APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan and Mr. Justice Muhammad Raza.

BABU KAMAKHYA DAT RAM (DEFENDANT-APPELLANT) *v.* KUSHAL CHAND (PLAINTIFF-RESPONDENT).* 1928 *March*, 9.

Will—Construction of wills—Devise containing the words "the non-taluqdari villages shall pass to the devisee and after him to his aulad-i-akbar *according to the rule of succession laid down in Act I of* 1869", *meaning of—Will, whether conferred an absolute estate.*

Where the precise words of a devise by a taluqdar with respect to villages not comprised in the taluqa were "that these villages shall pass to the devisee and after him to his *aulad-i-akbar* according to the rule of succession laid down in Act I of 1869", *held*, that the meaning of these words was that the devisee and his heirs after him were to receive the estate in question as an estate of inheritance regulated by the rule of primogeniture as it is enacted in section 22 of Act I of 1869. The primary intention was to confer an estate of inheritance in the properties mentioned and that intention was consistent with law. The testator's further wish that the succession to such properties should be according to the rule laid down in section 22 of Act I of 1869 cannot be given effect to.

The words "and after him to *aulad-i-akbar*" are words of limitation and not of purchase and are intended to express the absolute estate which the testator proposed to confer on his eldest son, the devisee, and that the later words "according to the rule of succession laid down in Act I of 1869" also connote the same estate though the line of inheritance indicated by the same words which the testator desired to fasten on the estate must be rejected as an idle attempt to legislate. *Richard Ross Skinner* v. *Naunihal Singh* (1), distinguished, and *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh* (2), followed.

*First Civil Appeal No. 54 of 1927, against the decree of S. M. Ahmad Karim, Additional Subordinate Judge of Fyzabad, dated the 17th of January, 1927, decreeing the plaintiff's claim.

(1) (1913) L.R., 40 I.A., 105.

(2) (1923) L.R., 50 I.A., 265 : 26 O.C., 257 : I.L.R., 45, All., 596.

1928

BABU KAMAKHYA DAT RAM v. KUSHAL CHAND.

Messrs. *Ali Zaheer* and *Ali Mohammad*, for the appellant.

Messrs. *A. P. Sen* and *Makund Behari Lal*, for the respondent.

HASAN and RAZA, JJ. :—This is an appeal by the defendant No. 1, Kamakhya Dat Ram, from the decree of the Additional Subordinate Judge of Fyzabad, dated the 17th of January, 1927.

The appellant is the oldest and one of the four sons of one Babu Sitapat Ram deceased. The other three sons of the deceased were defendants Nos. 2, 3 and 4 respectively in the suit, out of which this appeal arises. They are no parties to this appeal. There were two more defendants Nos. 5 and 6 respectively, who were alleged to be the transferees of portions of the property now in question, but they have also dropped out of the appeal before us. The appellant, Kamakhya Dat Ram, alone contested the suit by filing his written statement on the 6th of December, 1925. Subsequently he absented himself from the proceedings of the suit in the court of first instance. The decree under appeal was consequently passed *ex parte* and the only ground urged in support of the appeal is ground No. 4 embodied in the memorandum of appeal to this Court. The Counsel for the plaintiff-respondent agreed that the said ground may be decided in the present appeal by admitting in evidence a duly certified copy of the will mentioned in that ground. Accordingly we now proceed to decide the question raised in ground No. 4 mentioned above. The suit is founded on a deed of mortgage executed by Babu Sitapat Ram on the 26th of October, 1911. The plaintiff-respondent and his brother, Gyan Chand since deceased, were the mortgagees and the property mortgaged is mentioned in paragraph 4(*e*) of the plaint of the suit. The amount of the mortgage-money for which the deed of the 26th

1928

BABU KAMAKHYA DAT RAM v. KUSHAL CHAND.

of October, 1919, was executed by Babu Sitapat Ram is the sum of Rs. 12,600 and bore interest at the rate of 12 annas per cent. per mensem with six-monthly rests. In the event of default in payment of two instalments of interest the mortgagees were given the right to recall the entire mortgage money. Default has occurred and hence the suit.

Hasan and Raza, JJ.

The relief asked for is a decree for the recovery of Rs. 23,329-6-3, together with future interest by sale of the mortgaged property.

The property, previous to its vesting in the mortgagor Babu Sitapat Ram, belonged to his father, Babu Sri Ram and since the death of the latter it devolved upon Babu Sitapat Ram by virtue of the provisions of the will of Babu Sri Ram, dated the 21st of May, 1911. Babu Sitapat Ram died on the 3rd of November, 1925. It is agreed that the property covered by the mortgage in suit is the property entered in schedule 4 of the will and the devise in respect of that property in favour of Babu Sitapat Ram is contained in clause 4 of the said will of Babu Sri Ram. The contention in appeal is that under this devise Babu Sitapat Ram, the mortgagor, obtained only a life interest in the properties entered in schedule 4 of the will amongst which, as already stated, the mortgaged property is included.

The only question for decision, therefore, is the interpretation of clause 4 of the aforementioned will. That clause is as follows:—

> "Besides the villages comprised in taluqa Rasulpur entered in List III other villages and shares in villages entered in List IV given at the foot of this deed, shall pass to the said Sitapat Ram and after him to his eldest son (*aulad-i-akbar*—senior line of issue) under the rules of succession laid down in Act I of 1869."

1928

BABU KAMAKHYA DAT RAM v. KUSHAL CHAND.

To help us in the task of interpreting the clause under consideration we were referred to a decision of their Lordships of the Judicial Committee in the case of *Richard Ross Skinner* v. *Naunihal Singh* (1) by the learned Counsel for the appellant.

Hasan and Raza, JJ.

If clause 4 of the will interpreted by their Lordships in the case above mentioned had stood alone the resemblance with the will now being interpreted would have been remarkably great, but it appears to us that the interpretation of clause 4 in that case was mainly controlled by an elaborate scheme of destinations over, embodied in clause 5 of that will. In the present case there is no gift over whatsoever. We, therefore, think that the decision in *Richard Ross Skinner* v. *Naunihal Singh* (1) is of no help to us in interpreting clause 4 of the will of Babu Sri Ram.

The precise words of devise are :—

> " shall pass to the said Sitapat Ram and after him to his *aulad-i-akbar* according to the rule of succession laid down in Act I of 1869."

We think that the meaning of the words just now quoted is that Sitapat Ram and his heirs after him are to receive the estate in question as an estate of inheritance regulated by the rule of primogeniture as it is enacted in section 22 of Act I of 1869.

Babu Sri Ram's grandfather, Diwan Anant Ram, was a taluqdar and also a grantee within the meaning of section 8 of the Oudh Estates Act (I of 1869). On the death of Diwan Anant Ram, his son, Diwan Mewa Ram, succeeded to the estate of Rasulpur in the character of an heir of a taluqdar and on the death of Diwan Mewa Ram his son, Babu Sri Ram, succeeded as an heir to his father to the same estate. Taluqa Rasulpur is entered in

(1) (1913) L.R., 40 I.A., 105.

schedule 3 of the will of Babu Sri Ram and is the subject-matter of the devise contained in clause 3 of the same will. This devise is also in favour of Babu Sitapat Ram, who was Babu Sri Ram's eldest son. It is agreed that the devise of Rasulpur in favour of Babu Sitapat Ram conferred on him an absolute estate as contradistinguished from an estate for life. The words of devise contained in clause 3 in respect of taluqa Rasulpur are strikingly similar to the words of devise contained in clause 4 in respect of properties entered in schedule 4 of the will. The words in the former clause are "my eldest son Sitapat Ram and his *aulad-i-akbar* shall get the said taluqa according to the rules of succession laid down in Act I of 1869." This similarity strongly points to the conclusion that the intention of the testator was to confer the same estate on Babu Sitapat Ram in both cases. The rule of primogeniture regulates the succession of the taluqa of Rasulpur by the force of the provisions of section 22 of Act I of 1869, and it appears to us that by the devise contained in clause 4 the testator intended that the same rule should also regulate the succession of the property devised under clause 4 to Babu Sitapat Ram. The primary intention was, therefore, to confer an estate of inheritance in the properties mentioned in schedule 4 of the will and that intention was consistent with law. The testator's further wish that the succession to such properties should be according to the rules laid down in section 22 of Act I of 1869 cannot, however, be given effect to. This view of the case falls in line with the decision of their Lordships of the Judicial Committee in the case of *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh* (1). Paragraph 7 of the will interpreted in that decision was:—. . . . . "Babu Lachman Singh, the second son of Raja Hanwant Singh, and his heirs and representatives,

Hasan and Raza, JJ.

(1) (1923) L.R., 50 I.A., 265: 26 O.C., 257: I.L.R., 45 All., 596.

1928

BABU KAMAKHYA DAT RAM v. KUSHAL CHAND.

shall succeed to the entire Rampur Kaithaula estate, as provided by section 22 of Act I of 1869. . . . . ." It was held in that case that "the words 'heirs and representatives' are to be treated as words of limitation and not of purchase, that is, that they are merely intended to express the absolute estate which it was proposed to give to Lachman as distinguished from the life-estates which had preceeded it. This being so, the later words in the sentence may be regarded either as an idle attempt to derogate from the grant previously made and therefore to be rejected, or as words of description only, stating the legal incidents which the grantor conceived to belong to the estate which he had granted. In this case his mistake as to the legal consequences does not affect the grant which he has made. They think, therefore, that Lachman received an absolute estate in reversion."

Hasan and Raza, JJ.

Following the reasoning embodied in the above quotation we hold that the words in clause 4 of the will under consideration "and after him to *aulad-i-akbar*" are words of limitation and not of purchase and are intended to express the absolute estate which the testator proposed to confer on his eldest son, Babu Sitapat Ram, and that the later words "according to the rule of succession laid down in Act I of 1869" also connote the same estate though the line of inheritance indicated by the same words which the testator desired to fasten on the estate must be rejected as an idle attempt to legislate. This interpretation is strongly strengthened by the provisions contained in clause 6 of the will. By this clause devise is made in favour of Babu Sitapat Ram in respect of properties mentioned in schedule 6 of the will. The nature of the estate conferred by this devise is expressed by the words "but he shall have no power to make any transfer or create any incumbrance in respect of those villages. The said Sitapat Ram shall remain in possession during his lifetime and after him his sons, Adyadat

Ram, Bidyadat Ram and Shantadat Ram or of them any person or persons who may be alive after Sitapat Ram, shall get equal shares." Then follow words embodying a series of destinations over. It follows that had the testator intended to confer on Babu Sitapat Ram the same limited estate in the properties in suit as was conferred on him in properties entered in schedule 6 the former also would have been entered in schedule 6 and not schedule 4. It is quite clear to us, indeed it seems to us impossible to hold otherwise, that the estate devised to Babu Sitapat Ram under clause 4 of the will is different from, and larger in quantity than, the estate devised to him under clause 6 of the will; and we are of opinion that the former is an absolute estate and the latter an estate for life only.

Hasan and Raza, JJ.

We accordingly dismiss this appeal with costs

Appeal dismissed.