1929

MULLO v. RAM LAL.

the point. We think the case is governed by the decision of this Court in *Kishore Singh* v. *Bahadur Singh* (1). There can be no doubt whatsoever that in the present case an attempt has been made in the present suit to get round the decision of the rent court that the plaintiffs are the sub-tenants. In the reported case the previous suit in the Revenue Court was one in ejectment, but we do not think that that can make any difference to the principle applied, and we do not think that the Civil Court is empowered to go behind the rent court's decision or to set it aside. It will be noticed that the former decision of 1893 in favour of Hulasi had its full effect, but the subsequent decision was not contrary to the former decision of 1893. It was based on different facts and was decided in favour of the plaintiffs on the ground that the sons of Nain Sukh *had not inherited the occupancy tenure of Hulasi*. There is no necessity, therefore, to hold which of these two decisions is binding, for they do not clash. In our opinion there is no force in this appeal and the suit has been rightly dismissed. We, therefore, dismiss this appeal with costs.

Appeal dismissed.

Before Justice Sir Pramada Charan Banerji, Mr. Justice Piggott and Mr. Justice Walsh.

1920
July, 29.

SHEODAN KURMI AND OTHERS (DEFENDANTS) *v.* BALKARAN KURMI (PLAINTIFF) AND SHEOBADAN KURMI AND ANOTHER (DEFENDANTS)*.

Hindu law—Joint Hindu family—Separation, though property not divided by metes and bounds—Profits divided in specific shares—Suit by on member for joint possession to the extent of his specific share.

Although a member of a joint Hindu family may not, so long as the family remains joint, be able to say what his share in the joint family property is, the situation is altered as soon as the family separates, though the property is not actually divided by metes and bounds. In such a case there is nothing to prevent a member of the family whose share in the family property has been defined from suing the other members for joint possession of it.

*Second Appeal No. 349 of 1918, from a decree of P. K. Roy, Subordinate Judge of Jaunpur, dated the 14th of December, 1917, confirming a decree of Lakshman Prasad, Munsif of Jaunpur, dated the 31st of March, 1916.

(1) (1918) I. L. R., 41 All., 97.

1920

SHEODAN KURMI v. BALKARAN KURMI.

THE facts of this case were as follows:—

The plaintiff alleged that the property in suit, which consisted of occupancy holding, was the ancestral property of the parties and he had a one-third share in it; that the parties separated about seven years ago but the land in dispute was jointly held till 1321 Fasli, after which year the defendants had refused to give him profits. He claimed joint possession over his one-third share. The defendants, *inter alia*, pleaded that the plaintiff was not a member of the family, contended that there was no cause of action and that the suit was barred by limitation. The court of first instance overruled the defendants' pleas and decreed the suit for joint possession over one-third of the property. The lower appellate court confirmed the decree. The defendants appealed to the High Court.

Munshi *Haribans Sahai*, for the appellants:—

According to the law as laid down in the *Appoovier* case no member of a joint Hindu family can say what his share in the family property is unless there is a partition. In the present case the plaintiff claimed not a partition but joint possession over one-third of the property, alleging that his share was one-third. There could be no definement of shares unless there is a partition. This was not a suit for partition. The plaintiff did not include all the family property in the suit. The plaintiff does not allege that there was any partition of property. He clearly states in his plaint that the parties were separate only in food and all property remained joint. The decree declaring the plaintiff's share to be one-third is a wrong decree because in the present suit the plaintiff did not claim definement of shares but only joint possession. The plaintiff, though he might as a member of a joint Hindu family be entitled to claim joint possession, was not competent to claim possession with regard to a specific share.

Maulvi *Mukhtar Ahmad*, for the respondent, was not called upon.

The following judgments were delivered.

BANERJI, J.:—This appeal arises out of a suit in which the plaintiff claimed joint possession, to the extent of a third

share of certain plots of cultivatory land. The plaintiff set forth a pedigree under which he alleged that he had a third share in the holding. He also alleged that the family was joint, that they were in joint possession of the holding until seven years ago when a separation of the family took place but that the lands remained joint. By this, manifestly, he means that the lands were not divided by metes and bounds. He goes on further to allege that the defendants who are the owners of the remaining two-thirds share have excluded him from the profits of his one-third share, and he accordingly claimed joint possession in respect of a third share. The defence was that the plaintiff did not belong to the family at all, that he was not entitled to any portion of the disputed property, and that he had never been in possession. Both the courts below have found that the land in dispute belongs to the plaintiff and the defendants, that each set of parties represents a third branch of the family, and that thus the plaintiff is entitled to a third share. The lower appellate court believed the statement of one of the defendants who deposed that at the end of each year the profits arising from the land used to be divided. The claim accordingly was decreed. Three of the defendants, who represent one branch of the family, have preferred this appeal and Munshi *Haribans Sahai* on their behalf put forward two pleas in the memorandum of appeal. The first was that the suit as brought was not maintainable. He has now to concede that a suit for joint possession could be maintained if the plaintiff was in joint possession before his exclusion from possession, and that he was entitled to be restored to the possession which he held before he was interfered with by the defendants. He, however, urges that it must be assumed that there has not been a separation of the family, that, therefore, a decree for joint possession of a third share could not be granted. This is his second plea. In my opinion according to the findings of the learned Judge there has been a separation of the family, although not a division by metes and bounds. As I have already stated, the learned Judge has believed the statement of one of the defendants that the produce of the

1920

HEODAN KURMI v. BALKARAN KURMI.

land used to be divided at the end of the year between the different co-sharers. This means that the produce used to be divided in defined shares. Therefore there was a disruption of the joint family, although there was no division by metes and bounds. The parties agreed upon taking defined shares and according to these shares they divided the profits. Furthermore, the objection taken in this appeal seems to me to be wholly groundless inasmuch as according to the pedigree filed by the plaintiff, which has been found by the court below to be correct, the plaintiff has a one-third share and it cannot be alleged that he does not own that share. No question, therefore, for decision by the Full Bench arises in the case and I deem it unnecessary to discuss it. I would dismiss the appeal with costs.

PIGGOTT, J. :—I concur, but take the liberty of adding a few words regarding the aspect of the case which has led to its reference to a Full Bench. The memorandum of appeal to this Court does raise a question of law which had not been raised in the pleadings or in argument in either of the courts below. It is not clearly stated in this memorandum of appeal that the claim should have been dismissed because on the facts stated by the plaintiffs themselves they had no cause of action. Such a plea would be, in my opinion, upon the face of it, unsustainable, but I do not think that it was taken. Apart from questions of jurisdiction or of limitation which a court is always bound to consider, it is only a plea which goes to the root of the case, in this sense that if it be well founded the plaint itself discloses no cause of action, that this Court is bound to entertain in second appeal. Over and beyond this the court has a wide discretion. In the present case, as soon as the nature of the point taken had been explained to the court, it would have been obvious that at most even if the plea succeeded, the result would have been a slight modification in the decree. Even such modification would, in my opinion, have had no practical effect, because the finding that the plaintiff was entitled to a one-third share would have remained and would have operated as *res judicata* in any subsequent litigation. This Court, therefore,

would have been fully warranted in holding that this was not a plea which should be entertained in second appeal.

WALSH, J.:—I entirely agree. I am not particularly surprised at the result. In my experience a point which is deliberately not taken until the eleventh hour, and is then taken in the final Court, is generally a bad one. I had my suspicion that this was the nature of the point on this occasion, but I do not see on what principle courts of appeal should be compelled to listen to long arguments on bad points which have been deliberately kept in reserve for the final Court. For the very reason that such points, although there may be exceptions to the rule, are generally irrelevant, an appellate court ought not to be compelled to listen to them for the first time. In my opinion the real principle which has always been followed, certainly in English Courts and in most High Courts in India, is that the cases in which a point whether it goes to the root of the cause of action or is merely a subsidiary point can be taken after all the evidence has been concluded and one Court of appeal has also determined the suit are very rare indeed, and in my opinion it should only be done by the permission of the court hearing the appeal; i. e., the court hearing the appeal may take the point itself or, if persuaded that for some good cause a vital point has been overlooked in the proceedings of the court below, it may permit the point to be argued. It cannot, however, in my opinion be compelled as a matter of right at the instance of the appellant to listen to a point so raised.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismiss