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BHAWANI
DIN
s.
SATROHAN
SINGH.

Stuart,
C. J., and
Raza, J.

the mortgagor should be permitted to redeem; but they nowhere countenanced the suggestion that where no suit for redemption had been brought, a mortgagor should be given a decree to redeem in a suit, where he was sued for possession which he had wrongfully refused to give to the mortgagee under the terms of the deed. If we adopt the course which the learned Counsel for the appellants would have us adopt we should be going against the practice of the previous Judicial Commissioner's Court—a practice which has been recognized and understood in Oudh for more than 50 years. Unless we are shown very strong reasons to support our departing from the former practice we shall not be justified in making the departure. On considering the point we are of opinion that to adopt the practice suggested will do considerably more harm than good. The mortgagor in this instance and his sons and grandsons will be in no way prejudiced by being directed, as we direct them, if they wish to redeem, to institute a suit for the purpose. We accordingly dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

*Before Mr. Justice Wazir Hasan and Mr. Justice
Gokaran Nath Misra.*

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March, 31.

MUHAMMAD SIDDIQ KHAN AND OTHERS (DEPENDANTS-APPELLANTS) v. RISALDAR KHAN AND OTHERS (PLAIN-TIFFS-RESPONDENTS).*

Maintenance grants, rules of construction of—Grant in favour of an illegitimate son—Entry of name of grantee in khewat and transfers by him, effect of, on construction—Muhammadian law—Ariat—Gift—Maintenance grant making only a transfer of usufruct of property amounts only to ariat and not gift.

Held, that the rule of construction of maintenance grants is well settled. Where the purpose of the grant is found

* Second Civil Appeal No. 90 of 1925, against the decree of Baghubar Dayal Shukla, Additional Judge of Gonda, dated the 21st of January, 1925, reversing the decree of Jagdamba Saran, Second Additional Subordinate Judge of Gonda, dated the 8th of May, 1924.

to be the maintenance of an illegitimate son, the purpose is *primâ facie* an indication that the grant was intended to be for the life of the grantee.

The circumstances that the grantee's name was entered in the khewat, that several transfers were made by him while in possession and that the grantor was not under any legal obligation to make provision for the maintenance of the grantee neither singly nor collectively rebut the *primâ facie* construction which must be placed on the grant. [*Rameshar Bakhs Singh v. Arjun Singh* (1), and *Karim Nursey v. Heinrichs* (2), followed.]

Where the maintenance grant must be construed as a transfer of the right to the usufruct of the property it is a transaction of *ariat* and not of a gift under the Muhammadan law. [*Mumtazunnisa v. Tufail Ahmad* (3); *In the matter of the petition of Khalil Ahmad* (4), relied upon. *Amjad Khan v. Ashraf Khan* (5), referred to.]

Mr. *Khaliquzzaman*, for the appellants.

Messrs. *Hyder Husain* and *Naim Ullah*, for the respondents.

HASAN and MISRA, JJ. :—This is the defendants' appeal. The lower appellate Court has reversed the decree of the trial Court and granted the plaintiffs a decree for possession of a three annas share in mauza Jogipur, mahal Ali Raza Khan, pargana Utraula in the district of Gonda. Prior to the recent partition of the village the share in suit represented a one anna share, which was a part of a larger share held by Ali Raza Khan, a zamindar of the village. Ali Raza Khan had an illegitimate son called Bakhtawar Khan. The plaintiffs' case is that Ali Raza Khan made an oral gift of the share in suit to Bakhtawar Khan in the year 1877. Bakhtawar Khan died about four years previous to the institution of the suit. The plaintiffs are the representatives of Bakhtawar Khan

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(1) (1901) L.R., 28 I.A., 1.

(2) (1901) L.R., 28 I.A., 198.

(3) (1906) I.L.R., 28 All., 264.

(4) (1908) I.L.R., 30 All., 309.

(5) (1925) 28 O.C., 265.

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either by right of inheritance or under a deed of gift dated the 2nd of December, 1918. The defendants are the representatives of Ali Raza Khan, who died about 25 years ago, either in the right of inheritance or as legatees under a will, dated the 1st of November, 1890, made by Ali Raza Khan.

*Hasan and
Mitra, JJ.*

The main defence to the suit, with which we are concerned, was the denial of the alleged gift. The positive case put forward on behalf of the defendants was that Ali Raza Khan had granted the share in suit to Bakhtawar Khan by way of maintenance for life only. It is obvious that if this defence succeeds the suit must fail. The trial Court held that the defendants' case was established and dismissed the suit. The lower appellate Court reversed the decree of the trial Court and gave a decree for possession of the share in suit.

The lower appellate Court is of opinion that the exact nature of the grant cannot be ascertained. Bakhtawar Khan's name was entered as an owner in respect of the share in the khewats of 1878 and also of the recent settlement. The learned Judge further observes that in paragraph 12 of the written statement of the defendant No. 1 it was admitted that Ali Raza Khan had made a grant of the disputed share to Bakhtawar Khan for his maintenance. He had before him, as we have before us, a statement of Ali Raza Khan made on the 21st of September, 1878 before the Revenue Court for the purpose of securing the entry of Bakhtawar Khan's name in respect of the share in question on the basis of the grant which he had made in his favour. The learned Judge has considered the effect of that statement, and in our opinion that statement is the only evidence on the record which determines the nature of the admitted grant. On the interpretation of that statement we

hold and here we are in agreement with the learned Judge that the purpose of the grant was the maintenance of Bakhtawar Khan.

The rule of construction of such grants is well-settled. The purpose is *primâ facîe* an indication that the grant was intended to be only for the life of the grantee. The entry of Bakhtawar Khan's name as an owner in the two khewats of the village cannot have the effect of extending the true construction of the grant. *Rameshar Baksh Singh v. Arjun Singh* (1) and *Karim Nursey v. Heinrichs* (2). The learned Judge of the Court below does not seem to challenge the validity of the rule mentioned above, but is of opinion that it is inapplicable to a case of a Sunni Muhammadan, Ali Raza Khan being such a Muhammadan. According to him "the Muhammadan law for Sunnis is that in cases of gift the donee takes an absolute estate even though the donor expressly made a gift for life only." He held that as it was not shown that the grant was intended to be for the life of the grantee only under the rule of the Muhammadan law the grant should be deemed to have been of an absolute interest in the property. In the present case it seems to us that the appeal can be decided without discussing the question as to whether a gift of a limited interest is or is not permissible under the Sunni Muhammadan law and as to the true rule of construction in cases where there is a gift of a limited interest.

We are of opinion that the grant with which we are concerned in the present case is not a gift under the Muhammadan law. So far as it is possible to ascertain the nature of the grant from the language employed by Ali Raza Khan in his statement of the 21st of September, 1878, and having regard to the

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(1) (1901) L.R., 28 I.A., 1.

(2) (1901) L.R., 28 I.A., 198.

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purpose of the grant as indicated therein, the grant must be construed as a transfer of the right to the usufruct of the one anna share. It was therefore a transaction of *ariat* and not a gift under the Muhammadan law—*Mumtazunnisa v. Tufail Ahmad* (1) read with *In the matter of the petition of Khalil Ahmad* (2). The difference between an *ariat* and a gift as contemplated by the Sunni Muhammadan law has been stated at great length in the judgments of Mr. Justice ASHWORTH and one of us in the case of *Amjad Khan v. Ashraf Khan* (3). It will serve no useful purpose to repeat the observations made in those judgments.

It was finally argued by the learned Counsel for the respondents that the construction of the grant in question as limited to the life of the grantee is displaced by several circumstances of this case such as the entry of Bakhtawar Khan's name in the khewats as an owner, several transfers made by him while in possession and Ali Raza Khan not being under any legal obligation to make provision for the maintenance of Bakhtawar Khan. We are of opinion that these circumstances neither singly nor collectively rebut the *primâ facie* construction which must be placed on the grant in question.

We, therefore, allow this appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance with costs throughout.

Appeal allowed.

(1) (1906) I.L.R., 28 All., 264.

(2) (1908) I.L.R., 39 All., 308.

(3) (1925) 28 O.C., 265.