1883

MADHO PRASAD v. AMBAR.

tenants, in which the right to receive rent is disputed on the ground that it has been *bonâ fide* paid to a third person, such third person may be brought on to the record as a party. This, however, is only for the purpose of determining, between the landlord and the tenant, the question as to whether the latter made the payment to such person as one who had actually and in good faith received rent from him before and up to the time when the right to sue accrued. The provisions of s. 148 were obviously made for the protection of the tenant, who, upon establishing a payment to a third person, under the circumstances mentioned therein, must be held to have satisfactorily answered the landholder's claim. Any rights the latter may have against the third person can necessarily only be enforced through the medium of the Civil Court, by a suit for declaration of title and recovery of any rents improperly collected by him.

In the present case it is found as a fact that Madho Prasad, the appellant, received the Rs. 125 *bonâ fide* under circumstances fulfilling the requirements of s. 148 of the Rent Act. The Judge, being of that opinion, should have dismissed the plaintiff-respondent's claim to that extent, but instead of doing so he has decreed it against the appellant. Such portion of his decree cannot stand, and allowing the appeal with proportionate costs, we direct that the decree be modified by striking out such portion of it as declares any liability on the part of Madho Prasad.

Appeal allowed.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Brodhurst.

1883 *April* 5.

NASIR HUSAIN (PLAINTIFF) *v.* SUGHRA BEGAM AND OTHERS (DEFENDANTS).*

Muhammadan Law—Gift—Transfer of absolute estate—Condition—Sunni Law—Shia Law.

The owner of a house made a gift thereof to certain persons "for their residence, and that of their heirs, generation after generation," declaring that if the donees sold or mortgaged the house, he and his heirs should have a "claim" to the house, but not otherwise. *Held* that under Muhammadan Law, whether that by which the Shias, or that by which the Sunnis, were governed, the house passed by the gift to the donees absolutely, the declaration by the donor as to the effect of an alienation by the donees being in the nature of a recommendation, and not having the effect of limiting the estate in the house itself.

* First Appeal No. 125 of 1881, from a decree of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 6th August, 1881.

1883

NASIR HUSAIN v. SUGHRA BEGAM.

In this case the plaintiff's father, Zulfikar Husain, executed on the 23rd of November, 1868, a deed of gift in respect of a certain house belonging to him to his cousins Ali Muhammad Muzaffar Husain and the defendant Abdul Muzaffar; and by another deed of gift duly registered, and executed on the 14th of December 1872, he assigned his proprietary right in the same house to the plaintiff Nasir Husain. The right of Ali Muhammad, one of the above-named transferees under the deed dated the 23rd of November, 1868, was attached in execution of a decree against him held by the defendant Sughra Begam. The plaintiff objected in the execution department, but as his objections were disallowed, he brought this suit to establish his right to the house in dispute, and for a declaration that on the death of Ali Muhammad all his right in the property ceased and terminated. The main point for determination in this case was whether, under the terms of the instrument of transfer, dated the 23rd of November, 1868, the proprietary right in the house had passed to the transferees. The material portion of that instrument was as follows:—"I have of my own accord and free will given the house to brothers Ali Muhammad, Muzaffar Husain, and Abdul Muzaffar for their residence and that of their heirs, generation after generation: I or my heirs neither have nor shall have any claim regarding the house in question; but if the said brothers or their heirs attempt to sell or mortgage the house, I or my heir shall have a claim to the house: so long as a sale or mortgage is not effected, I or my heirs shall have no connection or concern with the house." The Court of first instance observed as follows on the point in question:—"On reading the deed of gift ..... from Zulfikar Husain to Ali Muhammad, Muzaffar Husain, and Abdul Muzaffar, I find that the donor made a gift of the house and not of its usufruct (*sookna*) to the above-mentioned persons and the heirs of their bodies (*naslan bad naslan*), with a condition that the donees should be precluded from selling or mortgaging it, such a condition being void according to Muhammadan Law. The deed states, 'that whereas my cousins, the heirs of my uncle Raza Husain, were in want of a house, I give this house to them and the heirs of their bodies, generation after generation, for their residence: I or my heirs have or shall have no claim to the house, unless the donees or their heirs mortgage

1883

NASIR HUSAIN v. SUGHRA BEGAM.

or sell it.' The house, as shown by the terms of the deed, was not made over to the sons of Raza Husain as a loan, for use during their life, or for a limited time, nor was there any reservation of the donor's right to resume it after extinction of the family of the donees; but the house was given to the donees as a gift absolutely, with a condition attached to it, that they should not sell or mortgage it. The resumption of possession by the donor was not contingent upon the extinction of the heirs of the donees, but on their breaking the above condition, which, according to Muhammadan Law, was void. It is laid down in Baillie's Digest of Muhammadan Law, p. 537:—'All 'our' masters are agreed that when one has made a gift and stipulated for a condition that is *fasid*, or invalid, the gift is valid and the condition void; as if one should give another a female slave and stipulate 'that he shall not sell her,' or 'shall make her *com-i-walad*,' or 'shall sell her to such a one,' or 'restore her to the giver, after a month,' the gift would be valid, and all the conditions void.' It 'is a general rule with regard to all contracts which require seizing, such as gift and pledge, that they are not invalidated by vitiating conditions.' From the very fact of the donees appropriating the house as a gift, and not using it as a loan, and laying out a large sum of money in rebuilding it, it is evident that they considered and treated the house as their own property by gift. The house and not only its use or usufruct being granted, and the condition attached to it being void, the donees have absolute property in the house." Having regard to this decision the Court of first instance held that the right of Ali Muhammad, one of the donees, was heritable and transferable, and dismissed the suit. The plaintiff appealed to the High Court, contending, *inter alia*, that the parties to the suit being Shias were not governed by the texts of Muhammadan Law relied upon by the lower Court, which were applicable to Sunnis.

Pandit *Bishambhar Nath* and *Nand Lal*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banerji*) and Mir *Zahur Husain*, for the respondents.

1883

NASIR HUSAIN v. SUGHRA BEGAM.

The Court (STUART, C. J., and BRODHURST, J.) delivered the following judgment :—

STUART, C. J.—We are of opinion that the Subordinate Judge has come to a right conclusion in this case, and that the house, the subject of the suit, was taken by the defendants, not merely for the purpose of residence, but absolutely. The operative words in the deed of gift are very clear and strong. (After stating these words, the judgment continued) :—Now the meaning of such a conveyance is perfectly clear. The purpose and inducement of the gift of the house is residence, but the gift itself in property is to the donees and "their heirs, generation after generation," and what follows is merely in the nature of recommendation, and has not in law the effect of limiting the state in the house itself. This is the construction of such an instrument under all systems of law, European or Indian. It is clearly conformable to the law of England, and the Subordinate Judge shows that it is in accordance with Muhammadan Law.

It was argued at the hearing on behalf of the appellant that the parties in the present case are Shias, and that the text of the Muhammadan Law, and of the other authorities referred to, related to the more numerous Moslem sect, the Sunnis. The parties in the present case are undoubtedly Shias, and if their Imameea Law had contained any precept or provision inconsistent with the Sunni Law referred to by the Subordinate Judge, it would have been our duty to have given effect to such a state of things. But the careful examination which we have given to the doctrines of the Imameea Code, as expounded by Mr. Baillie, 1889, page 226, *et seq.*, has convinced us that there is no difference on this subject between the two systems of Muhammadan Law. In fact, while the Sunni Law is very distinct, the Shia or Imameea Law is silent on the subject, the intention in the latter system evidently being the adoption and application of the Sunni rule to Shias, where their own Imameea Law does not speak, the only cases of gifts of this nature alluded to in the latter being gift plainly limited to a life interest.

There is a passage in Baillie's Imameea Law, pp. 226, 227, which, if expressing undoubted Shia doctrine, perhaps deserves

1883

NASIR HUSAIN v. SUGHRA BEGAM.

some notice. The passage is this :—" If one should say ' I have given this mansion to thee for life, and to thy successor,' it would only be an *oomra*, or for his own life, and there would be no transfer to the life-holder, according to the most approved opinion ; just as if he had not said ' to thy successor.' " If such is the Imameea Law it is difficult to understand, and still more difficult to appreciate, a limitation of interest which necessitates the striking out from the words of gift its distinctly expressed extension to a " successor." The author does not explain what he is pleased to call " the most approved opinion." It is at least a most arbitrary construction of the gift, confessing, as it appears to do, that it could not stand if the terms " to thy successor" also remained part of the gift. In the present case, however, the estate given by the gift is conveyed in much larger terms, giving the house to the donees " for their residence and that of their heirs, generation after generation: I or my heirs neither have nor shall have any claim regarding the house in question,"—words which, if they are capable of any legal meaning, clearly and distinctly bestow the right to the thing given absolutely.

FULL BENCH.

1883
April 5.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

DEO KISHEN (DEFENDANT) *v.* BUDH PRAKASH (PLAINTIFF).*

Hindu Law—Inheritance—Insanity.

A person is disqualified under Hindu Law from succeeding to property, if he is insane when the succession opens, whether his insanity is curable or incurable.

Under the same law, when property has once vested by succession in a person, his subsequent insanity will not be a ground for its resumption.

Under the same law, although a person becomes qualified to succeed to property, after the disqualification of insanity ceases, he cannot resume property from an heir who has succeeded to it in consequence of his disqualification when the succession opened.

* Second Appeal No. 110 of 1882, from a decree of H. F. Evans, Esq., Judge of Moradabad, dated the 16th September, 1881, affirming a decree of Maulvi Samiullah Khan, Subordinate Judge of Moradabad, dated the 29th April, 1881.