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in which this court should be deterred from proceeding by the provisions of section 537 of the Code of Criminal Procedure. I allow this application, set aside the convictions and sentences of all the three applicants. Thakur Din and Muneshar will be released forthwith and Abdul Karim, who is on bail, will not be required to surrender. All fines, if paid, will be returned.

Application allowed.

APPELLATE CIVIL.

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice A. G. P. Pullan.

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September, 16.

SANT BAKHSH SINGH AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* BHAGWAN BAKHSH SINGH (DEFENDANT-RESPONDENT.)*

Construction of documents—Wajib-ul-arz, *construction of*—*Custom in derogation of ordinary law, proof of*—*Hindu law*—*Joint Hindu family*—*Widow entering into possession of her husband's share while his brothers living*—*Adverse possession*—*Hindu widow's possession, when adverse*—*Terms in a* wajib-ul-arz *that "widow shall succeed as owner with power of transfer and after her, collaterals of her husband will get possession," whether conferred absolute estate on the widow.*

Held, that when a construction can be put on a *wajib-ul-arz* which is compatible with the rules of Hindu law, that is the proper construction to be placed upon the *wajib-ul-arz*. *Dhonde Singh* v. *Sant Bakhsh Singh*, (1) *and Durga* v. *Lal Bahadur* (2), relied on. *Musammat Punni* v. *Chet Ram* (3) dissented from.

Where, therefore, the terms of a *wajib-ul-arz* were that if the widows are sonless, then they will all remain in possession as owners with power of transfer *(malikana baikhtiyar*

*Second Civil Appeal No. 118 of 1930, against the decree of L. S. White, District Judge of Lucknow, dated the 22nd of February, 1930, reversing the decree of Mirza Mohammad Munim Bakht, Subordinate Judge of Malihabad at Lucknow, dated the 18th of August, 1929.

(1) (1892) 3 O.C., 181. (2) (1928) 5 O.W.N., 992.
(3) (1914) 1 O.L.J., 319.

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intiqal) and after their death, the collaterals (*bhai wa bhatije*) of their husband will get possession of the share, *Held*, that it did not prove that widows possessed full power of alienation in respect of their husband's estate and the power of transfer given to the widows was not a power free from the restrictions imposed by Hindu law on Hindu widows.

Held further, that where a party sets up a custom in derogation of the ordinary law, the custom must be proved by very clear and unambiguous evidence.

Where certain brothers form members of a joint Hindu family on the death of one of them his widow is not entitled to anything more than maintenance out of her husband's estate. Her possession, therefore, of the share of her husband would be *prima facie* adverse unless it could be shown that it was the result of any arrangement with the reversioners or that she took possession of the property prescribing only for the limited estate of a Hindu widow. *Sham Koer* v. *Dab Koer* (1), referred to.

It cannot be laid down that in every case whenever a Hindu widow is found in possession of property without title her possession must be regarded as that of a widow's estate but the determination of the question as regards adverse possession must be based upon the circumstances of each case. *Deo Datt* v. *Raj Bali* (2), followed. *Lajwanti* v. *Safa Chand* (3), referred to.

Under Hindu law a female can succeed as an heir only to a limited estate. Where, therefore, on the death of a person the widow of his brother succeeded to a moiety share of his estate with the consent of his other brother but she referred to her possession both with regard to that share as well as the share which came in her possession on her husband's death as possession as an heir she was in possession of both the shares without any legal title and in that sense her possession was adverse but she prescribed not for an absolute estate but only for the limited estate such as is possessed by a female succeeding as an heir to a Hindu.

Messrs. *L. S. Misra*, *Lachman Prasad*, and *Gaya Prasad*, for the appellants.

Messrs. *M. Wasim* and *G. D. Khare*, for the respondent.

(1) (1902) L.R., 29 I.A., 132. (2) (1928) 5 O.W.N., 653.
(3) (1924) L.R., 51 I.A., 171.

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SRIVASTAVA and PULLAN, JJ. :—This is a second appeal against the decision dated the 22nd of February, 1930, passed by the District Judge of Lucknow reversing the decision dated the 13th of August, 1929, passed by the Subordinate Judge of Malihabad at Lucknow. It arises out of a suit for possession of 1 rupee 8 annas 5 pies 2-10 krants share, together with a house and *chaupal*, of village Kathwara in the Lucknow district and for Rs. 150 as the price of three bullocks.

The material facts relevant to the appeal are that there were three brothers, Pancham Singh, Bahadur Singh and Baldeo Singh who were all childless.

Pancham Singh owned a 1 rupee 15 annas 11 pies share in village Kathwara and Bahadur Singh owned a 2 rupees 10 pies 5 krants share in the same village. Pancham Singh died long ago and on his death his share came into the possession of his widow Musammat Lachmin who also obtained mutation in her favour. Bahadur Singh died in April, 1903, and on his death the share possessed by him was mutated in equal moieties in favour of Musammat Lachmin and his surviving brother Baldeo Singh. Baldeo Singh also died two years later. On the 20th of April, 1921, Musammat Lachmin executed a deed of gift in favour of Bhagwan Bakhsh Singh, defendant, in respect of 1 rupee 8 annas 5 pies 2-10 krants share including the house and *chaupal* in suit. This gifted share consisted of the whole of the share of which mutation had been made in Musammat Lachmin's favour on the death of Bahadur Singh and of an 8 annas share out of the share possessed by her husband. Mutation in respect of the gifted share was made in favour of the donee, Bhagwan Bakhsh Singh and he has remained in possession of it ever since. Musammat Lachmin died on the 11th of November, 1927.

The plaintiffs instituted the suit which has given rise to this appeal claiming the property which formed

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the subject of gift by Musammat Lachhmin in defendant's favour on the ground that she possessed only a limited interest in the said property and that they were entitled to it on her death as next reversioners of Pancham Singh. It was also pleaded that the deed of gift dated the 20th of April, 1921, was executed by Musammat Lachhmin under the undue influence of the donee's grandfather, Kalka Singh, who was employed by Musammat Lachhmin as her *mukhtar*. The plaintiffs' claim was resisted by the defendant on several grounds. It was pleaded that under a custom obtaining amongst Chauhan Thakurs, Musammat Lachhmin, as the widow of Pancham Singh, was full owner of the property left by Pancham Singh, that the property of which she obtained possession on Bahadur Singh's death was an accretion to it and that therefore she had the power to alienate the entire property in suit. In the alternative it was pleaded that she had acquired absolute ownership in respect of the property in suit by adverse possession. It was further pleaded that Musammat Lachhmin had adopted the defendant as her son but no question as regards adoption arises in this appeal as both the lower courts have concurrently found that the alleged adoption did not take place.

Both the lower courts have found, and it is no longer disputed, that the plaintiffs are the next reversioners of Pancham Singh, deceased. The learned Subordinate Judge found that under the custom as recorded in the *wajib-ul-arz* of village Kathwara, Musammat Lachhmin acquired absolute title in the property in suit. He, however, held that the deed of gift relied upon by the defendant had been executed as a result of undue influence exercised by Kalka Singh. He accordingly decreed the plaintiffs' claim. On appeal the learned District Judge has agreed with the interpretation placed by the learned Subordinate Judge on the *wajib-ul-arz* and has held that according to custom, the widow succeeds to her husband's property as absolute owner

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with full power of alienation. He has further found that when Pancham Singh died, he was a member of a joint Hindu family with his brothers, Bahadur Singh and Baldeo Singh and that Musammat Lachhmin acquired an absolute title by adverse possession in respect of the share of Pancham Singh as well as that of Bahadur Singh. Lastly on the question of the deed of gift he disagreed with the trial court and held that it was not vitiated by any undue influence and was valid. As a result of these findings he dismissed the plaintiffs' suit.

The learned counsel for the plaintiffs appellants has challenged the correctness of the findings of the learned District Judge on the question of custom, adverse possession and validity of the deed of gift. The decision as regards custom depends upon the interpretation of the *wajib-ul-arz* of Kathwara, exhibit A2. The relevant portion of the *wajib-ul-arz* runs as follows :—

> "If one widow has sons (*aulad*) and the other is without sons, or has daughters, then in respect of a half share the sons, and in respect of the other half the widow who has no sons, shall succeed as owners with power of transfer. The daughters will not get any share. After the death of such widow the share possessed by her will also come in the possession of the sons by the other widow. If all the widows are sonless, then they will all remain in possession as owners with power of transfer (*malikana baikhtiyar intiqal*). After their death, the collaterals (*bhai wa bhatije*) of their husband will get possession of the share."

The contention urged on behalf of the appellants is that this *wajib-ul-arz* does nothing more than lay down the ordinary rule of Hindu law applicable to Hindu widows and that the power of transfer referred to therein must be construed as the power of transfer subject to the

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limitations of Hindu law. Reliance has been placed upon *Dhonde Singh* v. *Sant Bakhsh Singh* (1) and *Durga* v. *Lal Bahadur* (2), in support of this contention. In *Dhonde Singh* v. *Sant Bakhsh Singh* (1), it was decided by a Bench of the late Court of the Judicial Commissioner of Oudh consisting of Messrs. SPANKIE and BLENNERHASETT that where a construction can be put on a *wajib-ul-arz* which is compatible with the rules of Hindu law, that is the proper construction to be placed upon the *wajib-ul-arz*. In this case also the *wajib-ul-arz* provided that the wife 'is the owner of the share with the power of transfer', and that 'after her death, the sharers of her husband's family, who are nearest, obtain the share.' Thus the language of the *wajib-ul-arz* which was the subject of interpretation in this case was almost identical with the language of the *wajib-ul-arz* before us. It was held that the power of transfer possessed by the widow was not a power free from the restrictions imposed by Hindu law on Hindu widows. In *Durga* v. *Lal Bahadur* (2), also it was held by a Bench of this Court consisting of the late Mr. Justice MISRA and Mr. Justice NANAVUTTY that where a *wajib-ul-arz* recites that if a sharer died issueless his widow became the owner of his assets and she became owner in possession in the same way as her husband and also possessed power of transfer, the power of transfer should be interpreted as power of transfer of her husband's estate in accordance with Hindu law.

Mr. *Wasim*, the learned counsel for the defendant respondent on the other hand argued that on a proper construction of this provision of the *wajib-ul-arz*, the widow should be considered to have an absolute power of transfer in respect of her husband's estate. As regards the provision regarding the succession of the collaterals after her death, he argued that this provision is intended to apply only with regard to such portion of the estate as

(1) (1899) 3 O.C., 181. (2) (1928) 5 O.W.N., 992.

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might be left by her undisposed of. He contended that her possession under this custom in relation to the husband's estate was analogous to that of a Hindu female with regard to her *stridhan*. We are of opinion that the analogy with *stridhan* is a false one inasmuch as in the case of *stridhan* the property devolves on the heirs of the female whereas in this case the *wajib-ul-arz* provides that the property is to devolve on her death on her husband's heirs. One essential element of an absolute estate is that the property is heritable and devolves upon the heirs of the person who is the absolute owner. There can be no gainsaying the fact that the provisions of the *wajib-ul-arz* which we have reproduced above are not free from ambiguity and are not altogether consistent. While on the one hand it is said that the widow is to hold as owner with power of transfer, yet on the other it is followed by the provision that the property on her death is to devolve not on her heirs but on the heirs of her husband. Mr. *Wasim* relied upon the decision of a single Judge of the late Court of the Judicial Commissioner of Oudh reported in *Musammat Punni* v. *Chet Ram* (1). This decision does no doubt support the construction sought to be placed on behalf of the defendant respondent. The question is not altogether free from difficulty but we should prefer to follow the Bench decision of our Court as against the single Judge decision of the late Judicial Commissioner's Court. We are clearly of opinion that when a party sets up a custom in derogation of the ordinary law, the custom must be proved by very clear and unambiguous evidence. The evidence furnished by the *wajib-ul-arz* in the present case can hardly be regarded as such. We, therefore, hold that the defendant has failed to prove that according to custom the widow possesses full power of alienation in respect of her husband's estate.

The next question is as regards adverse possession. As stated before, Pancham Singh died long ago; so no evidence is available as regards mutation proceedings

(1) (1914) 1 O.L.J., 319.

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which took place on his death. But we have evidence available as regards the mutation proceedings on Bahadur Singh's death. Exhibit 12 is the copy of the statement of Baldeo Singh made in these mutation proceedings. In this statement Baldeo Singh said that he and Musammat Lachhmin are entitled as heirs to an equal share in Bahadur Singh's property and are in possession as such. Reference has also been made to the recitals in the deed of gift, dated the 20th of April, 1921, executed by Musammat Lachhmin in which she referred to the property which formed the subject of the gift as property which she had obtained by right of inheritance (*wirastan*). The learned counsel for the plaintiffs appellants contended in the first place that in the absence of any evidence of an assertion of adverse title on the part of Musammat Lachhmin, her possession in respect of the share belonging to her husband as well as in respect of the share belonging to Bahadur Singh, could not be considered as adverse and in the second place that at any rate the statement of Baldeo Singh above referred to and the recitals contained in the deed of gift, sufficiently showed that if she was in adverse possession at all she was in adverse possession only of a limited estate. We are of opinion that the first contention is not correct. The learned District Judge has found that Pancham Singh at the time of his death was joint with his two brothers. This finding has not been challenged before us. So Pancham Singh's widow was not entitled to anything more than maintenance out of her husband's estate. Her possession, therefore, of the share of her husband would be *prima facie* adverse unless it could be shown that it was the result of any arrangement with the reversioners [*Sham Koer* v. *Dab Koer*] (1) or that she took possession of the property prescribing only for the limited estate of a Hindu widow. But we think that the second contention is correct and must succeed. In *Lajwanti* v. *Safa Chand* (2) it was held that title acquired

(1) (1902) L.R., 29 I.A., 132. (2) (1924) L.R., 51 I.A., 171.

through adverse possession by a widow who claims and holds a widow's estate, inures to the estate of her deceased husband and descends upon her death accordingly. In *Deo Datt* v. *Raj Bali* (1) one of us discussing the decision of their Lordships just quoted held that it could not be regarded as an authority for the broad proposition that in every case whenever a Hindu widow is found in possession of property without title her possession must be regarded as that of a widow's estate but that the determination of the question as regards adverse possession must be based upon the circumstances of each case. In the present case we find that when Bahadur Singh died Baldeo Singh was the person legally entitled to succeed to his estate. However, mutation was made in his name as well as in the name of Musammat Lachhmin at his request and with his consent. A female can succeed as an heir only to a limited estate under the Hindu law. When Baldeo Singh stated that Musammat Lachhmin succeeded to a moiety share as an heir, he could not possibly mean anything else than that she was to hold it as a limited owner. It is further to be noted that Musammat Lachhmin herself in the deed of gift exhibit 1, refers to her possession both with regard to the share which came in her possession on her husband's death as well as in regard to the share which she obtained on the death of Bahadur Singh, as possession as an heir. This seems to us to show beyond all doubt that she never regarded herself as in possession of an absolute estate. It is no doubt true that she was in possession of both these shares without any legal title and in that sense her possession was adverse but we are under the circumstances clearly of opinion that while she was in possession she prescribed not for an absolute estate but only for the limited estate such as is possessed by a female succeeding as an heir to a Hindu.

Lastly as regards the validity of the deed of gift. The only contention urged on behalf of the appellant

(1) (1928) 5 O.W.N., 653.

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was that the learned District Judge had wrongly thrown the onus on the plaintiffs to show that the deed had not been understood by Musammat Lachhmin and had not been properly explained to her. We think the contention has no force. The learned District Judge after an examination of the entire evidence came to the conclusion that the defendant had sufficiently brought home the document to the lady and had established the genuineness of the deed. We must therefore overrule this contention.

The result of our findings on the first two points is that the appeal must succeed. We therefore set aside the decision of the learned District Judge and restore that of the trial court. The plaintiffs will get their costs in all the courts.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Bisheshwar Nath Srivastava.

1930
September, 17.

LALTA SINGH (DEFENDANT-APPELLANT) *v.* MUTHUR UPADHIA (PLAINTIFF-RESPONDENT.)*

Limitation Act (IX of 1908), section 18 and articles 116 and 120—Mortgage with possession—Possession not delivered—Suit by mortgagee for personal decree, limitation applicable to—Transfer of Property Act (IV of 1882), section 68—Fraud—Specific allegations of fraud necessary in a case of fraud—Mere omission to inform another party of his title not enough to constitute actual fraud.

Where a mortgagor mortgaged with possession certain plots of land and stipulated that the mortgagee was to remain in possession and in case there was any disturbance in the mortgagee's possession he was entitled to recover the mortgage money with interest and possession was not delivered, *held*, that the mortgagee had a right to sue the mortgagor for the mortgage money and to claim a personal decree against him un-

*Second Civil Appeal No. 222 of 1930, against the decree of M. Zia-uddin Ahmad, Subordinate Judge of Sultanpur, dated the 16th of April, 1930, reversing the decree of Pandit Shiam Manohar Tewari, Munsif of Musafirkhana at Sultanpur, dated the 18th of January, 1930.