1906

SUNDAR LAL v. CHHITAR MAL.

be handed over to them—these sums to be ascertained in the execution department. We accordingly allow the appeal to this extent and modify the decree of the lower appellate Court accordingly. The parties will have their costs in all Courts proportionate to failure and success.

Two objections were filed which have not been pressed. We say nothing as to the costs of these objections.

Decree modified.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

1906 *December* 14.

PADAM LAL (PLAINTIFF) *v.* TEK SINGH AND ANOTHER (DEFENDANTS).*

Hindu law—Mitakshara—Will—Construction of document—Property devised to wife as "malik"—Estate taken by widow.

Where a Hindu governed by the Mitakshara law devised immovable property to his wife stating that she would be the "malik" of the property after his death, it was *held* that the word "malik" imported an absolute proprietary interest, and that, in the absence of any indication of a contrary intention on the part of the testator, the widow took an absolute, and not merely a life estate in the property so devised. *Surajmani* v. *Rabi Nath* (1) dissented from. *Jamna Das* v. *Ramautar Pande* (2) distinguished. *Lala Ramjewan Lal* v. *Dal Koer* (3), *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (4) and *Raj Narain Bhadury* v. *Ashutosh Chuckerbutty* (5) followed.

The facts out of which this appeal arose were as follows:—

One Gayendra Narain died possessed of the entire 16 annas of a village named Muhana, and leaving him surviving his second wife Musammat Kadam Kunwar and two daughters by her, Janki Kunwar and Rukmin Kunwar, and a daughter Tulsha Kunwar by his first wife. By his will dated the 31st of July 1866 Gayendra Narain declared that out of the 16 anna zamindari in the village Muhana "Musammat Kadam Kunwar will be the malik of a 10 anna 8 pie share" and Musammat Tulsha Kunwar his daughter of a 5 anna 4 pie share. He then stated that he had caused each of these ladies to be placed in separate possession of her share and that mutation of names might be effected in the revenue department under the will. On the death of

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* First Appeal No. 278 of 1904, from a decree of Babu Bipin Bihari Mukerji, Subordinate Judge of Cawnpore, dated the 15th of August 1904.

(1) (1903) I. L. R., 25 All., 351. (3) (1897) I. L. R., 24 Calc., 406.
(2) (1904) I. L. R., 27 All., 364. (4) (1897) I. L. R., 24 Calc., 834.
(5) (1899—1900) I. L. R., 27 Calc., 44 and 649.

1906

PADAM LAL v. TEK SINGH.

the testator the devisees entered into possession of the property left to them; and in 1886 Kadam Kunwar caused the names of her two daughters to be recorded in respect of a 6 anna 8 pie share out of the 10 annas 4 pies devised to her, retaining the remaining 4 annas for herself. In 1888 Kadam Kunwar mortgaged this 4 anna share to Kunwar Tek Singh. The mortgagee brought a suit for sale on this mortgage and obtained a decree on the 30th of January 1901. Kadam Kunwar died in 1902, and thereupon (Janki Kunwar having died some years previously) the name of Rukmin Kunwar was substituted in the execution department in place of that of the original judgment-debtor Kadam Kunwar. The plaintiff Padam Lal then brought the present suit for a declaration that Kadam Kunwar was not competent to mortgage the property beyond the period of her own life, and there was no legal necessity for the mortgage. Padam Lal was the son of Rukmin Kunwar and the next reversioner. The Court of first instance (Subordinate Judge of Cawnpore) dismissed the suit, finding that under the will of her husband Kadam Kunwar became absolute owner of the share mortgaged; it also found that there was legal necessity for the mortgage. Against this decree the plaintiff appealed to the High Court.

Maulvi *Karamat Husain* and Mr. *A. E. Ryves*, for the appellant.

Dr. *Satish Chandra Banerji* and Munshi *Gokul Prasad*, for the respondents.

STANLEY, C.J., and BURKITT, J.—This appeal arises out of a suit brought by the plaintiff Padam Lal to obtain a declaration that a 4 anna share in the village of Muhana in the district of Cawnpore is not saleable in execution of a decree obtained by the defendant Kunwar Tek Singh against the defendant Musammat Rukmin Kunwar. The entire village of Muhana belonged to the late Gayendra Narain, husband of Kadam Kunwar. He left his second wife Musammat Kadam Kunwar and two daughters by her, namely, Musammat Janki Kunwar and Musammat Rukmin Kunwar, and also a daughter, Musammat Tulshi Kunwar, by his first wife him surviving. The plaintiff Padam Kunwar is son of Rukmin Kunwar. Gayendra Narain before his death, namely, on the 31st of July 1866, executed a will

by which he purported to dispose of the village of Muhana. In the will he recites his title to the village in question and states that he has two heirs to that village, one his wife and the other his daughter: and then he declares that out of the 16 anna zamindari in that village "Musammat Kadam Kunwar will be the malik of a 10 anna 8 pie share," and Musammat Tulshi Kunwar his daughter of a 5 anna 4 pie share. Then follows a statement that he had caused each of these ladies to be placed in separate possession of her respective share and that mutation of names may be effected in the revenue department under the document so that there may be no dispute after his death. This is the substance of the will. No provision is made in it for Musammat Janki Kunwar. Shortly after its execution Gayendra Narain died and his widow and daughter Tulshi entered into possession of the shares given to them by his will. In April 1886 Kadam Kunwar had mutation of names effected in favour of her two daughters, Janki Kunwar and Rukmin Kunwar, in respect of a 6 anna 8 pie share out of her 10 anna 8 pie share. Of the remaining 4 anna share she herself remained in possession. On the 27th of August 1888 she executed a mortgage of this 4 anna share in favour of the defendant Kunwar Tek Singh to secure an advance of Rs. 900. A suit was brought by Kunwar Tek Singh on foot of this mortgage and an *ex parte* decree was passed on the 30th of January 1901. Kadam Kunwar died on the 19th of June 1902 and after her death the name of her daughter Rukmin Kunwar was substituted in the execution department in her place as her representative. The other daughter Janki Kunwar had died about 10 years previously. Rukmin Kunwar filed no objection in the execution department to the proceedings for sale of the mortgaged property, and the property has been advertised for sale. The plaintiff's case is that the mortgage was not made to meet any legal necessity and that Kadam Kunwar was not competent to mortgage her share beyond the period of her own life.

In his defence Kunwar Tek Singh set up the plea that under the will of her husband Musammat Kadam Kunwar became absolute owner of the share of the property given to her, and that in any case the mortgage in dispute was executed for valid

1906

PADAM LAL v. TEK SINGH.

necessity. These are the only pleas which have been relied upon before us; but it was further contended that the plaintiff has no right to maintain the suit during the life-time of his mother, he being merely a contingent reversionary heir to the property.

The learned Subordinate Judge held that upon the true construction of the will of her husband Kadam Kunwar became the absolute owner of the property in dispute; and he also held that the mortgage debt was incurred to meet a legal necessity and dismissed the plaintiff's claim. From this decree the present appeal has been preferred.

The will of Gayendra Narain is very simple in character. He says in it that with a view to avoid disputes in the future he executes the will, and he thereby declares that his wife Kadam Kunwar shall be the *malik* of a 10 anna 8 pie share in the village of which he was the owner, and his daughter by his first wife, Tulshi Kunwar, of a 5 anna 4 pie share. The word "*malik*" is a word of well known meaning, signifying the absolute owner of property. Its ordinary meaning is to be given to it, unless there are to be found in the will indications that it was not the intention of the testator to use it in its ordinary sense. No such indications are to be found in the will before us. On the contrary we are disposed to think that the expressed intention of the testator, namely, to avoid disputes in the future would be frustrated if a narrow construction were to be put upon the language used by him. If he intended his daughter Tulshi Kunwar merely to have a life-estate, we think that he would have expressed his meaning in clear terms, and the same observation applies to the gift to Kadam Kunwar.

The legal import of the word "*malik*" has been frequently considered, but we do not propose to discuss all the cases upon the subject. It will suffice if we refer to a few of them. In the case of *Lala Ramjewan Lal* v. *Dal Koer* (1) the language of a will not unlike that before us was considered. In that case a Hindu, survivor of two brothers in a joint family governed by the Mitakshara law, died leaving a widow and two daughters, a brother's widow and three daughters of his brother. By his will he provided that his daughters and brother's daughters "shall be

(1) (1897) I. L. R., 24 Calc., 406.

maliks and come into possession in equal shares of all the movable and immovable properties." In their judgment Trevelyan and Beverley, JJ., say:—"*Primâ facie* there can be no question but that a gift, when there are no controlling words, is an absolute gift, and the expression 'maliks' used here would ordinarily imply an absolute gift. But it is contended that we must introduce into this will what is said to be the prevalent Hindu idea that a female ought not to obtain anything beyond an estate for her life-time, and therefore, although the word 'malik' is used, we must cut down the estate to the extent of an estate to a Hindu daughter. There is no authority for such a proposition. The words are absolute, and if they stood by themselves without anything to the contrary, it would be impossible for us to say that they did not give an absolute estate." In the case of *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (1) Lord Davey in delivering the judgment of the Privy Council observes (at p. 849):—"The words 'become owner (malik) of all my estates and properties' would, unless the context indicated a different meaning, be sufficient for that purpose (that is to give an absolute interest) even without the words 'enjoy with son, grandson, and so on, in succession,' which latter words are frequently used in Hindu wills and have acquired the force of technical words conveying a heritable and alienable estate." The gift in this case was not to the testator's widow but to his sister's son—but the language of Lord Davey is quite general. To the same effect is the decision of one of us sitting on the original side in Calcutta in *Raj Narain Bhadury* v. *Ashutosh Chuckerbutty* (2), which was affirmed on appeal (3). In that case the gift was to the testator's widow. The decision in *Jamna Das* v. *Ramautar Pande* (4) does not conflict with this decision. In that case the testator used language which showed that he did not intend to confer on his wife an alienable interest. We are unable to agree in the view taken by our brothers Knox and Aikman JJ., in the case of *Surajmani* v. *Rabi Nath* (5). In that case a Hindu executed a document to take effect after his death and thereby purported to transfer properties in favour of each of his two wives and

(1) (1897) I. L. R., 24 Calc., 834.
(2) (1899) I. L. R., 27 Calc., 44.
(3) (1900) I. L. R., 27 Calc., 649.
(4) (1904) I. L. R., 27 All., 364.
(5) (1903) I. L. R., 25 All., 351.

1906

PADAM LAL v. TEK SINGH.

also in favour of his daughter-in-law, in the following words:—"After my death they (*i.e.*, the donees) shall under this document get their names recorded in the public records in respect of the respective properties given to them and remain in possession as *owners* with proprietary powers." The words used are "*malik wa khud ikhtiar*," that is, "owners to deal with as they liked." It was held that these words did not confer an absolute estate. This decision appears to us to be in conflict with the canon of construction laid down by their Lordships of the Privy Council in *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (1). The language of Lord Davey as to the true interpretation of the word "*malik*" is not confined to the case of a male but is quite general. Ordinarily it denotes absolute ownership. Even without the words "*wa khud ikhtiar*" we think that according to the ruling of the Privy Council the gift in question passed the absolute estate.

We find nothing in the will before us to qualify the language in which the gift to the testator's daughter and wife is expressed. Interpreting the language of the will therefore according to its ordinary signification, we are of opinion that Kadam Kunwar thereby acquired an absolute interest in the property, the subject matter of the gift to her. We agree in the view expressed by the Court below as to this. This disposes of the appeal, and it is unnecessary to consider the other questions which have been raised before us. We dismiss the appeal with costs.

Appeal dismissed.

1906
December 17.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

HUSAINI BEGAM (DEFENDANT) *v.* MUHAMMAD RUSTAM ALI KHAN (PLAINTIFF).*

Muhammadan law—Suit for restitution of conjugal rights—Legal cruelty—Other misconduct of the plaintiff pleaded as a defence to the suit.

In a suit for restitution of conjugal rights, the parties being Muhammadans, if the defendant raises a plea of legal cruelty, the facts to be proved to establish such a plea are similar to those which must be proved to establish

*Second Appeal No. 827 of 1905, from a decree of D. R Lyle, Esq., District Judge of Moradabad, dated the 5th of May 1905, confirming a decree of Pandit Alopi Parsad, Additional Subordinate Judge of Moradabad, dated 7th of December 1904.

(1) (1897) I. L. R., 24 Calc., 834.