PRIVY COUNCIL.

P. C.* 1896. *February* 11 & 22.

JOGESWAR NARAIN DEO (PLAINTIFF) *v.* RAM CHANDRA DUTT AND OTHERS (DEFENDANTS.)

[ON appeal from the High Court of Judicature at Fort William in Bengal.]

Hindu Law—Will—Construction of—Right of transfer exercised by one of two legatees of property bequeathed equally to each.

Where a Hindu testator bequeathed a 4-anna share of a zemindari to his youngest widow and her son, "for your maintenance," with power to them to alienate by sale or gift the property bequeathed;

Held, that on the true construction of such gift each of the two legatees took an absolute interest in a 2-anna share of his estate, and the words *for your maintenance* did not reduce the interest of either legatee to one for life only.

Held, also, that the widow's conveyance of her share operated as a severance of the joint tenancy which had been created by the will between her and her son, and was effectual without her son's consent.

Vydinada v. *Nagammal* (1), overruled.

APPEAL from a decree (28th June 1893) of the High Court, reversing a decree (29th September 1891) of the Subordinate Judge of Midnapur, and dismissing the suit.

This appeal related to the construction of the will of Raja Mokand Narain Deo, of Phûl Kûsna, in the Manbhum District, who died in November 1870, leaving two sons. The elder, Sunder Narain Deo, was born of the Raja's senior wife. The younger, Jogeswar Narain Deo, was the son of the Raja by his junior wife, Srimati Durga Kumari.

The suit was brought by Jogeswar Narain Deo against his mother and Ram Chand Dutt and other members of the family, who were interested with him in a lease of 1879.

The question raised was what were the interests respectively taken under the will by the testator's son, Jogeswar Narain, and his youngest widow under a bequest to them of a fourth part of

* *Present*: LORDS WATSON, SHAND and DAVEY, and SIR R. COUCH,

(1) I. L. R., 11 Mad., 258.

1896

JOGESWAR NARAIN DEO v. RAM CHANDRA DUTT.

the zemindari of Silda, the widow having conveyed to the first defendant respondent, Ram Chandra Dutt, the whole of her interest in the estate bequeathed to her and her son by the will. The son brought this suit to have the transfer set aside for want of title in his mother singly to make it. The widow died after the decree of the High Court had dismissed the suit, but before this appeal, and was now represented by her minor grandson, appearing by his next friend.

The Silda zemindari, which belonged to the late Raja Mokand Narain, had descended to him through his mother from her grandfather, and was unconnected with the Raj estate. The Raj estate itself descended to him as lineal successor and was inherited by the elder son.

The plea of limitation was also raised by the defendant, and the date of Jogeswar Narain's birth, and the date of his attaining full age, alleged by him to have been the 10th March 1888, were contested. A question as to the admissibility of certain evidence, under clause 5 of section 22 of the Indian Evidence Act, 1872, was disposed of in the judgment of the High Court—*Ram Chandra Dutt* v. *Jogeswar Narain Deo* (1). On that appeal, the merits of the suit were also decided by the High Court.

The late Raja had at one time in his possession the whole sixteen annas of Silda. Some years before making his will, he had however granted a *putni* lease of ten annas of it to Ram Chandra Dutt. His will was dated the 15th March 1869, and by it, after stating his apprehension that his elder son was not likely to live on amicable terms with Durga Kumari and her son, the testator disposed of the six annas of Silda then remaining at his disposal, bequeathing two annas to his elder son the Jubraj, and making another bequest of four annas of that zemindari to his widow and her son in the following terms :—

"The remaining four annas share I give to you, Srimati Rani Durga Kumari, and the son born of your womb, Jogeswar Narain Deo, *for your maintenance.*"

"Upon my death you and your sons and grandsons, in due order of succession, shall hold possession of the zemindari according to the above distribution of shares. And I give to you the power of making alienation by sale or gift."

(1) I. L. R., 20 Calc., 750.

1896

JOGESWAR NARAIN DEO v. RAM CHANDRA DUTT.

The testator also directed that his elder son should give, out of the zemindari of Phûl Kûsna, villages yielding an income of Rs. 300 per annum to Durga Kumari and her son for maintenance. He gave them also an elephant and a horse with a continuing right of residence in his new house.

The concluding paragraph of the will was as follows :—

"Of the Ranis that I have living now, you Srimati Durga Kumari are the youngest. Excepting yourself, if any of the other Ranis have any issue, then Jubraj Sunder Narain Deo shall bear the expenses of their maintenance, marriage and other expenses, as well as pay the maintenance of the Ranis. And any children, hereafter born of you, shall, after my death, remain with you, and shall likewise get maintenance from your said four annas share. Therefore, making division according to the plan mentioned above, I execute this will to the following effect: That as long as I live, the said zemindari, &c., shall remain in my possession; if I make *ijara* or *putni* settlement you shall have no obligations, but you shall get the same rights. Upon my death you shall, with sons, grandsons, &c., in succession, be in possession according to the aforesaid shares of the zemindaries, &c., and the power of gift and sale is given to you."

The Raja before his death made an *ijara* of the four annas. He had no other son by the Rani Durga Kumari than the appellant.

In the year following Durga Kumari applied for, and obtained, under Act XL of 1858, a certificate from the District Court appointing her to be manager of the properties of her son, then a minor. On the 20th January 1879 she executed to the first respondent, Ram Chandra Dutt, the *istemrari mourasi potta* or permanent lease, now in dispute, for an annual rent of Rs. 450 and a sum of Rs. 25,000. This purported to be executed by her, in consideration of money paid by Ram Chandra for her own expenses, and for payment of her own debts, in order to transfer to Ram Chandra Dutt "her own two annas out of the four annas bequeathed to her and to her son for their maintenance."

By his plaint dated the 7th March 1891, to which he made Ram Chandra and other Dutts, and also Durga Kumari his mother, defendants, the appellant submitted that his mother had no power thus to dispose of any portion of the Silda zemindari as if it had been her own; and that, as a Hindu widow, she was entitled only to a suitable monthly allowance

which should be Rs. 360 per annum. The respondents answered that by the will an absolute right in two annas out of the four annas bequeathed of the Silda zemindari was vested in the widow, who had full power to give, sell, or settle, that share.

There were further issues raised as to the quantity of estate taken by the widow under the will, as to her power to execute the lease, and what, if she had no power so to execute it, was a proper allowance for her, which might be held to pass under the lease which she had executed.

The Subordinate Judge was of opinion that, on the due construction of the will, no power was given to the widow to deal with the property by herself singly. That "the power of alienation conferred by the will could not be restricted to her singly." That "generally it was the intention of a Hindu testator that the ancestral estate should remain in his family, and the Raja probably had no intention that his widow should take an absolute estate of inheritance." In support of this he referred to the judgment of the Judicial Committee in *Moulvie Mahomed Shumsool Hooda* v. *Shewukram* (1). And, as the result, he held that all that the Dutts took under their lease from the widow was what she was entitled to for maintenance, which he found upon the evidence to be Rs. 360 per annum, which sum represented a three gundas and two krants share of the two annas comprised in Durga Kumari's lease. He accordingly decreed that the lease should stand good only for that proportion, and only during her life.

The High Court (O'KINEALY and AMIR ALI, JJ.) ruled on the contrary that there was a gift made of these 4 annas to the widow and her son jointly, and that words of limitation followed, but without defining the shares; that the widow was not limited to a mere right of maintenance; also, that she did not take as a Hindu widow, but as one of two joint devisees, to whom was given an estate of inheritance. The words *putra poutrade krame* used in the will denoted the intention to create an estate to the widow and her son, and her son's son, in succession. The conclusion was that the widow and her son jointly had the same extent of interest in the four annas of Silda; and that any lease by

(1) L. R., 2 I. A., 7.

1896

JOGESWAR NARAIN DEO v. RAM CHANDRA DUTT.

the widow would be binding to the extent of her share, which was the half of the four annas. This they held would be binding on the widow's successor. The result was a decision that this appellant was not in a position to demand *khas* possession of any portion of the two annas, and that the suit must be dismissed with costs.

Mr. *T. H. Cowie*, *Q C.*, (Mr. *J. H. A. Branson* with him) for the appellant.—The construction put by the first Court on the will of Raja Mokand Narain Deo was correct. When read with regard to the Hindu law of inheritance, which must have been in the testator's mind, the will did not show an intention on his part that the widow should have the right to exercise, on her own account, an absolute power of alienation. So strong was the tendency to deprive the Hindu widow of any such power that, unless express power of alienation appeared in the will, it must be taken that only for the period of her widow's estate, her own life, could she alienate for her own purposes. There was a power given in the last paragraph of this will to the mother and son to sell or to give the estate conferred. But this was not to be understood as an absolute power to the widow to dispose of the estate. On the contrary, the intention, apparent from the whole will, was to provide a family estate to be kept together. They referred especially to the words: "Any children hereafter born shall likewise after my death get maintenance from your four annas share." The effect of a gift, such as this, made by a husband to a wife, was that as a widow she could not for her own purposes alienate the estate, but was under the restriction to alienate only for justifying necessity. That the terms in which the gift had been made should have imported inheritance would not alter this. The restriction, ordinarily holding good, which the testator must be taken to have contemplated, controlled in this case the widow's power to transfer. *Moulvie Mahomed Shumsool Hooda* v. *Shewukram* (1), *Mayne's Hindu Law*, *para* 617, *Koonjbehari* v. *Premchand Dutt* (2), *Prosunno Coomar Ghose* v. *Tarrucknath Sirkar* (3), *Lakshmibai* v. *Hirabai* (4).

(1) L. R., 2 I. A., 7.
(2) I. L. R., 5 Calc., 684.
(3) 10 B. L. R., 267.
(4) I. L. R., 11 Bom., 69.

Again if the widow took an estate of inheritance she took an undivided estate jointly with her son, the appellant, and the two were joint tenants. The widow was not in a position to transfer without the appellant's consent. In *Vydinada* v. *Nagammal* (1) a Hindu testator devised land to his nephew and to that nephew's wife. They were held to be joint tenants; and it was decided that, therefore, the husband could not sever the joint tenancy by an alienation, on his own part alone, to a creditor. That was a precedent in favour of the appellant's view.

Mr. *J. D. Mayne* (Mr. *A. Phillips* with him) for the respondents on the question of the application of the principle of joint tenancy:—

Vydinada v. *Nagammal* (1) has been wrongly decided. It was an erroneous view that, either in that case or in this, a joint tenancy, as understood in English law, to give an undivided interest in the entirety to each co-owner, had been created. If such an interest had been given, the attempted alienation would have been sufficient ground for partition. The right of co-ownership, corresponding to the joint tenancy of the English law, did not follow merely upon the existence of a gift to two persons of undivided shares in the same property. It might be generally stated that such a right existed only in the co-parcenary of an undivided family, so far as the recognition of it by Hindu law went. In this case the testator had bequeathed to each of them, the mother and her son, the undivided moiety of a four annas share in the property. There was nothing in this state of things resembling the family co-parcenary of males tracing inheritance through males. The term "joint tenancy" was inapplicable to the estates given. The incidents which, according to English law, followed joint tenancy could not follow upon such a bequest as the one in question which was according to Hindu law.

The judgment of the High Court in *Mussamut Kollany Kooer* v. *Luchmee Pershad* (2) was referred to, as well as the cases there cited.

Mr. *T. H. Cowie*, *Q. C.*, replied.

(1) I. L. R., 11 Mad., 258.
(2) 24 W. R., 395.

1896

JOGESWAR NARAIN DEO v. RAM CHANDRA DUTT.

Their Lordships' judgment was delivered by

LORD WATSON.—The appeal depends upon the construction of certain provisions made by the will of the late Raja Mokand Narain Deo, in favour of the Rani Durga Kumari, his youngest wife, and of their son Jogeswar Narain Deo, the appellant. At the time of his death, in November 1870, the Raja was possessed of an impartible paternal Raj called Phûl Kûsna, and also of a six annas share of the zemindari of Silda, which he had inherited from his maternal grandfather.

The will, which was executed by the deceased upon the 15th March 1869, appears to have been dictatde by the apprehension that his youngest wife and her son would be unable to live peaceably with his elder son, Jubraj Sunder Narain Deo, and the other members of the family after his death, and by his desire to prevent disputes arising between them after that event. The testator thereby directed that his elder son, now Raja Sunder Narain Deo, should remain in possession of the whole sixteen annas of his paternal estate of Phûl Kûsna, subject to these conditions, that Rani Durga Kumari and the appellant should get for their maintenance villages yielding an income of Rs. 300, and should also retain possession of certain buildings which had already been assigned to them for their separate residence. Two of the six annas share of zemindari Silda were bequeathed by him to his successor in the Raj. No question as to those provisions of the will is raised in this suit.

The remaining four annas share of zemindari Silda was disposed of by the testator in the following terms :—

> "The remaining four annas share I give to you Srimati Rani "Durga Kumari and the son born of your womb, Joges- "war Narain Deo, for your maintenance."

His intentions with regard to the respective interests which were to pass, under that gift, to the mother and son, were declared as follows :—

> "Upon my death you and your sons and grandsons, &c., in "due order of succession, shall hold possession of the "zemindari, &c., according to the above distribution of "shares. And I give to you the power of making aliena- "tion by sale or gift."

It was not disputed by either party that the expression "according to the above distribution of shares" refers to the distribution of the six annas share between Raja Sunder Narain Deo on the one hand and the appellant and his mother on the other. It was also admitted that the words "you" and "yours" occurring in those passages of the will already quoted are plural.

At the death of the testator the appellant was a minor, and his mother, who was appointed manager of his property until he attained majority, entered into possession of the four annas share of zemindari Silda which had been bequeathed to them. On the 20th January 1879 the Rani, in consideration of a sum of Rs. 25,000 paid to her by Ram Chundra Dutt, and the other respondents in this appeal, executed in their favour a *mourasi mokurari potta* in perpetuity of what is therein described as her own two annas share of the four annas share of the zemindari Silda bequeathed to herself and the appellant. Upon his attaining majority, the appellant brought the present suit, for the purpose of having it judicially declared that the *potta* thus granted by his mother was null and void in so far as it extended beyond her own lifetime. The only ground of action disclosed in his plaint was that, according to the true construction of the will, the Rani took a right to maintenance out of the four annas share in question for the period of her life, whilst the appellant took an estate of inheritance in the whole four annas share, subject only to the burden of his mother's right.

The 6th, 7th and 8th of the issues framed for the trial of the action are the only ones having any relation to its merits. They are in these terms :—

6. What right Durga Kumari has acquired under the will of her late husband Raja Mokand Narain Deo, and whether in terms of the will the *mokurari potta* granted by her is wholly invalid ?

7. Whether the Rani has acquired an absolute right to two annas share of Silda ?

8. If the defendants be entitled to a share only proportionate to the amount of the Rani's maintenance, then what amount can properly be fixed for the maintenance of the Rani ?

1896

JOGESWAR NARAIN DEO v. RAM CHANDRA DUTT.

The Subordinate Judge of Midnapore found that the Rani took no interest beyond a right of maintenance ; and he accordingly decreed that the *potta* granted by her to the present respondents should stand good for her lifetime to the extent of three gundas and two krants share, and that as regards the remaining portion of the said two annas share the *potta* be set aside. On appeal to the High Court that decision was reversed by O'Kinealy and Amir Ali, JJ., who held that the appellant and his mother took the same interest under the will, each to the extent of a two annas share, and on that ground dismissed the suit with costs.

Their Lordships have had no difficulty in coming to the conclusion that the judgment of the High Court ought to be affirmed. It is no doubt true that the gift of the four annas share of Silda appears to be made to the Rani and the appellant "for your maintenance"; but these words are quite capable of signifying that the gift was made for the purpose of enabling them to live in comfort, and do not necessarily mean that it was to be limited to a bare right of maintenance. That no such limitation was intended by the testator appears from the language of the gift, which clearly shows that the interest given is an estate of inheritance, with express power to the *donees* of making alienation by sale or gift. Then the gift to both is made, not in similar language merely, but under the very same words. If there had been a gift to the Rani alone in these terms, there could hardly have been a doubt that it would have conferred upon her an estate of inheritance, with power of alienation ; and their Lordships cannot understand why the same terms, when equally applied to her and the appellant, should be held to confer upon her any lesser interest.

In his argument for the appellant, Mr. Branson raised a new point, which is not indicated in the plaint, and was not submitted to either of the Courts below. He maintained, upon the authority of *Vydinada* v. *Nagammal* (1) that, by the terms of the will, the Rani and the appellant became, in the sense of English law, joint-tenants of the four annas share of Silda, and not tenants in common ; and that her alienation of her share before it was severed, and without the consent of the other joint-tenant, was

(1) I. L. R., 11 Mad., 258.

ineffectual. The circumstances of that case appear to be on all fours with the circumstances which occur here; and, if well decided, it would be a precedent exactly in point. There are two substantial reasons why it ought not to be followed as an authority. In the first place, it appears to their Lordships that the learned Judges of the High Court of Madras were not justified in importing into the construction of a Hindu will an extremely technical rule of English conveyancing. The principle of joint tenancy appears to be unknown to Hindu law, except in the case of co-parcenary between the members of an undivided family. In the second place, the learned Judges misapprehended the law of England, because it is clear, according to that law, that a conveyance, or an agreement to convey his or her personal interest by one of the joint tenants, operates as a severance.

Their Lordships will humbly advise Her Majesty to affirm the judgment appealed from, and to dismiss the appeal. The appellant must pay the costs of the respondents who have appeared to oppose this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Freshfield & Williams.*

Solicitor for the respondents: Mr. *J. F. Watkins.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

MEHERBAN RAWOOT (DEFENDANT, APPELLANT) *v.* BEHARI LAL BARIK *alias* SHAM LAL KATRI (PLAINTIFF, RESPONDENT.) *

1896 *April* 16.

Partition—Revenue-paying land in Civil Court—Civil Procedure Code (XIV of 1882), section 265—Commissioner to make partition—Partition by the Collector.

In a suit brought in the Civil Court for a partition of the lands in a revenue paying estate, the Court has no power to appoint a Commissioner to make the partition; it is bound under section 265 of the Civil Procedure

* Appeal from Original Decree No. 106 of 1894, against the decree of Babu Brojomohun Pershad, Subordinate Judge of Gya, dated the 20th of December 1893.