

APPELLATE CIVIL.

Before Mr. Justice Broadway and Mr. Justice Zafar Ali.

MUSSAMMAT RAM KAUR (PLAINTIFF) Appellant

1926

versus

ATMA SINGH AND ANOTHER (DEFENDANTS)

Nov. 11.

Respondents.

Civil Appeal No. 2060 of 1922.

Will—Construction of—Bequest of absolute ownership in deceased's property—subsequent clauses restricting alienation and directing management—whether operative after legatee has attained majority—“Malik wa qabiz”, “milkiyyat”—meaning of—Hindu Will—attestation of—by legatee—whether operates as an estoppel.

The Will of a Hindu declared his two sons *G. D.* and *N. D.* owners and possessors (*malik wa qabiz*) of his estate after his death, but proceeded to direct that *Mst. R. K.* (his wife) should during her life have full powers of management, in which neither of her sons (the legatees) should have a right to interfere, to get his share partitioned, alienated or encumbered; it was further declared that nobody should be entitled to call upon *Mst. R. K.* for an account of her management. In subsequent clauses of the will, the property (*milkiyyat*) was repeatedly referred to as owned by the two sons, and *Mst. R. K.* was directed as Manager, to use it, *not* at will, but for the benefit of herself and the two sons generally. There was nothing in the will to reduce the meaning of the expressions used, *viz.*, “*Malik wa qabiz*” and “*milkiyyat*,” to anything less than full and complete ownership. During the pendency of probate proceedings by *Mst. R. K.* the elder of the two sons *G. D.* who was a major, executed a deed purporting to sell his half-share in three shops out of the property covered by the will.

Held, that there being no clear disposal of the income of the property in favour of some other person, the estate that passed to the two sons was an absolute one; and, that the rights of management and to enjoy the rents, conferred upon *Mst. R. K.* did not constitute such an interest as could be given effect to, so as to postpone the making over of the

1926

MUSSAMMAT
RAM KAUR
v.
ATMA SINGH.

corpus of the estate to those legatees on their attaining majority.

Lloyd v. Webb (1), referring to *Gosling v. Gosling* (2), and *Husenbhoy Ahmedbhoy v. Ahmedbhoy Habibbhoy* (3), followed.

Surajmani v. Rabi Nath Ojha (4), Mulla's Hindu Law, 4th edition, paras. 318 and 319, Majumdar's Hindu Wills Act, Gour's Hindu Code, and Mayne's Hindu Law, referred to.

Held further, therefore, that the conditions contained in the will regarding alienation (etc.), must be disregarded and did not avoid *G. D.*'s deed of sale.

Held also, that the fact that *G. D.* (at about the age of 18) had attested the will, and that his attestation included a statement by him that he had read the will and that it was correct, did not operate as an estoppel.

First appeal from the decree of Lala Prabhu Dayal, Senior Subordinate Judge, Amritsar, dated the 24th July 1922, dismissing the plaintiff's suit.

TEK CHAND and JAGAN NATH BHANDARI, for Appellant.

MANOHAR LAL and MEHR CHAND MAHAJAN, for Respondents.

JUDGMENT.

BROADWAY J.

BROADWAY J.—One Mohkam Chand, an *Ahluwalia* of Amritsar, died on the 11th of August 1920, leaving him surviving a widow, *Mussammat* Ram Kaur, and two sons, Gurbakhsh Das and Narsingh Das, the former of whom was a major, while Narsingh Das was a minor. On the 10th of August 1920 Mohkam Chand had executed a will which had been attested as a witness by Gurbakhsh Das. The attestation included a statement by Gurbakhsh Das, aged about

(1) (1896) I. L. R. 24 Cal. 44. (3) (1901) I. L. R. 26 Bom. 319.

(2) (1859) 123 R. R. 107, 112. (4) (1907) I. L. R. 30 All. 84 (P. C.).

18 years, to the effect that he had read the will and that it was correct. On the 12th of March 1921 *Mussammatt* Ram Kaur propounded the will and asked for probate thereof as the executrix. This application for probate was opposed by Bala Mal and Gurbakhsh Das, Bala Mal claiming to be an alienee from Gurbakhsh Das. Gurbakhsh Das later withdrew his caveat and despite Bala Mal's objections probate was granted to *Mussammatt* Ram Kaur on the 4th of February 1922. In the meantime, on the 17th of August 1921, Gurbakhsh Das had executed a deed of sale in favour of one Atma Singh, purporting to sell his (Gurbakhsh Das's) half share in three specific shops which had formed part of Mohkam Chand's estate. On the 31st of August 1921, *Mussammatt* Ram Kaur instituted a suit against Atma Singh and her son Gurbakhsh Das asking for a declaration that the sale in question was null and void and, therefore, incompetent. It was also urged that it had been made without consideration. Her suit having been dismissed she has come up to this Court in appeal through Mr. Tek Chand, while Atma Singh has, through Mr. Manohar Lal, filed a cross appeal relating to the question of costs.

The main question in this appeal is whether the will has been correctly interpreted by the trial Court. This will is to be found printed at pages 3-7 of the paper book. It commences with the statement of the testator's position in life and the motives which induced him to execute the will and also names the members of his family. After giving a description of his property he proceeds to deal with it, the important clauses being clauses 2, 3 and 4. Clause 2 is as follows:—

“ After my death the aforesaid two sons of mine and other sons who will be born in future will become

1926

—
 MUSSAMMAT
 RAM KAUR
 v.
 ATMA SINGH.
 —
 BROADWAY J.

1926

MUSSAMMAT
 RAM KAUR
 v.
 ATMA SINGH.
 ———
 BROADWAY J.

the owners and possessors (*malik wa qabiz*) of every kind of property left by me in equal shares. But the property owned by the legatees will remain under the management of my wife *Mussammat Ram Kaur* during her lifetime. *Mussammat Ram Kaur*, mother of the legatees, during her lifetime will be competent to make every kind of management of their property and to look after them. None of the legatees during the lifetime of their mother will take management of his property into his hand. No legatee will have a right to interfere in her management to get the property of his share partitioned and to alienate it or to encumber it with any charge. No creditor or decreeholder of a legatee will be competent to realize his demand from the share of the said legatee by means of attachment and auction sale through Court. If any legatee violates the above condition, the aforesaid *Mussammat Ram Kaur*, the manager, will be competent to have the attachment and sale proceedings set aside and the property released."

It is in reliance on this clause that this suit has been instituted. Reading this clause by itself, in my judgment, it is perfectly clear that the sons of the testator acquired an absolute right to the properties devised to them. It has, however, been urged by Mr. Tek Chand that in order to interpret the will as it should be interpreted it is essential that the whole of it should be examined and duly weighed. In this view he is of course perfectly correct, for it is quite possible that one clause which *primâ facie* would devise an absolute estate on a legatee might be governed by a later clause reducing that estate to something other than an absolute one. It has been further urged that the mere use of the expressions '*Malik wa qabiz*' do not of themselves connote the passing of an

absolute estate and on this point various authorities have been cited. Turning to the other clauses of the will it will be seen that in clause 3 it is laid down that *Mussammatt* Ram Kaur is to be fully competent to realize all the debts due to the estate and to carry on the current business, a part of which was a contract of sale of liquor, under her own personal supervision. The immoveable property was to be managed by her, she being responsible for the realization of the rents as well as the settlements of the rents. She was to be responsible for the repairs to the houses. Then come the following words:—

“ She will have full powers to spend the income of rent, interest and profits of the trade business on expenses relating to the family, education, betrothal, marriage and other expenses of her children. Each and every night the legatees will give the daily income of the shops to her, and they will get money from her according to their need. In other words she will be competent to make management of every kind. None will have a right to interfere in her management and to take an account from her. But she will not be competent to waste, destroy, and alienate the property of the legatees.”

It has been urged by Mr. Tek Chand that under the terms of these two clauses the *corpus* of the property was vested to a limited extent in the two sons but that they had been deprived of the enjoyment of the income thereof, the enjoyment of the same being made over to *Mussammatt* Ram Kaur for her life. He, therefore, urged that the estate that vested in the sons on the death of their father was one other than an absolute one and that, therefore, the alienation of a portion of the *corpus* of the estate by one of the legatees being opposed, not only to the will but to the

1926

—
 MUSSAMMAT
 RAM KAUR
 v.
 ATMA SINGH.
 —
 BROADWAY J.

1926

MUSSAMMAT
RAM KAUR
v.
ATMA SINGH.
BROADWAY J.

estate which was taken by him under the will, must be declared void. In the alternative he urged that assuming that the estate taken by the sons was an absolute one, nevertheless the income having been made over to *Mussammat* Ram Kaur for her life entitled her to retain possession of the entire estate of the testator during her lifetime and that, therefore, in any event, she would be entitled to a declaration to the effect that she could retain the property and enjoy the income thereof during her life. On the other hand it was urged by Mr. Manohar Lal that once the estate had vested absolutely in the legatees any conditions or directions restricting their enjoyment of the property as owners should be disregarded. He also urged strenuously that by a proper reading of this will it should be held that the view taken by the trial Court was correct and that the estate that passed was an absolute one. Attention was drawn to various authorities, such as Mulla's Hindu Law, Majumdar's Hindu Wills Act, Gour's Hindu Code and Mayne's Hindu Law. At page 371 of the 4th edition of Mulla's Hindu Law paragraph 318 runs as follows :--

“Where property is bequeathed absolutely to a person, but the will contains a direction that it shall not be alienated, or partitioned, or that it shall be applied or enjoyed in a particular manner, such direction is inoperative, and the legatee is entitled to receive the property as if the will had contained no such direction.”

Again in the next paragraph 319 it is said that “where a will confers an absolute gift, but directs that the property so given shall not be made over to the legatee until he has attained a certain age beyond the period of his majority, such direction is inopera-

tive, and the legatee is entitled on attaining his majority to receive the property as if the will had contained no such direction, unless during the interval the income of the property is clearly disposed of in favour of some other person." The passages referred to by the learned counsel in the other works cited are to the same effect. In applying these principles to the present case it is first necessary definitely to construe the terms of this will. After giving full weight to Mr. Tek Chand's arguments and the authorities cited by him it seems to me that the correct interpretation of the document in question is that the estate taken by the two sons was an absolute one. I have borne in mind what has been said at the Bar with regard to the value to be placed on expressions such as ' *milkiyyat* ' and ' *malik wa qabiz* '. I have also borne in mind that Their Lordships of the Judicial Committee in *Surajmani and others v. Rabi Nath Ojha and another* (1) and other similar authorities, while laying down that the expression ' *malik wa qabiz* ' raises a presumption that full ownership is intended to pass, held that it is a presumption which the surrounding circumstances may rebut. In the present case I am unable to see any circumstances which could or should reduce the meaning of these expressions to anything less than a full and absolute estate or ownership. It was urged that the will clearly contemplated that the mother should remain in possession and that, therefore, the use of the word ' *qabiz* ' clearly was not meant to give the legatees a right to take possession of the property. As I read the document, however, the expressions used are those that have become more or less recognised as the correct expressions to be used in documents of this nature,

1926

MUSSAMMAT
RAM KAUR
v.
ATMA SINGH.
BROADWAY J.

(1) (1907) I. L. R. 30 All. 84 (P. C.).

1926

MUSSAMMAT
RAM KAUR
v.
ATMA SINGH.
BROADWAY J.

connoting clearly the intention of the testator to pass an immediate estate to the legatee. It will be seen that the property is referred to repeatedly in this document as belonging to the legatees. In clause 2, after a declaration that the sons are to become the 'owners and possessors' of the testator's property of whatsoever description, we have a reference to 'the property owned' by the legatees which is to remain under the management of their mother who will again be competent to make every kind of management of "their property." Again, none of the legatees during the lifetime of their mother will take the management of 'his property' into his hands, and yet again no legatee will have a right to interfere in her management to get the 'property of his share partitioned' and to alienate it or to encumber it with any charge. In this view of the case it remains to be seen whether there has been a disposal of the income during the interval in favour of some other person. As to this, it has been urged that *Mussammat Ram Kaur* must be held to have been given a life interest in the income, for, although, according to clause 3, she is directed to spend the income of the property on expenses relating to the family generally, it is specifically declared that nobody will have a right to interfere in her management and to take an account from her. In this respect it was urged that the fact that she had been given full control over the income without being liable to render accounts to anyone clearly indicated that she had an interest in the income of this property.

Now, such a dealing with property is, and has always been, recognised by the Courts of this country and of England. In *Gosling v. Gosling* (1), Vice-

(1) (1859) 123 R. R. 107, 112.

Chancellor Wood is reported as having said that "the principle of this Court has always been, to recognize the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age: unless, during the interval, the property is given for the benefit of another." This principle has been recognised and followed in decisions of various High Courts in this country. In *Lloyd v. Webb* (1) a testator dying in 1896 bequeathed the whole of his property, with the exception of an annuity, to his wife and some other specific legacies, to his only son, who had attained majority at the date of his father's death, but subject to the restriction that he should not be allowed to enjoy it until the end of the year 1900; and appointed two trustees to carry out his wishes. It was held that the son took an immediate vested interest in the estate of the testator and that the condition restricting his immediate enjoyment was a condition repugnant and was invalid. *Gosling v. Gosling* (2) was referred to with approval in this case.

A case, which has, to my mind, a strong resemblance to the present one, is that of *Husenbhoy Ahmedbhoy v. Ahmedbhoy Habibbhoy* (3) where it was held that "where a will confers an absolute gift, but directs that the property so given shall not be made over to the legatee until he has attained a certain age beyond the period of his majority, such direction is inoperative, unless the will confers an interest in the property upon some person for the intervening period, and the legatee is entitled to have the property handed

1926

MUSSAMMAT
RAM KAUR
v.
ATMA SINGH.
BROADWAY J.

(1) (1896) I. L. R. 24 Cal. 44. (2) (1859) 123 R. R. 107.

(3) (1901) I. L. R. 26 Bom. 319.

1926

MUSSAMMAT
RAM KAUR
v.
ATMA SINGH.
BROADWAY J.

over to him as soon as he attains his majority.' There, there was a clause in the will which was practically identical with the third clause of the will now under consideration. After making a bequest of the property, moveable and immoveable, to the legatee in that case the testator went on to say that "when the said Husenbhoy Ahmedbhoy attains the age of twenty-five years my 'executors' shall make over my said property to him and till then my 'executor' Ahmedbhoy Habibbhoy shall keep with him the whole of that property. And as to such interest as may be realized by him, he shall deal with the same in such manner as he thinks fit. The said Husenbhoy Ahmedbhoy or any one else has no right to ask for an account, etc., in respect of that matter." Here, there was a will containing a clause postponing the enjoyment of the income of certain property which had vested in the legatee to a specific period and a provision was made for the executor to use and enjoy the income of the said property as he pleased with the provision that neither the legatee nor anybody else had a right to call upon the said executor to call for an account thereof. It was held in that case that the legatee took an immediate estate and that the executor was bound to hand over the estate to him without waiting for the period laid down. In the present case there is a similar provision making *Mussammat* Ram Kaur manager of the property (and in more places than one in this will she is referred to as the manager) and directing her to use the property not at will but for the use and benefit of herself and her sons (the legatees), a provision being made that neither the said legatees nor anybody else should call upon her to render an account of her management. I agree with Mr. Tek Chand that this does not make her an

ordinary guardian of the property but it seems to me that it cannot be said that the estate or interest given to her under the will was one carved out of the absolute estate that was given to Gurbakhsh Das and his minor brother under the will, and I cannot regard the provision with regard to the income of the estate as falling within the purview of the proviso referred to in *Gosling v. Gosling* (1) and paragraph 319 of Mulla's Hindu Law. I cannot hold that during the interval that elapsed from the death of the husband to her own death the income of the property had been disposed of in "favour of some other person." Admittedly conditions restraining alienations or partition must be disregarded. That is perfectly clear from paragraph 318 of Mulla's Hindu Law, a paragraph based on certain definite authorities. This interpretation is, in my judgment, further supported by the fact that in paragraph 4 of this will provision is made for *Mussammat* Atma Devi, the step-mother of the testator. There certain shops and houses specified are made over to her and then come the following words:—

"She will be fully competent to locate and eject tenants. She will be bound to effect repairs out of the income of the rent. She will be fully competent to spend the remaining income of rent. But she will have no right to alienate the above shops and houses."

That is the creation of a life estate in favour of *Mussammat* Atma Devi in connection with certain specified property. Similar words are not used in dealing with the rest of the property which was to be under the management of *Mussammat* Ram Kaur. It may be that

1926

MUSSAMMAT
RAM KAUR
v.
ATMA SINGH.
BROADWAY J.

1926

MUSSAMMAT
RAM KAUR
v
ATMA SINGH.
—
BROADWAY J.

it was the intention of the testator, while giving his property to his sons, to place the management of the said property in the hands of his wife in whose business capacity, honesty and reliability he obviously had the utmost confidence. But what we have to see is whether he has been able to carry out his intentions or wishes in this connection, and after a most careful perusal and study of this document I am forced to the conclusion that the view taken by the Senior Subordinate Judge is correct and that the estate that passed under the terms of the will to the two sons was an absolute one and that the right of management and the right to enjoy the rents conferred on *Mussammatt* Ram Kaur is not such an interest as can be given effect to, to postpone the making over of the *corpus* of the estate to the legatees. Gurbakhsh Das, therefore, was not acting illegally in making the alienation that he did, and I would, therefore, dismiss this appeal with costs.

With reference to the cross appeal, having regard to the fact that the defence set up by the defendants during the trial amply justified the orders passed as to costs by the trial Court, I would dismiss it also with costs.

In conclusion, although the above disposes of the appeal, I would note that I do not think that it has been proved that the property in suit was joint property. I would also hold that Gurbakhsh Das's attestation of the will does not operate as an estoppel.

ZAFAR ALI J.

ZAFAR ALI J.—I agree.

N. F. E.

Appeal dismissed.