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appeal to His Majesty in Council. In order to justify our granting him the certificate which he asks for, we must be satisfied that a substantial question of law is involved in the case. There is no doubt that a question of law is involved, but that question must be a substantial question of law and a question about which there may be a difference of opinion. We do not think that in the present instance there can be any doubt that an appellate court cannot order stay of sale unless it has seisin of the case in which the sale was ordered to take place. This is obvious from the terms of order XLI, rule 5. When the vacation Judge made his order no appeal had been preferred. It was an urgent matter, and if the present applicant intended to appeal and to have the sale, which was to take place the following day, stayed, he ought to have obtained the leave of the vacation Judge to present the appeal as an emergent matter and then file his application for stay of sale. We think the learned Judges of this Court have rightly held that the order of the vacation Judge was *ultra vires* and therefore the sale was not a nullity, We dismiss the application with costs. Two sets of costs will be allowed, one to the decree-holder and the other to the auction-purchaser.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Walsh.

GOBIND UPADHYA AND OTHERS (DEFENDANTS) *v.* LAKHRANI. (PLAINTIFF).*

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Hindu law—Hindu widow—Gift by widow of property of her deceased husband for the spiritual benefit of the deceased.

The question whether the gift of a portion of her husband's property made by a Hindu widow was made for the benefit of his soul is a question of fact in each case. *Khub Lal Singh v. Ajodhya Misser* (1) referred to.

It is not a necessary condition to the validity of such a gift that the donee should be expected to do something which might be supposed to confer some benefit on the soul of the deceased.

THE facts of the case briefly are these:—

One Jagai Kurmi was the owner of some property worth about Rs. 2,000 to Rs. 4,000. He died in 1903 leaving his widow, Musammat Bhagwanti, and daughter, Musammat Lakhrani. In 1905 Musammat Bhagwanti went to Gaya and on her return, made

*Appeal No. 116 of 1919 under section 10 of the Letters Patent.

(1) (1915) I. L. R., 43 Calc., 574.

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a gift of property worth Rs. 400 in favour of one Jagdat, her husband's *purohit* (priest), in the following words :—"On the occasion of my visit to Gaya, having regard to spiritual benefit in after life, I made an oral *shankalp*, but since an oral gift does not convey property permanently, I therefore, made this written deed of gift."

On the death of Bhagwanti, her daughter Lakhrani brought a suit for cancellation of the deed alleging fraud, undue influence and absence of valid necessity.

The court of first instance decreed the suit. The lower appellate court found that "the deed of gift, it is true, does not say in clear words for whose spiritual benefit the deed had been made, but the oral evidence supplies the deficiency. There is evidence on the record that Jagai had something like 50—60 bighas of land, so if the widow made a gift of about 4½ bighas fixed rate holding for the benefit of her husband's life after death, I do not think his daughter can challenge the gift or get it set aside. No undue influence has in my opinion been proved." That court accordingly decreed the appeal and dismissed the plaintiff's suit.

On appeal a learned Judge of this Court again decreed the suit. The following is an extract from his judgment :—

"The learned Subordinate Judge has stated that the widow had returned from Gaya after performing her husband's *sradh*. I can find nothing on the record to show that she performed her husband's *sradh* in Gaya, though perhaps it is not an unfair inference that a Hindu widow who went to Gaya would naturally perform her deceased husband's *sradh* there. But there is nothing in the deed to show that Jagdat Upadhya had agreed, in consideration of receiving the grant, to do anything towards praying for or otherwise benefiting spiritually the soul of the deceased Jagai. The law does not require actual proof that spiritual benefit will follow, but the law does require that the circumstances should show some reasonable expectation of spiritual benefit. It could not be argued that if a Hindu widow made a grant of land to a Christian missionary she would thereby confer spiritual benefit on her Hindu husband and it would be of

no avail to produce evidence to say that the widow thought she was conferring spiritual benefit by such a grant. Here we have to look at the terms of the grant. The grant was not a *shankalp*, it was a deed of gift. Even if it were meant to be a *shankalp* it laid down no conditions for obtaining spiritual benefit. Nothing was to be done for it. It was immaterial whether the grant was made to a Brahmin who was her husband's *purohit* or to a Brahmin, who was not her husband's *purohit*, or to a non-Brahmin. There is no evidence that the donee had ever done anything in the past or proposed to do anything in the future for the benefit of Jagai's soul. So how can it be said that any spiritual benefit was expected to follow the transaction? I find that under the terms of the grant and on the evidence on the record, accepting the findings of fact of the learned Subordinate Judge, that the witnesses are telling the truth, there can be no finding that spiritual benefit was expected to accrue to Jagai's soul and as no spiritual benefit was expected to accrue to Jagai's soul the widow had no right to make a permanent transfer of the ancestral property."

The defendants appealed under section 10 of the Letters Patent.

Munshi *Shiva Prasad Sinha* (for Dr. *S. M. Sulaiman*) for the appellant:—

I submit that the lower appellate court having found as a fact that the gift was for the spiritual benefit of the soul of Jagai the suit should have been dismissed. Even assuming that the deed is silent as to the purposes of the gift, the fact that it was made soon after her return from Gaya, clearly showed that it was for the benefit of the soul of the deceased; for Gaya, unlike so many other pilgrimages, is a pilgrimage which confers benefit not upon the souls of the living but only upon those of the dead. It is immaterial whether the gift conferred any benefit or not. The question is whether the lady 'supposed' it would conduce to such a benefit. I rely upon *The Collector of Masulipatam* v. *Cavaly Vencata Narrainappah* (1), *Kunj Bihari Lal* v. *Laltu Singh*, (2), *Udai Chandar Chuckerbutty* v. *Ashutosh Das Mozumdar* (3) and *Tarini Prasad Chatterjee* v. *Bhola Nath Mookerjee* (4).

(1) (1861) 8 Moo. I. A., 529. (3) (1893) I. L. R., 21 Calc., 190.
(2) (1918) I. L. R., 41 All., 130. (4) (1891) I. L. R., 21 Calc., 190, F.N.

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In *Kunj Bihari Lal* v. *Laltu Singh* (1), Justices PIGGOTT and WALSH have dealt exhaustively with the point and I rely strongly upon it. I also rely upon *Vuppuluri Tatayya* v. *Garimilla Ramakrishnamma* (2), and *Khub Lal Singh* v. *Ajodhya Misser* (3).

Munshi *Purushottam DasTandon* for the respondent :—

The question is whether the transaction was such as was expected to conduce to the spiritual benefit of the soul of the deceased. The general meritoriousness of the deed is not enough; *Puran Dai* v. *Jai Narain* (4).

In *Kunj Bihari Lal* v. *Laltu Singh* (1), the property gifted was only $\frac{1}{400}$ of the whole property. Here the finding is that the whole property is worth from Rs. 2,000 to Rs. 4,000 and the property gifted is worth Rs. 400 or even more. Besides it is a fixed rate tenancy, which is very valuable. I rely upon *Balkishan Bharthi* v. *Sat Ram Singh* (5). The deed of gift is absolutely silent as to whether it was for the benefit of the soul of her husband or her own. It is not proper to import into the deed anything which is not there and presume that it was for the benefit of her husband's soul.

Munshi *Shiva Prasad Sinha* was not heard in reply.

MEARS, C. J., and WALSH J. :—This appeal must be allowed. As we are differing from the learned Judge of this Court who delivered a very full judgment we will just state our reasons. In our view this question is really a question of fact. The only questions which in second appeal the High Court can consider are whether having regard to the established principles the learned Judge of the lower appellate court has rightly directed himself, and whether there is evidence to support the finding of fact at which he has arrived. The principles of law applicable to this case are very clearly laid down in a case heard before Mr. Justice MOOKERJEE in *Khub Lal Singh* v. *Ajodhya Misser* (3) where he has pointed out that this being a question purely of Hindu law care should be taken in coming to a decision to prevent English Judges being warped by

(1) (1918) I. L. R., 41 All., 130. (3) (1915) I. L. R., 43 Calc., 574.

(2) (1910) I. L. R., 34 Mad., 288. (4) (1882) I. L. R., 4 All., 482.

(5) Weekly Notes, 1908, p. 202.

impressions made upon their minds in consequence of the nature of English decisions to which they are accustomed. We entirely agree with that observation, and we would point out that it is not the function of the Court in considering whether a gift of this kind by a Hindu widow out of her husband's estate is a valid trust, but what were the real purposes for which she made the gift. So stated it follows as a matter of course that the question can be one of fact and one of fact only. The learned Judge of this Court has accepted the fact as found by the lower appellate court, namely, that the gift was made by the widow for the benefit of the soul of her deceased husband. He has, for reasons given, questioned the soundness of that finding of fact: but he has stated that he is bound by it. If his judgment had stopped there, we should have entirely agreed with him. It cannot be said that there was no evidence to support the finding by the lower appellate court. Indeed there was direct evidence by witnesses, and there was the indirect evidence of the natural duty and inclination of a pious widow, and the fact that Gaya is a special place of pilgrimage for the benefit of the souls of deceased persons and also, thirdly, the example set by her husband's inclination to make a similar gift which was defeated by his death and which it would appear from the evidence it was the intention of the widow to complete. The learned Judge has, however, gone on to say that, granted that the widow was under the impression that she was thereby conferring spiritual benefit on her deceased husband, are the circumstances such that the gift can be upheld? He seems to have held as a matter of law that unless there is some proof that the donee is expected to confer benefit upon the deceased's soul the conditions of a valid gift cannot be established, and he has held that no spiritual benefit was expected to accrue to the deceased husband's soul. This last finding is really inconsistent with the finding of the lower appellate court by which he had rightly held himself to be bound. We have no alternative, the matter having been conclusively determined by a finding of fact with which we have no right to interfere, but to allow the appeal.

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We accordingly allow the appeal, set aside the decree of the learned Judge of this Court and restore that of the lower appellate court with costs of both hearings in this Court.

Appeal allowed.

FULL BENCH.

Before Justice Sir Pramada Charan Banerji, Mr. Justice Muhammad Rafiq and Mr. Justice Lindsay.

1921 *March*, 18.

JANG BAHADUR SINGH AND ANOTHER (DEFENDANTS) *v.* HANWANT SINGH (PLAINTIFF)*

Execution of decree—Limitation—Civil Procedure Code (1882), sections 318 and 319—Civil Procedure Code (1908), order XXI, rules 95 and 96—Formal possession not available to save limitation where actual possession could have been and ought to have been given.

If, upon an execution sale, possession has been delivered to the auction purchaser in accordance with the provisions of the law, that is, in accordance with section 318 or 319 of the Code of Civil Procedure of 1882 as the case may be, having regard to the nature of the property, or under order XXI, rule 95 or rule 96, of the Code of 1908, as the case may be, in each case regard being always had to the nature of the property and the mode in which possession ought in law to have been delivered, and such possession has been delivered, the auction purchaser gets a fresh start for the computation of limitation. But where such possession has not been delivered, the mere fact of formal delivery of possession is not available to him for saving the operation of limitation.

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

Babu *Piari Lal Banerji*, Munshi *Vishun Nath* and Munshi *Beni Bahadur*, for the appellants.

Dr. *Surendra Nath Sen*, Mr. *Ibn Ahmad* and Munshi *Kanhaiya Lal*, for the respondents.

BANERJI, MUHAMMAD RAFIQ and LINDSAY, JJ. :—This appeal arises out of a suit for possession of a house, and the question to be determined is whether the suit is barred by limitation. The house in question was sold by auction in execution of a decree against the first four defendants and the sale was confirmed on the 13th of January, 1903. Delivery of possession was obtained

* Second Appeal No. 847 of 1918 from a decree of Shekhar Nath Banerji, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Allahabad, dated the 2nd of April, 1918, confirming a decree of Sidheshwar Maitra, Munsif of Allahabad, dated the 17th of August, 1917.