties to this appeal and other persons to whom reference will be made:—



After the death of Deoki Nandan, which occurred many years ago, Ram Charan, his sons Kali Prasad and Lachhmi Prasad, and his grandsons Jainti Prasad and Sarup Narain constituted a joint family. In 1874, Kali Prasad brought suits against Ram Charan, Lachhmi Prasad and Sonkali for partition and possession of his share in the family property and obtained decrees which established his right to possession of a one-third share. In August, 1876, Kali Prasad made a will whereby he left his shares in the villages Katyalu, Bisauli, Kanura and Badhya, to his nephews, Jainti Prasad and Sarup Narain. In January, 1878, Ram Charan executed a deed of gift whereby he transferred to the same two persons his ancestral and acquired shares in the four villages mentioned above and other property. All the males in the family have died. The dates on which they died are not material. It is only necessary to state that Jainti Prasad predeceased his brother Sarup Narain, and on Jainti's death mutation of names in respect of the shares standing in his name was made in favour of the respondent, Musammat Mundra. On the death of Sarup Narain, mutation of names in respect of the property standing in his name was made in favour of his son, Triloki Narain, and on the latter's death in favour of the appellant, Musammat Kishori. It may be mentioned here that Musammat Sonkali was at one time recorded with Jainti and Sarup as one of the proprietors of shares in two villages called Misraulia and Gular Babar, a fact which seems to have puzzled the lower appellate court. The explanation is to be found in the deed of gift executed by Ram Charan, whereby he gave his

1911

KISHORI DUBAIN v. MUNDRA DUBAIN.

Chamier, J.

shares in certain jungle land to Musammat Sonkali for life and thereafter to his two grandsons. That land, as the lower appellate court has shown, is now known as Misranlia and Gular Bahar. With the exception of these two villages the whole of the property in the six villages with which we are concerned in the present case was for many years recorded in the names of Jainti Prasad and Sarup Narain.

The respondent, Musammat Mundra, having made a lease of her recorded shares in two of the villages in favour of the respondent, Mahant Beni Bibikanandgir, and having in other ways shown that she intended to claim a widow's estate in the property recorded in her name, the appellant brought the suit out of which this appeal has arisen, claiming a declaration that she is the owner and in possession of the property recorded in Musammat Mundra's name, and that the lease is invalid. The appellant's case is that the brothers, Jainti and Sarup, held all the property recorded in their names as members of a joint family; that on the death of Jainti the whole passed to Sarup Narain, on the latter's death to Triloki Narain, and on his death to the appellant who has been in undisputed possession for many years. The respondent's case is that the decree of 1874 operated to sever the interests of Kali Prasad, Ram Charan and Lachhmi Prasad; that each took a one-third share, Lachhmi Prasad taking one-third for himself and his two sons; that Jainti Prasad and Sarup Narain each took a separate interest under the will of their uncle, Kali Prasad, and under the deed of gift executed by their grandfather, with the result that the interest of Jainti, which is the property now in dispute, passed on his death to his widow, Musammat Mundra.

The first question is as to the effect of the decree of 1874. There is no doubt that the decree operated to sever the share of Kali Prasad from the shares of the rest of the family. The appellant referred to the decisions in *Durga Dei* v. *Balmakund* (1) and *Balkishen Das* v. *Ram Narain Sahu* (2), and contended that as shares were not actually allotted by the decree to Ram Charan and Lachhmi Prasad, these two should be held to have remained joint in estate. The respondent referred to the case of

(1) (1908) I. L. R., 29 All., 93. (2) (1903) I. L. R., 30 Calc., 738.

Ram Pershad Singh v. *Lakhpati Koer* (1), and contended that Ram Charan and Lachhmi Prasad should be regarded as having held separately after the decree, because in order to determine the shares of Kali Prasad it was necessary to determine the shares of Ram Charan and Lachhmi Prasad, and because the evidence shows that they held their shares separately after the decree. They might, no doubt, have elected to remain in union, but the evidence shows that they did not. Ram Charan, as already stated, transferred his shares to his grandsons, and there is other evidence to support the view of the lower appellate court that Ram Charan held a separate share after the decree of 1874.

The second and most important question in this case is whether Jainti Prasad and Sarup Narain took separate interests under the will and deed of gift, as contended by the respondents, or took the property as undivided co-parceners, as contended by the appellant. The latter does not suggest that the two brothers took the property as joint tenants in the sense of the English law. Her learned advocate relied principally upon the decision of their Lordships of the Privy Council in *Venkatayyamma Garu* v. *Venkataramanayyamma Bahadur Garu* (2). That case does not appear to me to have any real bearing on the question which we have to decide. There the question was whether the sons of a daughter who were members of a joint family with their father and had succeeded to their maternal grandfather's estate on the death of their mother, took the property as undivided co-parceners (i.e. jointly) or as tenants in common. It has been pointed out by the Madras High Court, see *Karuppai Nachiar* v. *Sankaranarayanan Chetty* (3), that that decision cannot be regarded as laying down a rule that all property coming to two or more persons who happen to be members of a joint family is taken by them jointly, i.e. with the rights of co-parceners in a joint family. Moreover, we have to deal here not with succession on an intestacy, to which alone the ruling of the Privy Council can be applied, but to a case of property passing under a will and a deed of gift. The nature of the interests

(1) (1902) I. L. R., 30 Calc., 231. (2) (1902) I. L. R., 25 Mad., 678.
(3) (1903) I. L. R., 27 Mad., 300.

1911

KISHORI DUBAIN v. MUNDRA DUBAIN.

Chamier, J.

taken by the two brothers depends upon the language of the will and deed of gift, and, if the language is ambiguous, upon any presumption or rule of construction that may be applicable to such documents. There is nothing either in the will or the deed of gift which gives any indication as to whether the testator or donor intended that the two brothers should hold as undivided co-parceners or as tenants in common with separate interests. There are cases, e. g., *Vydinada* v. *Nagammal* (1) and *Mankamna Kunwar* v. *Balkishan Das* (2), in which it has been held in accordance with a rule of English law that a gift or bequest to two persons without more creates a joint tenancy, but their Lordships of the Privy Council have disapproved of the application of this rule to the will of a Hindu and have observed that the principle of joint tenancy is unknown to Hindu law except in the case of co-parcenary between the members of an undivided family; *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (3). As regard may be had to surrounding circumstances in order to ascertain the meaning of the testator in the one case and of the donor in the other, the learned advocate for the appellant has relied upon the fact that the brothers were at the time of the gift and will members of a joint family and has pointed out that this circumstance was relied upon by this Court in the case of *Mankamna Kunwar* v. *Balkishan Das* (2) as a reason for holding that a joint tenancy had been created by a deed of gift. The respondent's learned vakil contended that the authority of the last mentioned case was much weakened by the erroneous application of a rule of English conveyancing to the construction of a deed of gift executed by a Hindu, and he referred to a later case of *Gopi* v. *Jaldhara* (4), in which, following a decision of the Privy Council, one of the same Judges declined to apply that rule to the construction of a will executed by a Hindu. The learned vakil referred also to the case of *Bai Diwali* v. *Patel Bechardas* (5). There, property had been given to two brothers who were members of a joint Hindu family. One died leaving a widow, and it was held that she was

(1) (1888) I. L. R., 11 Mad., 258.
(2) (1905) I. L. R., 28 All., 38.
(3) (1896) I. L. R., 23 Calc., 670.
(4) (1910) I. L. R., 29 All., 41.
(5) (1902), I. L. R., 26 Bom., 445.

entitled to half the property as heir of her husband. The facts of the present case are very much the same. It was suggested that, as this Court in the case of *Mankamna Kunwar* v. *Balkishan Das* (1) relied upon the fact that the donees were living as undivided co-parceners as a reason for holding that the donor intended that they should hold the property passing to them under the deed of gift, in the same manner we should give the same weight to a similar circumstance in the present case. That would not be a proper way of using a reported decision. One document cannot be construed by reference to decisions on other documents executed in different circumstances and containing different language. We must determine for ourselves what weight should be attached to the fact that the two brothers, Jainti Prasad and Sarup Narain, were living in union when the will and deed of gift were executed in their favour. It was suggested that a passage in the judgement of the Privy Council in *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (2), to the effect that the principle of joint tenancy is unknown to the Hindu law except in the sense of co-parcenary between the members of an undivided family recognizes the possibility of property being given or devised to two or more Hindus to be held by them in co-parcenary under the Hindu law. But the context shows that nothing of the kind was intended or contemplated. Their Lordships were considering only the incidents of the right of survivorship between joint tenants under the English law. There seems to be a difficulty in treating a gift or devise of property to two members of a joint family as gift or devise to them of property to be held as undivided co-parceners, for, as pointed out in the case of *Bai Diwali* v. *Patel Bechardas* (3), such a devise or gift would create interests in favour of the issue of the donees who might be unborn at the time of the gift on the death of the testator. I see no reason whatever for supposing that either Ram Charan or Kali Prasad intended that any children that might be born to either of the brothers should on their birth acquire an interest in the property. It must be remembered that the two brothers were at the time joint with

(1) (1904) I. L. R., 28 All., 38. (2) (1896) I. L. R., 23 Calc., 670.
(3) (1902) I. L. R., 26 Bom., 445.

1911

KISHORI DUBAIN v. MUNDRA DUBAIN.

their father, Lachhmi Prasad, and others, and the fact that the gift and devise were made to them only suggests that there was no intention to benefit any other members of the joint family whether then in existence or to be born thereafter. It must also be remembered that Ram Charan had already given some property to Lachhmi Prasad to be held by him separately. In the circumstances I am unable to come to the conclusion that either Kali Prasad or Ram Charan intended that the two brothers should hold the property given to them as undivided co-parceners. The fact that the two brothers were joint is not in my opinion a sufficient reason, in the present case, for holding that the donor and testator intended that they should hold the property as undivided co-parceners. The lower appellate court held that the brothers took in severalty, and I am not satisfied that that decision is erroneous.

The question of limitation is disposed of by the finding of the lower appellate court that, though there is no good evidence of possession on the part of Musammat Mundra, there is no good evidence that her relatives ever held adversely to her.

I would dismiss the appeal with costs.

KARAMAT HUSAIN, J.—I agree.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.