

1916

CHANDRIKA
BAKSH
SINGH
v.
INDAR
BIRRAM
SINGH.

circumstances, a purely academic discussion as to the powers of a Hindu widow to dispose of property, and finally allowed the appeal and dismissed the suit with costs.

Their Lordships, at the conclusion of the argument, humbly advised His Majesty that this appeal should be allowed; that the decree of the Court of the Judicial Commissioner of Oudh should be set aside with costs; and the decree of the Subordinate Judge of Bara Banki restored.

The respondent was ordered to pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondent: *Barrow, Rogers & Nevill.*

J. V. W.

FATEH CHAND (1ST DEFENDANT) v. RUP CHAND (PLAINTIFF).

AND ANOTHER APPEAL.

Two appeals consolidated.

[On appeal from the High Court of Judicature at Allahabad.]

Hindu law—Will—Construction of will—Will of Hindu widow in possession of her husband's estate—Bequest of whole estate to one person on conditions—Condition containing exception to conveyance of entire estate—Bequest of portion of estate to a different legatee—Owner in possession—Malik-o-qabiz—Absolute or limited estate.

A Hindu widow in possession of her husband's estate disposed of it by will as follows:—"Under the will of my husband I am the sole 'owner in possession' of his entire estate and possess all the proprietary powers . . . I bequeath the entire estate of my husband to Fateh Chand . . . subject to the following conditions . . . (1) So long as I live I shall continue to be the 'owner in possession' of the entire estate . . . and possess all the powers such as making sales, mortgages, gift, etc. (2) After my death the said person (the legatee) shall become the 'owner in possession' of the entire estate of my husband, and he, too, shall possess all the powers of alienation like myself. (4) I have bequeathed mauza Khudda with all the property to Musammam Gomi . . . After my death she shall be the 'owner in possession' of the entire property in mauza Khudda aforesaid."

Held (affirming the decision of the High Court) that on the construction of the will the words "owner in possession" (*malik-o-qabiz*) in clause 4, conferred on Musammam Gomi an absolute estate, and that completeness of the ownership and possession was not altered by any other expressions in the will *Surajmani v. Rabi Nath Ojha* (1) followed.

Taking all the clauses of the will together there was no repugnancy in such a construction, for, though the entire estate was conveyed in the first place

*Present:—Lord SHAW, Lord PARMOOR and Mr. AMTEB ALI.

(1) (1907) I. L. R. 30 All., 84; L. R., 35 I.A., 17.

P.C.*
1916
June, 23.

to Fateh Chand, it was subject to conditions, one of which (clause 4) bequeathed mauza Khudda as an exception to the conveyance of the entire estate.

1916

FATEH
CHAND
v
RUP CHAND.

CONSOLIDATED Appeals No. 135 of 1915 from two judgements and decrees (5th February, 1913) of the High Court at Allahabad, which partly affirmed and partly reversed a judgement and decree (11th March, 1911) of the Court of the Subordinate Judge of Saharanpur.

These two consolidated appeals arose out of a suit brought by the respondent for possession of a village named Khudda, which the plaintiff alleged belonged to Musammat Gombi Kunwar, widow of Lala Sri Kishan Das; that by her will, dated the 18th of September, 1901, she bequeathed the village to Musammat Gombi, daughter of Shibba, and wife of Suraj Mal; and that Musammat Gombi on the 26th of November, 1908, executed a deed of gift in his favour of part of the village, and on the 3rd of December, 1908, executed a deed of sale to him of the remaining part. The suit was brought against Fateh Chand, the present appellant, and Musammat Gombi was made a *pro forma* defendant. Fateh Chand, who alone contested the suit, admitted that Musammat Gombi made the will, dated the 18th of September, 1901, and that she thereby made a bequest of the village Khudda in favour of one Musammat Gombi, but he alleged that Musammat Gombi, the legatee under the will, was not the daughter of Shibba and wife of Suraj Mal; but another person of the same name; and further that even assuming that Musammat Gombi, the daughter of Shibba and wife of Suraj Mal, was the legatee, the will of Musammat Gombi was subsequently revoked, and her entire property bequeathed to himself, Fateh Chand.

The will of Musammat Gombi Kunwar, who died on the 11th of January, 1903, was, so far as it is material, as follows:—

“Under the will of my husband I am the sole owner in possession of his entire estate and possess all the proprietary powers. I have no male or female issue, and life is uncertain and not everlasting. Hence, through foresight and with a view to avoid future troubles and disputes, I, in a sound state of body and mind, bequeath the entire estate of my husband to Fateh Chand, son of Lala Sri Ram Das, who is related to me as the son of my ‘jeth’ (husband’s elder brother) subject to the following conditions. I covenant in writing that I shall abide by the following conditions:—

“1. So long as I live, I shall continue to be the owner in possession of the entire estate, the subject of the will, and possess all the powers, such as (those of) making sales, mortgages, gifts, etc.

1916

FATEH
CHAND
v.
RUP CHAND.

" 2. After my death, the said person (the legatee) shall become the owner in possession of the entire estate of my husband and he, too, shall possess all powers of alienation like myself.

" 4. I have bequeathed mauza Khudda, with all the property, to Musammat Gomi, the daughter of my priest, ('*prohit*') whose marriage was celebrated by my father-in-law and whom I have brought up as my own daughter. After my death, she shall be the owner in possession of the entire property in mauza Khudda aforesaid."

On the 13th of November, 1902, Musammat Gomi made a deposition in the presence of a Deputy Magistrate of Saharanpur, and stated (*inter alia*) as follows :—

" Fateh Chand should perform my obsequies, and he is the owner on my behalf . . . he is the owner of my property, goods, and chattels . . . "

The main questions argued in the Lower Courts were—

(1) Whether Musammat Gomi, wife of Suraj Mal, and the plaintiff's vendor, was the real legatee under the will or some other woman of that name? As to that it was found by both Courts in India concurrently on the evidence that the plaintiff's vendor was the real legatee. That question therefore was finally decided. Both Courts also held with regard to question (3) as to the alleged revocation of the will that it was not revoked by the deposition made by the testatrix on the 13th of November, 1902. That, though a question of law was also considered settled; and practically the only question for determination on these appeals was—

(2) Whether on the true construction of the will Musammat Gomi was entitled to an absolute estate or only to an estate for life?

The Subordinate Judge answered that question by holding that the legatee took only a life interest in the village Khudda. From the decree of the Subordinate Judge both parties appealed to the High Court, the plaintiff on the ground that he was entitled to an absolute interest, and the defendant contending that the plaintiff took no interest whatever in the village.

The High Court (Sir H. RICHARDS, C. J., and Sir P. C. BANERJI, J.) set aside so much of the Subordinate Judge's decree as in any way limited the estate of the plaintiff in the property in dispute, and held him entitled to an absolute estate

in Khudda. The material portion of the judgement was as follows :—

“ The learned Subordinate Judge has, for reasons which he has given in his judgement, held that on the true construction of the will as a whole, Musammat Gomi only took an estate for her life. He lays a good deal of stress upon the words in clause (2) giving all powers of alienation to Fateh Chand and to the omission of words of the same nature in clause (4). He then goes on to say that by reading clause (4) ‘as conferring merely a life estate, he can reconcile both clauses of the will.’ We cannot agree with this view. Having regard to the recent ruling of their Lordships of the Privy Council (1) if clause (4) stood alone, we certainly would have to hold that Musammat Gomi took an absolute interest, and not merely a life-interest.

“ We have then to see whether there is anything else in the will to lead us to believe that merely a life-interest was intended. The case cannot be put more forcibly than it was put by the learned Subordinate Judge. We, however, think that his reasoning is not quite complete, because by interpreting clause (4) as giving merely a life-estate, would not reconcile the two clauses or give effect to clause (2). Clause (2) provides that, after the death of the testatrix, Fateh Chand should at once become the absolute owner in possession of the entire estate. It is impossible to reconcile this clause with clause (4), which undoubtedly gives at least a life-estate to Musammat Gomi. We are bound to consider each clause by itself, and we must hold that under clause (4) an absolute estate is conferred upon Musammat Gomi. There are no words in clause (4), or in any other part of the will save, as already mentioned, which could in any way limit the estate conferred upon Musammat Gomi to a mere life-estate.”

The appeal of the plaintiff was consequently allowed and that of the defendant was dismissed.

The defendant appealed from both decrees to His Majesty in Council.

On these appeals—

De Gruyther, K. C., and *J. M. Parikh*, for the appellant, contended that on the construction of the will the decision of the Subordinate Judge was right, and that the legacy on which the claim was based conferred only an estate for life on Musammat Gomi. The language employed by the testatrix in describing her own absolute interest and the absolute interest she intended Fateh Chand to have was different from the terms used by her in conferring the interest she intended to give to Musammat Gomi, from which the presumption was that the latter's interest was meant to be of a limited nature. The word “ malik ” only

(1) (1907) *Surajmani v. Rabi Nath Ojha*, I. L. R., 30 All., 84 ; L. R., 35 I. A., 17.

1916

FATEH
CHAND
v.
RUP CHAND.

1916

FATEH
CHAND
v.
RUP CHAND.

conveyed an absolute interest where the terms used did not indicate a more limited estate. Reference was made to *Lalit Mohan Singh Roy v. Chukhun Lal Roy* (1); *Surjamani v. Rabi Nath Ojha* (2); and *Funchoo Money Dossee v. Troylukho Mohiney Dossee* (3). Express words of inheritance, it was submitted, were necessary to convey a larger estate than a woman ordinarily held. A life-interest in mauza Khudda therefore was all that Musammat Gomti conveyed to Fateh Chand.

Sir W. Garth and B. Dube, for the respondent, were not called on.

1916, June 23rd:—The judgement of their Lordships was delivered by Lord SHAW:—

In these consolidated appeals it has been admitted in the argument submitted to the Board by the counsel for the appellant that substantially only one question falls now to be determined. That question has reference to the construction of a will, dated the 18th of September, 1901, of one Musammat Gomti Kunwar. In that document there is a description of the title of the testatrix given in the following words: "I am the sole owner in possession of his '[her husband's]'" entire estate and possess all the proprietary powers." Their Lordships note that throughout this will the term thus translated "sole owner in possession" or "owner in possession" is *malik-o-qabiz*.

Having thus described the property she proceeds to bequeath "the entire estate of my husband to Fateh Chand." There is, however, appended to this bequest of the entire estate the subjection of the whole of the estate "to the following conditions," and a covenant in writing by herself that she would abide by those conditions. One of those conditions is in the following terms:—

(4) "I have bequeathed mauza Khudda, with all the property to Musammat Gomi, the daughter of my priest (*prohit*), whose marriage was celebrated by my father-in-law, and whom I have brought up as my own daughter. After my death, she shall be the owner in possession of the entire property in mauza Khudda aforesaid."

(1) (1897) I. L. R., 24 Calc., 884; L. R., (2) (1907) I. L. R., 30 All., 84; L. R., 24 I. A., 76.

35 I. A., 17.

(3) (1884) I. L. R., 10 Calc., 342 (347).

Their Lordships hold that there can be but little doubt that under the first sentence of condition 4, there would have been a competent bequest of the village Khudda, with the totality of rights falling under the designation "*jumla-i-hakikat.*"

Under the second part of condition 4, which says that the village is to be owned in possession, their Lordships cannot hold that there has been any abatement of the force of the words employed. Those words are *malik-o-qabiz*. Translated "owner in possession" they truly are "owner and possessor of." There can, according to their Lordships' view of this will, if condition 4 were alone under construction, be therefore no doubt, under either branch of it, that that village now belongs under this will, to Musammat Gomi.

The argument presented to the Board, however, was that while that same form of expression was used in earlier portions of the will, there were appended to it certain conditions or elaborations of which a sample may be given from condition—I. "I shall continue," says that portion of the will, "to be the owner in possession of the entire estate the subject of the will," and then there are added these words "and possess all the powers such as (those of) making sales, mortgages, gifts," etc.

In their Lordships' opinion these expressions do not abate from the completeness of the ownership and possession, nor do they fortify it in any way whatever. Accordingly condition 4, omitting the words which are thus surplusage, has to be given effect to, and it must be given effect to in the full sense recognised by law.

Their Lordships are of opinion that with regard to that sense there is now in the Indian law no doubt whatever. The judgement of Lord COLLINS in *Surajmani v. Rabi Nath Ojha* (1), attaches to the word *malik-o-qabiz* unquestionably a signification of a full ownership in property. Such an ownership in property in their Lordships' view was thus conveyed in this village to Musammat Gomi, and their Lordships will only conclude these observations by saying that in their view there is no repugnancy in such a construction. It is perfectly true that the entire estate was conveyed in the first place to Fateh Chand,

1916

FATEH
CHANDv.
RUP CHAND.

1916

FATEH
CHAND
v.
RUP CHAND.

but it was subject to conditions. On a perusal of those conditions, No. 4, occurs to the effect that as an exception from the conveyance of the entire estate this village is conveyed. This is not a repugnancy in the proper sense of the term, and taking the clauses of the will together it simply means that Fateh Chand takes the entire estate, with the exception of this village, while it, in proper conveyancing terms, is disposed of in favour of Musammam Gomi.

Their Lordships are accordingly of opinion that there is no ground for the argument which would upset the judgement of the learned Judges of the High Court. Their Lordships agree with that judgement, and they also agree with the observations made as to the judgement of the Subordinate Judge who, with much care had arrived at a different conclusion. The views of the High Court are shared by this Board, and accordingly they will humbly advise His Majesty that these appeals be dismissed with costs, including the costs of the petition for special leave to appeal.

Appeals dismissed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondent: *Barrow, Rogers & Nevill.*

J. V. W.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr Justice Muhammad Rafiq.

BENI PRASAD AND ANOTHER (DEFENDANTS) v. LAJJA RAM (PLAINTIFF).
Minor—Guardian—Suit to set aside a decree against a minor—Minor properly represented in such suit—Fraud or collusion of guardian.

A decree obtained against an infant properly made a party and properly represented in the case cannot be set aside by means of a separate suit except upon proof of fraud or collusion on the part of the guardian.

THE facts of this case are fully set forth in the judgement of the Court.

*Second Appeal No. 21 of 1915, from a decree of O. F. Jenkins, District Judge of Agra, dated the 7th of November, 1914, reversing a decree of Shekhar Nath Banerji, Subordinate Judge of Agra, dated the 16th of April, 1914.