1922

Mst. DHAN KAUR v. SUNDER.

collateral male relationship which excludes the succession of a daughter has been the subject of numerous decisions and a good deal of doubt has been expressed on the point, and in *Jiwan Singh* v. Mst. *Har Kaur* (1), referred to above, it was doubted whether the seventh or the fifth degree should be fixed as the extreme limit. It, therefore, cannot be said that an entry which says that the collaterals in the sixth degree exclude daughters is opposed to general custom. Therefore having regard to the decision of the Privy Council in *Beg* v. *Allah Ditta and others* (2), we hold that the entry in the 1911 *Riwaj-i-am* is quite sufficient to shift the initial *onus* from the plaintiffs to the donees defendants, and we find that the latter have not discharged it.

The appeal accordingly fails and is dismissed with costs.

A. R. *Appeal dismissed.*

LETTERS PATENT APPEAL.

Before Sir Shadi Lal, Chief Justice and Mr. Justice Harrison.

RULDU SINGH, ETC. (DEFENDANTS)—*Appellants*,

versus

SANWAL SINGH (PLAINTIFF)—*Respondent*.

1922

Jan. 14.

Letters Patent Appeal No. 130 of 1921.

Appeal—Letters Patent, clause 10—meaning of the word 'judgment,' explained—Limitation—suit under customary law by a collateral for possession of land, gifted by a male proprietor to his step-son, brought more than 12 years after mutation was effected—nearest reversioner assented to the gift and died 4 or 5 years before date of suit—donor died in 1901, after enforcement of Punjab Limitation Act, I of 1900—Meaning of 'heir' in article 2 of the Schedule to that Act.

On 17th March 1894 one B, a *Jat* of the Ludhiana District made a gift of the land in dispute to his step son, R. S., and on 11th January 1896 a mutation in respect of it was effected in favour of the donee. One B. S., who was the nearest reversioner of B, assented to the alienation and

(1) 41 P. R. 1914. (2) 45 P. R. 1917 (P. C.).

1922

RULDU SINGH
v.
SANWAL SINGH.

attested the deed of gift. B. S. survived the donor and died only 4 or 5 years before the institution of the suit. The donor died on 14th July 1901 and the present suit for possession of the property was brought on 21st January 1919 by his collateral, S. S. The trial Court dismissed the suit as time-barred, but its decree was discharged by the District Judge, who held that the suit was within time under article 144 of the Limitation Act and remanded the case under Order XLI, rule 23, Civil Procedure Code, for decision on the remaining issues. Against this order of remand an appeal was preferred to the High Court which was heard by a Single Judge who affirmed the decision of the District Judge and dismissed the appeal. From this decision the defendants preferred the present appeal under clause 10 of the Letters Patent.

Held, that in order to decide whether an adjudication should be treated as a 'judgment' within the meaning of clause 10 of the Letters Patent regard should be had not to the form of the adjudication but to its effect upon the suit or the civil proceeding in which it was made. If its effect, whatever its form may be and whatever be the nature of the civil proceeding in which it is made, is to put an end to the suit or proceeding, so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a judgment within the meaning of the clause.

It is, however, impossible to lay down any definite rule which would meet the requirements of all cases, and the only thing which can be said is that in determining whether an order constitutes a judgment or not the Court must take into consideration the nature of the order and its effect upon the civil proceeding in which it was made.

Tuljaram v. *Alagappa* (1) per Sir Arnold White C. J., followed.

The Justices of the Peace for Calcutta v. *The Oriental Gas Company* (2), per Sir Richard Couch C. J., *Ramendra Nath Roy* v. *Brajendra Nath Dass* (3), *Budhu Lal* v. *Chattu Gope* (4) and *DeSouza* v. *Coles* (5), referred to and discussed.

Held also, that the general provision of section 104 of the Code of Civil Procedure does not take away by implication the right of appeal conferred in express terms by the special provision relating to appeal to be found in the Letters Patent.

(1) (1910) I. L. R. 35 Mad. 1 (F.B.).
(2) (1872) 8 Beng. L. R. 433.
(3) (1917) I. L. R. 45 Cal. 111, 127.
(4) (1916) I. L. R. 44 Cal. 804.
(5) (1868) 3 Mad. H.C.R. 384.

1922

RULDU SINGH v. SANWAL SINGH.

Hurish Chunder Chowdhry v. *Kali Sunderi Debi* (1), *Toolsi Money Dassee* v. *Sulevi Dassee* (2), *Sabhapathi Chetti* v. *Naraiyanasami Chetti* (3), and *Secretary of State* v. *Jehangir Maneckji Curestji* (4), followed.

Muhammad Naim-ul-Lah Khan v. *Ihsan Ullah Khan* (5) *Piari Lal* v. *Madan Lal* (6) and *Banno Bibi* v. *Mehdi Hussain* (7), disapproved.

Held further, that in the present case the decision of the learned Judge of the High Court confirming the order of the District Judge put an end to the appeal which came up before him, and constitutes therefore a 'judgment' within the meaning of clause 10 of the Letters Patent.

Held also, that the suit being one to recover possession of ancestral land alienated by a male proprietor was governed by the provisions of the Punjab Limitation Act, I of 1900, the donor having died in 1901, after the date of the enforcement of the Act.

Mahna Singh v. *Ladha Singh* (8), followed.

The object of that Act is to render the title of the alienee immune from attack if the alienation in his favour is not contested within 12 years from the date mentioned in the third column of the Schedule. The word 'heir' in article 2 should be read with article 1 and connotes the same person or persons as the expression 'son or reversioner' in that article.

Held concequently, that the plaintiff was the 'heir' of B. within the meaning of article 2, and it was immaterial whether he could or could not have claimed the property immediately after the death of B. The suit having been brought more than 12 years after the date of mutation, was, therefore, barred by limitation.

Letters Patent appeal from the order of Mr. Justice Scott-Smith, dated the 10th March 1921, affirming that of Rai Bahadur Misra Jwala Sahai, District Judge, Ludhiana, dated the 20th August 1920, remanding the case.

GULLU RAM, for Appellants.

SHEO NARAIN AND BALWANT RAI, for Respondent.

The judgment of the Court was delivered by—

(1) (1882) I. L. R. 9 Cal. 482 (P. C.).
(2) (1899) I. L. R. 26 Cal. 361 (F.B.).
(3) (1902) I. L. R. 25 Mad. 555
(4) (1902) 4 Bom. L. R. 342.
(5) (1892) I. L. R. 14 All. 226 (F. B.).
(6) (1916) I. L. R. 39 All. 191.
(7) (1889) I. L. R. 11 All. 375.
(8) 18 P. R. 1919.

1922

RULDU SINGH v. SANWAL SINGH.

SIR SHADI LAL C. J.—The facts, which are relevant to the question of limitation arising in this appeal, are as follows :—

On the 17th March 1894 one Baghela, a *Jat* of the Ludhiana District, made a gift of the land in dispute to his step-son, Ruldu Singh; and on the 11th January 1896 a mutation in respect of the alienation was effected in favour of the donee. The donor died on the 14th July 1901, and the present action for possession of the property was brought on the 21st January 1919 by his collateral, Sanwal Singh. The trial Court dismissed the suit holding that it was barred by limitation; but its decree was discharged by the District Judge who came to the conclusion that the suit was within the period of limitation prescribed by Article 144 of the second schedule to the Indian Limitation Act, and remanded the case under Order XLI rule 23, Civil Procedure Code, for decision on the remaining issues. Against the order of remand an appeal was preferred to the High Court, which was heard by Mr. Justice Scott-Smith, who has affirmed the decission of the District Judge and dismissed the appeal.

From the decision of the learned Judge the defendant has brought the present appeal under clause 10 of the Letters Patent. Mr. Sheo Narain for the respondent raises a preliminary objection that the order complained of does not constitute a 'judgment' within the meaning of the aforesaid clause, and that consequently no appeal lies from it.

The expression 'judgment' is not defined in the Letters Patent, and though some attempts have been made by the High Courts at defining the term, it cannot be said that any precise and, at the same time, exhaustive definition has been formulated. The earliest definition, which is often cited and is now regarded as the *locus classicus*, is contained in the well-known judgment of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (1). In that case Sir Richard Couch C. J. said :—

"We think 'judgment' in clause 15 means a decision which affects the merits of the question between the parties by

(1) (1872) 8 Beng. L. R. 433.

1922

RULDU SINGH v. SANWAL SINGH.

determining some right or liability. It may be either final or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined."

The learned Advocate for the respondent places his reliance upon this definition and contends that the words 'right' and 'liability,' as used in the definition, have reference to the substantive law and not to a matter of procedure; and that the question of limitation, which was the only issue determined by the Single Bench in this case, is not a question of 'right' or 'liability,' but is a matter which affects only the remedy of the plaintiff. In this connection our attention is invited to the observations of Mookerjee J. in *Ramendra Nath Roy* v. *Brajendra Nath Dass* (1), but we do not think that they support the contention of the respondent. The question for consideration in that case was whether the adjudication that there was a misjoinder of causes of action in the suit, and that the plaintiff could not proceed against all the defendants in one suit was a 'judgment' within the definition given by Sir Richard Couch. Now, Mr. Justice Mookerjee points out that, while a mere formal order or an order merely regulating the procedure in a suit could not be treated as a judgment, the adjudication on the question of multifariousness was not an order of that description, and that it determined some right between the parties, namely, the right whether the suit as framed was not authorized by the law and the rules relating to procedure, and could not, therefore, be entertained. It is not necessary that a decision in order to constitute a judgment must involve an actual decision on the right in controversy between the parties. While fully endorsing the view that a mere formal order or an order merely regulating the procedure cannot be viewed as a judgment, we cannot hold that the words "right" and "liability" were used in the narrow sense contended for by the learned Advocate. It seems to us that the determination of the question whether the plaintiff is entitled to bring his suit after the lapse of twelve years from the date of the mutation,

(1) (1917) I. L. R. 45 Cal. 111, 127.

1922

RULDU SINGH
v.
SANWAL SINGH.

is a determination of a right, and the adjudication thereupon certainly affects the merits of the question between the parties, more especially, when it involves, as it does in the present case, the determination of the point whether the defendant has acquired a prescriptive right of ownership to the land in dispute, *vide* section 28 of the Indian Limitation Act. It is, however, clear that this definition, which has no doubt been adopted by the High Courts of Calcutta and Bombay as a useful guide in determining the question whether a decision is or is not a judgment, has never been regarded as absolutely exhaustive, *vide Budhu Lal* v. *Chattu Gope* (1) and *Ramendra Nath Roy* v. *Brajendra Nath Dass* (2).

The Allahabad High Court has not felt the necessity of defining the term 'judgment,' because it has held that the right of appeal given by the Letters Patent is, in respect of an order made under the Civil Procedure Code, controlled by the provisions of section 104, Civil Procedure Code. Now, section 588 of the old Code, which has now been replaced by section 104 and Order XLIII, rule 1 of the new Code, enacted that an appeal lay from the orders specified in that section and "from no other orders"; and it was consequently decided by a Full Bench of that Court in *Muhammad Naim-ul-Lah Khan* v. *Ihsan Ullah Khan* (3) that clause 10 of the Letters Patent was controlled in its operation by section 588, and that no appeal lay under the Letters Patent from an order made under the Code if it was not one of the orders enumerated in that section. Section 104 of the new Code, however, expressly saves the right of appeal otherwise provided by "any law for the time being in force"; but a Division Bench of the Allahabad High Court in *Piari Lal* v. *Madan Lal* (4) has again adopted the rule enunciated in *Muhammad Naim-ul-Lah Khan* v. *Ihsan Ullah Khan* (3) and held that sub-section (2) of section 104 makes the appellate orders final and takes away *pro tanto* the right of appeal conferred by the Letters Patent. It seems to us that the object of the Legislature in enacting sub-section (2) was to make

(1) (1916) I. L. R. 44 Cal. 804.
(2) (1917) I. L. R. 45 Cal. 111.
(3) (1892) I. L. R. 14 All. 226 (F. B.).
(4) (1916) I. L. R. 39 All. 191.

1922

RULDU SINGH
v.
SANWAL SINGH.

it clear that there was no second appeal under the Code from the orders specified in sub-section (1) of section 104, and that sub-section (2) was not intended to override the express provisions of the Letters Patent. In the case of *Hurish Chunder Chowdhry* v. *Kali Sunderi Debi* (1) their Lordships of the Privy Council made the following important observations:—

"It only remains to observe that their Lordships do not think that section 588 of Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this where the appeal is from one of the Judges of the Court to the Full Court."

We do not agree with the learned Judges of the Allahabad High Court when they say, *vide Binno Bibi* v. *Mehdi Husain* (2), that these observations were confined to the facts of that particular case. We consider that the general provision contained in section 104 does not take away by implication the right of appeal conferred in express terms by the special provision relating to appeal to be found in the Letters Patent, and this is the view taken by the High Courts of Calcutta, Madras and Bombay in *Toolsi Money Dassee* v. *Sudevi Dassee* (3), *Sabhapathi Chetti* v. *Naraiyanasami Chetti* (4) and *The Secretary of State for India in Council* v. *Jehangir Maneckji Curestji* (5).

Coming now to the definition of the expression "judgment" given by the Madras High Court we find that the earliest Madras case which deals with this matter is that of *DeSouza* v. *Coles* (6). In that case Mr. Justice Bittleston said—

"The word 'judgment' cannot be limited to the final judgment in the suit, but must be held to have the more general meaning of any decision or determination affecting the rights or the interest of any suitor or applicant. When the language giving the appeal is so general in its terms as that contained in the 15th clause of the Charter, it is, we think, impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from."

(1) (1882) I. L. R. 9 Cal. 482 (P. C.).
(2) (1889) I. L. R. 11 All. 375.
(3) (1899) I. L. R. 26 Cal. 361 (F. B.).
(4) (1902) I. L. R. 25 Mad. 555.
(5) (1902) 4 Bom. L. R. 342.
(6) (1868) 3 Mad. H. C. R. 384.

1922

RULDU SINGH
v.
SANWAL SINGH.

It is difficult to endorse the view contained in the second sentence of the passage quoted above. There can be no doubt that this definition is much too wide, and it has now been superseded by another definition which appears to be the best definition attempted so far. In *Tuljaram* v. *Alagappa* (1) it was rightly pointed out that in order to decide whether an adjudication should be treated as a 'judgment,' regard should be had, not to the form of the adjudication, but to its effect upon the suit or other civil proceeding in which it was made. In that case Sir Arnold White laid down the following test:—

"If its effect, whatever its form may be, and whatever be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause."

It will be observed that this definition furnishes a better and a surer test for deciding the question whether an adjudication is or is not a judgment than that given by Sir Richard Couch in the case of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (2). If an adjudication puts an end to the suit or appeal, or if its effect, if it is not complied with, is to put an end to the suit or the appeal, then it is clearly a judgment. The difficulty, however, arises when an adjudication has no such effect upon a suit or appeal, but disposes of only an application made in a suit or appeal. Now there can be no doubt that it is not every application which results in an adjudication which can be held to be a judgment. In the Madras case cited above Sir Arnold White draws a distinction between an application which is nothing more than a step towards obtaining a final adjudication in a suit and an application which is an independent proceeding ancillary to the suit and instituted not as a step towards judgment but with a view to render the judgment effective if obtained. He considers that while an adjudication on the former would not be a

(1) (1910) I. L. R. 35 Mad. 1 (F. B.). (2) (1872) 8 Beng. L. R. 433.

1922

RULDU SINGH v. SANWAL SINGH.

judgment, an order terminating the latter would come within the purview of that expression.

Now, there are a large number of applications in respect of which it is easy to determine whether they belong to one category or the other. For example, applications for transfer, summoning witnesses, issue of commission for the examination of witnesses, adjournments, directing a party to produce and give inspection of documents, framing an issue, are clearly those on which an adjudication cannot be regarded as a judgment. On the other hand, applications for the appointment of a receiver, issue of an *interim* injunction, etc., belong to the second class, in which the order disposing of the application would be a judgment appealable under the Letters Patent. Indeed, to this class may be assigned all the applications, the orders on which are appealable under section 104 or Order XLIII, rule 1 of the Code of Civil Procedure. There are, however, several applications in respect of which the distinction drawn in the Madras case cannot be of much practical assistance in deciding whether the order thereupon should be a judgment within the meaning of the Letters Patent. Applications for a *mandamus*, leave to defend a summary suit on a negotiable instrument, etc., may be cited as examples of this type of applications. There is no sure guide for deciding whether an order terminating an application of this character is or is not a judgment, and it is for this reason that the High Courts have in respect of orders passed thereon taken divergent views. For instance, an order directing a *mandamus* to issue to a public body to compel it to refer a question of compensation to arbitration has been held by the Calcutta High Court in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (1) not to be a judgment, but this view has been dissented from by the Madras High Court in *Tulja Ram* v. *Alagappa* (2).

It is clear that in the absence of an authoritative definition binding upon all the High Courts there is bound to be some divergence of judicial opinion on the subject. It is, therefore, impossible to lay down any definite rule which would meet the requirements of all

(1) (1872) 8 Beng. L. R. 433. (2) (1910) I. L. R. 35 Mad. 1 (F.B.).

the cases, and the only thing which can be said is that in determining whether an order constitutes a judgment or not the Court must take into consideration the nature of the order and its effect upon the civil proceeding in which it was made.

The case, with which we are concerned, does not however, present any real difficulty. It is beyond dispute that the decision of the learned Judge confirming the order of the District Judge put an end to the appeal, which came up before him, and it must, therefore, be held to be a 'judgment' within the meaning of clause 10 of the Letters Patent. We are accordingly of opinion that the preliminary objection is not well-founded and must be overruled.

On the merits we are unable to endorse the conclusion of the Single Bench and consider that the suit is governed by the provisions of the Punjab Limitation Act, I of 1900. It is common ground that the alienor died in 1901, after the date of the enforcement of the Act, and it has been repeatedly held, *vide inter alia Mahna Singh* v. *Ladha Singh* (1), that an action to recover possession of ancestral land alienated by a male proprietor subject to the Customary Law of the Punjab is governed by the provisions of the aforesaid Act, if the death of the alienor, which gives rise to the cause of action for a suit for possession, takes place after the enforcement of the Act. It is, however, urged that Article 2 of the schedule to the Act, which is the only provision governing a suit for possession, refers to a suit by the "heir" of the alienor, and that the plaintiff Sanwal Singh was not the heir of Baghela within the meaning of the above article. Now, it appears that one Basawa Singh was the nearest reversioner of Baghela, but that he assented to the alienation and attested the deed of gift executed by Baghela. Basawa Singh, however, survived Baghela and is said to have died only four or five years before the institution of the suit, and it is, therefore, contended that on the date of Baghela's death Basawa Singh was his heir, and that Sanwal Singh was "only a remote reversioner who became entitled to possession after the death of Baghela's heir."

(1) 18 P. R. 1919.

1922

RULDU SINGH
v.
SANWAL SINGH.

We have considered this argument, but we do not think that it takes the case out of the purview of the aforesaid article. The whole scheme of the Act makes it clear that the object of the legislature was to remove uncertainty about titles to land by compelling the relatives of the male proprietors to impeach their alienations within a specified period, namely, twelve years from one of the dates mentioned therein. It was intended that the title of the alienee should be immune from attack, if the alienation in his favour was not contested within twelve years from the date mentioned in the third column of the schedule. Article 2, which deals with a suit for possession, should be read with Article 1 which prescribes the period of limitation for a suit for a declaratory decree, and it seems to us that the word "heir" used in the former Article connotes the same person or persons as the expression "son or reversioner" in the latter Article. The word "heir" denotes a person who succeeds by descent to an estate of inheritance, and it is beyond doubt that as long as a proprietor is living he has no heir. The person impeaching his alienation and seeking a declaratory decree cannot, therefore, be designated by the term "heir" and is consequently described as "son or reversioner." It is only after the death of the proprietor that the "son or reversioner" becomes his heir.

The plaintiff Sanwal Singh, when seeking to recover possession of the property of Baghela, claims to be his heir, and it seems to us that the suit as brought by him is a suit by Baghela's heir. Whether he could or could not have claimed the property immediately after the death of Baghela is beside the point; the question is whether the suit as brought by him is a suit by the heir of the proprietor. In order to determine whether an action is governed by a particular provision of the law of Limitation the Court has only to peruse the plaint and to decide whether upon the averments contained therein the claim comes within that provision. Now, if the claim in the present case is one by the heir of the alienor to recover possession of the property alienated by him (and we consider that there can be no reasonable doubt on that point) the Court is not called upon to go into the history of the

question whether the plaintiff was or was not entitled to inherit the estate immediately after the alienor's death.

It is urged that the plaintiff could not sue for possession during the lifetime of Basawa Singh, that his right to possession accrued for the first time on the latter's death, and that the date of that death should be regarded as the *terminus a quo* for the period of limitation prescribed for the suit. Now, assuming that the plaintiff's right to possession did not accrue until the death of Basawa Singh, we consider that the legislature has drawn a clear distinction between the date on which the right to sue accrues and the date from which the period of limitation begins to run. Indeed, it is laid down in express terms that if no declaratory decree has been obtained in respect of an alienation, the period of twelve years for a suit for possession is to be counted from the date of the mutation in respect of the alienation, or, in the absence of mutation, from the date of the alienee obtaining possession, etc., as the case may be ; and it is by no means a rare thing that a suit for possession is barred by limitation though the right to sue for possession has not yet accrued. The argument that the contention urged by the defendant would lead to an anomalous position does not appeal to us, because it is beyond doubt that the provisions of the Act are not free from such anomalies. The reason, however, is not far to seek. The object of the legislature was to ensure without leaving any loophole that the title of the alienee should not remain in doubt for more than twelve years, and that object has been achieved regardless of any anomalies or absurdities which may arise in special cases.

We must, however, point out that it would also be absurd that each successive reversioner should have twelve years for a suit for possession from the date of the death of the preceding reversioner. According to this contention an alienation could be attacked after the expiry of even a hundred years, a result which is much more absurd than that pointed out by the learned counsel for the plaintiff. It may be that the framers of the Act did not anticipate all the results which flow from its provisions, but we have to interpret the Statute as we find it.

We accordingly hold that the action brought by the plaintiff comes within the *ambit* of the Act, and as it was brought after the expiry of twelve years from the date mentioned in the schedule to the Act, it is barred by time. We therefore accept the appeal and reversing the judgment of the Single Bench dismiss the suit with costs throughout.

Appeal accepted.

FULL BENCH.

Before Sir Shadi Lal, Chief Justice, Sir William Chevis, Mr. Justice Scott-Smith, Mr. Justice LeRossignol, and Mr. Justice Broadway.

1922.

Jan. 21.

MOTAN MAL, ETC. (DEFENDANTS)—*Appellants*,

versus

MUHAMMAD BAKHSH AND OTHERS (PLAINTIFFS), AND AHMAD KHAN (DEFENDANT)—*Respondents*.

Civil Appeal No. 757 of 1917.

Mortgage—Interest after due date—in absence of express or implied stipulation in the deed— post diem *damages—allowable at what rate and for what period.*

Held, that when the mortgage deed contains no express stipulation for the payment of interest after the due date, the correct rule is that the law raises no presumption either in favour of or against an implied intention to pay interest after the due date.

Bulanda v. *Fateh Din* (1), not followed.

Bindesri Naik v. *Ganga Saran Sahu* (2), and *Sardar Umrao Singh* v. *Sardar Thakar Singh* (3), referred to.

The determination of the question rests entirely upon the interpretation of the instrument and no definite rule of construction can be laid down except that the deed must be viewed as a whole, and the Court should avoid an interpretation which would ascribe to the parties an intention that, however payment may be delayed beyond the fixed day, the debt shall carry no interest and that the creditor shall have no remedy provided by the contract, but shall be driven to treat the contract as broken and to seek for damages. It is more reasonable to ascribe to the parties the intention of making a perfect contract.

(1) 57 P. R. 1914. (2) (1897) I. L. R. 20 All. 171 (P. C.).

(3) 77 P. R. 1898.