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July, 1.

Before Mr. Justice Tudball and Mr. Justice Abdul Raoof.

GANGA (DEFENDANT) *v.* KANHAI LAL AND OTHERS (PLAINTIFFS) AND DHANNO AND OTHERS (DEFENDANTS).*

Act No. I of 1877 (*Specific Relief Act*), *section* 42—*Declaratory decree—Trespasser in possession of property to which a Hindu widow was entitled—Execution of will by trespasser—Suit by reversionary heirs for declaration of their rights and to set aside will.*

On the death of the widow of a separated Hindu, in possession as such widow of her husband's property, the daughter of one of her sons, who had both predeceased the husband, took possession of the property to the exclusion of her two daughters. While so in possession of the property the son's daughter executed a will bequeathing the property as if it were her own.

Held on suit by persons alleging themselves to be the reversionary heirs for a declaration that the son's daughter had acquired no adverse or proprietary right to the property and had no right to make a will in respect thereof, that no such declaration could be granted. *Umrao Kunwar* v. *Badri* (1) and *Jaipal Kunwar* v. *Indar Bahadur Singh* (2) referred to.

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

Munshi *Panna Lal*, for the appellant :—

The appellant acquired absolute right to the property, and not only a life-estate. Moreover, the plaintiffs not being immediate reversioners cannot in law obtain a declaration of their contingent and remote reversionary right. Under the circumstances the plaintiffs are not entitled to any declaration. Who knows whether they will be alive at the time of Musammat Dhanno's death? The declaration in that case would be absurd.

Mr. *N. C. Vaish*, for the respondents :—

The respondents being immediate reversioners can maintain the present suit. It is true that their right is contingent and inalienable, but it has been consistently held by the Privy Council and the High Courts in India that a suit by a reversioner for declaration that any transfer made by a female owner is not binding on him is maintainable. There

* Second Appeal No. 1247 of 1916, from a decree of H. E. Holme, District Judge of Aligarh, dated the 29th of May, 1916, modifying a decree of Shams-ud-din Khan, First Additional Subordinate Judge of Aligarh, dated the 31st of March, 1916.

(1) (1915) I. L. R., 37 All., 422. (2) (1903) I. L. R., 26 All., 238.

is nothing in principle to distinguish the present case, in which the daughter has allowed the appellant to remain in possession of the property for sixteen years allowing her claim to become barred by limitation, from a case of gift. In the first, possession against a female heir is not adverse to the reversioner and cannot affect his rights. In the second, the female heir, being a limited owner, cannot make a gift of immovable property which may bind the reversioners. In principle there is nothing against the granting of a declaration in respect of a point of law. Declarations have been repeatedly granted in the case of gifts. And it is a clear point of law that a Hindu female cannot make a gift of immovable property prejudicial to the rights of reversioners. In this particular case the appellant claims ownership of the property against the whole world and not against the daughter only. The appellants' claim clearly casts a cloud upon the plaintiffs' title and under section 42 of the Specific Relief Act the declaration may be granted to remove that cloud. Even though a will does not operate as a transfer of immovable property in the life-time of the testator, as the testator is dealing with the property as if she were its absolute owner, her so dealing with the property amounts to denial of title sufficient to allow a suit for a declaration of its invalidity so far as it affects the plaintiffs' reversionary rights; *Sheoraji* v. *Ramjas Pande* (1).

TUDBALL and ABDUL RAOOF, JJ.:—This is a defendant's appeal. The facts of the case are not in dispute. One Tika Ram was the owner of the property in respect of which this suit has been brought. He had a wife, Musammat Jhunia, two sons and two daughters. His two sons predeceased him, and one of them left a widow, Musammat Ganga. Tika Ram died and his wife Musammat Jhunia survived him. She died some sixteen years before the present suit was brought. On her death her two daughters, Musammat Dhanno and Musammat Jethi, were in law entitled to take the property. However, Musammat Ganga took possession and obtained mutation of names in her own favour and admittedly has been in possession ever since. Neither Musammat Dhanno nor Musammat Jethi apparently opposed her.

(1) (1911) I. L. R., 33 All., 430.

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Musammat Jethi died some eight years before the suit leaving the three plaintiffs, her sons. Musammat Dhanno is still alive. On the 6th of April, 1915, Musammat Ganga made a will, bequeathing this property, as if it were her own, to the defendants Khacher Mal and Chadda Lal. The plaintiffs have brought the present suit. They alleged collusion between Musammat Dhanno and Musammat Ganga. They pointed out that Musammat Dhanno had allowed Musammat Ganga to acquire title by prescription as against her (Musammat Dhanno). They claimed that they were entitled to take possession on behalf of Musammat Dhanno and to manage for her. They sought not only to recover possession of the property, but they also asked for a declaration which is relief A in their plaint. That runs as follows :—"On establishment of the plaintiffs' right it may be declared that the name of defendant first party stands recorded against the property given below without any right, and that she has no adverse or proprietary right to the property aforesaid, nor has she any right to make the will, dated the 6th of April, 1915." The court of first instance dismissed the suit. The lower appellate court held that the plaintiffs were entitled to a declaration that they are the owners of the property in suit as from the death of Musammat Dhanno and that as against them, Musammat Ganga's possession is not and cannot become adverse or proprietary, and the will of the 6th of April, 1915, made by her is void and unenforceable. An examination of the lower appellate court's decree will show that this was not the declaration which was actually granted in the decree. In that decree it was declared that the plaintiffs have been in possession of the property in dispute since Musammat Dhanno's death (a fact that nobody has asserted at any time, Musammat Dhanno being still alive). Secondly, that the possession of Musammat Ganga neither is nor can be adverse or proprietary as against the plaintiffs, and that the will, dated the 6th of April, 1915, executed by Musammat Ganga is void and ineffectual. This is followed by an order that Musammat Ganga should bear her own costs. This decree has been signed by the Judge and the pleaders for the parties as well as by the Munsarim of the court below. It is quite clear on the facts that the plaintiffs ought not in these

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circumstances to receive any declaration whatsoever. It is an absurdity to declare that the plaintiffs will be the owners of the property after the death of Musammat Dhanno. It is impossible to predict that they will be alive at the time of her death, and no such declaration can or ought to be granted. As regards the declaration that Musammat Ganga's possession is not and cannot become adverse as against the plaintiffs, there is no need for any such declaration at all. It is a question of law which has been repeatedly decided that possession taken by a trespasser during the life-time of a Hindu widow or Hindu female with a life-interest is not adverse as against the reversioners until after the death of the widow, but the courts in this country do not grant declarations on points of law simply for the convenience of parties. Thirdly, as regards the will executed by Musammat Ganga, the declaration in respect thereto is a declaration which ought not to be granted. We would refer to the decision in the case of *Umrao Kunwar* v. *Badri* (1) and also to the remarks of their Lordships of the Privy Council in the case of *Jaipal Kunwar* v. *Indar Bahadur Singh* (2). We do not think it is necessary on this branch of the case to make any further observations. It is obvious that the declaration which the court below sought to grant ought not to be given any more than the absurd declaration which was entered in the decree. We allow the appeal; set aside the decree of the court below and restore that of the court of first instance. The appellant will have his costs in all courts.

Appeal allowed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

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August, 1.

DILDAR HUSAIN AND ANOTHER (DEFENDANTS) *v.* SHEO NARAIN AND ANOTHER (PLAINTIFFS).*

Civil Procedure Code (1908), *order XXI, rule 57—Execution of decree—Sale in execution—Sale set aside—Order purporting to maintain attachment—"Default" of decree-holder.*

In execution of a decree the whole of a house was sold by auction instead of a share therein which alone was saleable in execution of the decree. Various objections were raised and in the end the court executing the decree passed

* First Appeal No. 64 of 1918, from an order of E. H. Ashworth District Judge of Cawnpore, dated the 6th of April, 1918.

(1) (1915) I. L. R., 37 All., 422 (2) (1903) I. L. R., 26 All., 238.