PRIVY COUNCIL.

P. C.* 1888 November 15th, December 1st.

NANDI SINGH AND ANOTHER (PLAINTIFFS) *v.* SITA RAM AND ANOTHER (DEFENDANTS).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Hindu law—Gift—Inheritance in a village community in Oudh—Wajib-ul-arz modifying the Mitakshara law—Hindu widow's power of alienation—Operation of gift by her to two donees, one of whom could not take.

A clause in the wajib-ul-arz of a village in Oudh authorized any co-parcener not having male issue, or his widow, to make a gift of his share in the village to a daughter, or a daughter's son; the intention apparent from this, and from a further provision as to the descendants of a sharer's daughter, being to modify the law otherwise prevailing, *viz.*, the Mitakshara, and authorize the introduction of a daughter, or her son, and their descendants, male or female, in priority to brothers or nephews of the sharer.

Held, that such introduction was authorized, and that the inheritance, where the widow had made a gift of it in favour of a daughter, was transmitted to the daughter's daughter, the gift being of more than the donor would have taken as a widow.

The gift was to the daughter and to her husband jointly. *Held*, that the gift being invalid as to the husband, the daughter took the whole estate given on the general principle of gifts to two persons jointly, where they failed as to one of them, operating entirely for the benefit of the other who could take, declared in *Humphrey* v. *Tayleur* (1), which, not depending on any peculiarity of English law, was applicable here.

APPEAL from a decree (7th July 1885) of the Judicial Commissioner, affirming a decree (10th June 1884) of the District Judge of Lucknow, which varied a decree (24th December 1883) of the Subordinate Judge of the Unao District.

The suit out of which this appeal arose related to a gift of a one anna and three pies share in a village, named Baboo Rajnan, in the Unao District, of the description generally termed "Zemindari," or jointly held by the proprietary body (2). The share had

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, SIR R. COUCH and MR. STEPHEN WOULFE FLANAGAN.

(1) Ambler, 138.

(2) In these the co-parceners hold the whole village jointly in shares ordinarily determined by hereditary right, as distinguished from the ownership of shares in villages of another kind, shown by the area of the proprietor's possession.

1888

NANDI SINGH v. SITA RAM.

been owned by Sheo Baksh, who died in 1869 without issue, but leaving a widow Mussammat Bichan Kunwar, and a daughter Mussammat Mithan Kunwar. His nephews now claimed his share, and the principal question raised was, whether under the authority of the wajib-ul-arz of the village, and in consequence of a gift made by the widow to her daughter, that daughter's daughter took in priority to the collateral heirs of the deceased Sheo Baksh.

The clause in the wajib-ul-arz, and the contents of the deed of gift of 7th March 1870, by Bichan Kunwar to Mithan Kunwar and her husband Sita Ram (the latter not taking under it) are stated in their Lordships' judgment. Mithan Kunwar died in 1878, leaving her husband surviving her, and he was the first defendant in this suit, the other being his daughter by Mithan Kunwar, named Maharaj.

The Subordinate Judge held that the gift was invalid as to Sita Ram, but valid as a gift in favour of Mithan to convey one-half to her; and that Mithan's estate descended to her daughter, Maharaj, under the terms of the wajib-ul-arz, which used the words, "*auiad pisri*" "*ya dukhtari.*"

On the plaintiff's appeal, the District Judge remanded the suit, directing that Maharaj, who had not till then been made a party, should be joined, and adding an issue as to the effect of the deed of gift of 7th March 1870 in favour of Mithan in transferring the entire inheritance. The Subordinate Judge repeated his former decree.

The District Judge's judgment was, that he found no specification of shares in the deed of gift, and though invalid as to Sita Ram, it passed the entire property to Mithan. In regard to possession which should have followed, he held that an application presented by Bichan Kunwar for mutation of names in favour of Mithan, alleging that she had given her possession, was sufficient evidence of possession given in Bichan Kunwar's lifetime. He therefore dismissed the suit with costs.

The Judicial Commissioner's judgment, after a short summary, was as follows:—

The main contention in appeal is, that the deed of gift of 1870, not having been followed by a transfer of possession during the donor's lifetime, is invalid according to Hindu Law.

The lower Courts however concur in finding that there was a transfer of possession during the life time of Mussammat Bichan Kunwar. The Court of First Instance has found that Mussammat Mithan Kunwar and her husband Sita Ram lived with Mussammat Bichan Kunwar, and that Sita Ram managed the estate on behalf of the family. Under these circumstances it is diffioult, if not impossible, to ascertain the truth as to actual possession. It is however on the whole presumable, that Mussammat Bichan did make over the estate to her daughter before her death. If the deed of gift were invalid by reason of Mussammat Mithan Kunwar's not having obtained possession during her mother's lifetime, and if she (Mussammat Mithan Kunwar) had no right of inheritance, the conduct of the plaintiffs appellants in acquiescing for nine years in her usurpation is inexplicable.

It is further contended that under the terms of the wajib-ul-arz the widow could not create any interest beyond her own lifetime. This no doubt is the ordinary Hindu Law, but it is clear that this is not the intent of the wajib-ul-arz, which I consider has been rightly interpreted by the Courts below, as giving the widow power to create an absolute estate in favour of the daughter, or daughter's son, of the original owner.

I further concur with the District Judge that the deed of gift, though invalid as regards Sita Ram, was a valid conveyance of the whole share in favour of his wife, Mussammat Mithan Kunwar, the daughter of Sheo Bakhsh. I therefore affirm the decree of the lower Appellate Court, and I dismiss the appeal with costs.

On this appeal, Mr. *J. D. Mayne* and Mr. *J. H. W. Arathoon*, for the appellants, regard being had to the finding of the Courts below in succession, as to the question of possession by Mithan, proceeded to other points in the case. It was argued that the judgments to the effect that under the wajib-ul-arz and the deed of gift, an absolute estate of inheritance descending to her own daughter was created in favour of Mithan, were wrong. How far the wajib-ul-arz had the effect of altering the law was open to question, it being merely part of the settlement record, and though entries were presumed to be true under ss 16 and 17 of the Oudh Land Revenue Act (XVII of 1876), it might be erroneous as in the case of *Uman Parshad* v. *Gandharp Sing* (1). At all events, the words must receive a reasonable construction, and one could be placed on it that did not conflict with the plaintiff's claims. It could hardly be that the widow could give an

(1) L. R., 14 I. A., 131; I. L. R., 15 Calc., 20.

1888

NANDI SINGH v. SITA RAM.

estate of inheritance which she did not herself possess. And that the words translated, "descendants," meant such descendants as were heirs, rather than that they should allow a daughter's daughter to come in as an heir, was the better construction. If moreover the wajib-ul-arz had authorized a certain exclusion of collaterals in favour of female heirs in a direct line, the gift of 1870 had not proceeded correctly upon the power given. The deed was invalid, at all events, as regarded one of the two donees, and formed but an ineffectual attempt to do more than create an estate for the life of Mithan Kunwar. If it could be taken to be intended to give a joint estate for the life of the daughter, or of both, with survivorship between them, it failed in both cases on the death of Mithan, and the right to inherit the share of Sheo Baksh belonged to his collateral heirs. The gift could not be treated as conferring upon Mithan an estate different from that which had been intended by the donor. Reference was made to *Harvey* v. *Stracey* (1), *Re Farncombe's Trusts* (2), *Re Brown's Trusts* (3).

The respondents did not appear.

Their Lordships' judgment was afterwards delivered, on 1st December, by

SIR R. COUCH.—The appellants in this case are the grandsons of one Fatteh Singh, who had two sons, Sardar Singh, the father of the appellants, and Sheo Baksh. The latter married Bichan Kunwar, and died on the 20th April 1869, without leaving any male child. They had a daughter Mithan Kunwar, who was married to Sita Ram, the first respondent. Mithan Kunwar died on the 18th March 1878, leaving a daughter Mussammat Maharaj, the second respondent. Bichan Kunwar died on the 26th March 1874. The suit was brought on 28th September 1883 by the appellants, to recover possession of land in the village, Baboo Rajnan, Pergunnah Harha, District Unao, which was the share of Sheo Baksh in the property inherited by him and his brother, the plaintiffs claiming to be his heirs according to Hindu law, and entitled to succeed to his estate on

(1) 1 Drew, 117. (2) L. R., 9 Ch. Div., 652.
(3) L. R., 1 Exch., 74.

1888

NANDI SINGH v. SITA RAM.

the death of his widow. It was not disputed that the plaintiffs would be entitled if the ordinary law was applicable. The defence was rested upon a custom of the village of Baboo Rajnan as to the right to inheritance, and a deed of gift, dated the 7th March 1870, executed by Bichan Kunwar.

The wajib-ul-arz, which governs the right of succession to the property in dispute, is as follows:—

"*Extract from wajib-ul-arz, of village Baboo Rajnan, Pergunnah Harha, paragraph 4, of right to inheritance.*

"The rule of inheritance is that if a sharer has children by two lawfully married wives—that is, one child by one wife and several by the other—the children by both the wives shall get equal shares, that is, one child will get possession over one half, and several children over the other half. If one wife have children, and the other be childless, both of them will hold possession of equal shares for their lifetime; after the death of the childless wife, the children of the other wife will hold possession in equal shares. If there be no male child, and any sharer or his wife make a gift of his or her share during his or her lifetime to his or her daughter or daughter's son, and puts her or him in possession of the same, they will remain in possession. If there remain no descendants of any sharer's son or daughter, his brothers or nephews descended from the same ancestor shall take possession of the share. A non-married wife, or children by her, shall not get anything except maintenance."

The intention appears to be to modify the Mitakshara law which prevails in Oudh by enabling a sharer in family property or his wife to alter the course of succession by introducing a daughter or daughter's son, and their descendants, male or female, in preference to brothers or nephews of the sharer. There is no reason for limiting the meaning of "descendants" to children, as where they are intended, that word is used, and where a male is intended it is so said. It is also apparent from the provision that the brothers and nephews are to take if there remain no descendants of a son or daughter, that the gift by the wife must be of more than the interest she would take as a widow, and is not, as the appellants contended, limited to that interest. Both the lower Courts have understood "descendants" as meaning male and female in any degree.

On the 7th March 1870, Bichan Kunwar executed a deed of gift of the property in dispute to Mussammat Mithan and Sita Ram, the words of gift being followed by "I promise and agree

1888

NANDI SINGH v. SITA RAM.

"in writing that the donee may, from the date of execution of "this instrument, take proprietary possession similar to mine over "the gifted property. There has been left no claim right or dis- "pute to me or any of my heirs." This was intended to be and should be construed as an absolute gift. The contention of the appellants in the lower Courts and before their Lordships was, that the gift being invalid as regards Sita Ram was also invalid as regards Mithan. The District Judge and the Judicial Commissioner have both held that it is a valid gift of the whole to Mussammat Mithan. Their Lordships are of this opinion: The gift is to the two donees jointly, and in *Humphrey* v. *Tayleur* (1), Lord Chancellor Hardwicke said: "If an estate is limited to "two jointly, the one capable of taking, the other not, he who "is capable shall take the whole." This principle does not depend upon any peculiarity in English law, and is appplicable to this deed of gift.

The question whether the gift was accompanied by possession was disposed of by their Lordships in the course of the argument, and it is not necessary to say more upon it.

Their Lordships will humbly advise Her Majesty to affirm the decree of the Judicial Commissioner, and to dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Young, Jackson & Beard.*

C. B.

P. C.* 1889 *February* 12, 13 *and* 16.

MAHABIR PERSHAD SINGH AND ANOTHER (PLAINTIFFS) *v.* MACNAGHTEN AND ANOTHER (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

Res judicata—Code of Civil Procedure, s. 13—*Omission to bring forward in a prior suit what then would have been a defence—Accounts between mortgagor and mortgagee—Purchase of mortgaged property by the latter at judicial sale, on leave obtained to bid.*

A mortgage between parties who had accounts together, comprised lands which also were leased by the mortgagors to the mortgagees, who in 1878 obtained a decree upon the mortgage, although at the time they owed

* *Present:* LORD WATSON, LORD HOBHOUSE, AND SIR R. COUCH.

(1) Ambler, 138.