1897

SUKURULLAH KAZI v. BAMA SUNDARI DASI.

of the Act, I think the term "proprietor" was intended to be confined to a zemindar and not to a *putnidar*; the first objection therefore fails.

Another preliminary objection was taken that an appeal would not lie having regard to section 153 of the Bengal Tenancy Act. Having regard to sub-section (*b*) of that section, it seems to me that the decree in this case has decided a question relating to title to land or to some interest in land as between parties having conflicting claims thereto, and therefore in my opinion an appeal lies.

This further question consequently arises. The Munsif found as a matter of fact that the relation of landlord and tenant did not subsist between the plaintiff and the defendant from whom she is claiming rent. The Subordinate Judge did not go into that matter at all. His judgment is absolutely silent upon the point. I am therefore of opinion that, as regards this point, which is the foundation of the plaintiff's claim, the case must be remanded to the Subordinate Judge for him to go into that question, and as the whole case is remanded, it will not prevent him from going into any other points which may have been raised, or from deciding, if he thinks fit, that a decree for the entire rent might be made, instead of a decree for a share only.

Upon these grounds the appeal will be allowed and the case remanded to the lower Appellate Court for retrial. The costs of this appeal will abide and follow the result.

Appeal allowed. Case remanded.

S. C. G.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

1897 *February* 18.

LALA RAMJEWAN LAL (DEFENDANT) *v.* DAL KOER (PLAINTIFF) IN APPEAL NO. 87.*

Hindu Law—Will—Construction of Will—"Malik," Meaning of, as applied to female legatees—Contingent bequest—Gift absolute—Life estate—Indian Succession Act (X of 1865), sections 111 and 125—Direction against alienation—Costs.

A Hindu, survivor of two brothers in a joint family under the Mitakshara law, died, leaving a widow and two daughters, a brother's widow, and

* Appeals from Original Decrees Nos. 87, 91 and 92 of 1895 against the decree of Babu Upendra Chunder Mallick, Subordinate Judge of Patna, dated the 28th of December 1894.

1897

LALA RAMJEWAN LAL v. DAL KOER.

three daughters of his brother. In his will it was provided *inter alia* hat his daughters and brothers' daughters "shall be *maliks* and come in ossession in equal shares of all the moveable and immoveable properties." was also provided that in the event of any of the daughters of the testator or of his brother dying childless her share "shall devolve in equal shares on the surviving daughters," "but such share shall have no connection with her husband's family." The will made a further provision that the daughters should not have on any account the right to sell or ienate their shares. *Held*,

(1) The expression *maliks* ordinarily implies an absolute gift, and there is no authority for introducing into the will the idea that a female ought not to obtain anything beyond an estate for her lifetime.

(2) Having regard to section 111 of the Indian Succession Act [applicable under the Hindu Wills Act (1870)] and the Privy Council case of *Norendra Nath Sircar* v. *Kamalbasini Dasi* (1), the provision of survivorship applied only to the case of a daughter dying during the lifetime of the testator, and did not take effect in the present case, the daughter whose share was in question having died several years after the testator's death.

(3) As to the direction against alienation, section 125 of the Indian Succession Act provides for a case like this, and the daughters receive their shares as if there was no such direction.

(4) The will was not open to the construction that there was a life estate only conferred by it on the daughters.

ON these appeals, questions were raised on the construction of the will of one Sunder Lal, sole surviving male member of a joint Hindu family under the Mitakshara law. The will was executed on the 25th May 1883, and Sunder Lal died on the 7th September of the same year, leaving a family consisting of a widow and two daughters, a brother's widow, and three daughters of the said brother. The principal point argued in the appeals was the nature of the estate conferred by the will upon Jiu Koer, one of the daughters of the testator's brother and the succession to that estate upon her death which occurred on the 28th July 1888.

The material parts of the will were as follow :—

Para. 10. "After giving Rs. 50 per mensem to the widow of my deceased elder brother and Rs. 50 per mensem to my fourth wife, the three daughters of my deceased elder brother and the two daughters born of the womb of my second wife as well as that daughter or daughters who may be born of the womb of my fourth wife, shall be the *maliks* and come in possession in equal shares of all the moveable and immoveable properties. Perchance any of the above daughters die and she leaves any male child, then such

(1) I. L. R., 23 Calc., 563.

1897

LALA RAMJEWAN LAL v. DAL KOER.

male child shall be the representative of his mother and get the share left by her. But in case any of the daughters die childless, then in that case the share left by such deceased daughter shall devolve in equal shares on the surviving daughters of my elder brother and of me the declarant. But such share shall have no connection with her husband's family."

Para. 11. "Perchance any of the daughters of my elder brother or the daughters of me the declarant give birth to no son, on the contrary she or they give birth to daughter or daughters, then in the place of a son, such daughter or daughters who will be born from her own womb shall inherit the properties of the daughter (who may not give birth to a son), which she might have inherited from me the declarant, and will succeed her mother as her representatives. No other person shall have any claim to it."

Para. 17. "The daughters of my elder brother or their children succeeding them will be entitled to get equal shares in the properties which exist at the present moment, or which may be acquired hereafter, and they will be at liberty to remain in possession of the properties jointly, being on good terms with one another, and after joint management take their respective equal shares of the properties and appropriate the proceeds thereof, or after separately managing their respective shares appropriate the proceeds thereof, separately to their own respective use. But my daughters or the daughters of my elder brothers shall not have on any account the rights to sell or alienate, directly or indirectly, the shares of the properties or of the houses which may fall to their respective shares. In case any of them does so, it will be held null and void in the Courts of Justice."

The plaintiffs in the three cases were, respectively, Dal Koer and Jhamela Koer (the two daughters of the testator) and Birja Koer (one of the daughters of his brother). The defendant in all the suits was Ram Jewan Lal, husband of Jiu Koer, deceased. The Subordinate Judge held that the will did not confer an absolute estate on the daughters, and that the defendant was not entitled to succeed to Jiu Koer's estate.

The defendant appealed to the High Court.

Dr. *Rash Behary Ghose*, Babu *Saligram Singh*, Babu *Mahabir Sahay*, and Mr. *H. E. Mendies* for the appellant.

Moulvie *Mahomed Yusuf* and Babu *Tarit Mohan Das* for the respondent in Appeal No. 87.

Moulvie *Mahomed Ishfak* for the respondent in No. 91.

Babu *Jogendra Chandra Ghose* for the respondent in No. 92.

The judgment of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows :—

These three appeals are against decrees made in three several

suits which were tried together ; and the only question before us is as to the construction of the will of one Lala Sunder Lal made on the 25th May 1882.

Before referring to the terms of the will it will be well to mention that the point is shortly whether, having regard to the terms of the will, the husband of a daughter who survived the testator is entitled to obtain the share given by the will to that daughter, or whether he is to be excluded from any rights under the terms of the will. It is not disputed that if an absolute estate was given to the daughter by this will, and there was nothing in the will giving the share to some one else on her death, the husband as her *stridhan* heir would be entitled to it. The important parts of the will are referred to by the learned Judge in the Court below. The testator begins by expressing a hope that the family will continue to live jointly, but in the event of disputes he makes certain provisions. Paragraphs 10 and 11 are the two first which we have to consider. Paragraph 9 first of all gives Rs. 50 a month to the widow of the testator's brother, and Rs. 50 a month to the testator's fourth wife, and then paragraph 10 provides that the three daughters of his elder brother and the two daughters of the testator's second wife as well as the daughter or daughters who may be born of the testator's fourth wife, shall be *maliks* and come in possession in equal shares of all the moveable and immoveable properties. *Primâ facie* there can be no question but that a gift, when there are no controlling words, is an absolute gift, and the expression "*maliks*" used here would ordinarily imply an absolute gift. But it is contended that we must introduce into this will what is said to be the prevalent Hindu idea that a female ought not to obtain anything beyond an estate for her lifetime, and, therefore, although the word "*maliks*" is used, we must cut down the estate to the extent of an estate given to a Hindu daughter. There is no authority for such a proposition. The words are absolute, and if they stood by themselves without anything to the contrary it would be impossible for us to say that they did not give an absolute estate. The following are the words upon which the lower Court has acted and upon which reliance has been placed in this Court: "Perchance any of the above daughters die, and she leaves any male child, then such male child shall be the representative of his mother and get the share left by her. But in case any of

1897

LALA RAMJEWAN LAL v. DAL KOER.

the daughters die childless, then in that case the share left by such deceased daughter shall devolve in equal shares on the surviving daughters of my elder brother and of me the declarant. But such share shall have no connection with her husband's family. Perchance any of the daughters of my elder brother or the daughters of me the declarant give birth to no son, on the contrary she or they give birth to daughter, or daughters, then in the place of a son, such daughter or daughters who will be born from her own womb shall inherit the properties of the daughter (who may not give birth to a son) which she might have inherited from me the declarant and will succeed her mother as her representative. No other person shall have any claim to it."

We think that having regard to the provisions of section 111 of the Indian Succession Act, which is made applicable to Hindus by the Hindu Wills Act, and having regard also to the recent case of *Norendra Nath Sircar* v. *Kamalbasini Dasi* (1), these provisions can apply only to the case of a daughter dying during the lifetime of the testator. "Perchance any of the above daughters die," as has been pointed out, must refer to their death at some particular time. No other time is pointed at by the will except the time when the share would be distributable, namely, the time of the death of the testator, and quite apart from section 111 and the case to which we have referred, it is clear that the scheme of this portion of the will provides for all events which might happen before the testator's death. If the daughter dies leaving a male child, the male child is to become the representative of his mother and to get the share left by her, that is to say, the share which she would have obtained if she had survived the testator. It is not disputed that a male child would obtain an absolute estate in this property. If the construction sought to be put upon this will by the respondent is correct, although the daughter would succeed to a life-estate, yet a son who succeeded her would get a very much greater interest in the estate than that of his mother, whereas the will provides that he is to get the very share left by her. Similarly, if the daughter dies childless, the share which she would have acquired goes over to the other daughters. If she dies leaving a daughter, then the daughter will also succeed her mother as her representative in the same way as the son.

(1) I. L. R., 23 Calc., 563.

1897

LALA RAMJEWAN LAL v. DAL KOER.

Much reliance was placed upon the words "but such share shall have no connection with the husband's family." That expression, it is true, is somewhat vague. The husband's family would of course include his son, &c. But assuming that it was intended to apply to the husband and persons of the family other than those related by blood to the testator, we think it was only intended so to apply where the daughter dies during the testator's lifetime. One can well understand that a man leaving property and wishing to provide for his daughter would not desire to provide for his son-in-law on the death of the daughter, as a son-in-law's relationship to the father-in-law would necessarily be altered by the death of the daughter, and the father-in-law would not have the same interest in providing for him, though he would not necessarily wish to exclude him entirely, in case his daughter was alive. He would not contemplate events happening so long after his own death. It is not to be supposed, in the absence of anything more definite, that the exclusion was to be for ever and ever, whatever events might happen, of any person connected with the husband. There is nothing on the face of the will to suggest such an exclusion. In our opinion the testator in this case intended to exclude his son-in-law only in the event of the daughter dying before his own death.

The only remaining question is, whether there is anything in the will to cut down the absolute gift in the 10th paragraph. There is nothing in any of the paragraphs in any way affecting this question, unless it be paragraph 17; and the only portion of that paragraph which may be said to deal with it is at the end: "But my daughter or the daughters of my elder brother shall not have on any account the right to sell or alienate directly or indirectly the shares of the properties or of the houses which may fall to their respective shares. In case any of them does so, it will be held null and void in the Courts of Justice." It is said that the effect of that is to give a life-estate to the daughter, that is, that the effect of giving an absolute estate *plus* a restriction on its sale or alienation is to give a life-estate. There is nothing in the will about a life-estate being given to the daughters, and if they had a life-estate given to them, there is no reason why there should be any provision restricting them from selling or alienating.

1897

LALA RAMJEWAN LAL v. DAL KOER.

Having a life-estate, they would have no right to sell or alienate. This case is not different from any other case where a testator makes an absolute gift, and in some other part of his will puts in a provision against sale or alienation. It is a case provided for by section 125 of the Indian Succession Act. That section says: "When a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction." That embodies a well known principle of law. Moreover, regarding this question as to whether there was a life-estate, one would expect, having regard to the express gifts to the legatees as *maliks*, to find that there have been some gifts over after the deaths of the daughters. Paragraphs 10 and 11 refer only to events happening during their life, and there is no provision in the will as to who should enjoy the property after their deaths. We think that this will is not open to the construction that there was a life-estate. Giving a reasonable construction to the will, and taking the whole of it into consideration, we are unable to say that the estate should in any way be limited. It follows that the appeals must be allowed, the decrees of the lower Court set aside, and the suits dismissed.

Regarding the question of costs, this is, we think, a case where the defendant is entitled to his costs. This is not an ordinary case of a suit brought for the construction of a will. It is a case in which an attempt has been made to oust from his property a person who has been enjoying possession of it, although the title of the plaintiff depends upon the construction of a will. He took his risk as to whether the Court would take his view of the construction, and, having failed, he must pay for the litigation. The defendant (appellant) is, in our opinion, entitled to costs against the plaintiffs-respondents in each case, and the order we make is that the appellant do recover in each of the appeals one-third of the highest set of costs, in respect to the hearing fee, that he is entitled to in any one of these three appeals. This concerns the hearing fee in this Court alone. He is also entitled to all other costs in these appeals, and to the costs in the lower Court.

S. C. C. *Appeal allowed.*

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

ABBAS AND ANOTHER (DEFENDANTS NOS. 2 & 3) *v.* FASSIH-UD-DIN AND ANOTHER (PLAINTIFFS) AND OTHERS (DEFENDANTS 4 & 5).* 1897 *March 15.*

Mesne profits—Limitation Act (XV of 1877), Schedule II, Article 109—Wrong-doers independent of the defendant—Civil Procedure Code (1882), section 211.

In a suit brought on 26th September 1893 for mesne profits of land, for the possession of which a decree had been previously obtained against the defendant, the plaintiff claimed damages in respect of the Fusli years 1297—1300, the year 1297 F. ending on the 28th September 1890. The defendant objected *inter alia* that the claim in respect of the period beyond three years before the date of suit was barred by limitation, and that she was not liable for profits of the lands from which she had been dispossessed by others. *Held* :—

(1) Under Article 109, Schedule II of the Limitation Act the defendant is liable for the mesne profits received by her or which she might have with due diligence received *during* the three years before the date of suit, and not *before*. The period of three years fixed has no reference to the time when rents fall due. *Byjnath Pershad* v. *Badhoo Singh* (1); *Thakoor Dass Acharjee Chuckerbutty* v. *Shoshee Bhoosun Chatterjee* (2), and *Thakoor Dass Roy Chowdhry* v. *Nobin Kristo Ghose* (3) distinguished.

(2) In the case of every wrong the liability of the defendant is limited to damages for the wrong which he has himself done. With reference to the definition of mesne profits in section 211 of the Civil Procedure Code, if the defendant was excluded from possession, she could not be said to have actually or even impliedly received the profits, nor could she with ordinary or extraordinary diligence have received them. The case was remanded to determine what mesne profits were payable between the 26th September 1890 and the date, if any, when dispossession was proved.

THE facts and arguments in this case sufficiently appear from the judgment of the High Court. The defendants Nos. 2 and 3, the legal representatives of Imambandi Begum, the original defendant, appealed to the High Court.

Mr. *C. Gregory*, Dr. *Rash Behary Ghose* and Moulvie *Mahomed Mustapha Khan* for the appellants.

Babu *Umakali Mukerjee*, Babu *Karuna Sindhu Mukerjee*, Babu *Dwarkanath Chakrabarti* and Babu *Lal Mohan Ganguli* for the respondent.

* Appeal from Original Decree No. 176 of 1895, against the decree of Babu Karuna Das Bose, Subordinate Judge of Tirhoot, dated 15th of March 1895.

(1) 10 W. R., 486. (2) 17 W. R., 208.

(3) 22 W. R., 126.

1897

ABBAS v. FASSIH-UD-DIN.

The judgment of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows :—

The plaintiffs, having obtained in another suit a decree for possession of property from which they had been ousted, have brought this suit for mesne profits.

This suit was originally brought only against Imambandi Begum, who was the principal defendant in the other suit, but in consequence of her alleging in her written statement that she had been dispossessed by other persons of a portion of the land in respect of which mesne profits were sought, those other persons, *viz.*, Dulhin Golab Kunwar and Awadh Behari Narain Singh, who had also been parties to the suit for possession, were, at the instance of the plaintiffs, added as defendants in this suit.

Imambandi Begum died pending this suit.

The learned Subordinate Judge has given to the plaintiffs a decree against the heirs of Imambandi Begum, and has declined to adjudicate on the liability of the added defendants, considering it to be a question between the defendants themselves.

The heirs of Imambandi have alone appealed to this Court, so that their liability to the plaintiffs can alone be determined in this appeal, and in whatever way we may alter the decree against them, we cannot in this appeal fix any liability upon the added defendants.

The two questions argued before us were : (1) Whether the plaintiffs can recover mesne profits for more than three years before suit? and (2) whether the liability of Imambandi for mesne profits continued after she had been herself ousted from the property?

The learned Subordinate Judge has given a decree for more than the three years before suit. His judgment on this question is as follows : "1st Issue—The mesne profits are claimed from 1297 ; and I have to determine whether the claim for 1297 and 1298 is barred by limitation. The present suit was filed on the 26th September 1893, and the plaintiffs' cause of action for the mesne profits of 1297 arose at the beginning of 1298. The Fusli year 1297 ended on the 28th September 1890 ; and the plaint in this case having been filed on the 26th September 1893, the claim

for the mesne profits of 1297 was just within time; and the claim for 1298 is *à fortiori* not barred by time."

The appropriate article of the Limitation Act is article 109, which allows three years from the time when the mesne profits are received, *i.e.*, the defendant is liable for all mesne profits received by him (or to use the words of section 211 of the Civil Procedure Code, which he might with ordinary diligence have received) during the three years before suit, and not before. There is nothing in the Act to fix the period with reference to the time when rents fall due. It is the actual receipt of the rents, whenever they may have fallen due, which creates the liability. The rents long since due or rents not yet due would, when received, equally fall within the expression mesne profits, as much as rents which are at the moment accruing due. This interpretation is that which, as far as we know, has been always placed upon this article of the Limitation Act and we know of no authority to the contrary under the present Limitation Law. In the case of *Mahomed Riasat Ali* v. *Hasin Banu* (1) a decree for more than the three years was admitted by Counsel to be incorrect and was accordingly varied by Her Majesty in Council. The decisions in *Byjnath Pershad* v. *Badhoo Singh* (2), *Thakoor Dass Acharjee Chuckerbutty* v. *Shoshee Bhoosun Chatterjee* (3) and *Thakoor Das Roy* v. *Nobin Kristo Ghose* (4) are under a different law, and are not therefore binding upon us. In our opinion the plaintiffs cannot in any event recover mesne profits received by Imambandi, or which might have been received by her, before the 26th September 1890.

The second question arises as follows: In her written statement Imambandi alleged that she had been excluded from occupation of a part of the land by an order of the Criminal Court obtained at the instance of the added defendants. The second issue is wide enough to include this question. The learned Subordinate Judge treats the question as one arising between the defendants themselves, not as arising between the plaintiffs and Imambandi. It is true, he says, that if the evidence taken by the Amin be not looked into, there is no reliable evidence whatsoever to show that Dulhin Golab Kunwar and Awadh Behari,

(1) I. L. R., 21 Calc., 157.
(2) 10 W. R., 486.
(3) 17 W. R., 208.
(4) 22 W. R., 127.

1897

ABBAS v. FASSIH-UD-DIN.

ever held any of the lands in dispute. But it is clear from his judgment that he declined to allow this question to be entered into.

It remains to be seen whether the Subordinate Judge's view is justified by the law. To use the words of Mr. Justice Phear in *Indurjeet Singh* v. *Radhey Singh* (1): "Generally from the nature of the claim to mesne profits, mesne profits ought not to be estimated for any period during which the defendant who is to be made responsible for them was not active in keeping the plaintiff out of possession." In that case the property was in the hands of a receiver appointed by the Court, and the same learned Judge pointed out that the defendant could not be answerable for damages for mesne profits in respect of those years during which an officer of the Court and not the defendant was keeping the plaintiff out of possession.

On this question the circumstance that an officer of the Court was keeping the plaintiff out of possession cannot differentiate it from the case where any person other than the defendant and not acting under or in collusion with the defendant was keeping the plaintiff out of possession.

Mesne profits are defined by section 211 of the Code of Civil Procedure as meaning those profits which the person in wrongful possession of such property actually received, or might with ordinary diligence have received therefrom together with interest on such profits. If the defendant was excluded from possession, she can scarcely be said to have been in wrongful or any possession. She cannot be said to have actually or even impliedly received the profits, nor could she, with ordinary or extraordinary diligence, have received them. This view of the law was also taken in the case of *Haradhun Dutt* v. *Joy Kisto Banerjee* (2).

It is complained that it would be hard upon a plaintiff to expect him to be continually enquiring whether a wrong-doer had ceased to be in possession, but in the case of every wrong, the liability of the defendant is limited to damages for the wrong which he himself has done. He is not a surety for damages resulting from the acts of other wrong-doers who are independent of him.

(1) 21 W. R., 269. (2) 11 W. R., 444.

In the case of *Doe* v. *Harlow* (1) the action was brought against a wrong-doer, his tenant, and the tenant's under-tenant. Lord Denman left the case to the Jury to say on the case against all the defendants how long the three had been jointly keeping out the rightful proprietors. On the application by the tenant for a new trial Lord Denman said : " If there had been no evidence here but that the under-tenant remained in possession I should have left the case differently." The evidence on which the Court relied was that the tenant had received rent from the under-tenant, and was therefore in possession through him. This case, we think, assumes that a wrong-doer is not responsible for the acts of another wrong-doer, who is independent of him. In Mayne on Damages, 4th Edition, p. 418, it is said that in an action for mesne profits when the ground of action is the bare fact of possession, damages can only be recovered for the time the possession was actually retained. The case must go back to the lower Court, in order that the appellants may have an opportunity of proving that Imambandi Begum was dispossessed. Inasmuch as her possession has been determined by the decree in the previous suit, the *onus* of proving dispossession must lie upon her representatives the appellants. They will not be liable for mesne profits for any time after her dispossession, or before the 26th of September 1890. The Court below must determine what mesne profits are payable between the 26th of September 1890 and the date, if any, when dispossession is proved. If dispossession be not proved, then the plaintiffs will be entitled to mesne profits up to date of suit. It will be necessary that an opportunity for giving evidence should be afforded to the parties.

We allow no costs of this appeal except to the added defendants who are entitled to their costs, as no case was or could have been made against them in this appeal.

S. C. C. *Appeal allowed. Case remanded.*

(1) 12 A. & E., 40