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July 23.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

KASHI PRASAD AND ANOTHER (DEFENDANTS) *v.* INDA KUNWAR (PLAINTIFF).*

Hindu law—Hindu widow—Widow in possession of husband's estate as inferior proprietor—Effect of enlargement of estate of inferior proprietor by action of Government—Mukaddam.

An under-proprietor, whose status was described by the term "mukaddam," died, and his estate devolved upon his widow. Whilst this estate was in the possession of the widow, the Government proceeded to make a settlement with the mukaddams, excluding the superior proprietor, to whom an allowance by way of malikana was given. *Held* that the enlarged estate of which the widow thus became possessed was still a Hindu widow's estate merely: the action of Government had not the effect of making her a zamindar with a title independent of that which she derived from her husband. *Keech* v. *Sandford* (1) referred to by Stanley, C.J.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Moti Lal Nehru*, and Dr. *Satish Chandra Banerji* for the appellants.

The Hon'ble Pandit *Sundar Lal* (for whom Babu *Jogindro Nath Chaudhri*) for the respondent.

STANLEY, C.J.—This appeal arises out of a suit for possession of a share in the village of Kanai Shibnagar in the district of Bareilly and for mesne profits. The facts are these. One Newal Rai was the owner of this as well as other property. He died before the year 1872, leaving a widow Musammat Jaika and two daughters, namely, Musammat Bilaso and Musammat Hulaso. One Banarsi Das purchased the property in suit at a sale in execution of a decree obtained against Musammat Jaika. The defendants Kashi Prasad and Basdeo Sahai are the brothers of Banarsi Das, who is dead. Five kachwansis of the property is in the possession of the defendants 3 to 8, and as to this portion the plaintiff's suit has been dismissed and we are not concerned with it in the present appeal. Musammat Jaika died on the 27th of November 1878, and after her death, her daughters Bilaso and Hulaso, sold ⅘ of the property to Musammat Lachman and three others. A suit was brought by the vendor and vendees for possession of the village of Hafizpur, not the village in dispute, and

* First Appeal No. 276 of 1906 from a decree of Girraj Kishore Datt, Subordinate Judge of Bareilly, dated the 15th of June 1906.

(1) (1726) 2 W and T, 7th edn. p., 693.

the suit was decreed on the 18th of May 1881, and on appeal the decree for possession was affirmed by the High Court. Musammat Hulaso died in the year 1894 and her sister Musammat Bilaso died on the 15th of September 1895. Musammat Hulaso left a son Majnun Lal, and he on the 15th of June 1904 sold the village in dispute to the plaintiff Musammat Inda Kunwar. The present suit was instituted on the 11th of December 1905, so that it was brought within 12 years from the deaths of Musammat Hulaso and Musammat Bilaso.

One of the defences set up was that the debt of Musammat Jaika, in respect of which the property was sold, was incurred for legal necessity. This defence was not established, and it has not been raised before us. Another plea raised was in regard to the $\frac{3}{4}$ of the property which was sold by Musammat Hulaso and Bilaso on the 8th of January 1881. The plea was that this sale was carried out for legal necessity and that the plaintiff, as legal representative of Majnun Lal, was bound by it. This is the subject of the connected appeal No. 280 of 1906.

As to the entire of the village the main and important defence was that the property was not the estate of Newal Rai and did not devolve on Musammat Jaika as his heir; that Newal Rai was only a *mukaddam* of the property, being recorded as lambardar, and that, after his death, the Government conferred proprietary rights on Musammat Jaika, and she thus acquired the absolute estate and did not inherit it from her husband, and that consequently Banarsi Das, who purchased the property at a sale in execution of a decree obtained against Musammat Jaika, acquired an absolute estate in it. This was the main contention before us of the defendants appellants.

The circumstances which led to the intervention of Government in regard to this estate were these. Raja Kheri Singh owned the village in dispute and a number of other villages as zamindar, but under him were inferior proprietors, who are described as *mukaddams*. Raja Kheri Singh made default in payment of the Government revenue, and in consequence the Government determined to make settlements with the under-proprietors and the under-proprietors engaged with the Government for the payment of the Government revenue, and a *malikana*

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allowance of Rs. 10 per cent. of the Government revenue was allowed to the Raja. The settlement was so made with Musammat Jaika after the death of her husband, and it is this settlement which forms the basis of the claim that Musammat Jaika by grant from Government became in her own right the absolute owner of the village in dispute with other property. It does not appear that any sanad was granted by Government to Musammat Jaika. The only evidence which has been laid before us on the subject is some records from the settlement department and also judgments of the Civil Courts. One of the records in question is a proceeding before the Settlement Collector of Bareilly, dated the 4th of September 1870, relating to a settlement of the village of Kanai Shibnagar (No. 58C of the record). In it the reason is assigned for the nomenclature of the village and successive transfers, and from it we gather that the village was populated by Hari Ram *mukaddam* about 300 years ago, that subsequently the village site was washed away by the floods of the Ram Ganga, and that it was afterwards populated by one Sewa Ram. Then follows this statement :—"At the time of the former settlement Ranis Rup Kunwar and Bas Kunwar, wives of Raja Kheri Singh, were the zamindars, and Ganga Ram, Khayali Ram, Gajadhar, Tilok Chand and Newal Rai, *mukaddams*, the lambardars of this village. After the settlement, Newal Rai died and in his stead the name of Musammat Jaika was entered as a lambardar." Then later on an order of the Lieutenant-Governor, dated the 24th of June 1851, is recited to the effect that the zamindari of this village was conferred upon certain persons, who are named, and amongst others as to 6 biswas, 13 biswansis and 5 kachwansis on Ganga Ram and Musammat Jaika. Later on we find the statement that on the 10th of March 1862, an order, together with a list of taluqdari villages of Raja Kheri Singh, was received from the Lieutenant-Governor to the effect that the *mukkaddams* should pay to the heirs of Raja Kheri Singh Rs. 10 per cent. of the Government revenue as *malikana* allowance.

In the khewat of the village of Kanai Shibnagar, dated the 8th of January 1870, there appears in the last column the following statement :—"There are two kinds of proprietors in this village, *i.e.*, one superior and the other inferior. As under the

order of the Government the inferior proprietors have been charged with the payment of revenue, the settlement of this village has been made with them. Raja Partab Singh, the adopted son of Ranis Rup Kunwar and Bishen Kunwar, widows of Raja Kheri Singh, has been declared to be the superior proprietor of this village. Rupees 134 on account of *malikana* allowance due to him shall, as per detail given in column 13, be paid into the Tahsil, and he will continue to receive it from the Tahsil treasury. He shall have nothing to do with the collections and assessments of the village."

It appears that the widows of Raja Kheri Singh instituted a suit as his representatives to recover zamindari and malguzari possession of the entire estate of Raja Kheri Singh, including 87 mauzas, and to set aside the decision of the Settlement Officer, dated the 24th of June 1851, by which the plaintiff's claim was rejected and the zamindari title of Ghulam Husain and others was recognized. The Judge of Bareilly decreed the plaintiffs' claim, whereupon an appeal was preferred to the Sadr Dewani Adaulat, and we have on the record a copy of the judgment of that Court, dated the 27th of August 1861. In that judgment a short history of the estate is to be found, and official reports are quoted as elucidating the fiscal history of the estate and the positions of the conflicting claimants. From this it appears that at the cession the name of Kunwar Kheri Singh was recorded as proprietor of the entire pargana, but that the first settlement was concluded generally with the *mukaddams*; that at the second settlement Kunwar Kheri Singh engaged for 21 villages, and at the third settlement for 26, but that owing to his incapacity and the fact that the revenue had fallen into arrears, Kunwar Kheri Singh was excluded from the settlement and a suitable provision was made for him as an equivalent for his exclusion from the management of the estate. The learned Judges held that the allowance in question was actually granted as a *malikana* allowance, and that the plaintiffs possessed a proprietary title to some extent in all the villages claimed, but that the defendants, who then engaged with Government for the 54 mukaddami villages were possessed of proprietary rights in these villages of a heritable and transferable nature. The conclusion at which the

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learned Judges arrived was, that in the case of the 54 mukaddami villages there existed an inferior proprietary right, heritable and transferable, which was vested in the defendants then engaging for these mauzas.

We gather from this that there was no actual confiscation by Government of the superior proprietary right of Raja Kheri Singh and no grant of that estate to the inferior proprietors. What the Government did was to settle for the revenue with the inferior proprietors reserving to Raja Kheri Singh in respect of his superior proprietary rights a *malikana* allowance. The inferior proprietors no doubt thus acquired zamindari rights which they had not previously enjoyed, but these rights were acquired by virtue of and not independently of their pre-existing estate. The inferior estate became as it were merged in the superior interest thus, I may say, usurped. Musammat Jaika had succeeded on the death of her husband Newal Rai to his estate and was recorded in the revenue papers as lambardar. Then by virtue of the order of His Honour the Lieutenant-Governor to which I have referred she and Ganga Ram acquired zamindari rights in respect of 6 biswas 13 biswansis 5 kachwansis in the villages in question, of which Musammat Jaika was entitled to one-half. It is difficult to see how the accretion to her rights thus acquired can be regarded as equivalent to a grant by Government to Musammat Jaika in her own right of the estate which formerly belonged to her husband, so as to enable her to deal with it as her absolute property and disappoint the expectation of her daughters and the other reversionary heirs of her husband to whom the property would in the ordinary course have come upon her death.

The learned Subordinate Judge held that Musammat Jaika inherited the property from her husband, and did not in her own right acquire the zamindari rights which Government conferred. He observes as follows:—"It seems clear to my mind that as Musammat Jaika's name was entered in the revenue papers in respect of her husband's lambardari rights as heir of her husband, the zamindari rights in the shares in dispute were also conferred on her by Government as representing her deceased husband and as his heir, and she herself had done nothing to merit the

grant of zamindari rights to her, and she might never have acquired the zamindari rights had she not been heir and wife of Newal Rai deceased."

I think that the learned Subordinate Judge was right in the conclusion at which he arrived. Musammat Jaika acquired the property of her husband for a Hindu widow's estate, and by virtue of her ownership derived from her husband acquired from Government the zamindari rights which had not previously been enjoyed. The acquisition of these must, I think, be taken to be an enlargement merely of the interest to which she was entitled as the widow of Newal Rai, and as such be treated as acquired for the benefit of all persons interested as reversioners in the estate of Newal Rai. Even if the act of Government amounted to a grant of the zamindari rights to Musammat Jaika, it appears to me that the doctrine of graft which is so fully dealt with under the leading case of *Keech* v. *Sandford* (1) would be applicable. The rule laid down in the principal case is that when a trustee of lease-hold property renews the lease in his own name, he must hold the renewed lease for the benefit of his *cestui que trust*. This rule has been extended and it is applicable to the case of a purchase of the reversion of an estate by a tenant for life, and is based in such case upon the duty which lies upon a limited owner to act in a matter of the kind for the benefit of the whole interest. The principle is embodied in the Indian Trusts Act, 1882. Section 90 of that Act prescribes that "where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property gains any advantage, he must holb for the benefit of all persons so interested the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage." Here Musammat Jaika, who inherited from her husband his estate as tenant for life acquired from Government

(1) (1726) 2 W. and T., 7th Edn, p. 693.

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the zamindari rights which had belonged to Raja Kheri Singh by virtue of her position as qualified owner, and thus gained an advantage in derogation of the rights of the other persons interested in the property. Consequently she was bound to hold the advantage so gained for the benefit of all persons so interested. If she had not been tenant for life of the property of her husband, Government would undoubtedly not have settled with her for the revenue. It was by virtue for her possession of the estate as his widow, and not otherwise, that she obtained the concession of zamindari rights from Government. If therefore there was a grant from Government to her, she became I think, a constructive trustee of the rights so acquired for the parties entitled to the whole interest.

For the foregoing reasons I would dismiss the appeal.

BANERJI, J.—I also am of opinion that the appeal should be dismissed. In my judgment the effect of the settlement with Musammat Jaika was to enlarge the widow's estate which she held as heir to her husband Newal Rai. As such widow she held a life estate in the rights of Newal Rai as mukaddam. When the Government made a settlement with her and Ganga Ram, the brother of Newal Rai, it only enlarged the mukaddami rights held by them. So that the enlarged rights were held by her in the same capacity in which she held the original rights, namely, as a Hindu widow. I see no reason to assume that absolute rights as proprietor were conferred on her by Government. She was not therefore competent to make the transfer in suit. I express no opinion on the question of graft or on the question whether she may be deemed to have been a trustee for the persons entitled to the estate.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

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July 24.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

RAM CHANDAR (DEFENDANT) *v.* KALLU AND OTHERS (PLAINTIFFS).*

Act No. IV of 1882 *(Transfer of Property Act), section* 91—*Redemption of mortgage—Reversionary heirs of deceased husband of Hindu widow not entitled to redeem mortgage made by husband.*

Held that the reversionary heirs of the deceased husband of a Hindu widow in possession as such of her husband's property are not persons who, within the meaning of section 91 of the Transfer of Property Act, 1882 have such an interest in the mortgaged property, as would entitle them during the life-time of the widow to redeem a mortgage made by the husband.

THE facts which gave rise to this appeal are as follows:—Diwan Singh mortgaged certain property to one Durga. The mortgagor died leaving a widow Musammat Ram Dei, who took possession of the property. The mortgagee sold his interest to one Ram Chandar. The present suit was brought by the person who would have been the reversionary heirs of Diwan Singh had the widow died at the date of its institution, and they asked to be allowed to redeem the mortgage made by Diwan Singh. The Court of first instance (Munsif of Khurja) gave the plaintiffs a decree, and this decree was, with some modification, affirmed by the Additional District Judge. The defendant mortgagee appealed to the High Court.

Mr. *Muhammad Raoof*, for the appellant.

Lala *Girdhari Lal Agarwala*, for the respondent.

STANLEY, C. J., and BANERJI, J.—The question raised in this appeal is whether persons who claimed to be reversionary heirs of a deceased mortgagor can, during the life-time of the mortgagor's widow, redeem a mortgage executed by the deceased. Diwan Singh was the mortgagor, and he executed the mortgage in question in favour of one Durga. His widow Musammat Ram Dei, is now in possession of the property. Ram Chandar, the defendant appellant, is a purchaser from Durga. No authority is shown for the proposition that a reversionary heir, who may or may not according to the circumstances ever come into possession of an estate, is entitled to redeem. The plaintiffs have no present interest in the property. Their interest is contingent upon their surviving the mortgagor's widow. The Court of

* Second Appeal No. 486 of 1907 from a decree of J. H. Cuming, Additional Judge of Aligarh, dated the 29th of January 1907, affirming a decree of Ganga Prasad, Munsif of Khurja, dated the 10th of September 1906.

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first instance gave a decree for redemption and directed that on payment of the mortgage debt the plaintiffs should be put into possession. Now it is obvious that the plaintiffs have no right to possession in the life-time of the mortgagor's widow. Therefore this provision of the decree is clearly wrong. Upon appeal the learned District Judge affirmed the decision of the Court below, with this modification that he directed that the provision in the decree awarding possession to the plaintiffs should be struck out. Notwithstanding this direction we find in the decree the same provision for possession. In it, it is stated that in the event of payment of the mortgage debt by the plaintiffs they shall be put into possession of the mortgaged property. On turning to section 92 of the Transfer of Property Act, it is obvious that the provisions of that section cannot be complied with, if the suit is one by reversionary heirs, as is the case here, seeing that they are not entitled to possession of the mortgaged property and may never be so entitled. That section also provides that if payment is not made of the mortgaged debt in accordance with the earlier provision of the section, the plaintiff is to be absolutely debarred of all right to redeem the property or that the property be sold. This provision would be inapplicable to the case of plaintiffs who are only reversionary heirs and who may ultimately never become entitled to the property. It would not be binding upon other parties who upon the death of the widow would become actually entitled to it as heirs. The plaintiffs respondents rely upon the language of section 91 (*a*) as giving them a right to redeem. This section provides that any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property may redeem, and the contention is that the plaintiffs-respondents have such an interest. We think that the interest there referred to is a present interest and not a mere contingent right such as the plaintiffs possess. In view of the difficulty of carrying out a decree for redemption in a case of the kind, particularly in cases in which persons are entitled to an interest in the property for life in succession, as for instance the widow of a deceased mortgagor and after her the daughters of such mortgagor, we do not see our way to extend the meaning of the word "interest" as used

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in this section so as to embrace the chance of inheriting of a reversionary heir. It seems to us that possibly this suit was instituted by the plaintiffs with a view to obtain an equitable charge or lien upon the property which would enable them in future proceedings to sell the property or in some way deprive the widow of her life estate. For these reasons we allow the appeal. We set aside the decrees of both the lower Courts and dismiss the suit with costs in all Courts.

Appeal decreed.

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July 31.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

MUJIB-ULLAH (JUDGMENT-DEBTOR) *v.* UMED BIBI, (DECREE-HOLDER).*

Execution of decree—Limitation—Application in continuation of previous proceedings in execution.

On the 7th December 1903, the sale of certain immovable property, which had been attached, was ordered. On the 30th January 1904, the amin reported that he had been unable to hold the sale, as there were no bidders. Notice of this fact was given to the decree-holder and he was allowed time till the 10th February to pay in fees for a fresh sale. On that date, no steps having been taken by the decree-holder, the case was ordered to be struck off "for the present." On the 13th January 1906, the decree-holder again applied, asking that the property, which was still under attachment, might be sold. *Held* that this was not a fresh application in execution, but merely an application to revive the former proceedings, and was not barred by limitation. *Dukhiram Srimani* v. *Joggndra Chandra Sen* (1) distinguished. *Rahim Ali Khan* v. *Phul Chand* (2) referred to.

THIS was an appeal under section 10 of the Letters Patent from a judgment of Aikman, J. The facts of the case are stated in the judgment under appeal, which was as follows:

AIKMAN, J.—This appeal arises out of an application to execute a decree for money passed upwards of a quarter of a century ago. As the learned District Judge remarks, the case "illustrates in a remarkable manner the protracted nature of proceedings in execution of a decree in those cases where the judgment debtor is not anxious to pay off the amount decreed." The decree was passed on the 14th May 1880. Various applications were made for execution, and some portion of the decretal amount was realized. On the 30th of June 1899 the decree holder presented an application to realize the balance due under

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* Appeal No. 9 of 1908, under section 10 of the Letters Patent.

(1) (1900) 5 C. W. N., 347. (2) (1896) I. L. R., 18 All., 482.