1921.

SHIRINBAI v. RATANBAI.

his widow Kuvarbai took a general testamentary power which was duly exercised by her will. If so, the questions raised at the trial as to the widow's right to dispose of part of the capital of the estate in her lifetime, as to the construction of the gift over in the event of her not making a will, and as to the Statute of Limitations, do not call for a decision. Their Lordships accordingly express no opinion upon these questions.

Their Lordships will humbly advise His Majesty that this appeal be allowed and the decree of the High Court set aside, except as to costs, and that it should be declared that the testator's widow had power by will to dispose of his estate. No order for administration appears to be required, but the plaintiff and the other persons entitled as legatees under the will of Kuvarbai will have liberty to apply as to their legacies. The respondent Ratanbai will pay the costs of this appeal.

Solicitors for appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for respondents: Messrs. *Waltons & Co.*

Appeal allowed.

A. M. T.

PRIVY COUNCIL.*

P.C. 1921. *February* 11.

BHAIDAS SHIVDAS (PLAINTIFF) *v.* BAI GULAB AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Bombay.]

Procedure—Bombay High Court—Original Civil Jurisdiction—Appeal—Disagreement of Judges—Letters Patent, 1865, section 36—Code of Civil Procedure (V of 1908), sections 4 and 98, sub-section 2.

Section 36 of the Letters Patent of the Bombay High Court which provides that if the Judges composing a division bench are equally divided in opinion

* *Present*:—Lord Buckmaster, Lord Dunedin, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

the opinion of the senior Judge is to prevail, is not affected by section 98, sub-section 2 of the Code of Civil Procedure, 1908, which provides a different procedure in these circumstances.

The Judicial Committee allowed an appeal where the procedure of section 98, sub-section 2, had erroneously been followed without objection by the appellant, but their Lordships being in a position to dispose of the appeal on its merits reserved for the ultimate decision the question whether the appellant should not be ordered to pay the whole of the costs since the date when the mistake was first made.

Decree of the High Court reversed.

APPEAL (No. 123 of 1919) from a judgment and decree of the High Court (March 23, 1917) affirming a decree of the High Court in its Original Civil Jurisdiction.

The suit was instituted in the High Court by the appellant who prayed for declarations as to the effect of a will.

The trial Judge, Macleod J., made a decree adverse to the plaintiff. Upon an appeal to the Appellate Jurisdiction of the Court the learned Judges (Scott C. J. and Heaton J.) disagreed. The question upon which the learned Judges disagreed was referred under section 98, sub-section 2, of the Code of Civil Procedure, 1908, and was heard by Batchelor and Shah JJ. without the the present appellant objecting to the jurisdiction. The learned Judges, agreeing with Heaton J. and Macleod J. decided the question referred adversely to the plaintiff.

An appeal to the Judicial Committee raising the whole question at issue between the parties came on for hearing in the ordinary course.

1921, February 11 :—*De Gruyther K. C.* and *Parikh* for the appellant. Under section 36 of the Letters Patent the appellant was entitled to a decision in her favour upon the Chief Justice and Heaton J. disagreeing. That section is not affected by section 98 of the Code of Civil Procedure but is preserved by section 4

1921.

BHAIDAS SHIVDAS v. BAI GULAB.

of the Code. *Roop Laul* v. *Lakshmi Doss*[1]; *Lachman Singh* v. *Ram Lagan Singh*[2]; *Nundeeput Mahta* v. *Urquhart*[3]; *Surajmal* v. *Horniman*[4]; see also *Sabitri Thakurain* v. *Savi*[5].

Sir Erle Richards K. C. and *E. B. Raikes* for the respondent. The procedure under section 36 of the Letters Patent is modified by section 98 of the Code. The latter section does not provide for a re-hearing of the appeal, but for a reference upon the particular question upon which the Judges differ. That procedure is consistent with the Letters Patent, the determination of the appeal remaining in the division Bench which originally heard the appeal. Section 44 of the Letters Patent makes their provisions subject to the legislative powers of the Governor-General in Council. The appellant by not objecting or appealing against the reference waived the right to object.

The judgment of their Lordships was delivered by

LORD BUCKMASTER:—The real question involved in the dispute giving rise to this appeal was a question as to the construction of the will of one Nathoo Moolji, who died on the 8th December 1894, affecting the respective estates and interests that were taken by the testator's widow and his two daughters. One of the daughters died in the lifetime of the widow, and her heir, who is the present appellant, instituted, on the widow's death, in the High Court of Judicature in Bombay, ordinary original civil jurisdiction, the proceedings out of which this appeal has arisen, claiming that, according to the true construction of the will, he was entitled to a vested one-half share in the testator's property.

(1) (1905) 29 Mad. 1.
(2) (1903) 26 All. 10.
(3) (1870) 13 W. R. 209.
(4) (1917) 20 Bom. L. R. 185 at p. 216.
(5) (1921) L. R. 48 I. A. 76.

The learned Judge before whom the suit was first heard dismissed the application and held that there was an intestacy after the widow's death.

An appeal was taken from that judgment and heard before Chief Justice Scott and Mr. Justice Heaton. They differed in their opinion. Chief Justice Scott thought that the plaintiff was entitled to the relief he claimed; Mr. Justice Heaton, on the other hand, agreed with the Judge who had first tried the suit. The course then taken was to refer the matter to two other Judges, Mr. Justice Batchelor and Mr. Justice Shah, who also decided adversely to the plaintiff's contention.

The plaintiff has now brought an appeal before His Majesty in Council, and the first point that he has raised is this: that the order made referring the case to the decision of Mr. Justice Batchelor and Mr. Justice Shah was *ultra vires* and void; that there was no jurisdiction in these two Judges to entertain the dispute; and that he is entitled, as of right, to a decree in accordance with the opinion of Chief Justice Scott, the senior of the two Judges, before whom the appeal was first heard.

That contention depends upon the construction of the Letters Patent of Bombay, under which the Court was constituted, and the Code of Civil Procedure, 1908. By section 36 of the Letters Patent it is provided that if the High Court is sitting in a division composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, the decision shall agree with the opinion of the majority of the Judges; but if the Judges are equally divided, the opinion of the senior Judge shall prevail.

In this case it is quite clear. There were two Judges sitting; the senior Judge was the Chief Justice; there was an equal division of opinion and under section 36,

1921.

BHAIDAS SHIVDAS v. BAI GULAB.

in consequence, the plaintiff was entitled to a decree in his favour.

It is, however, urged on behalf of the respondents that the procedure in section 36 is modified by the Code of Civil Procedure, 1908, and it is pointed out that by section 44 of the Letters Patent there is an express provision which makes those Letters Patent subject to the legislative powers of the Governor General in Council.

There are two sections in the Code of Civil Procedure which are relevant to this dispute. The one is section 4 and the other is section 98. Section 98 appears to have been the section under which the Judges acted. That section provides :—

"That where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ, and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it."

It is quite plain that those provisions create a totally distinct method of procedure in the event of difference between two Judges from that which was laid down by section 36. Under section 36 of the Letters Patent the judgment of the Judge who was the senior Judge would be the judgment which the parties before the Court would have a right to obtain; under section 98 the judgment to which they are entitled is the judgment of the majority of all the Judges who have heard the appeal; and this case shows that those two provisions might produce a totally different result. If, therefore, section 98 controls section 36 the respondents would be entitled to say that the proper procedure had been followed, and that the appellant had no cause of

complaint. But by section 4 of the Code of Civil Procedure it is also provided that :—

"In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force."

There is no specific provision in section 98, and there is a special form of procedure which was already prescribed. That form of procedure section 98 does not, in their Lordships' opinion, affect. The consequence is that the appellant is right in saying that in this instance a wrong course was taken when this case was referred to other Judges for decision, and he is technically entitled to a decree in accordance with the judgment of the Chief Justice. This view of the section is not novel, for it has been supported by judgments in Madras, in Allahabad and in Calcutta : see *Roop Laul* v. *Lakshmi Doss*[1] ; *Lachman Singh* v. *Ram Lagan Singh*[2] ; *Nundeeput Mahta* v. *Urquhart*[3].

There only remains for their Lordships' consideration the question as to how they ought to deal with the costs of these proceedings.

As has been already pointed out, the real matter is the question of the construction of a will. The record has been prepared, the will is before their Lordships, and they are perfectly ready to undertake the duty of determining what the meaning of that will may be ; but the appellant's counsel, acting under the strictest instructions from his client in India, is unable to consent to their Lordships taking that course, and is compelled to insist upon the determination of this dispute simply upon the question of procedure. The result, therefore, is this : that although it may be by a wrong

(1) (1905) 29 Mad. 1 at p. 24. (2) (1903) 26 All. 10.
(3) (1870) 13 W. R. 209.

1921.

BHAIDAS SHIVDAS v. BAI GULAB.

path, this appeal has reached their Lordships by whom it could be ultimately decided, but they are not permitted to decide it; they are obliged to send the case back for the further consideration and then, after a prolonged and tedious journey, it may find its way back again to the Board for ultimate decision.

Their Lordships are unable in these circumstances to advise His Majesty to follow the usual rule and give the successful appellant the costs of his successful appeal. They think that the whole of the costs from the 13th March 1917, when the mistake was first made, should await determination until the ultimate decision of this matter when the strict procedure has been followed and they will reserve the power of awarding those costs as seems right when that course has been taken. If the appellant fails, these costs may be regarded as costs in the cause; their Lordships make this intimation for the assistance of the Board before whom the matter may ultimately come; but this will in no way fetter their discretion if they think that even if the appellant ultimately were to succeed he ought not to be recouped and indeed ought to pay the wasted expense of this barren victory. They only desire to add that the original judgment of the 13th March 1917 appears not to have dealt with costs at all; but before any decree is drawn up under that order, it would be desirable that some proper application should be made to the Court for the purpose of seeing that the order is correct in that respect.

For the rest, they will humbly advise His Majesty that the decree of the appellate Court should be set aside, and they will remit the case to the High Court to be dealt with according to law, their Lordships having already pointed out the way in which they think that direction should be obeyed. The costs of this

appeal, and all costs subsequent to the 13th March 1917, are to be reserved to be dealt with by this Board.

Solicitor for appellant : Mr. *E. Dalgado.*

Solicitor for respondents : Messrs. *Hughes & Sons.*

Decree set aside and case remanded.

A. M. T.

ORIGINAL CIVIL.

Before Mr. Justice Setalvad.

THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY *v.* M. DAMODAR BROS.*

1920.

August 6.

Land Acquisition—City of Bombay Municipal Act (III of 1888), sections 91 and 296—Land Acquisition Act (I of 1894), sections 16 and 31—Land acquired by the Government of Bombay at the instance of Municipality—Effect of acquisition—Vesting of land in Municipality—Municipality empowered to acquire land in addition to that required for its scheme and to sell such additional land—Bombay Rent (War Restrictions) Act II of 1918, section 9—Bombay Rent Act does not override general provisions of the Land Acquisition Act or the Municipal Act—"Sufficient cause" within the meaning of section 9 of the Rent Act—Leases for fixed period terminate on compulsory acquisition—Monthly tenants under the original lessee—Tenants on sufferance—Not entitled to a month's notice—Ejectment.

In pursuance of a scheme for the widening of a street within the Fort, the Municipal Corporation of the City of Bombay, plaintiff No. 1, moved the Government of Bombay to acquire certain buildings on behalf of the Corporation under the Land Acquisition Act. The Governor-in-Council thereupon issued the necessary notification for the acquisition of the said buildings. Plaintiff No. 2 was the owner of the buildings in the five suits and he had leased them to *D* for a period of three years from 1st November 1917. *D* let out different portions of the buildings to the several defendants in the suits on monthly tenancies. By the time the proceedings before the Collector terminated, but before the award was actually published, an agreement was arrived at between the Municipality and plaintiff No. 2, whereby, in consideration of the plaintiff No. 2 agreeing, *inter alia*, not to claim the compensation payable

* O.C.J. Suit No. 910 of 1920 tried with Suits Nos. 911, 912, 955 and 956 of 1920.