

However, we need not press the matter further, because the learned vakil for the plaintiff has frankly admitted that the decree should be on actual collections, having regard to our decision on the first ground of appeal.

That being so, it is admitted that this appeal must succeed in part. We have come to the conclusion that the plaintiff is entitled to Rs. 870-3-0 for 1321 Faslî together with interest at 12 per cent. from the 8th of June, 1914, up to the date of suit and thereafter at 6 per cent. up to the date of realization, and he is further entitled to Rs. 394-7-11 together with interest at 12 per cent. from the 27th of June, 1915, up to the date of suit and thereafter at 6 per cent. up to the date of realization.

The office will prepare an account on the basis of this order. The parties will receive and pay costs in proportion to failure and success in all courts. The costs in the lower appellate court and in this Court will be calculated on the value of the appeals and the extent to which either party has succeeded or failed. The decrees of the two lower courts are set aside and a decree as indicated above will be substituted for them.

Order modified.

Before Mr. Justice Tudball and Mr. Justice Kanhaiya Lal.

LOKYA AND ANOTHER (PLAINTIFFS) v. SULLI AND OTHERS (DEFENDANTS).*

Birt jaimani—*Nature of right—Both heritable and transferable—*

Not confined to males.

The rights known as *birt jaimani* are heritable and transferable and their descent or transfer is not confined to males.

THIS was an appeal under section 10 of the Letters Patent from the following judgment of a single Judge of the Court:—

"It appears that there were three brothers, Chaudes by caste, called Dargal, Panjal (*alias* Mangal) and Sikander. The source of their income was to officiate at the bathing in the Jamna and get offerings from the people who bathed in the river. Dargal entered into an agreement with his brother Panjal (*alias* Mangal) on the 18th of April, 1905, by which the latter was to officiate at the ceremony of bathing both for himself and for his brother Dargal, who had become too old to take part in the ceremony, but to pay him one-third of the offerings. There was a further stipulation in the agreement

* Appeal No. 11 of 1919, under section 10 of the Letters Patent.

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that, after the death of Dangal, one-sixth of the offerings would be payable to his daughters. Both Dangal and Panjal are dead. The plaintiffs who brought the suit out of which this appeal has arisen are the daughters of Dangal, and the defendants are Sikandar, the surviving brother, and the sons of Panjal. The plaintiffs sued to recover possession by partition of the house and shops belonging to the family, and also one-sixth share in the offerings at the bathing ceremony. They claimed one-sixth in the offerings by partition. The claim was resisted on several grounds. The court of first instance decreed the claim for partition of the shops and house property, but refused the prayer for partition with regard to the offerings. It, however, declared the plaintiffs' right to share in the offerings to the extent of one-sixth. The defendants preferred an appeal to the District Judge with regard to the declaration in respect of the offerings. The learned Judge reversed the decree of the first court on that point. The plaintiffs have come up in second appeal, and contend that the decree of the first court should be restored. I am unable to agree with their contention. Their claim is not based upon the deed of the 13th of April, 1903, and it could not be, as Sikandar was no party to the deed. They failed to show that they have any right to share in the offerings, considering that they take no part in the bathing ceremony. No authority has been cited in support of the contention of the appellants. The appeal fails and is dismissed with costs."

The Hon'ble *Manshi Narayan Prasad Ashthana*, for the appellants.

Babu Durga Charan Banerji, for the respondents.

TUDBALL and KANHAIYA LAL, JJ. :—This Letters Patent appeal arises out of a suit brought by the plaintiffs, who are the daughters of one Dangal, for partition of certain movable and immovable properties and also for partition of what is known as "*birt jajmani*" and the books relating thereto. The court of first instance divided up all the property except the *birt jajmani* in respect of which it held that it was not partible, but it gave the plaintiffs a declaration that they were entitled to a certain share therein. On appeal the District Judge set aside the declaration. On second appeal to this Court that decision was upheld.

It appears that the three brothers, Dangal, Panjal and Sikandar were the owners to the extent of one-third each in this *birt jajmani*. We may note that the present appeal relates only to the latter class of property and the appellants ask this Court to restore the declaration granted by the court of first instance. Dangal entered into an agreement with the sons of

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Panjal on 30th of April, 1906, under which (he being an old man) those sons agreed to collect his one-third share in the *birt jajmani*, to retain one-fifth of the income as recompense and to pay four-fifths to Dangal. On his death the four-fifths of Dangal's share was to go one-half to Musammât Kalawati, the widow of Dangal's son and one-half to his three daughters; and on the death of Musammât Kalawati, the whole of Dangal's share was to be divided into two equal parts; one-half was to go to the sons of Panjal and the other half was to go to the present plaintiffs. Dangal also left a will in favour of his daughters and it was on that will and the agreement that the daughters now seek for a declaration of their title to a one-sixth share in the whole of the *birt jajmani*, being half of their father's one third share. The learned Judge of this Court who dismissed the appeal says in his judgment :—"Sikandar was no party to the deed. They failed to show that they have any right to share in the offerings, considering that they take no part in the bathing ceremony. No authority has been cited in support of the contention of the appellants. The appeal fails and is dismissed with costs." This class of property has repeatedly been the subject-matter of decisions by the various courts in India and the rights of the heirs of these Chaubes and other persons, the owners of *birt jajmani*, have repeatedly been upheld. In the case of *Sulh Lal v. Bishambhar* (1), a mortgage of such rights was upheld, and in the case of *Narayan Lal Gupta v. Chulhan Lal Gupta* (2), the whole subject of these rights was discussed at considerable length by Mr. Justice MUKERJI. There is also an unreported decision of a single Judge of this Court in S. A. No. 569 of 1903. There can be no doubt that the right of *birt jajmani* has been held by courts to be heritable and sometimes transferable. In the present case we can see no reason whatsoever why the daughters of Panjal should not inherit the estate of their father in this class of property. If there had been no will and no agreement, they would have been entitled to the whole one-third share. They claim only a one-sixth share. Sikandar is entitled only to a one-third share in his own right, the sons of Panjal are entitled to a one-third in

(1) (1916) I. L. R., 39 All., 196. (2) (1911) 15 C. L. J., 375.

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their own right and one-sixth under the terms of the agreement. As the appellants are satisfied with the declaration of their right all that is necessary for us to do is to declare that right. We, therefore, allow this appeal and set aside the judgment of this Court and the decree of the court below and restore the decree of the court of first instance. The appellants will have their costs in this and the lower appellate court.

Appeal decreed.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad.

WIZARAT HUSAIN AND ANOTHER (DEPENDANTS) v. M. DHAN LAL (PLAINTIFF)
AND CHATARPAL RAI AND OTHERS (DEPENDANTS).*

Bond—Bond payable by instalments with condition that interest may be charged if instalments are not paid on due date—Irregular payments made and accepted, not as instalments but in reduction of the debt generally.

Where a bond is payable by instalments without interest, but with a condition that if the instalments are not paid on due date then the obligor will be entitled to charge interest, acceptance of an instalment, though paid after due date, may be evidence of a waiver of the rights to charge interest, but the payment must be in discharge of a specific instalment in arrear and not merely a payment in reduction of the debt generally.

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

Maulvi *Iqbal Ahmad* and Maulvi *Mukhtar Ahmad*, for the appellants.

Mr. *Ibn Ahmad*, for the respondent.

RYVES and GOKUL PRASAD, JJ. :—The facts out of which this appeal arises must be carefully noted. The mortgagor (defendant appellant No. 1) borrowed a sum of Rs 99 under a mortgage of his zamindari property, dated the 14th of September, 1897. The rate of interest agreed upon was two per cent. per mensem. He paid nothing at all either towards principal or interest, so that in 1904 the debt had swelled to Rs. 450. The mortgagee then threatened to sue to recover this amount, but was persuaded by the mortgagor to give him time and renew the mortgage. Thereupon the mortgage now in suit was executed on the 3rd of August, 1904. The terms of this mortgage were most favourable to the

* Second Appeal No. 1336 of 1917, from a decree of W. T. M. Wright, District Judge of Budaun, dated the 30th of August, 1917, confirming a decree of Partab Singh, Subordinate Judge of Budaun, dated the 30th of January, 1917.