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As the proceeding under chapter II is thus justified, the revisional proceedings of the Special Judge cannot be held to have been without jurisdiction. He ordered a re-trial, and this has been held with a result contrary to the one before arrived at, but not, therefore, necessarily wrong. The admission of a single member's acknowledgment made in 1857 as binding the family might be questioned on some of the decisions and supported on others; but the acknowledgment of Bagaji, No. 39, binds all his sons, and was made within sixty years of the institution of the suit.

We, therefore, discharge the rule with costs.

Rule discharged.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nanabhai Haridas

1883 *July* 18.

BAI KUSHAL AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* LAKHMA MANA (ORIGINAL DEFENDANT), RESPONDENT.*

Hindu law—Gift—Possession.

Where one of several joint-donees is already in physical occupation of the subject-matter of an intended gift, a declaration by the donor to the donee so in occupation, assented to by such donee, that he has parted with the possession in favour of the donees, converts mere occupation into possession, and amounts to a valid gift under the Hindu law.

THIS was a second appeal from the decision of S. Hammick, Assistant Judge of Surat, confirming the decree of Rav Saheb Chunilal Maneklal, Subordinate Judge of Anklesvar.

One Ruda Partap was the father of five daughters, one of whom, Kushal, appellant No. 1, was a widow, and lived with her father, and managed his lands and affairs generally. On the 11th of November, 1872, Ruda executed a deed of gift in favour of his five daughters; Ruda was old and infirm, and the time of executing the deed of gift was under the apprehension of approaching death. There was, however, no formal or actual transfer of possession of any of the lands given away by the deed, and Ruda not dying till a years afterwards they continued to be managed by Rushal,

* Second Appeal, No. 363 of 1882.

as before, until his death. On Ruda's death the defendant, the son of Ruda's separated brother, took possession of his lands, and, in 1877, Kushal and three of her sisters brought this suit to recover possession of the lands granted them by the deed of gift. The defendant contended that the gift, unaccompanied by immediate possession, was invalid, and that he was entitled to the lands by the Hindu law in preference to the plaintiffs.

Both the Courts below upheld the contention of the defendant, and rejected the plaintiffs' claim

Three of the plaintiffs having died, the remaining two plaintiffs appealed to the High Court.

Nagindas Tulsidas for the appellant.

Manekshah Jehangirshah for the respondent.

The judgment of the Court was delivered by

WEST, J.—It appears in this case that Ruda, the separate owner of certain lands, having become old and somewhat incapacitated for ordinary affairs, called in his daughter Kushal, who for some years carried on the cultivation of the fields composing the paternal estate. It is admitted she had physical detention of the lands, though on her father's account. In this state of things Ruda, the father, executed a deed of gift, by which he bestowed all his lands on Kushal and her four sisters. The property being his own absolutely, he had a perfect right to do this, but it is said that he did not complete his gift by delivery of possession. As Kushal, however, already had the physical detention of the lands, it was not possible to do more than convert this into possession and Ruda, in his deed, says: "I have given you possession." This was, on its face, an act divesting himself of the possession, and transferring it to Kushal. He could not retain possession against his will, and here was a public and registered declaration that he no longer wished to be possessor. Unless Kushal then refused to hold as her own and her sisters' what she had hitherto held as her father's by merely derivative possession, the physical detention was supplemented by the requisite volition, and holding for herself she from that moment had complete possession by a change of intention, giving a new character to her physical act. Nor would

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this be the less so because her sisters had joint rights with herself. Each of several co-owners has a right to possess the whole, though subject to the right of co-possession by his fellows. The Courts below seem to have been under some slight misapprehension as to what change would be necessary to satisfy the Hindu law in a case like the present: a considertion of general principles makes it plain that no outward sign, except a declaration assented to by the donee, was really necessary where the donee already had physical occupation of the object of the gift. That a complete change of legal right may take place without any change in the actual possession, may be seen from the case of *Nawab Malka Jahan Sabba* v. *The Deputy Commissioner of Lucknow* (1). Reference may be made to *Gamble* v. *Bholagir*(2) also. Under the Hindu law, the shastri in the case at 2 Strange's Hindu Law, 3, says that a gift might be effectively made to an absent person by the proper ceremonies in presence of witnesses, and Colebrooke approve this. It would not be possible to complete such a gift by delivery of possession: in the particular case delivery was made to a person in trust for the donee. The donee's assent was probably assumed, and, under the English law, assent to a benefit has, in some cases, been presumed where dissent was not expressed(3).

The Courts below should find with reference to the foregoing observations:—

1. Whether Kushal and her sisters, or any of them, declined to accept the gift made by their father, or was unaware of its having been made down to the time of his death?

2. Whether Kushal, acting on the resignation contained in the deed of donation by her father, held the lands embraced therein from that time, or from any time, down to the moment of his death either as her own individually or as hers jointly with her sisters?

3. Whether her possession having been once completed by the addition, to her physical detention, of a mutual assent, she ever transferred such possession back again to her father?

(1) L. R., 6 I. A., 63. (2) Bom. H. C. Rep., 146, A. C. J.

(3) *Thompson* v. *Leach*, 3 Lev., 284, quoted by Lord Mansfield in *Taylor* v. *Horde*, 1 Burr. at p. 124; *per* Abbott, C. J., in *Townson*, v. *Tickell* 3 B. & Ald. at p. 37.

4. Whether this was done with or without the assent of her sisters, or any of them ; and,

5. With what legal consequences ?

Three of the sisters—Jeyba, Rupa, and Kadvi—are dead. Jeyba's husband claims no right, and she has left no children. Rupa's only son, Guman, is dead, and no one seems to have come forward to represent him. Kadvi's daughter, Oomed, withdrew from the appeal. With reference to these circumstances the Courts below should determine :—

6. Whether the deed is to be construed as making a gift to the daughters of the donor jointly, or to them severally, or as tenants-in-common, or in what mutual relation, and with what consequences on the claim of the plaintiffs.

We direct that the findings be forwarded to this Court within two months. Further proceedings meanwhile adjourned. Fresh evidence may be received on the new issues.

Case remanded.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nanabhai Haridas.

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July 23.

SHRIDHARNARAYAN (ORIGINAL PLAINTIFF), APPELLANT, *v.* ATMARAM GOVIND (ORIGINAL DEFENDANT), RESPONDENT.*

Insolvency—Mortgage—Secured creditor—Receiver—The Code of Civil Procedure (Act X of 1877*), Secs.* 352 *to* 355.

A judgment-debtor, arrested and imprisoned in execution, applied to be declared an insolvent, and included a mortgage-debt in his application. Notice was issued to the mortgagee, who failed to appear and prove his claim, and was consequently omitted from the schedule prepared under section 352 of the Code of Civil Procedure. A receiver was appointed under section 354 ; the whole of the property of the insolvent was made over to the receiver, including the nine fields mortgaged, which the insolvent held as tenant of the mortgagee. The receiver sold one out of the nine fields to satisfy the creditors entered in the schedule, and ultimately restored the remaining eight fields to the judgment-debtor. The mortgagee then sued to eject the judgment-debtor for default in payment of rent. The latter pleaded his discharge under section 355.

* Second Appeal, No. 373 of 1882.