Privy Council Appeal No. 79 *of* 1927.

Bengal Appeal No. 57 *of* 1925.

Srimati Hemlata Debi - - - - - - *Appellant*

v.

Satya Charan Banerji and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH MARCH, 1928.

Present at the Hearing:

LORD SHAW.
LORD ATKIN.
LORD SALVESEN.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD SALVESEN.]

This is an appeal from a judgment and decree dated the 29th April, 1925, in the High Court of Judicature at Fort William in Bengal, which reversed a judgment and decree dated the 25th May, 1923, of the Additional Subordinate Judge of Howrah.

The appellant is the daughter and sole heir of her father, Kedar Nath, and the respondents are the representatives of his deceased elder brother, Tincouri. These brothers were members of a Hindu joint family governed by the Dayabhaga Law. They carried on a business jointly and possessed movable and immovable property. Tincouri, as the elder brother, had the right of management of the joint properties; but under the law in question on the death of a joint owner it is common ground that his share in the properties does not pass to the survivor but to his own heirs.

In 1897 Kedar Nath commenced a suit for partition of the joint properties, but the suit was amicably settled and a decree in accordance with the compromise was made on the 23rd December

1897. The effect of the compromise was that the share of Kedar Nath in all the joint properties was fixed at 6 annas, and that of his brother Tincouri at 10 annas, the properties being left joint as before.

In 1899 a further dispute arose between the brothers which was settled by the execution of an annuity bond dated the 23rd March, 1899. It is on the true construction of this document, as to which the Courts below have differed, that the decision of the questions in controversy depends.

The bond of annuity proceeds on the narrative that the two brothers were desirous of getting their movable and immovable properties partitioned between them, but that instead of partitioning them out in accordance with the compromise previously effected, Kedar Nath gave his whole share to his elder brother Tincouri and his heirs on a series of conditions which are set forth at length. The leading provision was that a sum of Rs. 40 per month should be paid by Tincouri to Kedar Nath and after his death to his widow, as representing the profits of his share of the movable and immovable properties. Clause 3 of the bond, however, provided as follows :—

> "3. If Tinkari Bandyopadhyaya, or after his death, his heirs, make default in payment of the said monthly sum of Rs. 40, then Kedarnath Bandyopadhyaya or his wife will be competent to partition out the immovable properties of his share and to transfer the same by sale, gift, etc., at his or her pleasure. (He) is to receive from Tinkari Bandyopadhyaya or his heirs the sum of Rs. 2,000, two thousand on account of the price of the movable properties (and) Tinkari Bandyopadhyaya or his heirs shall be bound to pay the same ; if the same be not paid then Kedarnath Bandyopadhyaya or his wife will be entitled to realisethe same from the movable and immovable properties of Tinkari Bandyopadhyaya or his heirs."

It was also provided, Clause 4, that so long as Kedar Nath or his wife received the said monthly sum of Rs. 40, he or she should not have any power to transfer by sale, gift, &c., or to encumber his share of the properties.

The bond, however, was also in the nature of a family settlement after Kedar Nath's death. By Clause 6 it was provided:—

> "6. If a son be born to Kedarnath Bandyopadhyaya then that son shall receive the sum of Rs. 2,000, two thousand, which is the price of the movable properties and the immovable properties of his share ; (he), however, will be bound to pay the value of the aforementioned improvement in accordance with his share. God forbid, if no son be born, then after the death of Kedarnath Bandyopadhyaya and his wife, his daughter or daughter's son or daughter shall get from Tinkari Bandyopadhyaya or his heirs the sum of Rs. 2,000, two thousand only, and shall not be competent to claim any other property ; Tinkari Bandyopadhyaya or his heirs shall get all the properties of Kedarnath Bandyopadhyaya's share and shall hold and enjoy the same at their pleasure with powers to transfer the same by sale, gift, &c. If Tinkari Bandyopadhyaya or his heirs fail to pay the said sum of Rs. 2,000, two thousand, then the aforesaid daughter or daughter's son or daughter shall get the immovable properties of Kedarnath Bandyopadhyaya's share ; and to this neither Tinkari Bandyopadhyaya, nor his heirs shall have any objection."

The only other material clause is 8, which is in the following terms :—

"8. If Tinkari Bandyopadhyaya or after his death his heirs fail to pay the said monthly sum of Rs. 40, forty, to Kedarnath Bandyopadhyaya, or after his death to his widow, then according to the terms of the Solenama Kedarnath Bandyopadhyaya or his widow will be competent to partition out, by arbitration, the immovable properties of Kedarnath Bandyopadhyaya's share. If Tinkari Bandyopadhyaya or his heirs fail to pay the sum of Rs. 2,000 to Kedarnath Bandyopadhyaya's daughter or to the son or daughter of such daughter after the death of Kedarnath Bandyopadhyaya and his wife, then the said daughter or the son or daughter of such daughter will be competent to partition out, by arbitration, the immovable properties of Kedarnath Bandyopadhyaya's share (and) to this Tinkari Bandyopadhyaya or his heirs shall not be competent to raise any objection. Tinkari Bandyopadhyaya shall, before the registration of this document, have all the *hatchittas*, bonds, &c., which stand in the names of both the brothers, rewritten and made out in his own name."

Kedar Nath was predeceased by his wife, and he himself died in 1920, leaving a daughter, the appellant, who is his sole heir, and admittedly entitled to succeed to any property that was vested in him at the date of his death. It is not disputed that if Tincouri had fulfilled the terms of the bond, so far as incumbent upon him the appellant under Clause 6 of the contract could not have recovered more than Rs. 2,000 on payment whereof the whole of Kedar Nath's properties passed to his elder brother Tincouri and his heirs. This, however, was not what actually occurred, for Tincouri, after April, 1915, ceased to pay any portion of the annuity of Rs. 40 per month, which he had undertaken to pay to his brother during his life time. Kedar Nath thereupon consulted a pleader who, on the 30th June, 1915, wrote to Tincouri intimating that as a consequence of the failure to pay the monthly allowance the latter had forfeited his right under the bond of annuity, and that Kedar Nath was entitled to have the joint immovable property partitioned and to receive payment of Rs. 2,000 on account of the movable properties. He accordingly demanded on behalf of his client partition of the joint properties and payment of the Rs. 2,000 in question. It has been found as a fact by both Courts that this letter was duly received.

No legal proceedings were taken for the partition of the properties, but certain documents which have been produced show that Tincouri acknowledged the justness of his brother's claim to partition on his failure to fulfil the terms of the bond.

Thus on the 26th August, 1915, Tincouri executed a mortgage in favour of his brother Kedar Nath of the 10 annas share belonging to him of certain of the joint properties to secure payment of a loan of Rs. 5,000, the receipt of which is acknowledged in the mortgage. He appears to have paid off a portion of the sum so borrowed, but being unable to pay the balance of Rs. 1250 he, on 8th May, 1916, executed a kobala of sale of his share in certain of the joint properties of the brothers; the market price of the share, as stated in the document, having been ascertained to be Rs. 3,500. The consideration of this sale is stated in the schedule

to consist of Rs. 1,250 on account of the mortgage bond, Rs. 250 on account of hand notes, and Rs. 2,000 on account of the annuity bond. There has been some difference of opinion as to what this Rs. 2,000 represented ; but their Lordships entertain no doubt that it was the payment which Kedar Nath was entitled to in respect of his share of the movable properties which had been jointly held by the brothers. There is also documentary evidence that Kedar Nath let the properties so acquired from his brother, and there is no question but that these properties have passed transmitted to the appellant as her father's heir. A large number, however, of the other properties which belonged jointly to the brothers have not been partitioned, and accordingly the present suit was instituted by the appellant for partition of these properties and for the recovery of specific possession of a 6 annas share thereof.

In the lower Courts varying defences on the merits were considered and disposed of, which, as they depended upon facts on which both Courts were agreed, need not be considered. The only question that remains in controversy is whether, notwithstanding the failure on the part of Tincouri to pay the stipulated annuity, Kedar Nath's daughter is excluded under Clauses 6 and 8 of the bond of annuity from her right to succession to the immovable properties in which her father had a 6 annas share, and which had not been partitioned. The Subordinate Judge held that she was not so excluded and gave judgment in favour of the appellant. The Judges of the High Court came to the conclusion that Clause 6 of the bond of annuity, taken along with Clause 8 :—

> " was intended to provide for the events which have happened, namely, to provide that irrespective of the default, Kedar Nath's daughter's rights are restricted to the sum of Rs. 2,000 unless Kedar Nath has chosen to exercise his rights under the document of having a partition and receiving the payment of Rs.2,000, but this event has not happened. Therefore, in my view, under the provisions of Clause 8, the plaintiff is only entitled to receive in full satisfaction of her claim as Kedar's heir the sum of Rs. 2,000."

Their Lordships are unable to accept this construction of the document. The gift to Tincouri is conditional on the fulfilment by him of the obligations which he undertook in the bond and express provision is made for his failure to pay the annuity by Clause 3. In that event it is stated that " Kedar Nath or his wife will be competent to partition out the immovable properties of his share and to transfer the same by sale, gift, &c., at his or her pleasure and receive from Tincouri or his heirs the sum of Rs. 2,000 on account of the price of the movable properties."

The effect of this provision was to abrogate the conditional gift in favour of his brother and to leave him as absolute owner of his 6 annas share in the whole of the joint properties. It does not appear material to their Lordships that he did not exercise this right during his life time. As regards the properties dealt with in the deeds to which reference has already been made, he undoubtedly did exercise this right and it is noteworthy that

the High Court have fallen into an error with regard to the payment of the Rs. 2,000 in respect of the movable properties in the passage in which the Hon. Sir W. E. Greaves says: "But in fact, no partition took place, and the sum of Rs. 2,000 was not in fact paid, although certain properties were sold by the brothers and the proceeds divided in the proportion of 6 annas to Kedar Nath and 10 annas to Tincouri." As already pointed out, this sum of Rs. 2,000 was paid and was part of the consideration which Tincouri received for his 10 annas share in the land which he made over to his brother.

Notwithstanding that Kedar Nath remained during his life time the undivested owner of his share in the joint properties, the terms of the other clauses in the bond might be held to exclude his daughter from any share in these properties on his death. If, therefore, Article 6 had expressly provided that, whether Tincouri did or did not pay the annuity Kedar Nath's daughter's rights in his succession should be discharged on payment of Rs. 2,000, the appellant's suit would have failed. Clause 6, however, does not so provide in terms, and their Lordships are clearly of opinion that it proceeds on the assumption that the obligations of Tincouri had been duly fulfilled up to the date of Kedar Nath's death. This is plainly so as regards the earlier part of Clause 6, which deals with the succession in the event of Kedar Nath having a son. There is no ground for implying a contrary assumption in construing the remainder of the clause, which relates to Kedar Nath's daughter, and, indeed, it would have been strange if the failure of the main consideration in respect of which the conditional gift to Tincouri was made should have no effect on the daughter's rights. Clause 8 of the contract, on which so much reliance is placed by the High Court, merely provides for the partition being by arbitration instead of in the course of legal proceedings in the two events which are there specified. Apart from this the clause is a mere repetition of what is already provided for in Clauses 3 and 6.

Their Lordships therefore hold that the High Court erred in the construction which they put upon the bond of annuity, and that the decision of the Subordinate Judge, which they reversed, was right. They will therefore humbly advise His Majesty that the appeal should be sustained, that the decree of the Subordinate Judge should be restored, and that the appellant should have her costs both in this Court and in the Courts below.

In the Privy Council.

SRIMATI HEMLATA DEBI

v.

SATYA CHARAN BANERJI AND OTHERS.

DELIVERED BY LORD SALVESEN.

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