Before Mr. Justice Piggott and Mr. Justice Walsh.

1919
January, 8.

MAHADEO MISIR AND OTHERS (DEFENDANTS), *v.* DIRGPAL PANDE (PLAINTIFF).*

Act No. XVIII of 1873 *(N.-W. P. Rent Act)—Act No. XII of* 1881 *(N.-W. P. Rent Act), section* 9*—Occupancy holding—Will—Attempt to dispose of occupancy holding by will.*

Held that the North-Western Provinces Rent Act No. XVIII of 1873, and the succeeding Act No. XII of 1881, rendered void the terms of any will in existence on the date on which they were passed, if those terms contravened the prohibition against transfer by will which was thereby enacted.

THE facts that gave rise to this appeal are briefly as follows :—

The plaintiff respondent sued the present appellants as nephews of one Gaya Dat, deceased, for possession of certain occupancy holdings.

The defendants claimed that Gaya Dat deceased who died in 1884 was joint with them, that Gaya Dat died leaving a will which was executed about 70 years ago and by that will he gave a life-interest in the occupancy holding to his widow and the remainder to his nephews, the plaintiffs. The defendants are the daughter and daughter's sons of Gaya Dat. The defendants denied the jointness of Gaya Dat with the present plaintiffs and challenged the genuineness of the will. They also raised other points. The court of first instance found for the defendant on both these points and dismissed the suit. The Additional District Judge reversed the finding on the question of the genuineness of the will and remanded the case. The defendants appealed.

Babu *Saila Nath Mukerji*, for the appellant, contended that the will, whether genuine or otherwise, could not stand. The will was made 70 years ago, it was true, and at that time there was no law against it, but the will could take effect only at the time when Gaya Dat died, namely in 1884. Act No. XVIII of of 1873 specifically provided that occupancy holdings could not be transferred by grant, will or otherwise. To the same effect was section 9 of Act XII of 1881. The Act of 1873 only mentioned voluntary transfers. The result was that occupancy holdings were sold in the execution of decrees. The Legislature,

* First Appeal No. 80 of 1918, from an order of Kunwar Sen, Additional Judge of Gorakhpur, dated the 20th of April, 1918.

therefore, in providing against sales in execution of decree specifically mentioned them and provided generally against all voluntary transfers. The present Tenancy Act (II of 1901) is to the same effect. All wills regarding occupancy holdings became null and void on the passing of the Act of 1873.

Dr. *Surendra Nath Sen*, for the respondents (plaintiffs), contended that there being nothing in the Statute book against the will when it was made—a subsequent enactment of the Legislature could not invalidate a will which was valid at its inception. The plaintiffs, after the death of the widow of Gaya Dat, took possession of the holdings and were ousted by the defendants. They have a right to maintain a suit for possession. The question of jointness had in any case not been gone into. The plaintiffs took two distinct pleas. If they had been joint with Gaya Dat at the time of his death, as pleaded by them, then they were entitled to succeed, even if the will of Gaya Dat was thrown overboard.

Babu *Saila Nath Mukerji*, for the appellants, was heard in reply.

PIGGOTT and WALSH, JJ. :—This is a first appeal against an order of remand passed by the District Judge of Gorakhpur in an appeal from a decision of the Munsif of Deoria. The suit in question arose in the following way. One Gaya Dat Pande was an occupancy tenant in the village of Kasia. He died in or about the year 1884, A. D., and, in so far as the land in suit is concerned, it is an admitted fact that this land passed into the occupation of his widow, Musammat Rajpali, who was recorded as tenant of the same and remained ostensibly in possession as tenant for a long period of years. The said Rajpali died in 1915, and since her death conflicting claims to the possession of this land have been put forward by Drigpal Pande, a nephew of the deceased, on the one hand, and on the other hand by the defendants-appellants, who are the daughter and the daughter's sons of the aforesaid Gaya Dat Pande and Musammat Rajpali. The case set up in the plaint was essentially this, that Gaya Dat had died while a member of the same joint undivided Hindu family as the plaintiff Drigpal, that the land in suit had devolved by survivorship on the death of Gaya Dat upon the said plaintiff,

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as part of a larger area which formed the joint occupancy holding of the family. The plaintiff alleged that on the death of Gaya Dat he had obtained peaceable possession of the entire holding, including the land in suit, and had given the widow Rajpali nothing but what she was entitled to under the Hindu law, namely, maintenance as a widow belonging to the joint family. The plaint goes on to assert that, some two years after the death of Gaya Dat Pande, there was a dispute between the plaintiff and Musammat Rajpali as to the maintenance to be enjoyed by the latter, and that the plaintiff then assigned the land in suit to Musammat Rajpali in lieu of the maintenance to which she was entitled. In effect, therefore, the plaintiff's case was that the land in suit had continued, as a matter of law, ever since the death of Gaya Dat Pande, to form part of an occupancy holding, including this and other land, of which the tenant was the plaintiff Dirgpal. He admitted the fact of Musammat Rajpali's possession as regards the land in suit. He pleaded that her possession was permissive only and enjoyed by her in lieu of her right to maintenance. If so, of course, Musammat Rajpali had no rights as tenant of the land in suit which could devolve upon any one on her death, and the plaintiff was entitled to resume possession of this land on the death of Musammat Rajpali, merely on the ground that Musammat Rajpali's right to maintenance was extinguished by her death and that the plaintiff continued to be, as he had been all along, the occupancy tenant of the land in suit. Unfortunately, as it has turned out, the plaintiff's case was complicated by a reference made in the third paragraph of the plaint to a will which Gaya Dat Pande had left behind him. All that is really said about this will is to the effect that Gaya Dat himself had made it clear in the said will that the land in suit formed only part of the joint occupancy holding of the family and that, although Musammat Rajpali might after his death be entitled to maintenance out of the joint occupancy holding, she would not enjoy full rights of ownership over any portion of the same or have any power of alienation. When the case went to trial it would seem as if the plaintiff was allowed more or less to shift his ground and to set up a right of succession under the will,

independently of, or as an alternative to, the main case outlined in the plaint. The trial court fixed two issues which it decided together. One of these dealt with the jointness or separation of the family, and the other with the question whether, in any event, any claim which the plaintiff might have to the land in suit had or had not been extinguished by many years of adverse possession on the part of Musammat Rajpali. There was further a separate issue on the question of the will. On the two issues, which he tried together, the learned Munsif found against the plaintiff. He held that the case of jointness set up in the plaint was not proved and that, in any event, Musammat Rajpali had held the land in suit adversely to the plaintiff from the date of her husband's death, and had acquired, as against the plaintiff, a good title by adverse possession. With regard to the will the finding was, in the first place, that it had not been proved; in the second place, that the evidence was not sufficient to show that the land in suit was included in, or formed any part of, the holding referred to in that will, and, in the third place, that the will had never been acted upon. This last finding seems to be a repetition in another form of the finding in favour of the adverse possession of Musammat Rajpali. The first court having dismissed the suit, the plaintiff brought the matter before the District Judge in first appeal. In his memorandum of appeal he most distinctly challenged the finding of the trial court on the question of jointness or separation between his uncle and himself He further pleaded that the genuineness of the will should have been presumed and that the court below was in error in supposing that the terms of the will had not been acted upon, inasmuch as the possession allowed to Musammat Rajpali over the land in suit had been merely possession in lieu of maintenance, which the will admitted to be her right. The learned District Judge began by presuming the genuineness of the will. It was a document 70 years old produced from proper custody. We have not been asked to interfere with the presumption in favour of its genuineness drawn by the lower appellate court. That court, however, was in error in supposing that it could find a short cut to a decision by basing the plaintiff's case only upon the will. The learned Additional Judge says that, at the time when this will

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was executed, there was no statutory prohibition to the transfer of an occupancy holding, by will or otherwise. He assumes in favour of the plaintiff that the will does refer to the land in suit, and he interprets it as bequeathing this land to the plaintiff, subject to a right of maintenance in favour of Musammat Rajpali. Now, to go no further back than the Rent Act No. XVIII of 1873, it is beyond question that in that year the Legislature expressly prohibited the transfer of a right of occupancy such as that with which we are concerned in this case by grant, will or otherwise, except as between persons who have become by inheritance co-sharers in such right. This prohibition was repeated in more general terms in section 9 of the N.-W. P. Rent Act No. XII of 1881. We think it clear, as a question of law, that these Statutes rendered void the terms of any will in existence on the date on which they were passed, if those terms contravened the prohibition against transfer by will which was thereby enacted. It follows that the plaintiff cannot succeed in this case on the strength of the will alone, apart from the case of jointness between himself and his uncle set up in the plaint. The lower appellate court, in spite of the opinion which it formed regarding the terms of the will, has not decreed the plaintiff's claim, but has passed an order of remand, because it was of opinion that further inquiry was needed on a point raised by the defendant's pleadings, namely, whether the land in suit had actually formed part of the old occupancy holding as it existed in the life-time of Gaya Dat Pande, or was land in which Musammat Rajpali had herself acquired occupancy rights by occupation of the same for the statutory period of 12 years. This is really stating in another form the question which the lower appellate court seemed in a previous portion of the judgment to have decided in favour of the plaintiff, when it assumed that the land in suit was part of the land referred to by the provisions of the will. However this may be, we are satisfied, in the first place, that the order of remand cannot be affirmed; in the second place, we are not of opinion that we are in a position to restore the decree of the first court. The plaintiff is entitled to a finding of fact by a court of first appeal on the question of jointness or separation, and on the question of the

nature of Musammat Rajpali's possession as tenant of the land in suit, namely, whether the possession was adverse to the plaintiff or permissive on his part. These questions have not been considered at all by the lower appellate court in consequence of what was in our opinion an erroneous view taken by court as to the effect of the will. Our order, therefore, is that we set aside the order of remand passed by the learned Additional Judge and remand the case to that court to be re-admitted to his file of pending appeals and disposed of according to law, subject to the observations made by us in this judgment. Costs here and hitherto shall abide the event of the suit.

Appeal decreed and cause remanded.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1919 *January*, 9.

PARSOTAM DAS AND ANOTHER (PLAINTIFFS) *v.* JAGAN NATH AND OTHERS (DEFENDANTS.) *

Hindu law—Mitakshara—*Joint Hindu family*—*Separation of one member, the rest of the family remaining joint*—*Re-union.*

The filing of a suit by a member of a joint Hindu family in which the plaintiff declares that he wishes for partition and specifies his share amounts to a separation. But from this it does not follow that where, without any suit, one member of a family separates himself from the others and relinquishes his rights in the family estate, taking either no share in the family estate or perhaps a less share or a greater share, the surviving members cannot remain united.

Where such a separation of one member of a joint family takes place, it is not the necessary result in law that the other members must be taken to have separated *inter se* and then to have reunited. *Balabux* v. *Rukhmabai* (1) and *Kawal Nain* v. *Prabhu Lal* (2) distinguished.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Baldeo Ram Dave* (with him the Hon'ble Pandit *Moti Lal Nehru* and Munshi *Panna Lal*), for the appellants.

Mr. *B. E. O'Conor* (with the Hon'ble Dr. *Tej Bahadur Sapru*), for the respondents.

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* First Appeal No. 248 of 1916, from a decree of Shamsuddin Khan, First Additional Subordinate Judge of Aligarh, dated the 25th of August, 1916.

(1) (1903) I. L. R., 30 Calc., 725. (2) (1917) L.R. 44 I. A., 159; I. L. R., 39 All., 496.