

him. In the present case there is no suggestion that Sonu or Sukru died more than 12 years before the institution of the suit, so that so far as this case is concerned, it does not assist the appellant.

The question, however, remains whether the suit is barred on account of the finding that service ceased to be rendered in 1905. The view of the learned Judicial Commissioner is that it is not barred because there was no refusal or claim of service between 1905 and 1915. In support of this view he has relied on *Komargowda vs. Bhimaji Keshar* (1) in which case it was held that the fact that no services were performed does not in itself make the holding adverse. To make the holding adverse there must be a refusal to perform service or a claim to hold the lands free of service. This would appear to be the correct view of the law, and in my opinion the appeal has been rightly decided by the learned Judicial Commissioner.

I would accordingly dismiss this appeal with costs.

Ross, J.--I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Coultts and Ross, JJ.

ASHURFI SINGH

v.

BISESWAR PARTAP NARAIN SAHL.*

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January, 16.

Construction of Document—Deed of gift by Hindu husband in favour of his wife—donee described as malik—certain powers of transfer expressly granted and certain limitations on power of transfer imposed—nature of estate conferred upon donee—istamrari mukarrari lease granted by donee, validity of.

* Appeal from Appellate Decree No. 816 of 1919, from a decision of Dinanath De, Esq., Additional District Judge of Muzaffarpur, dated the 25th August, 1919, reversing a decision of Lala Damodar Prasad, Subordinate Judge of Muzaffarpur, dated the 11th February, 1919.

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Where, in a deed of gift executed by a Hindu in favour of his wife, the donee was described as *malik* and the succeeding clauses of the deed provided (i) that alienations by the donee during the lifetime of the donor should be made with the latter's permission; (ii) that after the donor's death the donee should have power to transfer up to 50 *bighas* for charitable purposes; (iii) that the donee should also have power to transfer by sale or gift to certain descendants and relations of the donor but that except to such persons she was not to sell, make a gift of, or mortgage more than 50 *bighas*; (iv) that the donee should have power to execute a Will in favour of the same specified persons; (v) that the property undisposed of by the donee either by deed or Will should descend to particular persons and (vi) that in the event of the donee predeceasing the donor the property undisposed of by the donee should revert to the donor *held*, (i) that the effect of the deed was to confer upon the donee an ordinary Hindu woman's estate with powers to sell, or to appoint by deed or Will, to certain specified persons, and, if these powers were not exercised by the donee, they were exercised by the donor in favour of those persons; (ii) that it could not be inferred from the absence of any clause restraining the donee from granting a *mukarrari* lease that she was empowered to grant such a lease.

Mussamat Kallany Kuer v. Lachmee Prasad (1), *Sarajmani v. Rabi Nath Ojha* (2), *Bhaidas Shibdas v. Baiyadab* (3), *Mussammatal Susiman Chamlkranin v. Shib Narayan Chowdhury* (4), *Shib Lakhau Bhakol v. Srimati Tarangini Dassi* (5) and *Kandarpura Nath Ghosh v. Jogendra Nath Bose* (6), referred to

Appeal by the plaintiff.

The facts of the case material to this report are stated in the judgment of Ross, J.

Manak (with him *Saroshi Charan Mitter, J. P. Singh* and *G. D. Singh*), for the appellant.

Kulwant Sahay, for the respondents.

Ross, J.—This is an appeal by the plaintiff. He alleges that Mussammatal Mulukrani Kuer was the absolute owner of the properties specified in the plaint and that he obtained an *istamrari mukarrari patta* from Mussammatal Mulukrani Kuer on the 7th of August, 1896. A dispute having arisen between himself and the reversioner of Babu Har Pragas Narayan Singh, the husband of Mussammatal Mulukrani Kuer, the properties were attached by the order of the Magistrate and this suit was brought for a declaration of the

(1) (1875) 24 W. R. 395.

(2) (1908) I L. R. 30 All 51.

(3) (1921) L. R. 48 I. A. 181;
26 Cal. W. N. 129.

(4) 1922) L. R. 49 I. A. 25.

(5) (1908) 8 Cal. L. J. 20

(6) (1910) 12 Cal. L. J. 391.

plaintiff's title to, and for recovery of possession of the properties, together with the surplus amount of profits in the hands of the Receiver. There were six parties who were defendants to the suit but we are concerned now only with the third party who are two minors under the protection of the Court of Wards. Their defence was that Mussammat Mulukrani Kuer had only a limited interest in the properties for the term of her life and that consequently the plaintiff was not entitled to succeed. The Subordinate Judge held that Mussammat Mulukrani Kuer had an absolute right to the property and consequently gave a decree to the plaintiff. This decision was reversed on appeal and the question now is as to the nature of the estate taken by Mussammat Mulukrani Kuer under a deed of gift executed in her favour by her husband on the 23rd June, 1859.

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The contention on behalf of the appellant is that the preamble to the deed refers to the whole collection of rights to their uttermost limit in these properties, and that by the first clause the properties are granted to the grantor's wife "as *malik*" and that consequently she became full owner, her interest being limited only so far as it is specially limited in the succeeding clauses. The second clause deals with the power of alienation and there is no restriction therein on the granting of a *mukarrari* lease. Consequently Mussammat Mulukrani Kuer had power to grant a *mukarrari* lease and the lease granted by her is valid.

Reference was made to the decisions in *Mussammat Kollany Koer v. Luchmee Prasad* (1), *Surajmani v. Rabi Nath Ojha* (2), *Bhaidas Shivdas v. Bai Gulab* (3) and the decision of the Privy Council in *Mussammat Sasiman Chowdhurain v. Shib Narayan Chowdhury* (4). It was argued that the effect of these cases, is to show, as observed in the last mentioned case, that "the term '*malik*' when used in a Will or other document as descriptive of the position which a devisee or donee is

(1) (1855) 24 W. R. 395.

(2) (1908) I. L. R. 30 All. 84.

(3) (1921) I. R. 48 I. A. 181;

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(4) (1922) L. R. 49 I. A. 26.

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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 proprietary rights were not intended to be conferred;" and, further, that the fact that the donee is the wife or widow of a Hindu is not in itself a circumstance qualifying the meaning of the word "*malik*."

Now as was pointed out in the case of *Mussammatt Sasiman Chowdhurain v. Sib Narayan Chowdhury* (1) it is always dangerous to construe the words of one Will by the construction of more or less similar words in a different Will which was adopted by a court in another case. The case upon which the learned Counsel for the appellant most strongly relies is *Bhaidas Shivdas v. Bai Gulab* (2) but the terms of the Will in that case were materially different from those under consideration now. The rule of construction is given in *Shib Lakshan Bhakat v. Srimati Tarangini Dasi* (3) where it was laid down that the court must, in construing a Will, look to all the clauses of the Will and give effect to all the clauses, ignoring none as redundant or contradictory [see also *Kandarpa Nath Ghosh v. Jogendranath Bose* (4)]. This deed, therefore, cannot be construed by reference only to the preamble and the first two clauses, but must be read as a whole. The second clause lays down the limits within which the donee can alienate the property; any alienation made during the lifetime of the donor is to be by his permission. After his death she can transfer up to a limit of 50 *bighas* for charitable purposes, she can also transfer by sale or gift to any son of the donor and the donee or the son of that son or any other son or daughter of the donor or any male descendants of his elder brother, but except these persons she is to have no power to sell, or make a gift of, or mortgage, more than 50 *bighas*. The third clause gives the donee power to

(1) (1922) L. R. 49 I. A. 25.

(3) (1908) 8 Cal. L. J. 20.

(2) (1921) L. R. 49 I. A. 181;
26 Cal. W. N. 129.

(4) (1910) 13 Cal. L. J. 391.

execute a Will in favour of any of the aforesaid persons. The fourth clause deals with the property undisposed of at the donee's death by any such Will and in that case it is declared that her son will get the property, or his male descendants, and if there is no son of the donee or male descendant of such son then in existence, then any other son of the donor or his son and in default of such persons, the donor's elder brother or his son will get the property but no daughter of the donee or any of her paternal or maternal relations. The fifth clause provides for any unmarried daughter or son's daughter of the donee, and the last clause declares that if the donee dies before the donor, the properties undisposed of by the donee will revert to him.

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Now as was pointed out in the case of *Bhaidas Shibdas v. Bai Gulab* (1) the "malik" is not a term of art, that is to say, it does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be. Absolute ownership imports at least the right to exclusive and free enjoyment of the property and free power of disposition. It is impossible to hold on the terms of this deed that an absolute estate was granted to Mus-ammatt Mulukrani Kuer; the limitations are inconsistent with free and full ownership. Reading the deed as a whole it seems to me clear that the intention of the donor was to provide for the donee and also for the ultimate devolution of his property. The grant in effect is the grant of an ordinary Hindu woman's estate with powers to sell, or to appoint by deed or Will, to certain specified persons, and if these powers are not exercised by the donee they are exercised by the donor by this deed in favour of those persons. It follows that the absence of any clause restraining the donee from granting a *mukarrari* lease does not lead to the conclusion that she is empowered to grant it; her powers must be gathered from the total effect of the conveyance and from the nature of the estate thereby granted. The argument of the appellant involves isolating a portion of the deed

(1) (1921) L. R. 48 L. A. '81, 26 Cal. W. N. 129.

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from the rest and than inferring that, because this power is not expressly taken away, it is granted. The argument infringes the rule of construction above referred to. In my opinion, therefore, this appeal must fail and be dismissed with costs.

COUTTS, J.—I Agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Adami, JJ.

SARADA IRASAD TEJ

v.

TRIGUNA CHARAN RAY.*

Succession Act, 1865 (Act X of 1865), section 50—Will—at testation—Will signed by testatrix by the pen of a scribe—execution witnessed by one witness—endorsement of Will by Sub-Registrar stating that execution admitted by testatrix.

Where a Will purported to have been signed by the testatrix who made her mark "by the pen of the scribe Ram Narayan Ray" and it was proved that one of two alleged attesting witnesses had been present when the mark of the testatrix had been affixed in her presence by the scribe, and the Will bore an endorsement of the Sub-Registrar that the testatrix had admitted execution of the Will to him, the endorsement also being signed by the testatrix who again made her mark "by the pen of Ramnarayan Roy" held, that the Will had been properly attested.

Roymoney Dasse, In the goods of (1), Hurro Sundari Deba v. Chunder Kant Bhattacharjee (2), Nitya Gopal Sircar v. Nayendra Nath Mitter Mazumdar (3), Tofaludda Peada v. Mahar Ali Shaha (4) and Amarendra Nath Chatterjee v. Kushi Nath Chatterjee (5), referred to.

* Circuit Court, Cuttack, Appeal from Original Decree No. 5 of 1921 from a decision of D. H. Kingsford, Esq., District Judge of Cuttack, dated the 24th January, 1921.

(1) (1876) I. L. R. 1 Cal. 150.

(3) (1885) I. L. R. 11 Cal. 428.

(2) (1881) I. L. R. 6 Cal. 17.

(4) (1898) I. L. R. 25 Cal. 78.

(5) (1910) I. L. R. 27 Cal. 169.