1904 JULY 1, 7.

CRIMINAL REVISION.

The examination referred to in section 200 of the Criminal Procedure Code and which a Presidency Magistrate is not obliged to reduce to writing, is an examination on the subject-matter of the "complaint" which, as defined in section 4, clause (*h*) means the allegation that some person has committed an offence.

32 C. 469=8 C.W.N. 883= 1 Cr. L. J. 845.

The Chief Presidency Magistrate was not excused from the necessity of placing on record the necessary evidence of the complainant's authority from Dinabandhu Nandy, nor is it even alleged before us that the complainant offered any proof of his authority except his own bare assertion. We hold that no summons could lawfully issue on the accused until the complainant's authority had been exhibited and recorded.

In this view, we direct that these Rules be made absolute, and that the proceedings now pending against the petitioners before Mr. Bonnaud be quashed.

Rules absolute.

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32 C. 473.

[473] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Pargiter.

CHOORAMANI DASI *v.* BAIDYA NATH NAIK.*

[15th December 1904.]

Hindu Law—Widow, alienation by—Reversioners—Declaratory decree, suit for—Limitation Act (XV of 1877), Sch. II, Arts. 91, 120, 135—Void transaction.

Where a Hindu widow succeeding to her husband's estate had, without any authority from him, executed jointly with her mother-in-law a deed of gift purporting to dedicate the bulk of his property for the *sheba* of certain idols:—

Held, that the transaction was altogether void.

The deed of gift being *ab initio* void as against the reversionary heir, a suit by him to obtain a declaratory decree that the instrument is invalid and not binding upon him is governed by Art. 120, Sch. II of the Limitation Act, and not by Art. 91, it being not necessary for him to have it cancelled or set aside in order to obtain such declaratory relief.

Banku Behari Shaha v. *Krishto Gobindo Joardar* (1) relied upon.

[Ref. 2 C. L. J. 144; 2 Lah. L. J. 13.]

APPEAL by the defendants, Chooramani Dasi and others.

Nandaram, Durga Prasad the defendant No. 4, and Baidya Nath the plaintiff, were three brothers. Nandaram died leaving a son, Sobharam, who separated from his uncles and died, leaving a widow, Chooramani Dasi, defendant No. 1, and his mother Doyamani Dasi, defendant No. 2. The defendant No. 1 having succeeded to the estate of her deceased husband executed jointly with the defendant No. 2 a deed of gift on the 22nd Chaitra 1305 B. S. purporting to transfer certain properties for the *sheba* of two *Thakurs*, and appointing the defendant No. 3 and his heirs to be *shebait* in pursuance of an alleged permission said to have been given to the widow by Sobharam shortly before his death.

The plaintiff alleged that it was the defendant No. 3 who had by his evil advice induced defendants Nos. 1 and 2 to execute this [474] fraudulent and collusive deed, and that he came to know of the

* Appeal from Original Decree, No. 354 of 1902, against the decree of Mohin Chandra Ghose, Subordinate Judge of Midnapore, dated July 28, 1902.

(1) (1903) I. L. R. 30 Cal. 433.

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deed on the 17th September 1899. He therefore as one of the reversionary heirs of Sobharam brought the present suit on the 5th March 1902, making the other reversioner, Durga Prasad, who refused to join with him, a defendant, praying "that the Court may find that the *danpatra* executed by the defendants Nos. 1 and 2 in favour of defendant No. 3 is illegal, collusive and fraudulent and executed without legal necessity, and declare that the same cannot be enforced against the reversionary right of the plaintiff."

The defendants Nos. 1, 2 and 3, who defended the suit, pleaded, *inter alia*, that the deed of gift having been executed in accordance with the directions left by the deceased Sobharam and having been attested by the defendant No. 4, who was one of the reversionary heirs was a valid document; that the plaintiff knew of the deed from the time of its execution and the suit not having been brought within three years from that date was barred by limitation; that by the deed of gift the properties were dedicated to the worship of the *Thakurs*, Sree Sree Sidheswar Mahadev Thakur and Sree Sree Mahamaya Thakurani, who were the real owners of the property and therefore necessary parties to the suit, and that the plaintiff had no right to bring the suit. They denied the allegations of fraud and collusion.

The following issues were raised at the trial: —

(i) Is the plaintiff's claim barred by limitation?

(ii) Is the suit bad by reason of non-joinder and misjoinder of parties and causes of action?

(iii) Is the deed of gift executed by the defendants Nos. 1 and 2 in favour of defendant No. 3 on the 22nd Chait 1305, an illegal and collusive document without consideration, and can it prevail against the interest of the plaintiff?

(iv) Has plaintiff any right to sue as reversioner?

(v) What other relief, if any, is the plaintiff entitled to?

The Subordinate Judge, who tried the suit, decided all the points in favour of the plaintiff and made a decree declaring "that the deed of gift dated the 22nd Chaitra 1305 B.S. executed by the defendants Nos. 1 and 2 shall not be effective as against **[475]** the interests of the plaintiff and binding upon him after the death of the widows."

The defendants Nos. 1, 2 and 3 appealed to the High Court.

Babu *Jagat Chandra Banerjee*, for the appellants.

Babu *Joy Gopal Ghose*, for the respondent.

GHOSE AND PARGITER JJ. This is an appeal by the defendants against a declaratory decree pronounced by the Subordinate Judge of Midnapore. The declaratory relief that was sought for by the plaintiff was in respect of a deed of gift bearing date the 13th April 1898 executed by two Hindu widows, Musammat Chooramani and Musammat Doynamani, the former being the widow of one Sobharam Naik, and the latter being his mother. The deed in question purports to transfer certain properties for the *sheba* of two *Thakurs*, appointing the defendant No. 3, Durga Prasad Poria, the *shebait*. It, however, states that the transfer is made under the authority of Sobharam Naik given shortly before his death. The plaintiff, Baidyanath Naik, who is one of the two reversionary heirs to the estate of Sobharam Naik, brought this suit to have it declared that the deed of gift is invalid, and asked that it be declared that the transaction in question is not binding upon him as the reversionary heir.

The Subordinate Judge has given the plaintiff a decree, and hence, as has already been indicated, this appeal by the defendants.

The first ground that has been urged before us by the learned vakil for the appellants is that the suit is barred by limitation under Article 91 of the Indian Limitation Act, it not having been instituted within three years from the date when the document in question became known to the plaintiff. It has also been contended that the suit was liable to be dismissed because the *Thakurs*, in whose favour the transfer was made, were not made party defendants. And it has lastly been contended that the Subordinate Judge ought to have held upon the evidence in the case that authority to make the said transfer was left by the deceased Sobharam Naik, and that therefore the transaction is a good and binding one.

[476] Upon the first point raised, it appears that the suit was not brought within three years from the date when the fact of the execution of the document in question came to the knowledge of the plaintiff. It was, however, instituted within six years from that date and from the date of the document itself. And the question we have to determine is whether Article 91 of the Indian Limitation Act applies, and if not, which other Article of the Act does apply. Article 91 runs as follows :—" To cancel or set aside an instrument not otherwise provided for, three years from the time when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him." It will be observed that the plaintiff was no party to the instrument in question, nor was it executed by the party through whom he claims. It was a transaction entered into by two Hindu females who had, as alleged by the plaintiff, no authority whatsoever to enter into it. According to his (plaintiff's) case, it is not a case of a voidable instrument, but a case of an instrument *ab initio* void ; and if that be so, it is obvious that, in order to obtain a declaratory relief, such as he has asked for, it is not necessary for him to cancel or set aside the instrument in question. This leads us to the consideration of the facts of the case. On turning to the evidence—evidence that has been discussed by the Subordinate Judge in his judgment,—we have no doubt in our minds that no authority was left by the deceased Sobharam Naik, for the execution of the document in question. The deceased Sobharam had a very bad attack of cholera, and, according to the medical evidence that has been given in the case, it would appear that he was not in a proper state of health to have been able to think over such a serious matter like this, and to have left instructions of the character which, it is said, he did leave to his widow and mother. We think that, on the evidence such as it is, it is rather incredible that a young man of twenty, as Sobharam was when he died, should have been so religiously disposed as to have left the bulk of his property for the purpose of *debsheba*, while apparently he made no provision whatsoever for his widow and mother. We think that the Subordinate Judge was perfectly right in holding that no authority whatsoever was left by the deceased Sobharam for the purpose of executing the document in question. If, therefore, no **[477]** authority was left by Sobharam authorising such an instrument, it is obvious that the deed in question was absolutely void, because, as Hindu widows, defendants Nos. 1 and 2 had no authority to make the gift either to defendant No. 3 or to any *Thakur*. We take it, therefore, upon the evidence, that this is a case of an altogether void and not of a voidable transaction. It is a transaction which the plaintiff was not bound to have set aside or cancelled, before he could obtain the relief he asked for, that

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relief being that the deed of gift in question, though it may be binding upon the widows during their lifetime, is not binding upon him, as the reversionary heir, after their death ; and that is the decree which the Court below has pronounced in this case.

In determining the question whether Article 91 of the Indian Limitation Act applies or not, a distinction like the one that we have already indicated should be borne in mind as existing between a void and voidable instrument, and this view is supported by several cases decided by this Court, notably the case of *Banku Behari Shaha* v. *Krishto Gobindo Joardar* (1). In that case, the learned Judges, in discussing the question whether Article 91 of the Indian Limitation Act applied or not, made the following observations :—" But we think the facts found by the lower Appellate Court as to the manner in which the *patta* propounded by the defendant No. 1 came to be signed by the grantor and to pass into the possession of the grantee, clearly show that it was a nullity from its inception and was never intended to be operative : it was not a voidable deed, but was one that was void *ab initio*, and so it did not require to be set aside, " and so on ; and accordingly they held that Article 91 of the Indian Limitation Act had no application. In this view of the matter we are of opinion that Article 91 of the Indian Limitation Act can have no application in this case.

The question then arises, which other article of the Indian Limitation Act does apply ? Reference has been made to Article 135 ; but having regard to the facts of this case, and specially to the fact that the next taker of the inheritance would be Doynamani the mother, and that the plaintiff would not be entitled to [478] possession of the property, if Chooramani, the widow of Sobharam, was dead upon the date of the institution of the suit, it may be open to doubt whether that Article applies. And it seems to us that there is no other Article in the Limitation Act which is specially applicable to this case. The only article which would therefore apply is Article 120, which runs as follows :—" Suit for which no period of limitation is provided elsewhere in this Schedule—six years from the date when the right to sue accrues." The present suit having been brought within six years from the date of the instrument in question is, in our opinion, within time. We accordingly overrule the objection as to limitation that has been raised before us.

Then, as to the question of non-joinder of parties, it seems to us on the evidence that this is not a *bona fide* bequest in favour of the *Thakurs*. It was intended to be for the benefit and interest of defendant No. 3, and if so, it is obvious that the *Thakurs* were not necessary parties to the suit. If, however, they have really an interest in the property, they cannot be bound by the decree, which has been pronounced in this case. The suit is between the plaintiff on one hand, and the defendants Nos. 1 and 2, the two widows, and the defendant No. 3 on the other ; and, so far as the matters have been raised between these parties, we are clearly of opinion that the deed in question is not operative as against the plaintiff. In this view of the matter, it seems to us that the non-joinder of the *Thakurs* as party defendants is not destructive of the plaintiff's case.

Upon the last question raised, namely, whether any authority had been left by Sobharam for the execution of the instrument in question, we have alredy expressed our opinion. We hold that there was no authority,

(1) (1902) I. L. R. 30 Cal. 433.

and as such, the Subordinate Judge was perfectly right in declaring that the deed in question is not operative and binding upon the plaintiff.

For these reasons, we think that this appeal should be dismissed with costs. We order accordingly.

Appeal dismissed.

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32 C. 479 (=13 C. W. N. 150=2 I.C. 550.)

[479] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Pargiter.

GHANA KANTA MOHANTA *v.* GERELI.*

[19th December, 1904.]

Maintenance, suit for—Illegitimate child—Right of suit—Order of Criminal Court refusing maintenance, effect of—Criminal Procedure Code (Act V of 1898) s. 488 —Civil Procedure Code (Act XIV of 1882) s. 11—Hindu Law.

Under the Hindu law as well as upon general principles, the father of an illegitimate child is bound to provide for its maintenance.

A suit lies in the Civil Court for maintenance of an illegitimate child, notwithstanding an order of the Magistrate, under section 488 of the Criminal Procedure Code, refusing to grant maintenance.

Subad Domni v. *Katiram Dome* (1) and *Subhudra* v. *Basdeo Dube* (2) distinguished.

[Ref. 37 Bom. 71; 33 M. L. J. 449=1918 M.W.N. 65=22 M. L. T. 293=42 I. C. 331.]

SECOND APPEAL by the defendant, Ghana Kanta Mohanta.

The plaintiff, Musammat Gereli, a minor, through her father brought a suit on the 9th August, 1900, praying for a decree directing the defendant to pay her, at Rs. 15 per annum, towards the maintenance of her illegitimate minor child alleged to have been begotten by the defendant. The child was born in March 1900.

The defendant denied that he was the father of the illegitimate child and pleaded that the suit was not maintainable, inasmuch as an application against him for the recovery of maintenance under s. 488 of the Criminal Procedure Code had been disallowed by the Deputy Commissioner.

[480] The Court of first instance held, that the suit was maintainable but dismissed it on the ground that the plaintiff had failed to prove that the defendant was the putative father of the child. But, on appeal, the Subordinate Judge accepted the plaintiff's story and gave her a decree as prayed for.

The defendant appealed to the High Court.

Babu *Manomohan Dutt*, for the appellant, contended that the order of the Magistrate under s. 488 of the Criminal Procedure Code was a bar to the suit: *Subad Domni* v. *Katiram Dome* (1); *Subhudra* v. *Basdeo Dube* (2): *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahiba* (3). Proceedings under the provisions of section 488 of the Code of Criminal Procedure are in the nature of civil proceedings: *Nur Mahomed* v. *Bismulla Jan* (4). The Hindu law, though it makes ample provision for illegitimate children born in the

* Appeal from Appellate Decree, No. 1327 of 1902, against the decree of J. C. Arbuthnott, Deputy Commissioner and Subordinate Judge of Sibsagar, dated March 20, 1902, reversing the decree of Kanak Lal Barooah, Extra Assistant Commissioner and Munsif of that place, dated Jan. 9, 1901.

(1) (1873) 20 W. R. (Cr.) 58.
(2) (1895) I. L. R. 18 All. 29.
(3) (1886) I. L. R. 14 Cal. 276, 289.
(4) (1889) I. L. R. 16 Cal. 781.