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him to compensation. All he is entitled to do is to remove the superstructure.

We must, therefore, reverse the decree of the Court below and award possession to plaintiff, with permission to defendant to remove the buildings within three months. Defendant must pay the costs throughout.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

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February 11.

BAI DIWALI (ORIGINAL PLAINTIFF), APPELLANT, *v.* PATEL BECHARDAS AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu Law—Gift—Gift to donees jointly—Death of one donee—Inheritance—Survivorship—Joint tenancy—Tenancy in common.

Where property is given jointly to two persons living as members of a joint Hindu family, each donee takes an interest in the property which passes to his heirs at his death, and not to the other donee by survivorship.

Two brothers, living in union as a joint Hindu family, were jointly given certain property. One of them died childless, leaving a widow.

Held, that the widow was entitled to a moiety of the property as heir of her husband, and that it did not pass to the other brother by survivorship.

SECOND appeal from the decision of Ráo Bahádur Lalshankar Umiashankar, Additional First Class Subordinate Judge, A. P., at Ahmedabad, reversing the decree passed by Ráo Sáheb V. K. Sovani, Joint Subordinate Judge of Ahmedabad.

Suit for partition of a house.

The plaintiff was the widow of one Joita Harjivan, who in his lifetime was joint with his brother Bechar Harjivan (defendant 1) as a member of an undivided Hindu family.

On the 19th September, 1895, one Hargovan Ranchhod executed a deed of gift to the two brothers jointly of the house in question. The material part of the deed was as follows:

> The house ..... has been given to you by me in gift ..... I have, therefore, made a gift of this house to you ..... You and your sons and grandsons, &c., are to happily enjoy, live in, and get others to live in or do anything else you or they (like) with the said house, as long as the sun and moon endure. No one is to obstruct you in doing so.

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Joita died childless in November, 1895, without having separated from his brother Bechar (defendant 1). His widow (plaintiff) continued to reside with Bechar.

On the 6th May, 1899, Bechar (defendant 1) sold the house to defendant 2 without the plaintiff's consent.

Plaintiff thereupon filed this suit for partition of the house, of which she claimed a moiety.

The defendants contended that the house having been the joint property of the two brothers, on Joita's death his interest survived to Bechar (defendant 1), and that the plaintiff had no claim.

The Subordinate Judge passed a decree for the plaintiff, holding that the rule of survivorship did not apply to property acquired by gift. He was of opinion that Joita's share passed to his widow (the plaintiff) on his death. In his judgment he said:

> The Hindu law of survivorship is not disputed by the plaintiff. On her behalf it is urged that the law is an exception to the general law of inheritance, and it applies only to certain kinds of property only. It applies to ancestral property inherited by the joint members, and also to property which is mixed up with ancestral property of the undivided members; that it does not apply to property which the two brothers acquired by gift from a third person .... There was no ancestral property with which the house in suit could be mixed, and the property in suit is not of a kind which could be unrecognizable by being mixed with other property, and under the rulings of the Calcutta and Madras High Courts in I. L. R. 17 Cal. 33, I. L. R. 20 Mad. 207, I. L. R. 7 Mad. 458, the plaintiff appears to be entitled to claim a half share in the donation.

On appeal, the lower Appellate Court reversed this decree, and dismissed the plaintiff's claim on the following grounds:

> The deed of gift shows that the two undivided brothers jointly got the gift in consideration of joint service done by them to Hargovan Ranchhoddas. It is admitted by plaintiff that no partition was made between the brothers. Under these circumstances, I differ from the lower Court and hold that the two brothers were joint tenants, and not tenants in common, of the disputed property, and that defendant 1 is entitled to the entire property as the sole surviving coparcener after the death of plaintiff's husband (*Radhabai* v. *Nanarao*, I. L. R. 3 Bom. 151; West and Bühler, Vol. I, page 76; Mayne, sections 277-278).

Plaintiff appealed to the High Court.

L. A. Shah for the appellant (plaintiff):—Hindu joint property acquired by gift is not subject to the rule of survivorship. The interest of each joint donee passes on his death to his heirs.

The remarks of the Privy Council in *Jogeswar* v. *Ramchandra*,(1) referred to and relied upon in *Navroji Manockji Wadia* v. *Perozbai*,(2) support our contention. We also rely upon *Jasoda Koer* v. *Sheo Pershad Singh* (3) and *Saminadha* v. *Thangathanni* (4) as showing that property acquired by gift is not ancestral property, which alone is subject to survivorship. The remarks of Sargent, C.J., in *Hirabai* v. *Lakshmibai* (5) also support that view. On a proper construction of the deed of gift, it is clear that the donor could not have intended that the interest of one of the brothers, on his death, should not pass to his heirs, but to the surviving brother. We submit that the view taken by the first Court is correct.

Again, if this property is to be treated as ancestral property, the widow has the right of residence and maintenance, and the alienation by the surviving brother is improper and invalid, particularly when it is not made for any family purposes and when there is no other family property: see Mayne, Hindu Law, section 423; *Bai Devkore* v. *Sanmukhram* (6); and section 39 of the Transfer of Property Act (IV of 1882).

G. S. Rav for the respondents (defendants):—When the plaintiff's husband died, both the brothers were living together, and were undivided members of a Hindu family. There never was any partition in the family, and the property was acquired as a gift to them jointly. Mere reference to sons and grandsons does not make their interests separate. The house was treated as part of the joint property, and must be taken to be ancestral property, subject to the rule of survivorship.

The following authorities were referred to in the course of the argument: Jarman on Wills, page 1115; *Lakshmibai* v. *Ganpat*(7); *Bai Mamubai* v. *Dossa Morarji* (8); *Jairam Narronji* v. *Kuverbai* (9); Phillips and Trevelyan on Hindu Wills, page 214.

FULTON, J.:—The gift of the house was to the two brothers, each of whom thereby acquired an interest in the property. By Hindu Law that interest as obtained by gift would be treated as self-acquired property, and, in the absence of any direction by

(1) (1896) 23 Cal. 670; 23 I. A. 44.
(2) (1898) 23 Bom. 80 p. 88.
(3) (1889) 17 Cal. 33.
(4) (1895) 19 Mad. 70.
(5) (1887) 11 Bom. 573.
(6) (1888) 13 Bom. 191.
(7) (1868) 5 Bom. H. C. O. C. J. 128 p. 132.
(8) (1890) 15 Bom. 443 at p. 449.
(9) (1885) 9 Bom. 491 at p. 509.

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the donor limiting the extent of the grant, would pass on the death of the holder to his heirs. In the case of *Jogeswar Narain* v. *Ramchandra Dutt*,[1] the Privy Council pointed out that the principle of joint tenancy appears to be unknown to Hindu Law, except in the case of coparcenery between the members of an undivided family. It need not be doubted that a donor can, when making his gift, limit the interest of the donee by giving an interest by way of survivorship to any other person living at the time of the gift; but we think, having regard to the above remark and the observations of Sargent, C.J., in *Hirabai* v. *Lakshmibai*,[2] that among Hindus, when property is given to two persons jointly, there is no presumption that the donor intended to annex the condition of survivorship which might have the effect of excluding the sons of one of the donees. If an unexpressed intention could be presumed, it would, we think, be more reasonable to suppose that here the gift was meant to be to the two brothers as coparceners; but we doubt whether such a gift could be made consistently with the principles of the *Tagore case*, for a gift in coparcenery would purport to create interests in sons and grandsons who might be unborn at the time. We think, then, that in the absence of any gift over, each donee took an interest which on his death would pass to his own heirs, and not to the other donee. In this view we are confirmed by the remarks of Farran, C.J., in *Navroji Maneckji Wadia* v. *Perozbai*.[3] In discussing the *dictum* above referred to of their Lordships of the Judicial Committee, he said: "What, in my opinion, they held in addition to construing the will before them was that the rule of English law, that a joint tenant's interest does not descend upon his heirs, is not properly applied to a bequest in joint tenancy under a Hindu will." The remark is equally applicable to a gift.

As this was the only issue raised in the lower Appellate Court, we reverse the decree of that Court, and restore that of the Subordinate Judge with all costs on the defendant throughout, including the fees payable to Government, and subject to the provisions of section 411 of the Civil Procedure Code.

Decree reversed.

(1) (1896) 23 Cal. 670; 23 I. A. 44. (2) (1887) 11 Bom. 573.
(3) (1895) 23 Bom. 80.