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AZIZ-UN-NISSA (PLAINTIFF) v. TASADDUQ HUSAIN KHAN
(DEFENDANT).*

[On appeal from the Court of the Judicial Commissioner of Oudh.]
*Construction—Duration of a grant—Use of words “always” or
“for ever.”*

The use of the words “always” or “for ever” in a grant of an allowance from a proprietor is not inconsistent with restriction of the interest to the life of the grantee.

Where the circumstances under which the grant was made, the expressions used in an award of arbitrators with a decree thereon supporting this view, were such as to show that the grant was a personal one in favour of the grantee for his life, and was not intended to operate as a grant of a heritable interest.

Held, that the grant was only for life, notwithstanding the use of the word “hamesha.”

APPEAL from a decree (12th August, 1898), reversing on second appeal a decree (18th November, 1896) of the District Judge of Rae Bareilly, which affirmed a decree (25th June, 1895) of the Subordinate Judge of Rae Bareilly.

The plaintiff-appellant was the granddaughter of Abdul Hakim Khan, deceased, formerly the Taluqdar of Anawan in the tahsil and district of Rae Bareilly. She became entitled to a one-fourth share in that taluq. The remaining three-fourths were owned by the second defendant Muhammad Saiyid Khan, the registered taluqdar. The first defendant Tasadduq Husain Khan, son of Chedu Khan, deceased, brother of the said Abdul Hakim, was now the only respondent. The third defendant was Nawab Sahib Asghar Husain Khan, mortgagee of the whole taluqa under a mortgage from the second defendant. The parties to the appeal, both in the Court of the District Judge and in that of the Judicial Commissioner, were only the plaintiff and the first defendant. The facts of the case are stated in their Lordships' judgment.

The question on this appeal was as to the construction of a decree of the 11th December, 1863, made in the Court of the Commissioner of the Lucknow Division upon an award of arbitrators of the same date, directing that Abdul Hakim should always (“hamesha”) pay Rs. 70 a month from 1271 Fasli to Chedu. Whether this allowance, which was paid during Chedu's

* Present:—LORDS HOBHOUSE, DAVEY, and LINDLEY, and SIR RICHARD COUCH.

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life, was to cease on his death, or to be a heritable charge in favour of Chedu and his heirs, was the question. After Chedu's death, which took place on the 29th December, 1889, payment of the allowance continued, being made by Muhammad Saiyid Khan, the second defendant, to Tafazzul Husain, the first defendant. This payment was made a charge in the taluqdari accounts, and Aziz-un-nissa's one-fourth share was debited accordingly. To this she objected, and on the 4th July, 1894, in this suit she claimed a declaratory decree that the right to the allowance on Chedu's death had ceased, and that Tasadduq was not entitled to receive the allowance from her as he had claimed to do to the extent of her one-fourth share. She also claimed a declaration as against the other defendants that, if they should pay the allowance, they should not be entitled to make a deduction from her share of the profits of the taluq.

Tasadduq denied that the right to the allowance was only for his father's life. In this he was supported by the Taluqdar Muhammad Saiyid, while Saiyid Asghar Husain was neutral, asking for his costs, each filing a separate written statement.

The principal issue raised the questions whether the allowance to Chedu Khan was for his maintenance, and only for his lifetime, or was a heritable interest.

The Subordinate Judge decided this in favour of the plaintiff, that it was terminated by the death of Chedu Khan.

On an appeal by Tasadduq alone this judgment was affirmed by the District Judge, who said:—"Both the decree and the award are silent as to whether the grant was to be continued to Chedu Khan's heirs, and in the absence of words conferring a perpetual or heritable right, I cannot come to any other conclusion but that the grant was personal on account of his services. 'Hamesha' is used in the award, but 'hamesha' or 'for ever' cannot be interpreted to the effect of the grant being heritable or other; and the next sentence, that Chedu Khan was to continue to obey his brother, refers to a personal obligation. I am of opinion that the 'gujara' ceased with the life of Chedu Khan."

On a second appeal to the Judicial Commissioner's Court that decision was reversed in a judgment which concluded thus:—

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“ In the present case there are several circumstances which the Court of appeal does not appear to have considered. It has held that Chedu Khan had a valid agreement in his favour, which would have entitled him to claim half the estate. That claim being barred by the sanad, the only course open to Chedu Khan was to claim the equivalent of the estate in money. As a matter of fact the calculation of Rs. 70 a month was based on an estimate of the full profits of a half share in the estate. There can be no doubt that in the Civil Court Chedu Khan claimed the allowance for himself and his heirs for ever. The Deputy Commissioner states that in his judgment. There having been no pleading before the Deputy Commissioner that the allowance should be limited to the life of Chedu Khan, it appears to me that the proper construction to be placed upon the concluding words of the judgment is that the claim is decreed in full. Assuming that the cash allowance was intended to be a complete compensation for the loss of the land, it is obvious that a compensation limited to the life of Chedu Khan would not be a complete compensation for the loss of the land. Construing the award together with all these circumstances, it appears to me that the word ‘hamesha’ used therein was intended to grant an estate of inheritance. The decree of the Court below is set aside. The claim is dismissed with costs in all Courts.”

On this appeal by the plaintiff,

Mr. *L. DeGruyther*, for the appellant, argued that the Judicial Commissioner had not rightly construed the decree of 1863, and had reversed the judgment of the District Judge without good ground. There were no circumstances here which would justify an indefinite extension of the duration of the grant. The circumstances under which a grant had been made were to be considered in giving no more than their due effect to such words as meant “always” and “for ever.” Where the circumstances indicated a grant for life, those words indicated no extension of it from any force in the words themselves. They might be used either in a grant for life where the circumstances and expressions, as here, showed the true construction to be that the grant was for life or they might be used in connection with a grant for an estate

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of inheritance. The judgment under appeal only arrived at the conclusion that the interest here granted was heritable by erroneously assuming that Chedu Khan had an absolute title to a share in the taluq, and, being kept out of it by Abdul Hakim his brother, had received an absolute grant of a permanent charge in compensation for his having been deprived of it. The expressions used in granting the allowance showed that the grant was a personal one for services by Chedu Khan rendered to the donor, and, taken with the circumstances, showed that the construction put upon the grant by the original Court and the first Court of appeal was correct. Reference was made to *Rameshar Bakhs Singh v. Arjun Singh* (1); *Maulvi Muhammad Abdul Majid v. Fatima Bibi* (2); and, as showing the result where the circumstances were of the opposite character, *Tootshi Pershad Singh v. Raja Ramnarain Singh* (3).

Mr. C. W. Arathoon, for the respondent, contended that the word "hamesha" in the decree and the award had been rightly construed by the Judicial Commissioner. Chedu Khan had been entitled, at the re-annexation, to a share in the taluq of which however his brother alone received the sanad. There was a right, which had not been enforced, that Chedu should have had a beneficial interest, of which the taluqdar should have been a trustee for him, in respect of his share. If circumstances, then, were referred to for aid in the construction of this grant, they were in support of the judgment now appealed from. The erroneous assumption had been on the part of the original Court and the Court of first appeal, that for a heritable interest in the taluq, a share, in fact, thereof, a mere life interest in an allowance had been granted and accepted as compensation. The words "of permanent duration," far from being overborne and controlled by the circumstances and expressions, were supported by them, and should receive effect.

Mr. L. DeGruyther replied.

Afterwards, on the 9th March, 1901, their Lordships' judgment was delivered by Sir Richard Couch.

(1) (1900) I. L. R., 23 All., 194; (2) (1885) I. L. R., 8 All., 39; L. R.,
 L. R., 28 I. A. 1. 12 I. A. 159.
 (3) (1885) L. R., 12 I. A., 205, 212; I. L. R., 12 Calc., 117.

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The question in this appeal is the construction of an award made on the 11th December, 1863, in the proceedings which followed the institution of a suit in the Court of the Deputy Commissioner of Rae Bareli by Chedu Khan against Abdul Hakim Khan. The facts which led to it are these: Taluqa Anawan was formerly the property of Allahdad Khan. He had two daughters who married Abdul Hakim Khan and Saadat Khan, and after the re-annexation of Oudh this estate was settled with the husbands of these ladies and a sanad was granted to them. Chedu Khan and Abdul Hakim were brothers, and on the 13th December, 1859, Chedu instituted a suit in a Revenue Court against Abdul Hakim for a quarter share of the taluqa as in accordance with an agreement with Abdul Hakim and Saadat said to be embodied in the proceedings, dated 4th June, 1858, of the Court of Captain Orr, late Deputy Commissioner of the district of Rae Bareli. These proceedings are not in the record of this appeal; but there is in it an agreement, dated 31st January, 1858, by which Abdul Hakim, after stating that his brother Chedu Khan by instituting the proceedings got his brother Saadat and himself released from prison, said: "I hereby declare and commit it to writing that I shall never and on no account be on bad terms with the said brother and shall have no objection to the giving of my brother's half share in the estate when I get possession of the estate, rather at the time of the execution of the lease." The suit was dismissed on the 13th October, 1860, on the ground that the claim was not cognizable by a Revenue Court, Chedu being told that he was at liberty to have recourse to the Civil Court for damages incurred from time to time on account of Abdul Hakim's breach of promise.

Thereupon Chedu Khan brought a suit in the Court of the Deputy Commissioner of Rae Bareli against Abdul Hakim, claiming Rs 70 a month from the 15th September, 1860, "compensation for breach of contract" in not giving him a share of the taluqa as promised in the agreement, and the Deputy Commissioner made a decree for him for "Rs. 70 per mensem from the date that defendant entered into possession of his share of the taluqa Anawan chargeable against defendant's share." Abdul Hakim appealed to Colonel Barrow, the Commissioner at

Lucknow, who appears to have doubted if Chedu could recover any damages. In his judgment he says:—"The document A (the agreement) is no specific contract, for no amount is mentioned in it; but it; is a clear expression of appellant's determination to do something for his brother (respondent); "but the allusions here are also to land and not to cash." The Commissioner followed this by saying that the case was susceptible of adjustment out of Court. After the judgment was delivered the parties being present agreed to refer to three native gentlemen who were named the decision as to the amount that should be paid by Abdul Hakim to Chedu Khan. The award was made on the same day (11th December, 1863) and is as follows:—"That from 1271 Fasli (1864) Abdul Hakim shall always pay to Chedu Khan Rs. 70 per mensem, "and that the latter should give up his claim in respect of previous years and should realize from Abdul Hakim Khan Rs. 70 "every month. Parties being present our decision stated above "was read over to them: Chedu accepted it, but Abdul Hakim "Khan did not. This arbitration award, together with deed of "agreement, is submitted to you (the Commissioner) for orders. "Moreover (we hold) that Chedu Khan should always remain "obedient to Abdul Hakim Khan." Thereupon the Commissioner upheld the decision of the Deputy Commissioner awarding Rs. 70 a month to Chedu Khan, to be paid by Abdul Hakim, but reversed so much of the decree as awarded arrears of instalments.

Chedu Khan has died and the question in this appeal is whether the respondent, who is his son, is entitled to the Rs. 70 per month, a suit having been brought by the appellant, the granddaughter of Abdul Hakim, for a decree, declaring that the right to receive it ceased at the death of Chedu Khan, the payment of it having continued to be made to the respondent by the lambardar of the estate. The Subordinate Judge, who first heard the suit, held that the agreement was purely and simply a grant to Chedu personally and not to his heirs, and made the decree prayed for. On an appeal to the District Judge of Rae Bareilly he held the same and referred to the sentence in the award that Chedu was to continue to obey his brother as being a personal obligation. He dismissed the appeal, and there was then a further appeal to the

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Judicial Commissioner, who reversed the decree and dismissed the suit. The reasons which he has given in his judgment for this decision are unsatisfactory. He begins by saying that the District Judge had based his judgment almost entirely on the interpretation of the word "hamesha" (always or for ever), and that there are several circumstances which the Court does not appear to have considered, and it has held that Chedu Khan had a valid agreement in his favour which would have entitled him to claim half the estate. The District Judge did not hold this: on the contrary he says in his judgment that an agreement was said to have been executed admitting Chedu Khan to share in a moiety of the taluqa, that the Rent Courts rejected the agreement as not genuine, the Civil Court of first instance accepted it; but the appellate Court doubted its genuineness and held it to be invalid. The Judicial Commissioner then says that construing the word, together with the circumstances he refers to, it appears to him that the word "hamesha" used therein was intended to grant an estate of inheritance, and sets aside the decree of the District Judge and dismisses the suit. Now it has been held by this Board that the words "always and for ever" in a will do not *per se* extend the interest given beyond the life of the person who is named (*Maulvi Muhammad Abdul Majid v. Mussamat Fatima Bibi*) (1). They are not inconsistent with limiting the interest given, but the circumstances under which the instrument is made or the subsequent conduct of the parties may show the intention with sufficient certainty to enable the Courts to presume that the grant was perpetual (*Toolshi Pershad Singh v. Rajah Ram Narain Singh*) (2). This ruling applies equally to the award and the Commissioner's order upon it. Their Lordships do not see in the circumstances under which the award was made any which would enable them to pronounce that the Rs. 70 a month were to be paid after the death of Chedu Khan. The last line of the award seems to indicate that it was for him personally. If Chedu had any title to a share in the taluqa before the Government took possession of it in 1858, he had none after the sanad which was granted by the Government, as his name was not in it. This is noticed by the Commissioner in the

(1) L. R., 12 I. A., 168.

(2) L. R., 12 I. A., 214.

judgment he gave before the reference to the arbitrators. Chedu's right was only under the agreement, and the Commissioner concluded his judgment by saying that the issue was reduced to "what consideration is Chedu Khan entitled to in consequence of Abdul Hakim's promises and agreements with him?" The arbitrators say in the award that they had inquired into the case, and they may have considered that justice would be done by giving to Chedu the Rs. 70 per month for his life, that being a sufficient reward for his services in obtaining the release of Abdul Hakim and Saadat from prison.

Their Lordships will humbly advise His Majesty to reverse the decree of the Judicial Commissioner, and order the appeal to him to be dismissed with costs.

The respondent will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant—Messrs. *T. L. Wilson and Co.*

Solicitors for the respondent—Messrs. *Barrow Rogers, and Nevill.*

APPELLATE CIVIL.

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April 13.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

CHUNNI LAL (PLAINTIFF) *v.* ABDUL ALI KHAN AND OTHERS
(DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act), sections 88, 89—Decree for sale—Decree assigned before the passing of an order absolute—Appeal—Assignee not made a party to appeal until after expiry of limitation—Civil Procedure Code, section 372—Lis pendens.

A decree under section 88 of the Transfer of Property Act, 1882, being only a decree *nisi* and not a final decree, the suit in which such a decree is passed does not terminate until an order absolute is made under section 89. Where therefore such a decree is assigned before any order absolute is made, the assignee takes subject to all the liabilities resulting from the application of the doctrine of *lis pendens*. Such an assignee, for example, may properly be made a party, under section 372 of the Code of Civil Procedure, to an appeal from the decree preferred against his assignors, and it is not competent to him to raise any defence, such as a plea of limitation, to the appeal which could not be raised by his assignors.

* Second Appeal No. 358 of 1899 from a decree of Babu Nihal Chandar, Officiating Subordinate Judge of Shahjahanpur, dated the 14th March, 1898, reversing a decree of Maulvi Muhammad Hamid Hasan, Munsif of Pawayan, District Shahjahanpur, dated the 18th March, 1898.

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