APPELLATE CIVIL.

Before Tek Chand and Monroe JJ.

PARTAP CHAND AND OTHERS (DEFENDANTS) Appellants

versus

MUSSAMMAT MAKHANI AND ANOTHER (PLAINTIFFS)
JAWAHARA SHAH-MAHRA SHAH AND ANOTHER (DEFENDANTS) } Respondents.

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Dec. 7.

Civil Appeal No. 2983 of 1926.

Civil Procedure Code, Act V of 1908, Order IX, rule 9: Suit dismissed in default—effect of—on subsequent suit—Different plaintiff and cause of action—Hindu Law—Will—in favour of female—conferring absolute estate—bequest over to others—effect of.

Held, that the present suit by a daughter and daughter's son who had an independent title of their own as persons entitled to succeed on the death of *Mussammat M.* (on whose death their cause of action arose) is not barred under Order IX, rule 9 of the Civil Procedure Code, by a previous suit brought by *Mussammat M.* which was dismissed in default, the present suit not being instituted by the same plaintiff or by a person claiming under her and the cause of action being different.

Held also, that according to well-settled rules of construction of Hindu wills, clauses declaring that a female shall be the " owner " of the testator's property and " enjoy full power to alienate " confer absolute estate.

And that, if an estate is given in terms which confer an absolute estate on the donee, and then further interests are given merely after, or on the termination of, that donee's interest, the absolute interest is not cut down and the further interests fail.

Mohan Lal v. *Niranjan Das* (1), *Sures Chandra Palit* v. *Lalit Mohan* (2), and *Bipradas Goswami* v. *Sudhan Chandra Banerji* (3), relied on.

(1) (1921) I. L. R. 2 Lah. 175. (2) (1915) 31 I. C. 405.
(3) (1929) I. L. R. 56 Cal. 790, 798.

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PARTAP CHAND *v.* MUSSAMMAT MAKHANI.

First Appeal from the decree of Mir *Ghulam Yazdani, Senior Subordinate Judge, Attock, at Campbellpur, dated the 28th October, 1926, granting the plaintiffs a decree of half the shares of the lands, etc.*

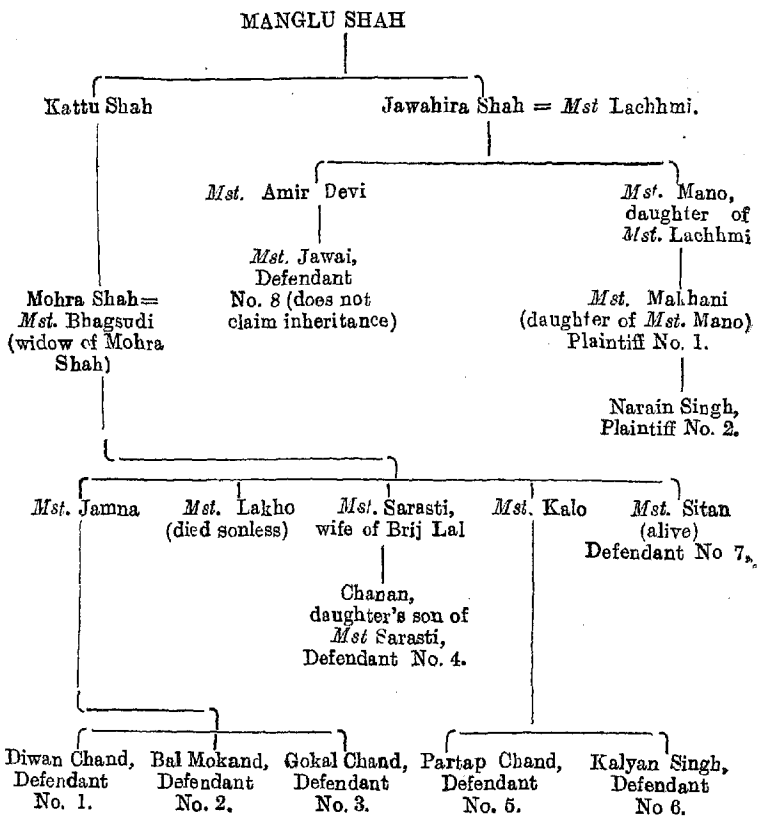
J. N. AGGARWAL and GOBIND DAS, for Appellants.

KISHEN DAYAL, BHAGWAT DAYAL and BISHAN NARAIN, for (Plaintiffs) Respondents; and DIN DAYAL, for Respondent No. 3.

The judgment of the Court was delivered by—

TEK CHAND J.

TEK CHAND J.—In order to understand the facts of this case it is necessary to refer to the following pedigree table :—



Kattu Shah and Jawahira Shah, sons of Manglu Shah, were well-to-do *Khatris* of Thatha, *Tehsil* Pindigheb, Attock District. Jawahira Shah was sonless, but had two daughters, *Mussammat* Mano and *Mussammat* Amir Devi, from his wife *Mussammat* Lachhmi. Kattu Shah had a son, Mohra Shah, who was married to *Musammat* Bhagsudi. Mohra Shah predeceased his father and uncle. The exact date of his death is not known, but all parties are agreed that he had died some time before 1883. He had no son, but left him surviving five daughters, *Mussammat* Jamna, *Mussammat* Lakho, *Mussammat* Sarasti, *Mussammat* Kalo and *Mussammat* Sitan. Of these, *Mussammat* Sitan alone is alive and is defendant No. 7 in this case. The other daughters are represented by their descendants, defendants 1 to 6. A few years after Mohra Shah's death, Jawahira Shah also died in 1884. His widow, *Mussammat* Lachhmi and his daughters *Mussammats* Mano and Amir Devi continued to live amicably with Kattu Shah till his death in 1892.

On the 21st August, 1889, Kattu Shah had executed a will (Exhibit P. 26) which is printed at pages 70 to 72 of the paper book. This will was duly registered on the 22nd August 1889. I shall discuss its terms in a later part of the judgment; it will suffice to say here that under its terms the family properties were bequeathed to *Mussammat* Lachhmi, widow of Jawahira Shah, and *Mussammat* Bhagsudi, widow of Mohra Shah, in equal shares. The plaintiff's case is that under the terms of the will, each of the two widows became absolute owner of the share in the properties which was devised to her, and possessed full power of disposition over it. The defendants

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contend, on the other hand, that *Mussammat* Lachhmi and *Mussammat* Bhagsudi got life estates only.

Three years after the execution of the will, Kattu Shah died, leaving extensive moveable and immoveable property and a flourishing business at Peshawar and Hassan Abdal, and on his death the two legatees, *Mussammat* Lachhmi and *Mussammat* Bhagsudi, entered into possession in accordance with the terms of his will. They seem to have lived amicably for some years, but later on relations between them grew somewhat strained. On the 3rd February, 1907, *Mussammat* Lachhmi, purporting to act as absolute owner of her half share in the moveable and immoveable properties, under the bequest made by Kattu Shah, executed a will (Exhibit P. 27) by which she devised her entire share to her daughter *Mussammat* Mano for her life without any power of alienation and after *Mussammat* Mano's death to her daughter *Mussammat* Makhani (plaintiff No. 1) and *Mussammat* Makhani's son, Narain Singh (plaintiff No. 2) as owners. This will was registered on the 5th February, 1907, and *Mussammat* Lachhmi died seven years later on the 17th April 1914. It is alleged by the plaintiffs that on *Mussammat* Lachhmi's death effect was given to her will, and *Mussammat* Mano remained in joint possession of the properties with the other co-sharer *Mussammat* Bhagsudi till 1922, when *Mussammat* Bhagsudi died.

Mussammat Mano died a year later, and on her death the entire property was taken possession of by defendants 1 to 7, who are the descendants of *Mussammat* Bhagsudi. Accordingly on the 18th July, 1924, the plaintiffs, *Mussammat* Makhani and Narain

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Singh, brought the present suit against defendants 1 to 7 for joint possession as owners of one-half of the various properties mentioned in the plaint. They also sued for recovery of their one-half share of the debts which were alleged to be due by defendants Nos. 11 to 20 to *Mussammat* Lachhmi and *Mussammat* Bhagsudi as per details given at length in the heading of the plaint. The plaintiffs based their claim on (1) the will of Kattu Shah, dated the 21st August 1889, whereby, they averred, he had bequeathed one-half of the family estate to his brother Jawahira Shah's widow, *Mussammat* Lachhmi as absolute owner and (2) the will of *Mussammat* Lachhmi by which she had devised her entire share to *Mussammat* Mano for her life, and on *Mussammat* Mano's death to the plaintiffs in full ownership.

The suit was resisted by defendants Nos. 1 to 7 on various grounds, most of which are not in dispute in appeal. The main defence raised by these defendants was that Kattu Shah's will conferred only a life estate on *Mussammat* Lachhmi in one-half of the family properties, and that she had no power to make a valid bequest to the plaintiffs. It was further pleaded that the suit was barred under Order 9, Rule 9, Civil Procedure Code, by reason of the dismissal in default of a suit which *Mussammat* Mano had instituted against *Mussammat* Bhagsudi for a declaration in 1914. Some of the debtor-respondents denied that anything was due by them to *Mussammat* Lachhmi and *Mussammat* Bhagsudi; others pleaded payment in full to *Mussammat* Bhagsudi; while some others stated that they would pay to the person declared by the Court to be the rightful successor-in-interest of the two ladies.

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The learned Subordinate Judge held that, on a true interpretation of the will of Kattu Shah, *Mussammat* Lachhmi had been made absolute owner of one-half of the properties and that, therefore, she could make a valid bequest in favour of the plaintiffs. He further held that the present suit was not barred by reason of the dismissal of *Mussammat* Mano's suit in 1914, the causes of action in the two suits being entirely different. He accordingly passed a decree in favour of the plaintiffs against defendants Nos. 1 to 7 for joint possession of the properties in dispute, except certain goods and ornaments which were not proved to have been in possession of defendants Nos. 1 to 7. The learned Judge also decreed the claim for Rs. 6,190 against Ram Chand, defendant No. 12, but dismissed the suit against the other debtor-defendants.

Against this decree two appeals have been lodged in this Court: (1) C. A. No. 2983 of 1926 by defendants Nos. 1 to 7, praying for total dismissal of the suit; and (2) C. A. No. 965 of 1927 by the plaintiffs asking for a decree against defendant No. 16 (firm Mohkam Chand-Radha Kishan) and defendant No. 20 (firm Mohar Chand-Daswandi) for Rs. 1,200 and 2,500, respectively.

The main question for determination in the 'defendants' appeal is whether the will of Kattu Shah (Exhibit P. 26) conferred full ownership or a mere life-estate in the half share of the properties which he had bequeathed to *Mussammat* Lachhmi. The will is not a very artistically drawn up document, but a careful perusal of its terms leaves no doubt as to its meaning. In the first paragraph the testator, after stating that he was childless, recited the fact

that on the 14th Chet, 1940 (=26th March, 1883) he and Jawahira Shah had made a will in the presence of the brotherhood to the effect that *Mussammat* Lachhmi and Bhagsudi were "the *proprietors* of our property." He then proceeded to say that as Jawahira Shah had since died, and he had become the sole owner of the property he made his last will and testament that "*Mussammats* Bhagsudi and Lachhmi shall be considered as *owners* (*Malik*) of my entire moveable and immoveable property in equal half shares." He next referred to certain oral gifts of cash, ornaments and certain other moveables which he had already made in favour of the widows, and declared as follow :—

"The above-mentioned ladies will be owners (*Malik*) in equal shares of the rest of the property, *i.e.* money due from others, herd of cattle, camels, etc., the immoveable property which I have got at present and the amounts due from certain persons as agents regarding which bonds were secured from them. *They will also enjoy full powers to alienate them.*" He then made provision for certain charities and funeral expenses, and wound up the document by stating that "even if no other writing is made after the execution of this will, after the deaths of *Mussammats* Bhagsudi and Lachhmi, their daughters shall be the heirs to, and owners in equal shares of, the property of every description. No other descendant, etc. shall have any claim thereto. *Mussammat* Bhagsudi shall exercise her rights over her half share, while *Mussammat* Lachhmi will live with her. After the death of *Mussammat* Lachhmi, her daughters *Mussammats* Mano and Amir Devi, shall be regarded as owners."

It is conceded by the learned counsel for the appellant that the only interpretation, which, accord-

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ing to well-settled rules of construction of Hindu wills, can be placed on the clauses in the will declaring that the two ladies shall be the " owners " of his properties, and that they " shall enjoy full power to alienate them " is that the testator conferred an absolute estate on them. He contends, however, that these clauses should be read along with the last clause in which the testator provided that on the death of *Mussammat* Lachhmi and *Mussammat* Bhagsudi their daughters shall be the heirs and owners. From this it is sought to be argued that the real intention of the testator was to give half of his property to each of the widows for her life-time, and on the death of each widow, her share was to devolve absolutely on *her* daughters. In my opinion this contention is without force, and must be rejected. After a careful perusal of the will as a whole, I have no doubt that the provision in the last clause, relating to the gifts to the daughters, is not in defeasance of the absolute estate conferred on the two widows in the earlier clauses, but is a " gift over " of the property of each widow on the termination of her life. If this is the correct interpretation of the will, there can be no doubt that the " gift over " is void and must be considered as non-existent in the eye of the law. The proposition of law is firmly established that if an estate is given in terms which confer an absolute estate on the donee and then further interests are given merely after, or on the termination of, that donee's interest, his absolute interest is not cut down and the further interests fail [*Mohan Lal* v. *Niranjan Das* (1) and *Sures Chandra Palit* v. *Lalit Mohan Datta, Chaudhri* (2) and the ruling cited therein.

(1) (1921) I. L. R. 2 Lah. 175. (2) (1915) 31 I. C. 405.

See also to the same effect *Bipradas Gaswami* v. *Sudhan Chandra Banerji* (1)]. I hold, therefore, that *Mussammat* Lachhmi took an absolute interest in the half share of the properties left by Kattu Shah, and that she was competent to bequeath it to her daughter *Mussammat* Mano for her life, and then to the plaintiffs absolutely.

Mr. Jagan Nath concedes that on this finding the present suit is not barred under Order 9, rule 9, Civil Procedure Code, by reason of the dismissal in default of a former suit which *Mussammat* Mano instituted against *Mussammat* Bhagsudi in 1914. In order to make that rule applicable, it is necessary to show (1) that the subsequent suit is instituted by the same plaintiff or person claiming under him, and (2) that the cause of action is the same. In the present case neither of these essential elements exists. The previous suit was instituted by *Mussammat* Mano, who was in possession for her life under the will of *Mussammat* Lachhmi: the present suit is by her daughter and daughter's son, who have an independent title of their own as persons entitled to succeed on the death of *Mussammat* Mano. The former action was one for declaration by *Mussammat* Mano, who was in joint possession of the property with *Mussammat* Bhagsudi and the alleged cause of action was a doubt alleged to have been cast on her title. The cause of action for the present suit arose on *Mussammat* Mano's death, when defendants 1 to 7 took exclusive possession of the entire property, and resisted the plaintiffs, who are owners of the half of the properties, to enter into joint possession. Order 9, rule 9, there-

(1) (1929) I. L. R. 56 Cal. 790, 798.

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fore, does not bar the suit and the plea was rightly rejected by the learned Subordinate Judge.

In the defendants' memorandum of appeal, however, a further point was raised that the lower Court should not have passed a decree for Rs. 6,190 against Ram Chand, defendant No. 12. The only person affected by this finding was Ram Chand, and he has not appealed. Indeed, his counsel has stated before us that he does not object to the decree which the lower Court has granted to the plaintiffs against him, and that he has actually paid the amount decreed to the plaintiffs. It appears that Ram Chand owed Rs. 20,000 odd to *Mussammat* Bhagsudi and *Mussammat* Lachhmi jointly. After *Mussammat* Lachhmi's death, *Mussammat* Bhagsudi realised about Rs. 14,000 from Ram Chand, and when disputes arose as to *Mussammat* Lachhmi's property, Ram Chand withheld payment of the balance pending the result of this litigation. The appellants have realized more than *Mussammat* Bhagsudi's share of the loan, and they cannot object to the balance being paid over to the plaintiffs, as *Mussammat* Lachhmi's heirs.

The result, therefore, is that the defendants' appeal (Civil Appeal No. 2983 of 1926) must be dismissed. The appellants shall pay separate costs to the plaintiffs-respondents Nos. 1-2, and Ram Chand, respondent No. 3, as he was quite unnecessarily impleaded.

In the cross-appeal filed by the plaintiffs, the dispute relates to two small sums of Rs. 2,500 and 1,200, respectively which they claimed from defendants Nos. 20 and 16, respectively. The claim against defendant No. 20 is admitted by his counsel Mr. Shamair

Chand, who has explained that the sum of Rs. 5,000 was due by him to the two widows, that half the amount had been paid to *Mussammat* Bhagsudi's heirs, and his client is prepared to pay the remaining half to whosoever is adjudged to be the heir of *Mussammat* Lachhmi in the present litigation. Counsel has stated that in view of the findings of this Court, his client is prepared to pay the amount to the plaintiffs, and that a decree for Rs. 2,500 may be passed in their favour against him.

With regard to Mohkam Chand, defendant No. 16, the plaintiffs' claim is for recovery of Rs. 1,200 being one-half of the debt of Rs. 2,400 which was admittedly due by him to the two ladies. It has now transpired that Mohkam Chand has paid the whole of this sum to defendants Nos. 1 to 7 in a suit which they had filed against him. This is admitted by Mr. Jagan Nath on behalf of these defendants, and he says that *Mussammat* Sitan had been granted a succession certificate for recovery of this sum by the Civil Court. As a result of the findings on the principal issues in the case, defendants 1-7 are not entitled to the whole amount: they must pay one-half of it to the plaintiffs. I would, therefore, accept Civil Appeal 965 of 1927 and pass a decree for Rs. 2,500 against defendant No. 20, firm Mohar Chand-Daswandhi, and for Rs. 1,200 against defendants Nos. 1 to 7. Having regard to all the circumstances I would leave the parties to bear their own costs of this appeal.

N. F. E.

Appeal No. 2983 of 1926 dismissed.
Appeal No. 965 of 1927 accepted.