1894.

MUNICIPALITY OF THE CITY OF POONA v. VA'MAN RA'JA'RA'M GHOLAP.

It was argued that, even if the defendant had a right of way, he was not justified in pulling down 20 feet of railings. The point was not taken in the memorandum of second appeal, nor apparently argued in the District Court, and at most would only raise a question of damages. As, however, the plaintiff only claimed nominal damages of Rs. 5, we must conclude that it was not thought worth while to raise the question in the District Court, and we cannot, therefore, entertain it in second appeal. The real question at issue is as to the defendant's right of way. If it is decided in his favour, the decrees of the Courts below are substantially correct.

The District Judge should now with reference to the above remarks record his finding on the issue referred, and return his proceedings within two months. The Court may admit further evidence if it thinks proper.

Issues sent down.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

KALU VALAD VISHNA (ORIGINAL DEFENDANT), APPELLANT, *v.* BARSU VALAD ZENDU (ORIGINAL PLAINTIFF), RESPONDENT.*

1894. *September* 13.

Hindu law—Joint family—Joint family property—Gift—Gift of undivided share by adults of family—Minor co-sharer not a party to gift—Ejectment—Defendant trespasser— Onus of proof—Plaintiff to prove his superior title.

According to Hindu law, under ordinary circumstances a gift by a co-parcener of his undivided share in the immoveable property is invalid, and a minor's share cannot be given away by a manager except in case of necessity or for certain specified purposes.

Certain land which was joint family property was given by the adult members of the family to the plaintiff as the worshipper of a deity. A minor co-parcener did not join in the gift. The plaintiff sued the occupier for possession.

Held that the plaintiff could not recover. The gift not being made from necessity, or for the performance of any pious duties obligatory on the minor or the family, was invalid, and could not be given effect to even with respect to the shares of the donors.

In an ejectment suit, the defendant, though a trespasser, is entitled to require the plaintiff who seeks to eject him to prove that he has a superior title.

THIS was a second appeal from the decision of Ráo Bahádur N. N. Nanavati, First Class Subordinate Judge of Dhulia with

* Second Appeal, No. 188 of 1893.

1894.

KALU v. BARSU.

Appellate Powers, confirming the decree of Ráo Sáheb D. G. Medhekar, Second Class Subordinate Judge of Yával.

Suit in ejectment. The plaintiff sued for possession of a certain field which formerly had been the property of three brothers, *viz.*, Lakshman, Mansarám and Barsu.

In 1891 Dagdu (son of Lakhsman), Nathu (son of Barsu) and Anandi (widow of Mansarám) made a gift of the field to the plaintiff as the worshipper of the god Shri Sadguru, and executed a deed of gift dated 9th January, 1891, which was duly registered. Nathu's brother, Rágho, who was then a minor, was not a party to the gift.

The field was at that time in the possession of the defendant, who had held it since 1881. In 1891 the plaintiff brought this suit to eject the defendant and to obtain possession.

The defendant alleged that he had purchased the field from the owners eighteen or nineteen years before suit, and he contended that, inasmuch as one of the co-parceners (Rágho) was not a party to the gift, it was invalid, and the plaintiff had no title to the property.

The Subordinate Judge passed a decree for the plaintiff.

On appeal by the defendant the decree was confirmed.

The following is an extract from the judgment in appeal:—

"For these reasons I hold that the gift in this case, though not followed by delivery of possession, is valid. There is one further objection to the validity of the gift advanced by the defendant. It appears that Nathu, one of the plaintiff's three donors, has a minor brother, Rágho, aged ten or eleven years, who lives with him. This Rágho is not a party to the gift, and he has an undivided interest in the land in suit. It has, therefore, been urged that the gift is invalid, because a member of an undivided family on this side of India cannot, without the consent of his co-parceners, make a gift of his share in the undivided property or dispose of it by will. As the defendant is a trespasser, whose possession has not strengthened into an indefeasible title by lapse of time, I do not think that he has a right to urge this plea. The question is one which can properly arise between the plaintiff and Rágho when Rágho becomes of age. The gift is not made to the plaintiff personally, but to him as the worshipper of the god Shri Sadguru. The gift is thus not like an ordinary gift, but it is gift to this god for a religious purpose. Where a gift is made for a religious purpose, the tendency of the Hindu law is to look upon it with greater favour than upon an ordinary gift. The share of Rágho in the land in suit is not, I think, more than $\frac{1}{6}$th, while $\frac{5}{6}$ths of the land goes to the plaintiff. I think, therefore, that the gift, though made without

Rágho being a party to it, is still valid so far as the $\frac{5}{6}$ths of the land is concerned. This suit does not debar Rágho from claiming his share when he attains majority. It seems proper, therefore, that the gift must be upheld."

The defendant preferred a second appeal.

Ghanashám N. Nádkarni for the appellant (defendant):—The gift to the plaintiff is void *ab initio*. A member of an undivided Hindu family cannot, without the consent of his co-sharers, make a gift even of his own share in the family property. A manager has no right to give away family property in which a minor member has a share. The gift being void must be set aside—*Gangubái* v. *Ramanna*(1); *Vásudeo Bhat* v. *Venkatesh*(2); *Vrandavandás* v. *Yamunabái*(3); *Bába* v. *Timma*(4); *Ponnusami* v. *Thatha*(5); *Ramanna* v. *Venkata*(6); *Virayya* v. *Hanumanta*(7); *Rámbhat* v. *Lakshman*(8); *Lakshman Dáda Náik* v. *Rámchandra Dáda Náik*(9); Mitákshara, Ch. I, sec. 1, paras. 28 and 29. Even if the gift to the plaintiff be good, it would be so only to the extent of the shares of the donors. As to the share of the minor, it cannot stand. The lower Courts have upheld the gift of the entire property.

Dáji Abáji Khare, for the respondent (plaintiff):—The gift was made for the purpose of worshipping an idol. The worship of an idol is a pious purpose, and gifts made for pious purposes are not invalid, even if the gift be of an undivided share—*Gangubái* v. *Ramánna*(1); *Vásudeo Bhat* v. *Venkatesh*(2); *Udarám* v. *Ránu*(10); West and Bühler, pp. 206 and 664; Mayne's Hindu Law, para. 393; Stoke's Hindu Law, pp. 519 and 520. The defendant himself has no right to the property, as he is a trespasser. He cannot, therefore, question the validity of the gift; and even supposing that he can do so, the gift would be invalid only with respect to the minor's share and not with respect to the shares of those who executed the deed of gift and who were not minors. We should, therefore, be allowed to turn this suit into one for partition, and the shares of the adult members should be given to us.

(1) 3 Bom. H. C. Rep., A. C. J., 66.
(2) 10 Bom. H. C. Rep., 139.
(3) 12 Bom. H. C. Rep., 229.
(4) I. L. R., 7 Mad., 357.
(5) I. L. R., 9 Mad., 273.
(6) I. L. R., 11 Mad., 246.
(7) I. L. R., 14 Mad., 459.
(8) I. L. R., 5 Bom., 630.
(9) *Ibid.*, 48.
(10) 11 Bom. H. C. Rep., 76.

1894.

KALU v. BAPSU.

Ghanashám, in reply:—The present being an ejectment suit, the plaintiff must succeed on the strength of his own title. We are in possession, and, therefore, we have a right to question his title.

FULTON, J.:—It was not disputed that under ordinary circumstances the gift by one co-parcener of his undivided share is invalid, or that a minor's share cannot be given away by the manager except in case of necessity or for certain specified purposes. It was contended, however, that as this gift was made to the plaintiff as worshipper of the god Shri Sadguru, its purpose rendered it binding on the minor.

The law on the subject is stated in paragraphs 28 and 29 of section I of Chapter I of the Mitákshara as follows:—

"28. Even a single individual may conclude a donation, mortgage or sale of immoveable property during a season of distress for the sake of the family and especially for pious purposes.

"29. The meaning of the text is this:—while the sons and grandsons are minors and incapable of giving their consent to a gift and the like; or while brothers are so and continue unseparated; even one person who is capable may conclude a gift, hypothecation, or sale, of immoveable property if a calamity affecting the whole family require it or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable."

Now, in the present case, it has not been found, nor in argument has it been urged, that any necessity for this gift has been established, or that it was made in performance of any pious duties obligatory on the minor or the family. The learned Subordinate Judge appears himself to have felt doubtful whether the minor was bound by the gift, for he said that the result of this suit would not debar the minor from claiming his share when he attained majority. But unless not only the shares of the adult co-parceners but also the share of the minor have been duly conveyed to the plaintiff, it is impossible to see on what principle his suit to recover the property can be admitted. Mr. Khare urged that as the defendant was a trespasser it was not open to him to question the validity of the gift, but we think that a defendant in possession is entitled to require the plaintiff seeking

1894.

KALU v. BARSU.

to eject him to prove that he has a superior title. This the plaintiff has failed to establish, and his suit must, therefore, be dismissed.

Mr. Khare also contended that the gift was good so far as the shares of the adult co-parceners were concerned, and that the plaintiff should be allowed to add the minor as a party and convert the suit into one for partition of the whole family property. Whether at this stage such a change in the nature of the suit could be allowed, is a question which we need not discuss, for we think the authorities establish beyond doubt that the gift of an undivided share is not allowed by Hindu law, and cannot be given effect to.

We, therefore, reverse the decrees of the Courts below and reject the claim, with costs on the plaintiff throughout.

Decree reversed and claim rejected.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

NARNA AND PARAMESHVAR, SONS OF NARASINH BHATTA (ORIGINAL APPLICANTS), APPLICANTS, *v.* ANANT AND ANOTHER BY THEIR GUARDIAN *AD LITEM* (ORIGINAL OPPONENTS), OPPONENTS.*

1894. *September* 24.

Practice—Procedure—Decree—Death of party between hearing and judgment—Judgment, date of operation of—Civil Procedure Code (Act XIV of 1882), *Sec.* 234.

An appeal having been argued on the 11th November, 1892, the case was adjourned for judgment which was delivered on the 30th November, 1892, and was in favour of the plaintiffs. In the meanwhile the defendant had died. On application for execution it was contended that the decree was null and void, as the respondent was dead when it was passed.

Held, that the judgment should be regarded as operating as if it had been delivered on the day when the arguments were closed.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order of E. H. Moscardi, Acting Judge of Kánara.

The applicants Narna and Parameshvar brought a suit (No. 76 of 1891) against one Paramabhatta in the Court of the Subordi-

* Application No. 94 of 1894 under extraordinary jurisdiction.