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known facts. And he does not even know that Sheobaran ever sued for a partition.

The High Court say that the plaintiff's witnesses must have known of the custom if it had existed, and ought to be believed. But people who knew nothing of the gaddi custom or of actual installations are not likely to have known or cared anything about the custom of inheritance. There need be no imputation on their veracity, for, with the exception of Hari Ram, they only speak to negatives, and are guilty of nothing worse than the common error of assuming the non-existence of that which is not known to them.

Their Lordships conclude that there is no contradiction of the defendant's case; and that the propositions of the Subordinate Judge are established by sufficient proof. All the lines of evidence here examined converge upon the same point. Perhaps no one of them would, if standing alone, be conclusive in favour of the defendant's case; but taken as a whole they are conclusive. The High Court should have dismissed the plaintiff's appeal, and it is now right to discharge their order and to restore that of the Subordinate Judge, and to direct that the respondent shall pay the costs of his appeal to the High Court. Their Lordships will humbly advise Her Majesty to this effect. The respondent must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant *Messrs. White* and *DeBuriaëtte.*

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July 13.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

MATHURA DAS AND OTHERS (DEFENDANTS) *v.* BHIKHAN MAL AND OTHERS (PLAINTIFFS).*

Interpretation of document—Devise by a Hindu in favour of a female—Presumption as to intention of testator concerning the estate to be taken by the devisee.

One M. R., a separated Hindu, died in 1862, leaving him surviving two daughters and a daughter-in-law, Musammat Sohni, the widow of a pre-deceased son.

* First Appeal No. 167 of 1894, from a decree of Pandit Bansi Dhar, Subordinate Judge of Meerut, dated the 18th May 1894.

During his lifetime M. R. had caused to be recorded in the *wajib-ul-arzes* of two villages, D. and A., owned by him—"Musammat Sohni, wife of my son Salig Ram, shall be regarded as owner after my death." In the *wajib-ul-arz* of a third village the following entry was recorded—"After my death Ganga Sahai the adopted son, and Musammat Sohni, the wife of Salig Ram, shall have a right to the property."

Subsequently to the death of M. R. the nature of the estate taken by Musammat Sohni in the villages D. and A. came before a Court of law and Musammat Sohni did not challenge the decree which was then passed declaring her interest to be only a life estate.

Held that under the above circumstances and having regard to the sentiments prevalent amongst Hindus on the subject of the devolution of immovable property upon females, the devise of the villages D. and A. must be taken to convey an estate for life only and not the absolute ownership in the villages. *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (1) and *Moulvie Mahomed Shumsool Hooda* v. *Shewukram* (2) referred to. *Hira Bai* v. *Lakshmi Bai* (3) and *Koonj Behari Dhur* v. *Prem Chand Dutt* (4) considered.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* and Munshi *Ram Prasad* for the appellants.

Mr. *D. N. Banerji*, Babu *Durga Charan Banerji* and Pandit *Baldeo Ram Dave* for the respondents.

BANERJI and AIKMAN, JJ.—The suit in which this appeal has arisen relates to the estate of one Moti Ram, a separated Hindu, who died in 1862, leaving him surviving two daughters and a daughter-in-law, Musammat Sohni, the widow of a predeceased son. On Moti Ram's death Musammat Sohni took possession of the estate, and remained in possession till her death on the 16th of September, 1881. The daughters of Moti Ram died during the lifetime of Sohni. Upon her death the defendants obtained mutation of names in their favour and took possession of the property, which is still in their possession.

The present suit was instituted on the 25th of August 1893, by three out of the five sons of Moti Ram's daughters. They claim a three-fifths share of the property, together with mesne profits, on

(1) 6 Moo. I. A., 526.
(2) L. R. 2 I. A., 7.
(3) I. L. R., 11 Bom., 573.
(4) I. L. R., 5 Calc., 684.

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the allegation that they are entitled to that share and have been wrongfully kept out of possession. The first two defendants are the remaining grandsons of Moti Ram. The other defendants are the descendants of his brother Hulas Rai.

The main defence to the suit was limitation, the defendants urging that the possession of Musammat Sohni was adverse to the plaintiffs. Ganga Sahai, the second defendant, raised a further plea to the effect that he had been adopted by Moti Ram.

The Court below found on both points in favour of the plaintiffs and made a decree in their favour. The defendants have appealed, and they have repeated in their memorandum of appeal the grounds on which they contested the claim in the Court below.

There can be no question, and it is indeed conceded, that as the inheritance to Moti Ram's estate opened out in 1862, the plaintiffs' claim would be barred by the law of limitation, unless they could pray in aid the estate held by Musammat Sohni after Moti Ram's death. The whole question therefore hinges on the nature of that estate. As the husband of Musammat Sohni predeceased Moti Ram, she was not entitled to succeed to Moti Ram's property by right of inheritance. The plaintiffs state in their plaint that she obtained possession under the will of Moti Ram recorded in the administration paper of two villages, and that the estate conferred on her by the will was that of a Hindu widow, which terminated on her death. In the *wajib-ul-arz* of Daryapur Moti Ram caused the following statement to be recorded:—"Musammat Sohni, wife of my son Salig Ram, shall be regarded as the owner (*malik*) after my death." A similar entry was made in the *wajib-ul-arz* of Alawalpur, with the addition of the words—"No other person shall have anything to do with this property." Both parties are agreed that the statements recorded in the *wajib-ul-arzes* amounted to a testamentary bequest in favour of Sohni. They differ as to the nature of the estate devised to her. Whilst the plaintiffs contend that the said estate was that of a Hindu widow, it is urged on behalf of the defendants that an absolute gift was made in favour of Sohni

under the will of Moti Ram. We have therefore to construe the said will.

The rule as to the construction of the will of a Hindu was thus stated by their Lordships of the Privy Council in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (1):—"The Hindu law no less than the English law points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made and the dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption."

In *Moulvie Mahomed Shumsool Hooda* v. *Shewukram* (2) their Lordships observed:—"In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, specially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate."

Bearing these observations of their Lordships of the Privy Council in mind, we have to construe the will of Moti Ram.

(1) 6 Moo. I. A. 526, at p. 550. (2) L. R., 2 I. A., 7 at p. 14.

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We are unable to agree with the contention of the learned counsel for the respondents that every bequest in favour of a Hindu widow should be regarded as the bequest of a life estate only, unless the contrary appears from the terms of the testamentary instrument. In *Hira Bai* v. *Lakshmi Bai*, (3) on which the learned counsel has relied, all that the learned judges held was that "in the absence of express words showing such an intention, a devise to a wife does not confer an estate of inheritance, but carries only a widow's estate as understood by Hindu law," (at p. 378). The learned judges referred to *Koonjbehari Dhur* v. *Premchand Dutt*, (4) as an authority for that view. The case referred to was that of a gift in favour of a wife by her husband, and it was decided on the authority of the Tagore Law Lectures for 1878, p. 333. There the learned author, in dealing with the restrictions on a woman's power over her *stridhan*, remarked that the power of a woman over immovable property obtained in gift from her husband is not absolute, and she has no right of alienation, at any rate during the life-time of the husband, unless such right is expressly conferred on her by the husband. The present case is not that of a gift made by a husband in favour of his wife. Musammat Sohni was the widow of a pre-deceased son of Moti Ram, and the rule of Hindu law relating to the *stridhan* of a widow acquired under a gift from her husband cannot apply to her. It is not necessary for us to say for the purposes of this appeal whether or not we agree with the view expressed in the rulings cited above as to the right of a widow taking property under a gift from her husband. In our opinion where the terms of a bequest are ambiguous we have to look to the intention of the person making the bequest, and if from the surrounding circumstances it appears that the intention was to make a bequest of a widow's estate only, that intention should be given effect to and the estate devised should be held to be a widow's estate only. In the present instance the recital in the *wajib-ul-arzes*, which must be regarded as testamentary instruments, is, as we have said, to the effect that Sohni should be regarded as the

(3) I. L. R., 11 Bom., 573. (4) I. L. R., 5 Calc., 684.

malik after the death of Moti Ram, the testator. There are no clear words conferring on her an absolute proprietary title. The use of the word *malik* (owner) is consistent both with an intention to bestow on her a widow's estate and also the estate of an absolute owner. In the *wajib-ul-arz* of a third village, Pali, which is not in dispute in this case, Moti Ram said :—" After my death Ganga Sahai, the adopted son, and Musammat Sohni, the wife of Salig Ram, shall have a right to the property." The circumstance of his associating the name of Ganga Sahai with that of Sohni, and the use of the vague expression referred to above indicate in our opinion that the intention of Moti Ram was not to give to Sohni an absolute estate. This conclusion is fortified by the fact that Sohni herself and the defendants and their predecessors in title submitted to a finding of the Subordinate Judge of Meerut made in a suit decided on 21st August 1868, to the effect that Sohni held a widow's estate only in respect of the property left by Moti Ram. That suit was instituted by some of the defendants and the predecessors in title of the other defendants to set aside a mortgage executed by Sohni, and for recovery of possession of the property of Moti Ram held by her. In that suit it was held that she had a life estate in the property and that the alienation would be valid during her lifetime. Both Sohni and the plaintiffs to that suit submitted to that judgment. We do not imply that that judgment operates as *res judicata* in the present case or can be treated as evidence, as between the present parties, as to the nature of Sohni's title. But we cannot lose sight of the fact that Sohni acquiesced in that judgment which declared her to have only a life estate, and, so far as is shown, took no steps to assert an absolute proprietary title. The present defendants allowed Sohni to continue in possession ; and when on her death they applied for mutation of names, on the 5th of October 1881, they referred in their application to the decree of the 21st of August 1868 and stated that, as under that decree Sohni and the transferees from her were to remain in possession during her lifetime, they, the applicants, were entitled to have their names entered in the revenue papers after her death,

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These circumstances show that the defendants themselves understood the bequest made by Moti Ram in favour of Sohni to be that of a widow's estate. There can be no doubt that the defendants have not a better title to the property than the plaintiffs. But that fact alone would not certainly entitle the plaintiffs to a decree, if the possession of Sohni was under an adverse proprietary title. Having regard to the terms in which Moti Ram bestowed the property on her, to the inference to be drawn as to his intention from the general understanding among Hindus as to the nature of a woman's estate and to the fact that she herself and the defendants, or their predecessors in title, regarded her estate as that of a Hindu widow with limited right, we are of opinion that the Court below has rightly held that the plaintiffs were equally entitled with the defendants to succeed to Moti Ram's estate on the death of Mussammat Sohni. This appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

1896
July 15.

Before Mr. Justice Knox, Mr. Justice Blair and Mr. Justice Aikman.

TAPESRI LAL AND OTHERS (DEFENDANTS) *v.* DEOKI NANDAN RAI AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, section 293—*Execution of decree—Sale in execution—Order for recovery of deficiency of re-sale—Suit to set aside order—Certificate of amount of deficiency.*

Held that a suit will lie to set aside an order passed under section 293 of the Code of Civil Procedure.

Held also that the fact that the certificate provided for by section 293 of the Code has not been granted will not prevent the decree-holder or the judgment-debtor, as the case may be, from recovering from the defaulter the deficiency arising on a re-sale of property sold in execution of a decree but not paid for.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Jwala Prasad* for the appellants.

Mr. *T. Conlan* for the respondent.

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* Second Appeal No. 117 of 1894, from a decree of Maulvi Muhammad Ismail, Additional Subordinate Judge of Ghâzipur, dated the 21st November 1893, modifying a decree of Babu Sheocharan Lal, Munsif of Rasra, dated the 31st July 1893.