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appellants that the meaning of that judgment is that in no case can separation be found unless there is evidence of a separate enjoyment of profits. We do not think that is the meaning of the judgment. In fact, in the passage quoted, the learned Judges say: "a definement of the shares followed by entries of separate interests in the revenue-records in some estate only is an important piece of evidence towards proving separation." From evidence of that kind, in our judgment, if there is nothing to explain it, separation as to the estate in respect of which there has been a definement of shares followed by entries of separate interests in the revenue-records may be inferred. If the case now before us had been before those learned Judges, they would probably have so worded their judgment that no one might infer that in all cases proof of separate enjoyment of profits was absolutely necessary. To hold that there could be no separation proved in the case of property in the hands of mortgagees unless proof could be given of separate enjoyment, would be to hold that a joint family whose sole property was in the hands of mortgagees could not, during the currency of the mortgage, effect or prove separation. We think that the learned Judges in the case to which we have referred were only dealing with the case before them, and did not intend to lay down rules of universal and exclusive application. This is a second appeal. The Judge in our opinion has shown by his judgment that he perfectly understood the law. There was documentary and oral evidence before him to prove the separation, and we cannot in second appeal question the findings of fact: we dismiss the appeal with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

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May, 10.

KANHIA (PLAINTIFF) *v.* MAHIN LAL (DEFENDANT).*

Hindu widow—Gift of immoveable property by husband—Life-interest—Heritable interest—Alienable interest—Appeal—Practice—Change of pleading in appeal.

The plaintiff, alleging himself to be joint in estate with *A*, his grand-uncle, sued to set aside an absolute gift of the house in suit made by *A* in favor of his wife, as also the subsequent sale of the house by the wife to the defendant. The lower appellate Court, finding that *A* was separate in estate from plaintiff and the sole and exclu-

* Second Appeal No. 42 of 1887 from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Agra, dated the 25th November, 1886, reversing a decree of Babu Baij Nath, Munsif of Agra, dated the 8th April, 1886.

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sive owner of the house held, the gift to the wife and the sale by her to defendant valid and dismissed the suit. On appeal to this Court plaintiff contended that he was the heir of the donee and that under the deed of gift she had no power to alienate.

Held, that the case put forward in second appeal being totally different from that which was originally put forward and tried, the appeal should be dismissed.

Held further that from the wording of the deed of gift it appeared that the husband intended to give and did give to his wife an heritable estate in and power of alienation over the property the subject of the gift and therefore the sale by the wife was valid.

Kunjbehari Dhar v. *Prem Chand Datt* (1) referred to.

Aman Singh, a Hindu, made an absolute gift of a house of which he was the owner to his wife Ramo. In the deed he said:—"I, my issues, relations, shall have no claim in respect of the house against the donee or her heirs, and if any of my heirs does so the claim shall be false." Upon the death of Aman Singh, his widow, on the 24th December, 1885, sold the house to the defendant Mahin Lal. Plaintiff as grand-nephew of Aman Singh, alleging himself to be joint in estate with him, instituted the suit to set aside the gift made by him to his wife and also to eject the defendant purchaser from the widow from the house.

The Munsif, holding that Aman Singh was competent to make a valid gift of the house to his wife, observed that she had no larger power to alienate it than if she had inherited it from her husband, and decreed that the gift to the wife and the sale by her were only valid during her lifetime and would not affect the reversionary rights of the plaintiff.

On appeal the learned Subordinate Judge found that Aman Singh was separate in estate from plaintiff and the sole and exclusive owner of the house in dispute, and therefore had a perfect right to make an absolute gift to his wife, which he did, and that his wife was free to exercise her uncontrolled power of alienation over the property in dispute. He therefore dismissed the suit.

On second appeal it was contended that it has not been shown that the house in dispute was the wife's *stridhan*, and that even then she could not absolutely alienate it.

Hon. Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the appellant.

(1) I. L. R., 5, Calc., 684.

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Mr. *Abdul Majid* and Pandit *Moti Lal*, for the respondent.

EDGE, C. J.—In this case the plaintiff brought his action to set aside a deed of gift and a deed of sale. The deed of gift was made by the husband of Musammat Ramo in her favour. It was a gift of immoveable property. But the plaintiff alleged as the foundation of his case that the property was the joint family property of her husband and himself or his predecessors, and he claimed to have the deed of gift avoided on the ground that, under the circumstances, the donor could not give the property in question to his wife. He also asked to get possession of the property.

Now it has been found that the property in question was not joint family property, and that it was in fact separate property of the husband. Under the circumstances, the plaintiff failed to prove the case on which he came into Court. He, however, comes here in second appeal, alleging that he is the heir of the donee, and that she had, under the deed of gift, no right of alienation. It is needless to observe that this is a totally different case from the case that he originally made. It involves different considerations of facts and of law. In the case as now put forward questions would arise as to whether the plaintiff was in fact the heir of the donee or whether he was the heir of her husband. However, although I think that the appeal ought to be dismissed on the ground that it is a totally different case from the case which was put forward and tried, I think that even on the case as put before us the appeal ought to be dismissed.

I am of opinion that the donor intended to give and did give an heritable estate and power of alienation to the donee by the deed of gift. He says :—"I, my issues, relations, shall have no claim in respect of the house against the donee or her heirs, and if any of my heirs does so the claim shall be false."

It appears to me that his intention was that he, the donor, should not, nor should any heirs of his, interfere with the enjoyment and disposal of the property the subject of the gift. Jackson, J., in delivering judgment in the case of *Kunjbehari Dhur* v. *Premchand Dutt* (1), said as follows :—

"We understand it to be a rule of law, well established in this Court, that a Hindu wife takes, by a will of her husband, no more

(1) I. L. R., 5, Calc., 684 at p. 687.

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absolute right over the property bequeathed than she would take over such property if conferred upon her by gift during the life time of her husband; and that, whether in respect of a gift or a will, it would be necessary for the husband to give her in express terms a heritable right or power of alienation."

The ruling recognises the conclusion that if the power of alienation is given, the power can be exercised, and it also is consistent with the rule of law laid down in paragraph 571 of Mayne's Hindu Law, 3rd. ed., where the author says :—

"Immoveable property, when given by a husband to his wife, is never at her disposal, even after his death. It is her *stridhanum*, so far that it passes to her heirs, not to his heirs. But as regards her power of alienation, she appears to be under the same restrictions as those which apply to property which she has inherited from a male. Of course it is different if the gift is coupled with an express power of alienation."

I have said that if the power of alienation is given to the wife by the husband in any portion of his separate property, it follows that she has the power to alienate it.

Under the circumstances, I think that the appeal should be dismissed with costs.

TYRRELL, J.—I concur.

Appeal dismissed.

1888
May 14.

Before Mr. Justice Straight and Mr. Justice Mahmood.

RAMPHAL RAI AND OTHERS (DEFENDANTS) *v.* RAGHUNANDAN PRASAD (PLAINTIFF).*

Public thoroughfare—Obstruction—Right to sue—Special damage—Lease—Right of lessee to sue—Trespass.

The plaintiff, a holder of a ten years' lease of the share and rights of one of the co-sharers of a village, sued for the demolition of certain buildings and constructions on a plot of land within the area of the village, on the ground that the public have been very much inconvenienced in going to and coming from the road and in taking carts, carriages, cattle, &c., and that he by reason of his own inconvenience, and also as lessee in possession of the entire rights of his lessor, has legally and justly a right to bring

* Second appeal No. 1371 of 1886, from a decree of Munshi Matadin, Subordinate Judge of Ghazipur, dated the 28th February, 1886, confirming a decree of Maulvi Inamul Huq, Munsif of Ballia, dated the 24th December, 1885.