APPELLATE CIVIL.

Before the Hon'ble Mr. R. F. Rampini, Acting Chief Justice, and Mr. Justice Sharfuddin.

BALBHADRA

v.

BHOWANI.*

1907
June 10.

Jurisdiction—Second Appeal—High Court, jurisdiction of—Sambalpore—Bengal and Assam Laws Act (VII of 1905), s. 6—Gift—Transfer of Property Act (IV of 1882) s. 123—Registered deed of gift, unaccompanied by delivery of possession, whether valid.

An appeal was preferred to the High Court against the decision of the Divisional Judge of Raipore, C. P., disposing of an appeal against the decision of the District Judge of Sambalpore, after the 16th of October 1905, on which date the Bengal and Assam Laws Act (VII of 1905) came into force, and the District of Sambalpore was added to the Province of Bengal by a Proclamation of the Governor-General. On preliminary objections being taken that no second appeal lay in the case under the provisions of s. 15 of the Central Provinces Courts Act (II of 1904), and that the second appeal, if any, lay to the Judicial Commissioner of the Central Provinces under section 6 of Act VII of 1905:—

Held, that although the Central Provinces Courts Act (II of 1904) did not expressly provide for a second appeal from the decision of the Divisional Judge to the Judicial Commissioner, yet such an appeal formerly lay under the provisions of section 584 of the Code of Civil Procedure (Act XIV of 1882) to the Judicial Commissioner of the Central Provinces, but now, after the passing of the Bengal and Assam Laws Act (VII of 1905), to the High Court.

Held, further, that a registered deed of gift, unaccompanied by delivery of possession, is valid by virtue of the provisions of section 123 of the Transfer of Property Act.

Dharmodas Das v. *Nistarini Dasi*(1), *Bai Rambai* v. *Bai Mani*(2) and *Phul Chand* v. *Lakkhu*(3) followed.

SECOND APPEAL by the plaintiffs, Balbhadra and others.

This appeal arose out of an action brought by the plaintiffs for the cancellation of a deed of gift. Their allegation was that

* Appeal from Appellate Decree, No. 2510 of 1905, against the decree of D. Campbell, Divisional Judge of Raipur, dated Aug. 22, 1905, affirming the decree of Raghu Nath Das, District Judge of Sambalpore, dated Dec. 21, 1904.

(1) (1887) I. L. R. 14 Calc. 446. (2) (1898) I. L. R. 23 Bom. 234.
(3) (1903) I. L. R. 25 All. 358.

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they were the reversioners to the estate of one Hari Suar deceased, consisting of two houses and other properties in the district of Sambalpore; that defendant No. 1, who was in possession of the said estate, and to whom it came from Musammat Marhi, widow of Hari Suar, executed a registered deed of gift of the property of Hari Suar in favor of her daughter, Musammat Janhavi, defendant No. 2, that Musammat Janhavi was no heir to Hari Suar under the Hindu Law; and that they being the reversioners after the defendant No. 1, the gift was void as against them, as defendant No. 1 was not competent under the Hindu Law to make such a gift. Hence the present suit was brought for a declaration that the gift was void as against them, and for the cancellation of the instrument.

Defence, *inter alia*, was that such gifts are allowed by Hindu Law; that a sister is an heir according to law and custom prevalent in the province; that the deed of gift was not accompanied by delivery of possession and was void under the Hindu Law, and could not therefore create or extinguish the rights of any person; and that the deed was practically cancelled by the subsequent sale of village Topapara, which formed a considerable portion of the said estate.

The Court of first instance, holding that the gift was invalid as it was not completed by delivery of possession, and that as the gift was a mere nullity there could be no present danger or injury to the interests of the plaintiffs to be averted by the declaration, dismissed the plaintiff's suit. On appeal, the learned Divisional Judge affirmed the decision of the District Judge.

Against that decision the plaintiffs now appealed to the High Court.

Babu Mahendra Nath Roy (*Babu Krishna Prasad Sarbadhikary* with him), for the respondents, raised two preliminary objections:—*First*, that no second appeal lay in the case, as section 15 of the Central Provinces Courts Act (II of 1904) does not provide at all for such appeals. *Secondly*, that the appeal, if any, would lie to the Court of the Judicial Commissioner of the Central Provinces, and not to the High Court: see Bengal and Assam Laws Act (VII of 1905) s. 6. As the suit out of

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which this appeal arises, was a proceeding pending in the Central Provinces at the commencement of the passing of the Act, so the appeal ought to have been preferred to the Court of the Judicial Commissioner of the Central Provinces. After the passing of the Act IV, B. C., of 1906, which repealed the Central Provinces Courts Act (II of 1904) and became operative on the 1st January 1907, the appeal could be preferred in this Court. He also contended that *Harabati* v. *Satyabadi Behara*(1) was not correctly decided.

Babu Satis Chunder Ghose, for the appellants, contended that an appeal lay from the decision of the Divisional Judge to the Judicial Commissioner of the Central Provinces. Although the Central Provinces Courts Act (II of 1904) does not expressly provide for a second appeal from the decision of the Divisional Judge to the Judicial Commissioner, yet such an appeal lies under the provisions of s. 584 of the Code of Civil Procedure. Clause (24) of section 3 of the General Clauses Act (X of 1897) lays down that the "High Court" shall mean "the highest Civil Court of appeal in the part of British India," and thus the Court of the Judicial Commissioner comes within the expression "High Court" in section 584 of the Civil Procedure Code. Thus an appeal must lie from the decree of the Court of the Divisional Judge to the Court of the Judicial Commissioner, to which it is subordinate; and after the 16th October 1905, such an appeal must lie to this Court, to which the Court of the Divisional Judge has been made subordinate by the Bengal and Assam Laws Act (VII of 1905).

As regards the second objection he contended that the district of Sambalpore was added to the province of Bengal by the Proclamation of the Governor-General in Council, and also by the Bengal and Assam Laws Act (VII of 1905) which came into force on the 16th October 1905, and it is further provided in Schedule D of Part II of the Act, that the words "Judicial Commissioner" of the Central Provinces shall be construed as if meaning "the High Court of Judicature in Bengal;" hence the appeal should after the 16th October, 1905, be preferred to

(1) (1907) I. L. R. 34 Calc. 636; 5 C. L. J. 550.

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this Court. He relied on the case of *Harabati* v. *Satyabadi Behara*(1). He further submitted that the matter is one of "procedure" only, and not a "judicial proceeding," and the amending Act will govern the case.

As to the merits of the case, his contention was that the deed of gift being a registered one, was valid, whether accompanied by possession or not; and thus the plaintiffs had a cause of action and a right to have the deed declared null and void as against them. He relied on s. 123 of the Transfer of Property Act (IV of 1882), and referred to the cases of *Dharmodas Das* v. *Nistarini Dasi*(2), *Bai Rambai* v. *Bai Mani*(3) and *Phul Chand* v. *Lakkhu*(4).

Babu Mahendra Nath Roy, for the respondents, submitted that s. 123 of the Transfer of Property Act (IV of 1882) has been interpreted in a different way in the Central Provinces; there it has been held that a deed of gift is invalid, unless accompanied by delivery of possession; and, *secondly*, even if the deed was valid, it was practically cancelled by the subsequent sale of a considerable portion of the property which was the subject-matter of the suit. Thus the deed was not at all injurious to the rights of the reversioners, and gave them no cause of action to have the deed declared null and void.

Cur. adv. vult.

RAMPINI, A.C.J. AND SHARFUDDIN J. This is an appeal from a decision of Mr. Campbell, the Divisional Judge of Raipore, dated the 22nd August 1905, affirming a decision of Mr. Raghu Nath Das, the District Judge of Sambalpore, dated the 2nd December 1904.

A preliminary objection has been urged to the hearing of this appeal on the ground (i) that the appeal, if any, lies to the Judicial Commissioner of the Central Provinces and (ii) that no second appeal lies in the case under the provisions of section 15, Act II of 1904 (The Central Provinces Courts Act, 1904).

(1) (1907) I. L. R. 34 Calc. 636.
(2) (1887) I. L. R. 14 Calc. 446.
(3) (1898) I. L. R. 23 Bom. 234.
(4) (1903) I. L. R. 25 All 358.

The district of Sambalpore was part of the Central Provinces until the 16th October 1905. It was then added by Proclamation of the Governor-General to the Province of Bengal, and by Act VII of 1905 which came into force on the 16th October 1905, it is provided in Schedule D, Part II, that in construing enactments in force in the district of Sambalpore, the words "Judicial Commissioner" of the Central Provinces shall be construed as if meaning "the High Court of Judicature in Bengal." Hence, it would seem that, if an appeal lay from the decision of the Divisional Judge of Raipur to the Judicial Commissioner of the Central Provinces, it should after the 16th October 1905 be preferred to this Court.

The question then arises "did any appeal lie from the decision of the Divisional Judge to the Judicial Commissioner of the Central Provinces?" The Act in force, when this appeal was preferred was Act II of 1904. It was repealed no doubt by Act IV of 1906, but this latter Act did not become operative till the 1st January 1907. The appeal to this Court was preferred on the 21st December 1905. Hence, the provisions of Act II of 1904 and of the Code of Civil Procedure would seem to govern the case. Now, it would appear that, though under the provisions of Act II of 1904 no second appeal expressly lies from the decision of the Divisional Judge to the Judicial Commissioner, yet such an appeal lies under the provisions of section 584 of the Code of Civil Procedure. This section enacts that "unless when otherwise provided by this Code or any other law, from all decrees passed in appeal by any Court subordinate to a High Court, an appeal shall lie to the High Court" on the grounds specified in the section. Now it would seem that under clause 24, section 3 of the General Clauses Act (X of 1897), which reproduces the definition of High Court given by section 2 (11) of the General Clauses Act of 1868, the Court of the Judicial Commissioner comes within the expression "High Court" in section 584, Civil Procedure Code. So that, as the Court of a Divisional Judge was subordinate to the Court of the Judicial Commissioner, and since the passing of Act VII of 1905 it is subordinate to this Court, both before and since the passing of Act VII of 1905, second appeals must lie from the decisions of the Divisional Judge, formerly to

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the Judicial Commissioner and now to this Court. We are fortified in this conclusion by reference to the Nagpur Law Reports, in which we find numerous reports of cases in which second appeals from the decisions of the Divisional Judge were heard and decided by the Judicial Commissioner of the Central Provinces. We therefore overrule the preliminary objection and proceed to consider the appeal on its merits.

The facts of the case are that the plaintiffs are reversionary heirs to the estate of one Hari Suar deceased—which estate is now in the possession of the defendant No. 1, Musummat Bhowani, to whom it came from Musummat Marhi, widow of Hari Suar. On the 14th June 1902, the defendant No. 1 executed a registered deed of gift of the property of Hari Suar in favour of her daughter, Musummat Jahnavi. The suit is brought by the plaintiffs to obtain a declaration that this deed of gift is void as against them as reversioners. The Court below has dismissed the suit on the ground that the deed of gift, being unaccompanied by delivery of possession is invalid, and can do the plaintiffs no harm.

The plaintiffs appeal and rely on section 123 of the Transfer of Property Act, according to which, it is contended the deed of gift being registered is valid whether accompanied by possession or not. This contention would appear to be correct, and this has also been laid down as the law in *Dharmodas Das* v. *Nistarini Dasi*(1), *Bai Rambai* v. *Bai Mani*(2), and *Phul Chand* v. *Lakkhu*(3).

The respondent's pleader, however, argues (i) that the law as interpreted in the Central Provinces is that, notwithstanding the terms of section 123 of the Transfer of Property Act, a deed of gift is invalid unless accompanied by possession and that possession of the property affected by the deed of gift in question was not delivered to the donee, (ii) that the gift was never accepted by Jahnavi, and (iii) that the deed was practically cancelled by the subsequent sale of the village of Topapara. But the law cannot be altered by an erroneous interpretation put upon it by the Courts of the Central Provinces. Possession of the property may not have been given (though there is a recital

(1) (1887) I. L. R. 14 Calc. 446. (2) (1898) I. L. R. 23 Bom. 234.
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in the deed that it has), the gift may not have been accepted by Jahnavi (though there is no finding to this effect), and the village of Topapara may have been sold (though the gift was not expressly cancelled), but notwithstanding all this, the execution of the deed of gift would seem to be injurious to the rights of the reversioners and gives them a cause of action and a right to have the deed declared null and void as against them. The execution of the deed raises a cloud upon their reversionary rights, which under section 39 of the Specific Relief Act is enough to justify their bringing this suit. In fact, the tenacity with which the respondents have resisted the suit and the persistency with which they have maintained that the deed is invalid, but that the plaintiffs have no right to sue to set it aside, are sufficient to show that the plaintiffs have very reasonable grounds for apprehending that it is intended at some future time to use the deed to their injury.

For these reasons, we consider the plaintiffs have a good cause of action and a right to the relief sought for.

We accordingly decree this appeal with all costs.

Appeal allowed.

S. C. G.