

*Special Appeal No. 549 of 1865.*

1866.  
Feb. 27.

NICHHA'BHA'I PRA'GJI ..... *Appellant.*  
ISSE KHA'N HAJI ABDULA' KHA'N, for him-  
self, and as guardian of the minor  
Khátizá Bibí, daughter of Madiná Bibí. *Respondent.*

*Muhammadan married woman—Lease—Jus Mariti—Co-sharers—Sanad  
—Irregularity—Issue—Remand.*

The lower appellate court not having decided material issues, and having based its decree on a sanad not recorded in the case, the decree was reversed, and the case remanded for a fresh decision on the merits.

The District Judge's decision, that a Muhammadan married woman cannot execute a valid lease, which may endure beyond her lifetime, of property of which she is one of several tenants-in-common, *held bad in law.*

THIS was a special appeal from the decision of C. H. Cameron, District Judge of Súrat, reversing the decree of the Munsif of Súrat.

The suit was brought by Nichhábhái, to recover possession of certain land which the defendants had obtained possession of; alleging that the land had been leased to the plaintiff till Samvat 1932, and that a written agreement to that effect had been passed.

The defendant, Issse Khán, alleged that he knew nothing about the agreement passed to the plaintiff; and that his wife, Madiná Bibí, had no right to pass an agreement without his consent.

The Munsif allowed the plaintiff's claim, as he considered that the agreement was proved, and that Madiná's heirs were bound to act up to it.

The Judge, in appeal, recorded the following finding :—

“ The issues for decision in this appeal are—(1) Whether a Muhammadan woman can, during the lifetime of her husband, dispose of any of the family property by her own free will; and, (2) if so, whether the plaintiff's claim is proved or not.

1866.  
 NICHHA'BHA'I  
 PRA'GJI  
 v.  
 ISSE KHA'N.

“ My finding on the first issue is, that no Muhammadan woman is competent, during her husband's lifetime, to dispose of any of the family property. I called on the vakíl to produce any proof, by books or otherwise, that, amongst the Muhammadans, a wife had, during her husband's lifetime, any power to dispose of the family property ; and he cannot do so. There is nothing in Macnaghten's Muhammadan Law to show that a woman has any such right : consequently, the deeds executed by Madiná are illegal and void. Again, if it be allowed that Madiná Bibí had the power of alienating land, still that power could only exist during her lifetime. I have examined the original sanad ; : and it contains a clause that the land shall never be sold or mortgaged. If, therefore, it could not be sold or mortgaged, it could only be rented, and such right only exists during the lifetime of the incumbent. I have returned the sanad to the defendant.

“ My finding on the second issue is that the plaintiff's claim is not proved. The party from whom he obtained the rent agreement was not competent to pass it ; and if she had been, still it could only have effect during her lifetime. Land granted by Government for a specific purpose cannot be alienated permanently at all, and can only be disposed of even temporarily, by the present incumbent.

“ No further issue was sought by either party. On the grounds above specified, I reverse the decree of the Munsif of Súrat ; and throw out the plaintiff's claim, saddling him with all costs of both courts.”

Against this decision a special appeal was preferred, on the ground that the decision of the District Judge was contrary to law : in that (1) He declared the appellant's title-deeds illegal and void : assuming that among Muhammadans the institution of joint family property prevailed ; that each sharer was not an absolute proprietor in respect to his or her share ; and that a Muhammadan woman, being such a sharer, could not dispose of that share at pleasure. (2) He assumed that the property in dispute was family property, in which Madiná Bibí had no interest during her lifetime, independ-

ently of her husband: the fact being that she acquired it from her father, and that it descended to the respondents as her heirs. (3) That, the respondents having taken the property through and under Madiná Bibí, as her heirs, the District Judge held that they were not bound by the lease, which she, along with the whole of the persons then interested, had granted to the appellant. (4) That the District Judge examined the original sanad, although not produced or recorded as evidence in the suit.

1866.  
NICHHA'BHAI  
PRA'GJI  
v.  
ISSE KHA'S.

The case was heard before WESTROPP and GIBBS, JJ.

*Shántarón Náráyan* for the appellant.

*Nánabhái Haridás* for the respondent.

WESTROPP, J.:—The Judge has not ascertained whether the other tenants-in-common of the lands in dispute have joined Madiná Bibí in making the lease to the appellant; but has proceeded apparently on the broad ground, that a Muhamadan woman cannot, in her husband's lifetime, deal in any wise with family property in which she is interested.

It would require some very strong authority to lead us to the conclusion that if she and her co-sharers have an absolute estate of inheritance in the lands, she could not, jointly with them, make a valid lease, binding upon her and their heirs. It has not been shown, or even alleged, that her husband was in any respect interested in the property at the time of the making of the alleged lease. A Muhamadan does not, on marriage, take any estate, *jure mariti*, in the property of his wife. Mr. Elberling, in his very convenient and carefully compiled treatise, states that she may, either by gift (p. 122) or by sale (p. 160), dispose of her property without her husband's consent. Can it then be said that she cannot make a valid lease, binding upon her heirs?

The Judge, however, refers to what we suppose to have been the original sanad, under which she and her co-tenants-in-common claim; but has omitted to record it, or any copy of it, amongst the exhibits in this cause—a very great irregularity on his part, which leaves this court quite in the

1866.

NICHHA' BHAI  
PRA'GJI  
v.  
LSEE KHA'N.

dark as to that sanad and its contents. He speaks indeed of a clause in it, prohibiting the grantees from selling or mortgaging the land. A lease is neither a sale nor a mortgage; and the clause on which he relies may, for aught we know to the contrary, be a mere clause *in terrorem*, inconsistent with the nature of the estate conferred, and, if so, inoperative. He also speaks of the land as granted for a specific purpose; but whether he be correct in his construction of the sanad in this or any other respect; whether, by reason of the nature of the estate created by the sanad, or of any proviso therein, it imposes any valid restriction upon the making of leases; we, in the absence of the sanad, are wholly unable to form any opinion.

It would manifestly be highly inconvenient, if the demise power of each co-sharer were limited to his or her life; for, in that case, the heirs of any one of them might, on his or her decease, dispute the lease; and if there were many co-sharers, the interest of the lessee would be of a very uncertain character. Such a limited power on the part of the grantees of the sanad would render it difficult for them to procure tenants. We must reverse the decree of the Judge, and send back the cause for re-trial.

PER CURIAM:—The Judge having partly based his decree on the supposed principle that a Muhammadan woman cannot execute a valid lease, which may endure beyond her lifetime, of property of which she is one of several tenants-in-common,—a principle in which this court does not concur; and the Judge not having ascertained, whether or not the co-tenants-in-common of Madiná Bibí were co-lessors with her in that lease, or considered what may be the effect of their having joined her therein; and the Judge having partly based his decree on an alleged sanad, which he has not recorded in the cause, and of the date of which said sanad, or custody whence it came, there is not any evidence whatever before this court, and as to the contents of which said sanad there is not any direct or satisfactory evidence before it; but from which said sanad he has deduced the inference that no tenant-in-common of the property, the sub-

ject of the said sanad, could, as to his or her share, execute a lease binding beyond his or her lifetime, inasmuch as that sanad, the Judge assumes, would render any such alienation void against the family, that is to say, the heirs by blood, of the original donee under the sanad : whereas the fact, that the respondent, Isse Khán, has, according to his own showing (although he does not allege himself to be of the blood of the original donee), been declared entitled, in right of his late wife, Madiná Bibí, to a portion of her share in the said property, shows that the said property was not then held to be descendible only to, and enjoyable only by, the heirs by blood of the original donee ; and, therefore, so far controverts the view taken of the said alleged sanad by the Judge (as to the construction of which sanad, it not being now before this court, it does not express any opinion) : this Court reverses the decree of the Judge, and remands the cause for a fresh trial on the merits ; costs of this suit, up to and including this special appeal, to abide the final decision

1866.  
NICHHA'BA'I  
PRA'GJI  
v.  
ISSE KHA'N.

*Decree reversed and suit remanded.*

*Special Appeal No. 113 of 1864.*

1864.  
July 6.

GANGA'BA'I KOM NA'RA'YANBHAT DA'TA'R... *Appellant.*  
VA'MANA'JI A. DA'TA'R ..... *Respondent.*

*Hindú Law—Family Property—Aliénation—Consent of Heirs—Family Purpose—Consideration—Election—Ratification.*

In a suit to recover possession of certain ancestral fields sold, during the absence of the defendant, who was united in interest, by his father, to the plaintiff, in consideration of money advanced by her, out of her stridhan, for the purpose of building the family house, of which the defendant possessed himself after his father's death ;—

*Held* that the defendant, by retaining possession of the house, ratified the act of his father, and elected to take the house in lieu of the ancestral fields, the sale of which was declared to be valid, and possession thereof given to the plaintiff.

THIS was a special appeal from the decision of C. Gonne, Acting Judge of the Konkan District, affirming the decree of Dáji Govind, Munsif of Alíabág.