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17, clause (vi), of schedule II applied. The same view was taken in the case of *Balwant Ganesh* v. *Nana Chintamon* (1). We accordingly consider that the decision of the Court of first instance was right, and that the order of that Court must be restored. We allow the appeal, set aside the order of the lower appellate Court and restore that of the Court of first instance with costs in all Courts.

*Appeal decreed.*

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## CIVIL REFERENCE.

*Before Mr. Justice Banerji and Mr. Justice Richards.*

ABDUL KARIM KHAN (PLAINTIFF) *v.* ABDUL QAYUM KHAN (DEFENDANT).*

*Muhammadan law—Will—Construction of document.*

One Muhammad Azim made a will, whereby, after making provision for his widow and daughters, he divided his property between his three sons giving to each certain villages. The gift was *prima facie* absolute, but the will further provided that none of the sons should have a right to alienate the property devised to him, and that on the death of one of the devisees without issue his share should go to the surviving brother or brothers or his or their heirs. The testator died, leaving surviving him three sons, Abdul Qayum and Abdul Kadir by one wife, and Abdul Karim by another. The will was assented to by the heirs of the testator, and the three sons entered into possession of their shares. Then Abdul Kadir died, and his full brother, Abdul Qayum, took possession of his share. *Held*, on suit by the half-brother for possession of half the share, that according to the Muhammadan law the three devisees took absolutely, and the plaintiff's claim could not be maintained.

THIS was a reference made by the Local Government under the provisions of the Kumaun Rules, 1894, and arose out of the following circumstances:—One Muhammad Azim made a will on the 4th of March, 1878, whereby, after making provision for his widow and daughters, he divided his property between his three sons, giving to each of them certain villages. *Prima facie* the gift of the villages to each son was an absolute gift; but the will further provided that no son should have the right to alienate the property given to him, and that on his death without issue the widow of the son so dying should take no

* Miscellaneous No. 243 of 1905.

(1) (1893) I. L. R., 18 Bom., 209.

interest, but the property of such son should go to the surviving brothers or their heirs. The testator died, leaving him surviving three sons, namely, Abdul Karim by one wife, and Abdul Qayum and Abdul Kadir by another wife. The will was assented to by the heirs of the testator, and the three sons entered into possession of the specific property devised to each of them by the will. Abdul Kadir having died without issue his full brother, Abdul Qayum, took possession of the whole of his share; whereupon the half-brother, Abdul Karim, instituted a suit claiming one-half of the property left by Abdul Qayum. The Court of the first instance (Assistant Commissioner) and the lower appellate Court (Deputy Commissioner) agreed in decreeing the plaintiff's claim; but on appeal to the Commissioner of Kumaun he allowed the appeal and dismissed the plaintiff's suit. The plaintiff thereupon applied to the Local Government under section 17 of the Kumaun Rules praying for a reference to the High Court, which was accordingly made.

Mr. *B. E. O'Conor*, for the applicant.

Mr. *R. Malcomson*, for the opposite party.

BANERJI and RICHARDS, JJ.—This is a reference by the Local Government under rule 17 of the Kumaun Rules. The question arises under the following circumstances:—

One Muhammad Azim made a will on the 4th of March, 1878, whereby, after making certain provision for his widow and daughters, he divided his property between his three sons, giving to each of them certain villages. *Primâ facie* the gift of the villages to each son was an absolute gift. But the will goes on to provide that no son shall have a right to alienate the property given to him, and that on his death without issue the widow of the son so dying shall take no interest, but that the property of such son shall go to the surviving brothers or their heirs. The testator died leaving him surviving three sons, namely, Abdul Karim by one wife, and Abdul Qayum and Abdul Kadir by another wife. The will was assented to by the heirs of the testator, and this has been found as a fact by the Assistant Commissioner and Deputy Commissioner. The three sons entered into possession of the specific property devised to each of the sons. Abdul Kadir having died without issue, his

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own brother, Abdul Qayum, entered into possession of the whole of the property devised to Abdul Kadir, and the present suit is brought by the half-brother, namely, Abdul Karim, seeking to recover a half share of the property of which the deceased, Abdul Kadir, was in possession. It is admitted that under the rules of inheritance according to the Muhammadan law, if the property had been the absolute property of Abdul Kadir, the defendant would be entitled to succeed him as his heir. The plaintiff, however, contends that the terms of the will ought to prevail, and that, according to those terms, in the events which have happened he is entitled to half of the property. It is quite clear that, according to Muhammadan law the will in question, devising property as it did to the heirs of the testator, was invalid. It became, however, valid as a will the moment it was assented to by the heirs after the death of the testator. This proposition is admittedly correct, according to the Muhammadan law. Mr. *O'Conor*, the learned counsel for the plaintiff, argues that the assent to the will made the will valid not merely as a will, but also validated every term and condition contained in it, no matter how repugnant to Muhammadan law they might be. On the other hand, it is argued that while the consent of the heirs rendered the will valid, the document must be construed according to the ordinary rules by which a deed or will giving property should be construed according to Muhammadan law. In our opinion the latter contention must prevail. In the course of the argument we asked the counsel for the plaintiff the following question: If a Muhammadan in the exercise of his limited testamentary powers disposed of one-third of his property to a stranger in terms similar to the terms in which the testator in this case gave the property to his sons, namely, after making an absolute gift sought to impose a condition that the donee should have no power to alienate, and that on his dying without issue the property should not devolve according to the ordinary rules of Muhammadan law, would such conditions and limitations be valid? The answer given was that in such case the gift would be good as an absolute gift and the conditions and limitations would be void. We think that this was the only answer which could be given, and that

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we must apply the same rule to the present case. The document became valid by the consent of the heirs. We must construe the will according to the way in which valid wills would be construed if the gift were made to strangers. Life estates and contingent interests are not recognised by the Muhammadan law, and we are not entitled to give the same effect to this will which might be given to an English will. In our view the gift in the will to Abdul Kadir was an absolute gift and the provisions restraining alienation and the condition as to the devolution of the property after his death without issue are void, and accordingly the claim of the plaintiff cannot be maintained. We are, therefore, of opinion that the decree of the Commissioner is correct, though not for the reasons which he has given. Under all the circumstances of the case we think that each party should abide his own costs in all Courts. This is our answer to the reference.

## APPELLATE CIVIL.

1906
*January* 12.

*Before Mr. Justice Banerji and Mr. Justice Richards.*

GANESHI LAL AND OTHERS (OBJECTORS) APPELLANTS *v.* AJUDHIA PRASAD AND OTHERS (APPLICANTS) RESPONDENTS.*

*Hindu law—Mitakshara—Succession—Stridhan.*

*Held* that the stridhan of a Hindu woman governed by the Mitakshara law would, on her death without issue, go to the sons of her husband's sister in preference to the sons of her own sister.

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

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*), for the appellants.

Dr. *Satish Chandra Banerji* (for whom Babu *Sarat Chandra Chaudhri*), for the respondents.

BANERJI and RICHARDS, JJ.—This is an appeal against an order made under Act No. VII of 1889, granting a certificate to the respondents. The debts in respect of which the certificate has been granted were due to a Hindu lady, Musammat Mathura Dei, and were admittedly her stridhan. The applicants for the certificate are her husband's sister's sons.

* First Appeal No. 61 of 1905, from an order of D. R. Lyle, Esq., District Judge of Moradabad, dated the 14th of February, 1905.