[APPELLATE CIVIL.]

Before Mr. Justice Kemp and Mr. Justice Glover.

SRIMATI PABITRA DASI AND ANOTHER (DEFENDANTS) *v.* DAMUDAR JANA (PLAINTIFF)* 1871 *May* 15.

Gift, Construction of Deed of—Deed of Absolute Gift—Grounds of Appeal.

A., a Hindu, executed a *dan patro* (deed of gift) of a talook in favor of his youngest wife B., wherein he stated :—"You are my youngest wife, and your two sons are minors, therefore for your charitable expenses (*dan o khairath*) and for the maintenance of your minor sons, I make a gift of the above talook to you. You from this day becoming possessor thereof, after deduction of the Government revenue with the balance of the profits, will perform acts of charity (*dano khairath*) and maintain the sons. For this purpose I execute this *dan patro*." A. died, leaving C., a son by his first wife, two minor sons by B., and B. his widow. The minor sons of B. died unmarried and without issue. B. made a gift of the property to D. her daughter's son. On suit by C. against B. and D. for a declaration of his reversionary right to the property after the death of B.—*Held*, that the gift to B. under the *dan patro* was absolute.

An appellant in regular appeal may not at the hearing raise a contention of law expressly abandoned by him in the Court below, and not contained in the memorandum of appeal.

One Guruprasad Jana in 1250 (1843) executed a *dan patro*, of which the following is a translation :—"To Srimati Pabitra Dasi, mother of Sriman Krishna Chandra Jana and Sriman Bhagwan Chandra Jana, minors, inhabitant of Gopinathpore, in Narajole, in the Zilla of Midnapore, I execute this *dan patro*. I have purchased with my self-acquired money the Collectorate talook Hudakusumda in Perguuna Kadar Kundu, of which the Government revenue is Rs. 1,098-10-8, and I am in possession thereof, and after paying the Government revenue, I am in the enjoyment of the profits. You are my youngest wife, and your two sons are minors, therefore for your charitable expenses (*dan o khairth*) and for the maintenance of your minor sons, I make a gift of (I give) the above talook to you. You from this day becom-

*Regular Appeal No. 216 of 1870, from a decree of the Subordinate Judge of Midnapore, dated the 8th August 1870.

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ing possessor thereof, after deduction of the Government revenue, with the balance of the profits, will perform acts of charity (*dan o khairâth*), and maintain the sons. For this purpose I execute this *dan patro*." After the execution of the deed, Guruprasad applied to the Collector for, and obtained, mutation of names in the Collectorate.

Guruprasad died, leaving him surviving a son by his first wife, Damudar Jana, the plaintiff above named, two minor sons, and a daughter by his youngest wife, and his youngest wife, the said Pabitra Dasi. Two sons of Pabitra died during minority unmarried and without issue.

On the 11th Magh 1177 (January 23rd, 1870), Pabitra Dasi executed a deed of gift of the said talook in favor of her daughter's son Bihari Lal Mandal, and caused mutation of names to be made in the Collectorate.

This suit was brought by Damudar for declaration of his reversionary right to the said talook, on the ground that, under the terms of the *dan patro*, Pabitra had only a limited interest, and that she had no power to alienate the property by gift or sale

The defence set up was (*inter alia*) that the property was the stridhan of Pabitra; that the gift by Guruprasad was an absolute gift; and that Pabitra Dasi had bestowed the talook on her daughter's son Bihari Lal.

On the hearing of the case before the Subordinate Judge, the pleader for the defendants abandoned the plea of stridhan, and the case was argued upon the issue "whether the original proprietor Guruprasad Jana had made over the property in dispute in gift to his younger wife, thereby creating in her an absolute right, or had bestowed the same upon her for enjoyment during her life-time."

The Subordinate Judge observed that the gift did not fall within the description of "stridhan" mentioned in page 755 of Vyavashta Darpana; and as the contention had been abandoned by the pleader for the defendants, he did not enter into the question. He held that the gift had been executed for supporting the minors, and for defraying the expenses incurred in giving alms and charity; that the gift could not be construed to be a "gift

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of the property ;" that the object was that, if anything remained after defraying the expenses for supporting the children, the same might be distributed in alms and charity ; and that the gift did not create an absolute title. He accordingly passed a decree, whereby the right of the plaintiff to the reversion after the death of Pabitra was declared.

The defendants appealed to the High Court.

Baboo *Annada Prasad Banerjee* contended that the property in dispute was " stridhan"—Sir Edward Hyde's notes 2 Morley, 234. (Mr. *Twidale contra*, objected to the question being raised, as it had not been in the Court below, nor in the written grounds of appeal). When a question of law arises, from the facts of a case, the Court would allow it to be argued. [KEMP, J., you waived raising the question in the Court below, it cannot be raised now.] A question of law could not be waived. The facts being before the Court, it was for the Court to take up any question of law which would legitimately arise from such facts. [By the Court, the objection was allowed]. The acts and conduct of the donor, after the execution of the deed, show that he intended to make an absolute gift of the property. His application to the Collector for mutation of names, unfettered by any condition or limitation, sufficiently shows that the deed would operate as an absolute gift.

Baboo *Bhairab Chandra Banerjee*, on the same side, contended that the deed itself showed that the gift was absolute. The operative words of the deed are " the said talook I give." The words, "for support of children &c.," do not create a trust. If there was no restriction in the deed, the gift would be absolute. Generally, when such gifts are intended for life only, or where the gift is made for support without power of alienation, words expressive of the intention are added. The right of the appellant to the property was absolute, as the children who had a charge upon it were deed—*Chattan Lal Sing* v. *Shewukram* (1).

(1) 5 B. L. R., 123.

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The suit was not maintainable by the step son, as he was no heir of the appellant.

Mr. *Twidale*, for the respondent, contended that the intention of the donor to create a life-interest only was apparent, as the gift was clogged with conditions. Hindus were always unwilling to vest property absolutely in females. A reference to their habits and customs would strengthen such inference. If the deed was absolute the appellant could alienate the property during the life-time of children. But she could not do so under the deed. The gift is fettered with a condition. The gift was for particular purposes—*Syad Mahomed Shumsul Hoda* v. *Shewakram* (1).

(1) *Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Bayley, and Mr. Justice Mitter.*

The 13*th September* 1870.

SYAD MAHOMED SHUMSUL HODA (ONE OF THE DEFENDANTS) *v.* SHEWAKRAM (PLAINTIFF).*

See also 14 B.L.R. 229.

Baboos *Anukul Chandra Mookerjee* and *Ramee Chandra Mitter*, Mr. *R. E. Twidale*, and Munshi *Mahomed Yusaff* for the appellant.

Mr. *Paul* (with him Mr. *M. M. Datta*, Mr. *C. Gregory* and Baboo *Amernath Bose*) for the respondent.

THE facts of the case are sufficiently stated in the judgment of the Court, which was delivered by

COUCH, C.J. (MITTER, J., concurring) —On the 16th of August 1830, Roy Harnarayan, the great-grandfather of the plaintiff, presented a petition to the Collector, the translation of which is as follows:—"The entire rent-free and rent-paying estates and gardens appertaining to the zillas of the Behar province, and buildings and ghat tungi, ryotkhanas, and household furniture, and other real and personal property which descended to my ancestors, one after the other, and at last to me, from Rani Mima Bibi, wife of my late brother Raja Bassantram, who, the said brother, was son-in-law of Maharaja Ram Narayan, according the vyavashta of the Pundits and decision of the Sudder Court, are now in my possession. But as in 1229, my son Kalika Prasad died, and in 1237 my younger brother Rae Ganga Prashad and his wife died, leaving no issue, and as my wife predeceased them, and only Rani Dhan Koer, the widow of my late som Kalika Prasad, is at present living, who has only two daughters, Mussamats Bibi Shitabo and Bibi Dulari, and no other children or heir, I decare her (Rani Dhan Koer) my heir, and as with the exception of the said Rani Dhan Koer, I have no other heir or malik nor can there be any, of which circumstances I have already preferred information in my petition of 16th April 1830; and life is uncertain, I consequently request that the name of Rani Dhan Koer, the widow of my late son, be registered in the Collectory mutation book as proprietor and malguzar in the place of

* Regular Appeal No, 53 of 1870, from a decree of the Judge of Patna, dated the 31st December 1869.