Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

JAVITRI (DEFENDANT) *v.* GENDAN SINGH AND OTHERS (PLAINTIFFS).* 1927 *March*, 28.

Hindu law—Deed of gift in favour of widows—Interpretation of document—Nature of interest conveyed—Stridhan—*Suit by reversioners—Burden of proof as to nearness.*

It is incumbent on a plaintiff seeking to succeed to property as a reversioner to establish affirmatively the particular relationship which he puts forward. He is also bound to satisfy the court that to the best of his knowledge there are no nearer heirs. He cannot be expected to do anything more, and it is for those who claim that their kinship is nearer than that of the plaintiff to prove that relationship. *Rama Row* v. *Kuttiya Goundan* (1), followed.

One *SR*, about a year before his death, executed a deed of gift by which he divided a certain village between his two wives, giving one-quarter to the senior wife and three-quarters to the junior wife. After *SR's* death the widows took possession of the village and divided it between them, but not in the proportions set forth in the deed of gift. Thereafter the senior widow is said to have given her share to her daughter's son. The junior widow was succeeded as to her share by her daughter and then by her daughter's daughter, *J*. In *J's* lifetime the reversioners to *SR* sued for possession and obtained a decree. *J* appealed, but died pending the appeal, and her sons were brought on the record in her place.

In appeal—the original deed of gift being construed (as in the first court) as conveying only a life-interest—it was *held* that the plaintiffs were entitled to succeed. But even if the gift had been absolute, as matters stood when the appeal came on for hearing—*J* being dead and having left no female heir—the plaintiffs would still be entitled to their decree. *Sheo Shankar Lal* v. *Debi Sahai* (2), *Sheo Partab Bahadur Singh* v. *The Allahabad Bank* (3), *Subrahmanian Chetti* v. *Arunachalam Chetti* (4), *Sham Bihari Lal* v. *Ram Kali* (5) and *Ram Kali* v. *Gopal Dei* (6), referred to.

* First Appeal No. 211 of 1924, from a decree of Kashi Prasad, Additional Subordinate Judge of Aligarh, dated the 29th of March, 1924.

(1) (1916) I.L.R., 40 Mad., 654. (2) (1903) I.L.R., 25 All., 468.
(3) (1903) I.L.R., 25 All., 476. (4) (1904) I.L.R., 28 Mad., 1.
(5) (1923) I.L.R., 45 All., 715. (6) (1926) I.L.R., 48 All., 648.

1927

JAVITRI v. GENDAN SINGH.

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

Mr. *B. E. O'Conor*, Dr. *Surendra Nath Sen*, Maulvi *Mushtaq Ahmad* and Munshi *Ram Nama Prasad*, for the appellant.

Sir *Tej Bahadur Sapru*, Pandit *Shiam Krishna Dar* and Munshi *Panna Lal*, for the respondents.

LINDSAY and SULAIMAN, JJ.:—The dispute in this case is with regard to certain zamindari property in a village called Nagla Anni. Admittedly this property once belonged to a man named Suchcha Ram who died in 1870. In the plaint there is exhibited a pedigree about which, except in one particular, there was no dispute in the court below, and from this it appears that Suchcha Ram had two wives, Musammat Nand Kunwar, the elder wife, and Musammat Gias Kunwar, the younger.

The plaintiffs in the present suit are the daughter's grandsons and great-grandsons of Suchcha Ram through his wife Musammat Nand Kunwar.

The sole defendant in the suit was Musammat Javitri, who was Suchcha Ram's grand-daughter, the daughter of his daughter Musammat Parbati. In other words, Javitri was the grand-daughter of Suchcha Ram's younger wife, Musammat Gias Kunwar.

The case for the plaintiffs was that on the death of Musammat Parbati, in 1922, the succession opened and the property devolved upon them as the nearest *bandhus* of Suchcha Ram. It was alleged in paragraph 9 of the plaint that there were no other heirs of Suchcha Ram than the plaintiffs.

It was admitted in the plaint that on the 5th of February, 1869, about a year before his death, Suchcha

Ram had executed a deed of gift by which he purported to give 5 biswas of Nagla Anni to his wife Musammat Nand Kunwar and the remaining 15 biswas to his second wife Musammat Gias Kunwar. The plaintiffs, however, maintain that this deed was not given effect to and that the two widows succeeded as joint heirs of their husband after his death in the year 1870. After Suchcha Ram's death, by a deed executed on the 24th of May, 1870, the two widows divided the property, one-third being assigned to Musammat Nand Kunwar and two-thirds to Musammat Gias Kunwar. After this it is said that Musammat Nand Kunwar made a gift of her one-third share to her daughter's son, Narain Singh. The two-thirds share, which was in the possession of Musammat Gias Kunwar, descended to her daughter Musammat Parbati and it was stated that in the year 1878, by partition arranged between Narain Singh on the one side and Parbati on the other, two *mahals* were constituted, one of Narain Singh and one of Musammat Parbati, in accordance with the shares above specified. It was, however, claimed that neither Musammat Gias Kunwar nor Musammat Parbati had more than the limited estate of Hindu females in the shares just mentioned, and the plaintiffs, therefore, claimed that they were entitled to succeed on the death of Musammat Parbati. Musammat Javitri, it was pleaded, had no right to take the property after Parbati's death.

The defence in substance was that the gift made by Suchcha Ram in the year 1869 conferred an absolute estate on both the widows and consequently it was pleaded that the share which was given to Musammat Gias Kunwar was her *stridhan* property which had rightly descended in the first instance to Musammat Parbati and after the latter's death to

1927

JAVITRI v. GENDAN SINGH.

Musammat Javitri. The defendant pleaded that the plaintiffs were not the heirs of Suchcha Ram, though she did not set up any plea of *jus tertii*. A further plea taken in defence was one of adverse possession, it being alleged that Parbati held adversely since the death of Musammat Gias in the year 1875 and so it was pleaded that the plaintiffs' suit was barred by limitation. Again in paragraph 21 of the written statement a reference was made to the partition which took place in 1878 between Narain Singh and Musammat Parbati and it was pleaded that in view of this partition the plaintiffs had no right to recover the property in suit.

The Subordinate Judge decreed the suit. He found that the deed of gift executed by Suchcha Ram on the 5th of February, 1869, could at most confer only a life-interest on Musammat Gias. He also found that no effect was given to this deed because no mutation took place after it had been executed. The Subordinate Judge was further of opinion that Gias's interest, after the arrangement entered into in 1870 with her co-widow, Musammat Nand Kunwar, was still only a life-interest in the property. He held that Parbati's possession was not adverse to the plaintiffs, for she succeeded as heir to her father on the death of the last surviving widow, Musammat Nand Kunwar, who died in the year 1878. He found that the plaintiffs could only bring their suit after Parbati's death. He was of opinion that the plaintiffs were the nearest heirs of Suchcha Ram and that it was not proved that there were any nearer heirs in existence.

Against this decree Musammat Javitri appealed. She died during the pendency of the appeal. It appears that Javitri left several sons but no daughter,

and the sons have been allowed to continue the appeal after the death of their mother. We have to note here that objection was taken to this substitution of parties on the ground that even if the property had, as alleged by the defendant, been the *stridhan* property of Musammat Gias, Musammat Javitri's sons could not inherit it and the property would revert to the heirs of the last full owner. This objection was withdrawn and obviously could not be maintained, for the question of the sons' right to take the property which was in Javitri's possession could only be decided after they were made parties to the appeal.

The first ground taken in the petition of appeal is that the plaintiffs have failed to prove themselves to be the nearest heirs of Suchcha Ram. Grounds 2 and 3 relate to the deed of gift executed by Suchcha Ram on the 5th of February, 1869. It is pleaded that by this transfer Musammat Gias took an absolute estate in the property. In grounds 5 and 6 it was pleaded that the property being the *stridhan* of Musammat Gias had rightly descended to Musammat Javitri. The fourth ground of appeal relating to a question of fact has not been pressed before us and may be ignored.

To deal with the first ground raised in the memorandum of appeal.

The plaintiffs are admittedly *bandhus* of Suchcha Ram and they are entitled to succeed to any property which was Suchcha Ram's estate in the absence of agnate relations, that is to say, *sapindas* and *samanodakas* to the 14th degree from Suchcha Ram. It is claimed here in appeal that the plaintiffs failed to discharge the burden of proof which lay upon them. They alleged in their plaint the absence of all other heirs except themselves but they produced no evidence.

1927

JAVITRI v. GENDAN SINGH.

None of the plaintiffs went into the witness-box and from the record it is proved that the plaintiffs' pleader refused to open the case and to lead evidence. He said he would content himself with calling evidence in rebuttal.

As regards the burden of proof the plaintiffs had in the first place to prove themselves *bandhus* and this they have done. They had also to satisfy the court that there were no nearer heirs, and the question is whether there is any evidence on the record on this point. The Subordinate Judge held that the plaintiffs had proved all that was necessary for them to prove because, as he said, it is not proved that any collateral of Suchcha Ram deceased is alive. While we do not think that the view of the Subordinate Judge on this point is quite correct, we are nevertheless of opinion that the plaintiffs did discharge the burden which lay upon them. In this connexion we may refer to the case of *Rama Row* v. *Kuttiya Goundan* (1). At page 656 of the report, dealing with the question of burden of proof in a case of this kind, one of the learned Judges observed :—

> " It is no doubt incumbent on a plaintiff seeking to succeed to property as a reversioner, to establish affirmatively the particular relationship which he puts forward. He is also bound to satisfy the court that to the best of his knowledge there are no nearer heirs. He cannot be expected to do anything more. It is for those who claim that their kinship is nearer than that of the plaintiff to prove that relationship."

We think that this, if we may say so, is a correct statement of the law relating to burden of proof in a case of this nature. Now, while it is true that the plaintiffs did not lead any evidence for the purpose of showing that to the best of their knowledge there were no nearer heirs than themselves, they are entitled to rely upon any evidence to this effect which can be

(1) (1916) I.L.R., 40 Mad., 654.

found in the statements of any of the witnesses called for the defence, and reliance is placed upon the statement of a defendant's witness, a man named Mihin Lal, a patwari. His deposition is printed at pages 10 and 11 of the record, and it is shown that in cross-examination Mihin Lal admitted that there was now no one alive in the family of Suchcha Ram. We think that the plaintiffs are entitled to rely upon this statement, and that being so, we are of opinion that the burden of proof was discharged and that the plaintiffs proved themselves to be the nearest heirs of Suchcha Ram.

The next question we have to deal with is the interpretation of the deed of gift executed by Suchcha Ram on the 5th of February, 1869. After having carefully considered this matter in the light of the arguments addressed to us we do not feel disposed to differ from the opinion come to by the court below, namely, that this deed gave nothing more than a life-interest in the property to the two widows.

The deed begins by reciting that Suchcha Ram is the owner of the whole 20 biswas in mauza Nagla Anni, and he goes on to say that, being in a sound state of mind, he has made a gift of the property with all its inherent and adventitious rights to his wives Musammat Gias Kunwar and Nand Kunwar, in the proportion of 15 biswas to the former and 5 biswas to the latter. It is also recited that the donor has withdrawn his possession and has put the donees in possession. Suchcha Ram goes on to say that the donees, while in possession and occupation of the gifted property, shall be "responsible for loss or gain" (malik nafa wa nuqsan). The next recital is that neither he nor his heirs shall have any claim whatsoever with regard to the subject-matter of the gift, and finally there is a declaration that the donees shall have no right to alienate this property.

1927

JAVITRI v. GENDAN SINGH.

It is true that if the earlier portion of this document stood alone it might be very difficult to suggest that the gift was not an absolute gift. There is, however, the clause at the end in which it is expressly recited that the donees are to have no right to alienate this property, and if effect is to be given to these words, it necessarily follows that we must hold, in agreement with the court below, that the two widows took nothing more than the limited estate peculiar to Hindu females. We were asked by the respondents to interpret this document in the light of the principles laid down in the Privy Council case of *Shumsool Hooder* v. *Shewukram* (1). Certainly if those principles are to be adopted here in connexion with this deed which was executed in the year 1869, our finding must be in favour of the respondents. The only other course would be to rule out the clause forbidding alienaction as being repugnant and of no effect. On the whole we certainly think it possible to interpret this document as conferring a limited interest only and we are not prepared to say that the judgement of the Subordinate Judge on this point is wrong. On this finding, therefore, the judgement of the court below must be held to be correct, and the plaintiffs being the nearest heirs of Suchcha Ram were entitled to succeed on the death of Parbati.

As regards the plea of adverse possession on the part of Parbati which was raised in the court below, we are of opinion that no such plea can succeed. There is no question of Musammat Parbati's possession having been adverse to the plaintiffs, who only became entitled to set up their claim when succession opened after Parbati's death.

We may further observe here that, as matters now stand, we should feel ourselves compelled to affirm the

(1) (1874) 14 B.L.R., 226 (231).

lower court's decree even if it were held in favour of the appellant that Musammat Gias took an absolute interest under the deed of gift executed by Suchcha Ram. If Musammat Gias took an absolute interest as the appellant contends, then the property became Gias's *stridhan* and would descend first to her daughter Musammat Parbati for her life and afterwards to her daughter Musammat Javitri for her life. We have mentioned above that Javitri died pending this appeal and left no daughter but only sons, and so there is now a reverter to the heirs of Musammat Gias, namely, Gias's husband and his heirs. In this connexion we refer to the two judgements of their Lordships of the Privy Council, *Sheo Shankar Lal* v. *Debi Sahai* (1) and *Sheo Partab Bahadur Singh* v. *The Allahabad Bank* (2). We also refer to the interpretation which was put on these judgements in the Full Bench case of the Madras High Court, *Subrahmanian Chetti* v. *Arunachelam Chetti* (3). This latter interpretation has been accepted in two cases in this Court, namely, *Sham Bihari Lal* v. *Ram Kali* (4) and *Ram Kali* v. *Gopal Dei* (5). Since the decree was passed in the court below, execution has been taken out and possession has been delivered to the plaintiff and now that Musammat Javitri is dead and her sons cannot take this property (on the assumption that it was the *stridhan* property of Musammat Gias), it would not be proper to hand back the property to Javitri's sons and thus to invite the parties to embark upon another litigation. In any view the plaintiffs are nearer heirs than the sons of Javitri, for the former are daughter's son's sons while the latter are daughter's daughter's sons.

(1) (1903) I.L.R., 25 All., 468. (2) (1903) I.L.R., 25 All., 476.
(3) (1904) I.L.R., 28 Mad., 1. (4) (1923) I.L.R., 45 All., 715.
(5) (1926) I.L.R., 48 All., 648.

1927

JAVITRI v. GENDAN SINGH.

There remains for consideration only one other argument which was pressed upon us in appeal. It was contended on behalf of the defendant appellant that there had been a family settlement which bound the parties and which constituted a bar to the present claim. There is in reality before us no case of family settlement nor was any such case set up in the court below. [The judgement then referred to certain evidence and concluded as follows:—] There was no family settlement which would bar the present suit.

The appeal, therefore, fails, but we modify the decree of the court below by directing that the parties do bear their own costs in the court below. In this Court also they will bear their own costs.

Appeal dismissed.

Before Justice Sir Cecil Walsh and Mr. Justice Banerji.

1927
March, 28.

MOHAN LAL (JUDGEMENT-DEBTOR) *v.* KALI CHARAN (DECREE-HOLDER) AND NIRANJAN LAL AND ANOTHER (AUCTION-PURCHASERS).*

Civil Procedure Code, order XXI, rules 66 *and* 90—*Execution of decree—Application by judgement-debtor to set aside sale on the ground of inaccuracy of the sale proclamation.*

Held that it is not open to a judgement-debtor, when making an application under order XXI, rule 90, of the Code of Civil Procedure, to object to the sale proclamation upon the ground that certain material entries therein were incorrect, when he might have impugned its accuracy when notice was sent to him under rule 66 (2).

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

Munshi *Panna Lal*, for the appellant.

* First Appeal No. 142 of 1926, from an order of Syed Iftikhar Husain, Subordinate Judge of Budaun, dated the 6th of July, 1926.