Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Wazir Hasan.

1925 December, 15.

MUSAMMAT SARTAJ KUAR (PLAINTIFF-APPELLANT) *v.* MAHADEO BAKHSH (DEFENDANT-RESPONDENT).*

Custom, record of—Wajib-ul-arz, whether alone sufficient to establish a custom—Malik *used for a Hindu widow in a wajib-ul-arz, meaning of—Interpretation of the term* malik *in a wajib-ul-arz.*

Held, that the custom asserted by the defendant-respondent was recorded by the settlement officer, and there being no reliable evidence, in fact there being no evidence of any kind that the settlement officer neglected to perform his duty, or recorded what he thought ought to be the custom, or was misled in recording the custom, that there being no evidence in rebuttal of the custom so recorded, and that the words not being ambiguous the evidence in the wajib-ul-arz alone is sufficient to establish the custom.

Where the words in a wajib-ul-arz were " and if there be no wife with sons then the wives of the deceased shall become *malik* over the inheritance of the deceased in equal shares;" *held*, that it is impossible to hold that the position of widows, when there are no sons, is other than the position of absolute owners with a right of transfer.

Held further, that in the above passage the only interpretation can be that the plural includes the singular and that the passage contains a statement that when the deceased co-sharer has left only one wife without a son, that wife becomes an absolute owner with right of transfer over the whole property [50 I. A., 196; 49 I. A., p. 1, and 50 I. A., p. 25, followed.]

Messrs. *M. Wasim and Rajeshuri Pershad*, for the appellants.

Messrs. *A. P. Sen, Bishambhar Nath Srivastava and Hargobind Dayal*, for the respondent.

STUART, C. J., and HASAN, J.:—This is a plaintiff's appeal. The plaintiff Sartaj Kuar is the

* First Civil Appeal No. 73 of 1924 against the decree of Gopendro Bhushan Chatterji, Subordinate Judge of Rae Bareli district, dated the 27th of August, 1924.

daughter of a certain Gur Prasad Kayastha who died in 1898 in proprietary possession of the whole of the village of Mubarakpur and Khandepur and a 1 anna 4 pies share in the village of Khanpur Khabura. He died without male issue leaving a widow Batasa Kuar and two daughters, the plaintiff-appellant Sartaj Kuar and Sukhdei. Sukhdei who was married to a man called Debi Bakhsh had four sons one of whom was Mahadeo Bakhsh. Batasa Kuar succeeded to her husband's interests. Under a compromise made by her prior to 1905 she gave up a full proprietary share of 2 annas in Mubarakpur and Khandepur to a certain Maha Narain, a collateral relative of her deceased husband. This left her with a 14 annas share in Mubarakpur and 14 annas share in Khandepur. On the 13th of October, 1905 she executed a deed of gift of the 14 annas share in Mubarakpur, the 14 annas share in Khandepur, the 1 anna 4 pies share in Khanpur Khabura and a house in Mubarakpur in favour of her grandson Mahadeo Bakhsh. Batasa Kuar died on the 23rd of April, 1923. Mahadeo Bakhsh obtained possession over the property the subject of the deed of gift (according to his assertion) prior to the death of his grandmother. In 1923 Sartaj Kuar instituted the suit out of which the present appeal arises for possession of the property which was the subject of the deed of gift. The suit was against Mahadeo Bakhsh. Her suit was dismissed by the Subordinate Judge of Rae Bareli on the 27th of August, 1924, upon two main findings. The first was that Batasa Kuar had executed the deed of gift in question fully understanding what she was doing. The second finding was that under a family custom Batasa Kuar had full proprietary title to the property transferred. The appeal contests the validity of these two findings.

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In respect of the first finding we have it established upon the evidence that the deed of gift of the 13th of October, 1905 was executed by Batasa Kuar. The deed is on the record as defendant's exhibit A23. Its translation is printed on part III, page 78 of the Printed Book. It was properly stamped and registered. The evidence in support of its execution is the evidence of Mahadeo Bakhsh defendant-respondent which is contained in part 1, page 27 of the Printed Book. His evidence is as follows :—

> " Musammat Batasa Kuar executed the deed of gift in my favour. I was present at the time of execution of the deed. She was not literate. She put a mark on the deed. Ram Adhin, Sheo Sakat Rai and Randhir Singh attested the deed. Girja Prasad was the scribe of the deed. Musammat Batasa put her mark on the deed in the presence of myself, the scribe and the attesting witnesses. The three attesting witnesses signed the deed in my presence and in the presence of Batasa Kuar. The three attesting witnesses and the scribe are dead. The deed was registered in my presence, and she said to sub-registrar in my presence that she had executed the deed. Ganga Prasad Brahman was the mukhtar of Batasa Kuar. He wrote Batasa Kuar's name on the deed of gift with her permission. The deed was read out to Batasa Kuar by Girja Prasad who explained it to her before she was asked to sign the deed. Sheikh Shahabuddin Sahib, the late pleader of this Court, prepared the draft of the deed of gift.

(Exhibit A23 shown.) This is the deed executed by Batasa Kuar. She put her mark on the deed at two places (witness points them out). The three attesting witnesses signed it in my presence. (Witness identifies them.)

I got this deed of gift back from the Registration office for Batasa Kuar said that the deed should be returned to me. I have been in possession of the property from the time of the gift."

Musammat Batasa Kuar gave evidence in a suit on the 5th of August, 1909. Her deposition is defendant's exhibit A11 and will be found in part III, pages 88 and 89 of the Printed Book. While this deposition contains some slight divergences from the conditions of the deed of gift, it supports absolutely the contention of the defendant-respondent that the lady had with full knowledge of what she was doing made a deed of gift in his favour and put him in possession. We accept the finding of the learned Subordinate Judge as correct to the effect that Musammat Batasa Kuar executed the deed of gift and executed it with full knowledge as to what she was doing. We further find that Mahadeo Bakhsh was put in possession during the lady's life-time.

We now come to the contention which is to the effect that Batasa Kuar had no power of transfer and that the deed of gift is accordingly now invalid. In absence of the custom set forward by the defendant-respondent Batasa Kuar as a widow of a Hindu governed by the Mitakshara law would not ordinarily have had the power of transfering the property by gift for a period beyond her life-time. The defendant-respondent has met this plea by asserting the family custom and in the opinion of the learned Subordinate

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Judge he has established its existence. The first point that we have to consider is whether the evidence establishes the existence of any custom in derogation of the ordinary Hindu law and the next point which we have to consider is even if a custom is established whether it justifies the transfer by gift. In respect of the question as to proof of custom the evidence is contained almost entirely in the wajib-ul-arz of the village of Khanpur Khabura (plaintiff's exhibit 5) a translation of which will be found in part III, pages 23 and 24 of the Printed Book. The learned Counsel for the appellant has argued that the court would not be justified in finding upon the basis of this wajib-ul-arz alone that a custom exists. The principles which should guide us in arriving at a decision on this point have been laid down very clearly by their Lordships of the Privy Council in *Balgobind* v. *Badri Prasad* (1). This is a decision of the 10th of May, 1923, and it, in our opinion, gives a final pronouncement upon the point, on which there was formerly some difference of opinion, as to the method by which the value of the evidence afforded by an entry as to custom in a wajib-ul-arz in Oudh should be determined. This appeal related to an alleged custom in a village in Gonda in the province of Oudh. Its existence depended upon an entry in one wajib-ul-arz. At page 201 their Lordships stated :—

> "It is quite true that a custom is not established by an ambiguous statement of it in a wajib-ul-arz."

They continued later :

> "Settlement officers in recording customs in wajib-ul-arzes have to perform duties which the Government orders them to perform.

(1) 50 I.A., page 196.

> One of these duties was to record customs as the settlement officer found them, and not as he might think they ought to be. When it is not shown by reliable evidence that the settlement officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of the custom is ambiguous, the record in a wajib-ul-arz of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen.
>
> There was no evidence to prove or even to suggest that the settlement officer in stating the custom as he did in the wajib-ul-arz had in any way neglected his duty in ascertaining what the custom was, or was misled as to the custom; nor was there any evidence given in his suit in denial of or at variance with the custom.
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> Their Lordships find that the custom excluding daughters and their issue from inheritance was proved."

We now proceed to examine the wajib-ul-arz which has relation to the matter before us. It was drawn up on the 19th of July, 1865 at the time of settlement. The first paragraph gives the history of the village. Khanpur Khabura which was the principal village of the family, to which Gur Prasad belonged, had been in the possession of this family from the beginning of the seventeenth century. This family held the hereditary office of Qanungo. The family had received certain special privileges in holding the

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village revenue-free. The first paragraph states these privileges and states how the village had remained with the family for 250 years. The wajib-ul-arz was verified by 20 members of the family including Gur Prasad himself. It continued to lay down in the fourth paragraph a custom of succession. We shall interpret the custom of succession later but we find here that there is nothing to show that the settlement officer neglected to perform his duty in recording the custom as he found it. There is nothing to show that he recorded what he thought ought to be the custom, instead of what was the custom. There is nothing to show that he was misled in recording the custom. We shall consider later whether the custom was or was not ambiguous. The words which we have to interpret have been translated in part by the learned Subordinate Judge and translated completely by a translator of this Court. The translator's translation is inaccurate. The translation of the Subordinate Judge is fairly accurate but only gives a portion of the relevant matter. We prefer to translate these words ourselves. This is our translation :—

> "If there are in existence several wedded wives of the deceased co-sharer and there have been sons from each wife in varying numbers, then the inheritance shall be divided with reference to the number of wives on the principle of *jurabant* as follows :—
>
> 'Where there is in existence a wife with only one son and where the remaining wife has more than one son, the sons of the first named and the sons of the second named shall severally take possession of one moiety of the estate of the deceased' (a more literal translation of the last

passage would be 'where a wife has only one son he will take possession of one-half share of the deceased's inheritance and where the remaining wife has more than one son all such sons will take possession of the remaining half of the inheritance of the deceased).' If included amongst the wives one wife has sons and the others have none then such wives as have no sons shall take shares for the period of their lives, and after the deaths of such wives the sons of the other wives shall be *malik* of such shares and if there be no wife with sons, then the wives of the deceased shall become *malik* over the inheritance of the deceased in equal shares."

We have advisedly left the word *malik* for the present in vernacular as the most important question for decision in this appeal is its interpretation. The interpretation of this word has been before the courts on many occasions. We consider, however, that the meaning which should be given to it in Judicial proceedings has now been established beyond doubt by two decisions of their Lordships of the Privy Council of the year 1921. The first of these will be found in the report of *Bhaidas Shivdas* v. *Bai Gulab and another* (1). There the word *malik* was used in a will made in the Gujrati language. There would appear to be no difference in the meaning of the word as used in Gujrati and as used in the wajib-ul-arz under consideration. Lord BUCKMASTER on page 6 of the decision said :—

"There is no dispute that the word that was used in clause 3 as the original word of

(1) 49 I.A., page 1.

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gift was the word *malik* which could be appropriately used to constitute the wife absolute owner. It is not that the word is a 'term of art'. It does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be; and in the context of the present will their Lordships think the estate was absolute."

In the subsequent decision *Sasiman Chowdhurain and another* v. *Shib Narayan Chowdhury and another* (1) their Lordships were interpreting a will made by a Hindu of Behar in Urdu. The Urdu used in the will was Urdu similar to that used in the wajib-ul-arz under consideration. This decision reviewed all the most important decisions in which the word *malik* had been interpreted, commencing with the decision of their Lordships themselves in *Mohammad Shamsool Hooda* v. *Sewak Ram* (2). At page 35 the decision states :—

"It appears from some of the decisions to which their Lordships have referred and from the judgement of the Board in *Bhaidas Shivadas* v. *Bai Gulab and another* (3) that the term *malik*, when used in a will or other document as descriptive of the position which a devisee or donee is intended to hold, has been held apt to describe an owner possessed of full proprietary rights, including a full right of alienation, unless there is something in the context or in the surrounding circumstances to indicate that such full

(1) L.R., 49 I.A., 25. (2) L.R., 2 I.A., page 7.
(3) L.R., 49 I.A., page 1.

> proprietary rights were not intended to be conferred, but the meaning of every word in an Indian will must always depend upon the setting in which it is placed, the subject to which it is related, and the locality of the testator from which it may receive its true shade of meaning, and their Lordships can find nothing in the quoted decisions contrary to this view."

According to this decision, which settles the matter finally, a devisee or donee described as a *malik* has a full right of alienation unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred. The learned Counsel for the appellant has argued that nowhere have their Lordships of the Privy Council considered the meaning of the word *malik* in a wajib-ul-arz in Oudh. That is so, but the portion of a wajib-ul-arz in Oudh which contains a custom of succession is clearly a document of the same nature as the documents to which their Lordships were referring. There is much force in the remark of the learned Subordinate Judge that the parties who dictated the custom were literary Kayasthas and it was not likely that the words were used loosely. He has further rightly laid great stress upon the fact that the position of the sons of a deceased co-sharer is described as that of *malik* and that the position of the widows of a deceased co-sharer who has no sons is also described as that of *malik*. We agree with him that it is impossible to construe the wajib-ul-arz in such a manner as to make the position of the sons other than that of the position of absolute owners with a right of transfer, and this being the case, it seems to us impossible to hold that the position

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of widows, when there are no sons, is other than the position of absolute owners with a right of transfer. The learned Counsel for the appellant has further argued that even if this view be accepted, there is nothing in the wajib-ul-arz which would give to the widow of a deceased co-sharer in a case, such as the present, in which he left only one widow an absolute estate. Here we are against him.

We can only interpret the words which we translate " if there be no wife with sons then the wives of the deceased shall become absolute owners with a right of transfer over the inheritance of the deceased in equal shares " as containing a statement that where the deceased co-sharer has left only one wife without a son, that wife becomes an absolute owner with right of transfer over the whole property. This is not an inference. The plural includes the singular, and it would be contrary to all right rules of interpretation, in our opinion, to hold that the custom did not affect a single wife without a son.

We are now in a position to consider the point which we have left over. Is the custom so asserted ambiguous? We do not find any ambiguity. The custom contained in this wajib-ul-arz is a custom which lays down a succession which in many ways is not the succession provided by the Mitakshara law. The principle of *jurabant* is contrary to the principle of succession under the Mitakshara law. The creation of an absolute estate in the widow is also contrary to the Mitakshara law. But there is no ambiguity. The meaning is perfectly clear.

We can now conclude our decision. We find that the custom asserted by the defendant-respondent was recorded by the settlement officer, there being no reliable evidence—in fact there being no evidence of any kind—that the settlement officer neglected

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to perform his duty or recorded what he thought ought to be the custom or was misled in recording the custom, that there is no evidence in rebuttal of the custom so recorded and that the words not being ambiguous the evidence in the wajib-ul-arz alone is sufficient to establish the custom. This custom governed not only the property of the family in the village of Khanpur Khabura but the property of the family situated in other villages. Under this custom Batasa Kuar had the right to transfer by deed of gift the property which she did so transfer by the deed of the 13th of October, 1905. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Wazir Hasan.

BAHADUR ALI KHAN (APPELLANT) *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL (RESPONDENT).*

1925 *December*, 16.

United Provinces Town Improvement Act (VIII of 1919)— Appeal against Tribunal's order fixing compensation, requirements of—Chief Court's power to grant special leave to appeal.

Held, that before an appeal can lie against the decision of a Tribunal awarding compensation under the provisions of the United Provinces Town Improvement Act it is necessary to obtain from the President of the Tribunal a certificate that the case is a fit one for appeal or to obtain special leave to appeal from the Chief Court.

Where the President of the Tribunal refuses to grant a certificate that the case is a fit one for appeal and where the amount of dispute is less than Rs. 5,000, *held*, that the Chief Court has no authority to grant special leave to appeal.

* First Civil Appeal No. 23 of 1925, against the order of C. H. B. Kendall, President Improvement Trust Tribunal, Lucknow, dated the 21st of October, 1924, dismissing the appellant's objection.