1921

PANCHAM v. ANSAR HUSAIN.

began to run. That time, in the absence of any payments on account of interest, came to an end at the end of 12 years and the present suit was brought, as we have already pointed out, at the end exactly of 24 years from the execution of the document. It is true that the Madras High Court has, in a recent case, differed from the decision of this Court. In doing so, it has had to go contrary to one of its own former decisions, whereas the Calcutta High Court has consistently followed the opinion of this Court, or rather, the decision in the Full Bench is based partly on the decisions of the Calcutta High Court, and we see no reason whatsoever not to follow the decision of this Court which up to the present moment has not been upset and with which we agree. Unless, therefore, the plaintiffs are able to satisfy us that the alleged payments of interest entered on the back of the document were made, their suit is clearly barred by limitation.

[The judgment then discussed the evidence as to the endorsements of payment of interest on the bond, and concluded.]

We cannot and we do not believe that any of the payments endorsed on the document were ever made. They certainly have not been established to our satisfaction. In any view, it is clear that the suit was barred by limitation and was properly dismissed by the court below. The appeal fails and we dismiss it with costs.

Appeal dismissed.

Before Mr. Justice Walsh and Mr. Justice Lindsay.

RAM PIARI AND ANOTHER (DEFENDANTS) *v.* KRISHNA PIARI (PLAINTIFF) *

1921 *April*, 14.

Construction of document—Will—Bequest to two brothers without specification of shares—Tenancy in common.

Held that a devise of separate property made by a maternal grand father in favour of two grandsons without specifying what share each was to take has the effect of creating a tenancy in common and not a joint tenancy. *Mankamna Kunwar* v. *Balkishan Das* (1) dissented from. *Kishori Dubain* v. *Mundra Dubain* (2) followed. *Joyeswar Narain Deo* v. *Ram Chandra Dutt* (3) and *Gordhandas Soonderdas* v. *Bai Ramcoover* (4) referred to.

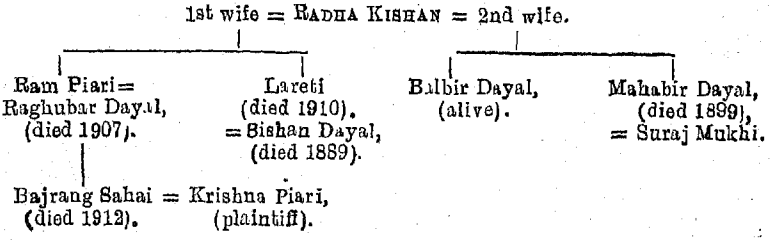
---

* Second Appeal No. 235 of 1919 from a decree of E. Bennet, District Judge of Farrukhabad, dated the 29th of November, 1918, reversing a decree of Rama Das, Subordinate Judge of Fatehgarh, dated the 31st of July, 1918.

(1) (1905) I. L. R., 28 All., 38. (3) (1896) I. L. R., 23 Calc., 670.

(2) (1911) I. L. R., 33 All., 665. (4) (1901) I. L. R., 26 Bom., 449.

THE following pedigree will explain the relationship of the parties to this case.



One Ganesh Rai, the maternal grandfather of Raghubar Dayal and Bishan Dayal, by a will executed in 1879 bequeathed the entire 20 biswas of Gopalpur to his two grandsons without specification of shares. He died shortly afterwards, and the names of the two devisees were recorded in the revenue papers as owners in equal shares. Bishan Dayal died in 1889, and the name of his widow Musammat Lareti was recorded as owner of his share. Musammat Lareti died in 1910 and Musammat Ram Piari succeeded in getting mutation in her favour in respect of Bishan Dayal's share—probably *solatii causâ*. Bajrang Sahai, the son of Raghubar Dayal, died in 1912, and thereafter his widow instituted the present suit claiming possession of the whole 20 biswas of Gopalpur as heir to her husband Bajrang Sahai, whom she alleged to be the last surviving member of a joint family. The court of first instance dismissed the suit finding that the plaintiff had failed to establish her title. On appeal, the lower appellate court (District Judge of Farrukhabad) reversed the first court's decree and decreed the claim, holding that the effect of Ganesh Rai's will was to create a joint tenancy in favour of Raghubar Dayal and Bishan Dayal. The defendants appealed to the High Court.

Dr. *Kailas Nath Katju*, for the appellants.

Munshi *Narain Prasad Ashthana* and Munshi *Girdhari Lal Agarwala*, for the respondent.

WALSH, J.:—I am of opinion that this appeal must be allowed and the judgment of the first court restored. The plaintiff has failed to make out a title. The only ground on which the lower appellate court has reversed the first court is contained in the view which it has taken that a conveyance to two or more

1921

RAM PIARI v. KRISHNA PIARI.

persons without words specifying their shares constitutes a joint tenancy. One can understand the learned Judge, if the more recent cases were not brought to his notice, falling into that fallacy because it is contained in a two Judge decision of this Court, reported in *Mankamna Kunwar* v. *Balkishan Das* (1).

But that case when studied appears to be merely a repetition of a highly technical rule of the interpretation which was placed upon language in an English conveyance at common law. There is no such thing as a technical art or system of conveyancing in India and, as has been pointed out in many cases in India and in the Privy Council, to which it is not necessary to refer, the application of that technical rule is inappropriate in India, and moreover, the statement of the rule, in my opinion, in I. L. R., 28 All., is only a half truth. If it were necessary, it would be easy to show, that in English law as it is to-day and has been for many years, the rule is more honoured in the breach than in the observance, because equity has always strongly leant against it and has seized upon any incident to raise the presumption against a joint tenancy and in favour of a tenancy in common, by reason of the disfavour with which it has regarded the rule of survivorship. And common law and equity having now for many years in England been fused, the rule is not, in my view, correctly stated in 28 Allahabad. I prefer the decision of this Court in *Kishori Dubain* v. *Mundra Dubain* (2) which must be taken to represent the law in this Province and in India; rather than the dictum in I. L. R., 28 All. I am in favour of allowing the appeal.

LINDSAY, J.:—I agree that the appeal should be allowed. The learned Judge of the court below has in my opinion wrongly held that the will executed by Ganesh Rai in the year 1869, by which he left a one-third share of his property to his daughter's sons Raghubar Dayal and Bishan Dayal, created a joint tenancy between them. The learned Judge relied on a decision of this Court which has been referred to by my learned colleague. That ruling has been dissented from in subsequent rulings of this Court. I may also mention that the principle laid down in the

(1) (1905) I. L. R., 28 All., 38; (2) (1911) I. L. R., 33 All., 665.

case relied upon by the learned Judge is against the ruling of their Lordships of the Privy Council in *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (1). I might also add that the law has been well expounded in the decision of the Bombay Court, *Gordhandas Soonderdas* v. *Bai Ramcoover* (2).

On the finding, therefore, that the tenancy created by this will was a tenancy in common, the plaintiff is out of court as regards one half of the property. As regards the other half the question remains as to whether it was disposed of by Raghubar Dayal, one of the tenants in common, by a will which he executed in the year 1907. Both the courts below have found that the document propounded as a will is a genuine document, and it is not to be denied that on the language used in that document the property was declared to be devoted to charitable purposes. I am satisfied that the share which was vested in Raghubar Dayal under the will executed by his maternal grandfather has been effectively disposed of and that there was nothing left for the plaintiff. I might add that the learned Judge seems to have been under a misapprehension of the law regarding conditions in restraint of alienation. It seems that under the will of 1869 executed by Ganesh Rai the devisees were to have no power of transfer. The only result of that was that they took a full title in the property and the condition against alienation was void. Raghubar Dayal had a full interest in the property which was left to him by his grandfather's will. I agree, therefore, that the appeal should be allowed, that the decree of the court below should be discharged and the decree of the court of first instance restored, and that the defendants should have their costs both here and in the courts below.

BY THE COURT.—The appeal is allowed, the decree of the lower appellate court is set aside and that of the court of first instance restored with costs in all courts.

Appeal decreed.

(1) (1893) I. L. R., 23 Calc., 670. (2) (1901) I. L. R., 26 Bom., 449.