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allowed to bring separate suits for the redemption of their own shares only, the same inconvenience will be the result if the plaintiffs be compelled to redeem the whole mortgage, inasmuch as each of the other heirs of the mortgagor, 50 in number in this case, who are defendants to the suit, will admittedly be entitled to redeem his own share from the hands of the plaintiffs. The principle of the rulings in *Azimat Ali Khan* v. *Jowahir Singh* (1), *Kallan Khan* v. *Mardan Khan* (2) and *Munshi* v. *Daulat* (3), is applicable to this case. The learned vakil for the respondent relied on *Lachmi Narain* v. *Muhammad Yusuf* (4), but that case has, in our opinion, no bearing on the question before us. For the above reasons we allow the appeal and setting aside the decree of the learned Judge of this Court restore that of the lower appellate court.

Appeal allowed.

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March 16.

Before Mr. Justice Richards and Mr. Justice Karamat Husain.

MURARI LAL AND ANOTHER (DEFENDANTS) *v.* KUNDAN LAL (PLAINTIFF.)*

Hindu law - Construction of will—Bequest to a female and on her death to her adopted son—Interpretation of word 'Malik' —Bequest not conditional on adoption.

A teastator bequeathed all his property to *S* and on her death to her adopted son *K*. *K* being the daughter 's son of *S* could not be adopted under the Hindu Law. The testator further directed under the will that his daughter and his predeceased son's daughters were to be excluded. *Held* that it was the intention of the testator to make *K* the object of his bounty irrespective of adoption. *Fanindra Deb* v. *Rajeswar* (5) referred to.

THE facts of this case are as follows :—

One Hargu Lal to whom the property in dispute originally belonged executed a will on 1st April 1889. The will commenced by reciting that the testator had made a previous will in favour of Sant Lal his son who had predeceased him, and he was therefore transferring the office of legatee to his daughter-in-law Musammat Sukhi. It then went on to say that all the testator's moveable and immoveable properties should remain his own during his life and that after his death Musammat

* Second Appeal No. 199 of 1908, from a decree of Austin Kendall, Additional District Judge of Meerut, dated the 18th of November 1907, confirming a decree of H. David, Subordinate Judge of Meerut, dated the 19th of June 1907.

(1) (1870) 13 M. I. A., 404. (3) (1906) I. L. R., 29 All., 262.
(2) (1905) I. L. R., 28 All., 155. (4) (1894) I. L. R., 17 All., 63.
(5) (1885) L. R., 12 I. A., 72.

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Sukhi, widow of Sant Lal, was to be '*Malik*' of all the property. The will then set out that Musammat Sukhi had adopted Kundan Lal, who was Sant Lal's daughter's son, and that on the death of Musammat Sukhi, Kundan Lal was to succeed her. Hargu Lal died on 26th August 1898, and Musammat Sukhi died on the 27th May 1899. The defendants claiming to have got the property by gift from Sukhi took possession of it. Thereupon the plaintiff Kundan Lal brought the present suit for ejectment on the basis of the will of Hargu Lal. The court of first instance held that the will was proved and that under the will, Musammat Sukhi took a life estate only and after her death Kundan Lal was entitled to succeed, although his adoption was not valid, inasmuch as the bequest in his favour was not conditional on his being adopted. The lower appellate court confirmed the decree.

The material paragraphs of the will were as follows :—

That after my death, Musammat Sukhi, wife of Sant Lal aforesaid, shall remain *Malik*, of all my property . . . , and no one else shall become so (*Malik*).

That Musammat Sukhi aforesaid, with the consent of me the executant, adopted her daughter's son Kundan Lal son of Kewal Ram . . . during the life-time of her husband, Sant Lal, and has performed all ceremonies observed in the brotherhood. After the death of Musammat Sukhi aforesaid, Kundan Lal aforesaid shall become '*malik*' and '*kabiz*' of all the property and nobody else shall have any claim. But after his death, his mother Musammat Basso, daughter of Sant Lal . . . . will be '*malik*' and '*kabiz*' of all the property.

The defendants appealed to the High Court.

Dr. *Satish Chandra Banerji* (with him Pandit *Moti Lal Nehru*), for the appellants, contended that Hargu Lal had executed a previous will in favour of Sant Lal and in the last will the only change he purported to make was to substitute Musammat Sukhi as the legatee. She was to be the '*Malik*', that is, absolute owner. The meaning of the word '*Malik*' has been definitely settled by the Privy Council. *Surajmani* v. *Rabinath Ojha* (1). The bequest was to Kundan Lal as the adopted son of Musammat Sukkhi and Sant Lal. Kundan Lal would therefore only succeed if he were and could be validly adopted. Being a daughter's son he could not be adopted and as the adoption was the motive and the condition of the bequest, the adoption being invalid, the bequest was inoperative. He cited

(1) (1907) I. L. R., 30 All., 84; P. C.

Fanindra Deb Raikat v. *Rajeswar Dass* (1), *Surendra Keshab Roy* v. *Durgasoondery Dossee* (2), *Karamsi Mashouji* v. *Karparndass Natha* (3), *Lali* v. *Murldhar* (4).

Hon'ble Pandit *Madan Mohan Malaviya*, for the respondent, was not called upon.

RICHARDS and KARAMAT HUSAIN, JJ.—This was a suit to recover possession of certain shops. The plaintiff claims under a will of one Hargu Lal. The defendants are the persons who would have succeeded to the property but for the will. Hargu Lal had one son named Sant Lal, who predeceased him leaving a widow, Musammat Sukhi. Musammat Sukhi had four daughters, Musammat Sendho, Musammat Gendu, Musammat Chuna and Musammat Baso. The plaintiff is the son of Musammat Baso. The will is dated the 12th of April 1898, and it commences by reciting that the testator had made a will in favour of Sant Lal. It then goes on to say that all his property, moveable and immoveable, is to remain his own during his life and that afterwards Musammat Sukhi was to be the *malik* of all property. It then sets out that Musammat Sukhi has adopted Kundan Lal with his approval with all due formalities and that on the death of Musammat Sukhi Kundan Lal will succeed her. After the death of Kundan Lal Musammat Baso was to succeed. The will then concludes with special directions that neither Musammat Pari, daughter of the testator, nor any of his son's daughters, were to have any right whatever. It is admitted that Kundan Lal being a daughter's son could not under the Hindu law be adopted as a son of Sant Lal. The appellants contend that upon a true construction of the will the reason or motive of the gift to Kundan Lal was that he had been adopted. This is the only question that has been seriously pressed in this appeal. We think that the decision of the court below was correct. The testator for reasons which he gives expressly excluded from sharing in his property the persons who would have taken if there had been no will. Kundan Lal was the testator's sole male descendant. A number of cases have been cited to us including the passage from

(1) (1885) I. L. R., 11 Calc., 463, P. C. (3) (1898) I. L. R., 23 Bom., 271, P.C.
(2) (1891) I. L. R., 19 Calc., 513, P. C. (4) (1906) I. L. R., 28 All., 488, P. C.

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a judgment of Sir RICHARD COUCH in the case of *Fanindra Deb Raikat* v. *Rajeswar Dass* (1): "The distinction between what is description only and what is the reason or motive of a gift or bequest may often be very fine, but it is a distinction which must be drawn from a consideration of the language and the surrounding circumstances." We think upon a true consideration of the language of the will and the surrounding circumstances that the adoption of Kundan Lal was not the reason or motive of the gift and that the testator wished to make him the object of his bounty irrespective of his having been legally adopted. We accordingly dismiss the appeal with costs.

Appeal dismissed.

MISCELLANEOUS CIVIL.

1909
March 19.

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

B. AND N. W. RAILWAY (PLAINTIFF) *v.* BANDHU SINGH (DEFENDANT).*

Act (local) No. 11 *of* 1901—(*Agra Tenancy Act*), *section* 4—*Tenant—License to cut grass from embankements of a Railway line*—Profit á prendre—*Jurisdiction of Civil Court.*

A person authorized by a Railway Company to cut grass from the Railway embankments is not a tenant within the meaning of section 4 of the Tenancy Act, and the payment which he agreed to make is not rent. The right which he obtained under the agreement is in the nature of a *profit á prendre*. A suit for recovery of the amount agreed upon lies in the Civil Court.

THIS was a reference made by the Munsif of Gorakhpur, under section 195 of the Agra Tenancy Act.

The parties were not represented.

The facts of the case appear from the judgment of their lordships.

STANLEY, C.J. and BANERJI, J.—This is a reference by the learned Munsif of Gorakhpur, under the provisions of section 195 of the Tenancy Act. From the reference it appears that the defendant was authorised by the plaintiff company under a written document to enter upon part of the railway embankment and cut grass therefrom. The suit was brought by the Railway company to recover the price of the grass and

* Civil Miscellaneous No. 5 of 1909.

(1) (1885) L. R., 12 I. A., 72.