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PUTONA KOLITA v. MUTIA KOLITA.

NORMAN, J.—It is clear to us, that the decision of this case must be reversed. The plaintiff sues to establish his title, under a deed of gift, of certain land obtained from the defendant. The lower Appellate Court holds, that the registration of the deed of gift is optional. This appears to be a mistake. The 17th section of Act XX. of 1866 enacts that the whole of the instruments enumerated shall be registered, provided the property to which they relate shall be situate in the district to which the Act came into operation.

Among the instruments enumerated are instruments of gift of immovable property. It is a little remarkable that in enumerating the documents, of which registration is optional, in section 18, after the word instrument in clause 1 the words "other than an instrument of gift," which are found in clause 2 of the 17th section, are not repeated, as they should have been, and as the sense seems to require. The words "instruments of gift of immovable property" in clause 17 are not qualified in any way. They include all such instruments without any exception. We think that taking the two sections together, the meaning is that all instruments of gift of immovable property must be registered, whatever be the value of the property.

The decision of the lower Appellate Court is reversed with costs in this Court and in both the lower Courts.

Before Mr. Justice Bayley and Mr. Justice Hobhouse.

AZIZUNISSA KHATUN AND ANOTHER (JUDGMENT-DEBTORS) *v.* SHASHI BHUSHAN BOSE AND OTHERS (DECREE-HOLDERS.)*

1869 *April* 13.

Joint-Decree—Act VIII. of 1859, *s.* 207.

Three persons obtained a joint decree. Two of them took out execution, and realized each his own share. The third applied for execution within three year from the time of the last proceedings taken by the other two; but after a lapse of three years from the last proceedings taken jointly by all three.

Held, that under section 207, Act VIII. of 1859, there was no severance of the decree, and therefore, the proceedings taken by the two kept alive the decree.

Baboo *Nalit Chandra Sen* for appellant.

Baboos *Bhawani Charan Dutt* and *Mohini Mohan Roy* for respondents.

BAYLEY, J.—I think these appeals must be dismissed with costs. It is necessary to premise by giving a few facts and dates. In the year 1846, a decree was passed in favor of the father of Lakhikant, Bepin Behari, and Nabin. Execution proceedings were taken out on the 27th April 1847. On the 13th June 1859, application was made by the above-mentioned three parties together for execution of the decree, and after this the case was struck off on the same

* Miscellaneous Special Appeals, Nos. 40, 41, 42, and 43 of 1869, from the decrees of the Judge of Dacca, dated 2nd December 1868, affirming the decrees of the Subordinate Judge of that district, dated 24th July and 25th June 1863, respectively.

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day. On the 26th March 1863, Lakhikant and Bepin Behari filed a petition, asking for execution of the decree, as for their recognized share of 5 annas 6 gandas 2 cowries and 2 krants each. Next, the plea of limitation was raised by one of the judgment-debtors, but the plea was finally overruled by the High Court, on the 30th July 1867. On the 8th January 1868, the third decree-holder, Nabin, applied for execution of the decree; and on his decease, his sons appeared to represent him in March of the same year; but it was pleaded that limitation barred the decree, there not having been any effective proceedings taken within the three years next preceding the last application for execution.

It is argued that there was a severance of the decree by the separate application made in March 1863 on the part of Lakhikant and Bepin Behari; and that, as they took out execution of the joint decree not in its entirety, but each of his own share, the entirety of that decree and of its execution was destroyed. I am of opinion that this plea is untenable, and that the case is clearly governed by the decisions in *Kowar Narain Roy* v. *Sreenath Mitter* (1) *Roy Preonath Chowdry* v. *Prannath Roy Chowdhry* (2); *Johiroonissa Khatoon* v. *Amiroonissa Khatoon* (3). I would also remark that the terms of section 207, Act VIII. of 1859, are clear on this point. "If there be two or more decree-holders, "one or more of them may make the application, if the Court shall see sufficient "cause for allowing him or or them to make such application, and the Court "shall, in such case, pass such order as it may deem necessary for protecting "the interests of the other decree-holders"; and so in the case of *Ram Sahaya Sing* v. *Degan Sing* (4), it is ruled by a Full Bench construction of the "section that, if a question arise on any subsequent application from what period "the three years shall date, it will date from the last of the proceedings, either "a *bonafide* application or the last act done by the party, by the Court, or "by the officer of the Court, in furtherance of the application." I think the original decree was not severed by any act of the separate decree holders in this case. There was no express agreement for severance; and as to an implied agreement, nothing has been urged, except the bare fact that Nabin, subsequently, came in and asked for the realization of his portion of the joint decree after that his brothers had already taken out execution of their portion of the decree. Moreover, I do not think that the plea as to the decree being severed is sound, because, reverting to the character of the decree as one entire decree, and looking to the provisions of the Procedure Code in section 207, that in a joint decree one or more of the decree-holders may be allowed to sue out his or their share of the joint decree, I am led to think that, after Lakhikant and Bepin Behari had sued out execution of their shares in the joint decree, there remained the one-third share of Nabin in the same existing joint decree for execution; in other words, I do not think that the mere fact of two, out of the three shares in a joint

(1) 9 W. R., 485.

(2) 8 W. R., 100.

(3) 6 W. R., (M. R.) 59.

(4) Case No. 728 of 1865; 11th September 1866.

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decree having taken out execution of their shares, joint decree became severed thereby, and lost its character as an entire joint decree as regards the share of the third decree-holder. There is nothing to shew that the three decree-holders, brothers, in this case, came in, stating that the alleged decree was originally joint, and that they wished it severed according to their respective shares in it. The case of *Nobin Chunder Bose* v. *Rádhábullub Ghosami* (1) is, I may here mention, one in which there was an express agreement between the parties for the severance of their joint interests in the decree; but, irrespective of that, I do not think that a decision under a different procedure can be cited as a precedent under the new Code.

HOBHOUSE, J.—The material facts are these:—Lakhikant, Bepin Behari and Nabin were the proprietors of a decree, and they jointly, up to the 13th June 1859, kept that decree alive. This is admitted by the pleader of the special appellant. Then, in December 1861, and in 1862, and in the present application, Lakhikant and Bepin Behari executed this decree so far as their shares of it were concerned; but between the 13th June 1859 and the 8th January 1868, Nabin took no proceedings in execution. On this state of facts it is contended that the proceedings of the two share-holders of 1861 and 1863, even if they be good in law, are not sufficient to keep alive the decree so far as regards the share of Nabin. Reading the provisions of section 20, Act XIV. of 1859, together with those of section 207 of Act VIII. of 1859, and looking to the precedents of this Court which Mr. Justice Bayley has quoted, and which I agree with him in thinking to be in point, I am of opinion that the first objection is not tenable.

The second objection is that the proceeding of the 30th December 1861 was not a proceeding in good faith, and, therefore, that it was not, under the Full Bench ruling, a proceeding sufficient to keep the decree alive; but looking to the record of this case and to the judgment of the Courts below, it is quite clear that this objection was not taken in those Courts in the shape in which it is now taken here; and as it is an objection which depends upon facts which had to be found, and have not been found, I think, that we cannot entertain it in special appeal.

The result, then, of our decision is, that all these appeals are dismissed with costs.

Before Mr. Justice Norman and Mr. Justice E. Jackson.

NITTA KOLITA AND OTHERS (PLAINTIFFS) *v.* BISHURAM KOLITA (DEFENDANT.)*

1869
April. 16

Limitation—Act VIII. of 1859, *s.* 246.

Certain lands were attached under a decree against the ancestor of the plaintiffs, but on the intervention of the defendant, under section 246, Act VIII of 1859, they were released to him.

* Special Appeal, No. 2947 of 1868, from a decree of the Judicial Commissioner of Assam, dated the 5th August 1868, affirming a decree of the Moonsiff of Gowhati, dated the 6th June 1868.

(1) S. D. R., 1856, 243.