APPELLATE CIVIL.

Before Sir Stanley Batchelor, Kt., Acting Chief Justice, and Mr. Justice Shah.

1917.
October 3.

PANACHAND CHHOTALAL (ORIGINAL PLAINTIFF), APPELLANT *v.* MANOHARLAL NANDLAL (ORIGINAL DEFENDANT NO. 1), RESPONDENT.*

Hindu Law—Gift for religious purposes—Hindu widow can make a gift for religious purposes of a reasonable portion of her husband's property—Civil Procedure Code (Act V of 1908), Order XXVI, Rule 1—Commission to examine witnesses.

It is not competent to a Hindu widow to make a religious gift of the whole or practically the whole of her husband's property for the religious benefit of her husband.

The Courts should not allow witnesses to be examined on commission without adequate reasons.

FIRST Appeal from the decision of Vajeram Maniram, First Class Subordinate Judge at Ahmedabad.

Suit to recover possession of property.

One Dolat, a Hindu, was the owner of the property. He died in 1880, leaving him surviving his widow named Jekore. It was alleged that shortly before his death, Dolat had sent for defendant No. 1 who was his religious preceptor, and had made a *Sankalpa* giving away in gift as *Krishnarpana* his house to defendant No. 1. He had also enjoined his wife Jekore to pass the deed of gift in case he did not live to do so. Jekore passed a deed of gift in favour of defendant No. 1 on the 12th October 1891 and delivered the house and other property to him. The defendant No. 1 installed the idols of Radha-Vallabh in the house and spent the sum of Rs. 2,000 in converting the house into a temple and in carrying out other necessary repairs. Jekore lived in a room of that house, which she did till her death on the 3rd November 1911.

* First Appeal No. 131 of 1915.

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The plaintiff, a reversionary heir of Dolat, sued in 1913 to recover possession of the house and other property, alleging that the story of *Sankalpa* by Dolat was not true and that the gift by Jekore of nearly the whole of Dolat's property was not valid.

It was contended by defendant No. 1 *inter alia* that the gift was virtually made by Dolat during his lifetime; that Jekore in passing the formal deed merely carried out his wishes; that the gift was valid; and that one Parbhudas was a nearer reversioner to Dolat than the plaintiff.

The Subordinate Judge held that the plaintiff was the nearest reversioner to Dolat and that the gifts relied upon by defendant No. 1 were valid. The learned Judge, however, decreed possession to plaintiff of such portions of the property as were not covered by the gift.

The plaintiff appealed to the High Court.

G. N. Thakor, for the plaintiff.

Ratanlal Ranchhoddas, for the defendant No. 1.

The following authorities were referred to in arguments:—*The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*[1]; *Ram Kawal Singh* v. *Ram Kishore Das*[2]; *Chooramani Dasi* v. *Baidya Nath Naik*[3]; *Khub Lal Singh* v. *Ajodhya Misser*[4]; *Rama* v. *Ranga*[5]; *Vuppuluri Latayya* v. *Garimilla Ramakrishnamma*[6]; *Bhaskar Trimbak Acharya* v. *Mahadev Ramji*[7]; *Ganpat valad Dhaku* v. *Tulsiram*[8]; *Puran Dai* v. *Jai Narain*[9]; *Balkishan Bharthi* v. *Sat Ram Singh*[10]; Vyavahara Mayukha, c. 4, s. VIII, pl. 11.

(1) (1861) 8 Moo. I. A. 529.
(2) (1895) 22 Cal. 506 at p. 508.
(3) (1904) 32 Cal. 473.
(4) (1915) 43 Cal. 574.
(5) (1885) 8 Mad. 552.
(6) (1910) 34 Mad. 288.
(7) (1869) 6 Bom. H. C. R. (O.C. J.) 1 at p. 13.
(8) (1911) 36 Bom. 88.
(9) (1882) 4 All. 482.
(10) [1908] A. W. N. 202.

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BATCHELOR, ACTING C. J.:—The plaintiff, who is the appellant before us, brought this suit as the heir of one Dolat Hirachand to recover three lots of properties. He was resisted by the 1st defendant Goswami Nandlal Vanmalilal, a religious preceptor, who claimed the properties for himself, pleading that lots Nos. 1 and 2 had been given to him by Dolat's widow Jekore by a deed of gift dated the 12th of October 1891, the gift being for the religious purpose of the installation of an idol, and pleading as regards lot No. 3 that it had been orally given to him by Jekore about a month after the deed of gift.

The learned Judge below has held against the alleged oral gift, but he has held in favour of the deed of gift of October 1891. At the same time the learned Judge says that the deed of gift refers only to lot No. 1, so that in the learned Judge's view the plaintiff was entitled to lots Nos. 2 and 3. There are no cross-objections to the Judge's decree, and the only question, therefore, now before us is whether the deed of gift of October 1891 is good as to lot No. 1. This lot comprises four Municipal Numbers constituting one house. That house is worth over Rs. 4,500, and the total value of the properties left by Dolat would at most be about Rs. 5,600.

Now it is clear to begin with that the burden of proving the particular gift which is set up by the 1st defendant rests upon him. He has taken certain steps to discharge that burden, but the difficulty which mainly confronts us is that the learned Judge below affords little or no indication of his opinion as to the value of the evidence given upon this question of fact whether or not the gift as alleged by the defendant is proved. The case made upon this point by the defendant is that on the morning of Dolat's death, i.e., the 20th April 1880, Dolat sent for the present 1st defendant and said to him in the presence of witnesses

"I give this house in gift to you and if I shall live I shall pass a deed," and so saying he put water on the ground. This is a description of a well-recognised Hindu rite known as *Sankalpa* (संकल्प), and it has by this term been referred to in the proceedings. There were four witnesses called to vouch for this *Sankalpa*, but with two of them I think we are not closely concerned, namely, with Manor Purbhudas and the 1st defendant, for it is clear that on neither of these two did the learned Judge place any reliance. There remain witnesses, Exhibit 101 and Exhibit 102, Maganlal Laldas and Ramji Bhaichand. It is impossible to say whether the learned Judge below who had these witnesses before him was convinced of the truth of their testimony or not. He does not discuss this evidence of fact, but apparently dazzled by a distant vision of a point of law merely recites that such witnesses have been called, and then says "it is thus a gift for religious purposes under the direction of her husband." Whether it is a deed of that character or not depends, however, on the Judge's view whether the witnesses called in support of it should be believed having regard to all the circumstances of the case.

Now this story of a *Sankalpa* is a story which is easy to tell and exceedingly difficult to cross-examine to. There is nothing about Maganlal or Ramji to compel the confidence of the Court, though I willingly admit that there is nothing either to inspire us with active disbelief in those witnesses. The burden, however, as I have said, lies upon the 1st defendant, and there are circumstances in the case which, as it seems to me, prevent us from holding that that burden is adequately discharged by the production of these two witnesses. The incident to which the witnesses refer took place, if it took place at all, in 1880, and it is not suggested that either of the witnesses ever again made any allusion

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to the gift or any disclosure of it until they appeared in the witness-box in this litigation.

As against the story told by these witnesses, we have two facts, both of which seem to me to possess much significance. The first is the great delay which occurred between 1880, when the *Sankalpa* was delivered, and 1891 when the deed of gift was executed. On the 1st defendant's case, we have a dying Hindu husband delivering to his wife a sacred charge for the advancement of his spiritual benefit. It seems to me contrary to experience to suppose that an injunction of this moment and character would by the widow be deferred in execution for so lengthy a period as eleven years.

Then, next, it appears to me probable that the present graphic story of a solemn *Sankalpa* made in the presence of witnesses is an after-thought, for neither in the deed of gift, nor in the 1st defendant's written statement is that story set forth. All that is disclosed in these two documents is a general assertion that the widow's gift was made for religious purposes by the husband's direction તેના ધણીના કહેવા મુજબ. That description is, however, merely common form, and would be present in every case where a litigant was relying upon a gift from a Hindu widow. I cannot but think that if at the time of the deed of gift, or at the time of the preparation of the 1st defendant's written statement the story of the *Sankalpa*, afterwards developed in the witness-box, had been present to the mind of the 1st defendant, we should have had that story in some detail, and it would not have been left to be obscured under the vague recital that the widow's action had followed on the directions of her husband. I think, therefore, that in all probability the story told by the witnesses was a later development intended to add

graphic plausibility to the indeterminate description given in the written statement and the deed of gift.

It is also material to notice that in 1888 Jekore mortgaged part of this property with possession, and made no reference to the existence of any *Sankalpa*. It is clear, however, that she was not avoiding the *Sankalpa* for had that been her intention, she would not have made the gift in 1891. I do not cite the making of this mortgage as a decisive incident in itself, but I do regard it as an incident telling in favour of the plaintiff and against the 1st defendant. On these grounds, despite the evidence of the witnesses Maganlal and Ramji, I am of opinion that the 1st defendant has failed to prove to the satisfaction of the Court that the gift upon which he relies was made to him.

Before leaving this part of the case, I must register my protest against the lower Court's action in allowing this first defendant to be examined on commission. I am clearly of opinion that that was a grave mistake. Under section 133 of the Civil Procedure Code power is given to the Local Government, in deference to certain opinions which are popularly held in India, to exempt from personal appearance in Court any person whose rank in the opinion of the Government entitles him to the privilege of exemption. If, then, a religious preceptor is of such an exalted rank as to obtain this exemption at the hands of the Local Government, well and good: the Courts have nothing to do but to give effect to the orders of the Government. But if he is not exempted then in my view the provisions of the Civil Procedure Code must be firmly enforced. Those provisions are contained in Order XXVI, and it cannot be pretended here that this religious preceptor has any imaginable claim under these provisions to be exempted from appearance in the Court. It seems to me very important not to relax the rules laid down in the Code

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or to encourage the notion that parties to a suit can win their cause without going into the witness-box to support it when they are able to do so. Such laxity of procedure has this further disadvantage that the Court is deprived of the invaluable assistance afforded to it by seeing the party as a witness under examination and cross-examination. In the present case the most important witness in the suit, defendant No. 1, has never been seen by the learned Judge who tried the suit, and that Judge had to decide without knowing the kind of witness this religious preceptor was, or the figure that he cut under cross-examination.

I have made these strictures because laxity of procedure on this point is more common than it should be in the Subordinate Courts, and I believe that in conceding such privileges to one party, there is grave risk of doing injustice to his opponent. Generally the rule should be impartially enforced that any person, of whatever rank or position or holiness, who seeks the Court's assistance to protect his rights must be subject to the rules of the Court as unreservedly as the humblest of litigants.

For the reasons which I have already given, I am of opinion that in this case there was no authority given by the husband Dolat to the widow Jekor to make this religious gift to the religious preceptor. That being so, I am of opinion that in Hindu law the gift is bad. I have already mentioned that the gift is of four-fifths of the total property of Dolat, so that the only proposition which Mr. Thakor is obliged to establish is that where, without authority from her husband, a Hindu widow makes a religious gift for the religious benefit of her husband, that gift is invalid if it be a gift of the whole or of practically the whole of the husband's property. That proposition is, I think, clearly established by numerous decisions of

the Courts. It is distinctly so laid down in *Ram Kawal Singh* v. *Ram Kishore Das*[1]; in *Balkishan Bharthi* v. *Sat Ram Singh*[2] where Mr. Justice Banerji gave a considered judgment after a review of the authorities; and in *Vuppuluri Tatayya* v. *Garimilla Ramakrishnamma*[3]. These judgments, it must be noted, lay down a rule of general Hindu law apart from the doctrines of any particular school of that law, and the rule was followed in this Court by Mr. Justice Arnould in *Bhaskar Trimbak Acharya* v. *Mahadev Ramji*[4]. That case was decided as far back as 1869, and it is not suggested that the decision has been departed from during the years that have since elapsed.

As against this steady stream of authority, Mr. Ratanlal for the 1st defendant falls back upon the only text which can be of service to him, namely the text in the Vyavahara Mayukha, Ch. IV, section VIII, pl. 11. There the material words are these, as given in the translation by Rao Saheb Mandlik :—"The prohibition of sale or other disposition of immoveable property by a widow, without the consent of takers of the heritage, is given on [the authority of] Madhava. As for the text of Katyayana :—'after the death of the husband, the widow preserving [the honour of] the family should obtain the share of her husband so long as she lives; but she has no ownership therein in respect of [its] gift, mortgage, or sale'; that is a prohibition of gift of money to the *Bandi* [bards], *Charana*, and the like [triflers]. Gifts for religious or spiritual objects and mortgage, and the like for that purpose, are of course permitted; [as is plain] from the aforementioned text [of Prajapati] commencing with *Sthavaram Jangamam*, &c.; and from the text of Katyayana :—'A widow always engaged in meritorious observances and

(1) (1895) 22 Cal. 506.
(2) [1908] A. W. N. 202.
(3) (1910) 34 Mad. 288.
(4) (1869) 6 Bom. H. C. R. (O.C.J.) 1.

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facts, constant in the duties of celibacy, intent upon restraining [her passions], and making holy gifts, shall reach the heavenly abodes even if she has no son.'" Mandlik, Part II, pp. 77, 78. I do not, however, find that on a fair construction of this passage, there is anything in it which requires us to reconsider the long current of authority to which I have referred. It appears to me that in this section the author of the Vyavahara Mayukha is merely explaining how it is legally competent to a Hindu widow to make a gift for religious purposes in spite of the apparently general prohibition against all gifts which is contained in the cited passage from Katyayana. To this end the author who, as usual, is modest in the expression of his opinion, endeavours to meet one text of Katyayana by another text of the same Smriti. But there is nothing that leads me to suppose that the object of the Vyavahara Mayukha was to go any further than this, that is to say, to establish that in the matter of making religious gifts the widow had unrestricted authority. It would have been simple for the author, had that been his meaning, to state that in the case of religious gifts the widow's authority was unlimited. But there are no words upon which any such suggestion can be based. I think, therefore, that the text upon which Mr. Ratanlal relies is not in conflict with the decisions which I have noted. In confirmity with those decisions we must, I think, hold that this particular gift, which is a gift of four-fifths of the entire property of the husband is bad in law, notwithstanding that it was made for the spiritual benefit of the donor's husband.

There remains only one minor point, and that is as to the defendant's claim for compensation for repairs and improvements made by him upon the property since he took possession in 1891. His claim upon this point was for Rs. 2,000, but I think upon the argu-

ments which we have heard that a fair allowance will be Rs. 1,500.

I would, therefore, reverse the decree of the lower Court, and give the plaintiff a decree as prayed, subject to payment by the plaintiff of Rs. 1,500 to the 1st defendant for compensation for improvements effected in the property. The plaintiff must have his costs throughout.

The enquiry as to mesne profits will embrace also the whole of the property now awarded to the plaintiff.

SHAH, J.—The principal point in this appeal is whether the gift made by Bai Jekor in October 1891 is valid and binding upon the plaintiff, the next reversioner. Dolat, the last male owner of the house in dispute, died in 1880, leaving his widow Bai Jekor as his heir. The gift was made by the widow in favour of defendant No. 1, who is a religious preceptor, by a registered document for the purpose of establishing a temple in the house. The house was given in *Krishnarpana* and she purported to make the gift in pursuance of the directions of her husband. The widow died in 1911, and the next reversioner has now sued to recover possession of the property on the ground that the gift made by the widow was invalid beyond her lifetime. In spite of Mr. Ratanlal's contention to the contrary I think the plaintiff must be held to be the next reversioner entitled to Dolat's estate. The gift is supported on two grounds, first, that it was made by the widow in pursuance of the directions of her husband; and secondly, that according to Hindu law, it was within the powers of the widow to make a gift of the immoveable property for a religious purpose for the spiritual benefit of her deceased husband, and that the gift was, therefore, valid.

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As regards the first ground, the case for defendant No. 1, as disclosed in the evidence, is that on the date of his death Dolat made a *Sankalpa* (संकल्प) for giving this property in *Krishnarpana* to the defendant No. 1 and that the gift was made by the widow in 1891 in pursuance of the *Sankalpa*. This story about the *Sankalpa* depends entirely upon the oral evidence in the case. I do not consider it necessary to deal with the evidence bearing on this point in detail. I generally agree with the observations of the learned Acting Chief Justice on this part of the case. I may add that the story about the *Sankalpa* having been made by Dolat on the day of his death was not put forward until the defendant No. 1 came to be examined on commission. The witnesses examined on this point depose to an event which occurred in 1880, nearly 35 years before they gave their evidence. There is nothing particularly impressive in the evidence on this point. It is an easy story to put forward and difficult to test. It is possible that the story put forward by defendant No. 1 may be true. But on the evidence on the record, it is not reasonably possible to hold that story proved. The result, therefore, is that the only direction, which the defendant No. 1 sought to prove as having been given by the husband of the widow, is not established. The statement in the deed of gift that the gift was made in pursuance of the directions of Dolat cannot be accepted as proved, even though the widow has on one occasion stated on oath that the recital in the document is true.

To the deficiencies of the oral evidence on this point the defendant No. 1 himself has contributed by asking the Court to examine him on commission. The application for his examination on commission was granted by the trial Court. The defendant No. 1 lived in the city of Ahmedabad, where he could have been examin-

ed in the ordinary course before the Court. But for the reasons stated in his petition to the Court, he desired to be examined on commission. Those grounds do not justify the application according to the provisions of the Civil Procedure Code. Under the Code the Court has the power, subject to the conditions and limitations that may be prescribed, to issue a commission to examine any person. It is not suggested in this case that the defendant No. 1 has been granted any exemption from appearance in civil Courts by the Local Government, nor is there any allegation that from sickness or infirmity he was unable to attend the Court. Under these circumstances, it seems to me that it was not open to the lower Court to allow defendant No. 1 to be examined on commission. On this point it is necessary to remember as pointed out in clause 104 of the Civil Circulars of this Court at p. 30 that "it is desirable to restrict the exemption under the law within as narrow limits as possible and to discourage as much as possible the idea that it is derogatory to give evidence in British Courts of Justice." Even assuming for the sake of argument that it was within the discretion of the Court to allow defendant No. 1 to be examined on commission, it seems to me that having regard to the fact that he was a party to the suit, and that his evidence related to an important point upon which the burden of proof lay upon him, it was necessary for the Court to consider whether within the limits allowed by the law it would be proper to exercise the discretion in favour of allowing a witness in that position to be examined on commission. On this point it seems to me that the following observations of Baggallay L. J. in *Berdan* v. *Greenwood*[1] are important:— "In considering whether the examination of a witness should be taken by commission, we must have regard,

[1] (1881) 20 Ch. D. 764 at p. 766 *f. n.*

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at any rate, to the possibility of his not being a credible witness. If the witness is a credible witness it is hardly material whether he gives his evidence *viva voce* in Court or before a commission, or by affidavit, or in any other form. But we must assume the possibility of his not being a credible witness, and then it becomes of the most extreme importance that the jury, or the Court which has to decide the question, should have the opportunity of seeing the demeanour of the witness, and observing the way in which the various questions which are put to him in cross-examination are answered". To the same effect are the observations of Cotton L. J. in the case. Within the limits allowed by law to the Court, this point should be considered by the Court in exercising its discretion as to whether a party to a suit should be allowed under the circumstances of the case, to be examined on commission. In the present case, however, it is clear to my mind that the order for examining defendant No. 1 on commission was not justified. The result, however, is that the trial Court has not had an opportunity of seeing him in the witness-box, that he has deprived himself of the opportunity of satisfying the Court by his satisfactory demeanour in the witness-box that he is a witness of truth, and that we have to consider his evidence without the advantage of the opinion of the trial Court as to the credibility of the witness formed after observing his demeanour.

As regards the second ground, upon which this gift is sought to be justified, it seems to me that the gift must be held to have been made for the spiritual benefit of Dolat. Mr. Thakor suggested in the course of the argument that if the story as to the gift having been made in pursuance of the directions of the deceased Dolat be not accepted, the gift cannot be treated as having been made for the husband's spiritual

benefit. I am, however, unable to accept that argument. Treating the gift as having been made by the widow, it is clear in this case that it was made for a religious purpose, and it must be taken to have been made, unless the contrary is established, for the spiritual benefit of her husband. There is nothing in the case to establish the contrary. The immoveable property given in *Krishnarpana* is worth Rs. 4,500, and the total value of the estate of the deceased is about Rs. 5,600. There is nothing in the case to show that the value of the deceased's estate in 1891 was materially different from that indicated above. Even making due allowance for the fact that in 1905 some substantial improvements were effected by defendant No. 1, it seems to me that the house must be taken to represent a very large part of the immoveable property of the deceased Dolat. It would be in any case more than one half, and probably nearly four-fifths of the whole estate.

On these facts it is contended on behalf of the respondent that the widow has full power to dispose of the whole of the immoveable property of her husband for any religious purpose, which is believed to be for the spiritual welfare of her deceased husband. On the other hand, it is contended for the appellant that though the widow's power to deal with the immoveable property may be wider when she is dealing with the immoveable property for any religious purpose, still it is subject to the ordinary limitation that she can make a gift of a reasonable part of the whole estate, and not the whole or practically the whole of the estate. On this point the decisions of the Calcutta, Madras and Allahabad High Courts are against the respondent's contention, and in favour of recognising the limitation that even in making gifts for religious purposes the widow can deal with the immoveable property within

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proper limits. It is clear from the observations of their Lordships of the Privy Council in *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*[1] that "for religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes". In that case their Lordships have not defined the extent of the power of disposition which the widow has for religious and charitable purposes. In Bengal, however, it has been held, that the widow's powers are limited even in making gifts for religious or charitable purposes. I shall refer only to the cases of *Mahoda* v. *Kuleani*[2]; *Ram Kawal Singh* v. *Ram Kishore Das*[3] and *Khub Lal Singh* v. *Ajodhya Misser*[4]. The judgment in the last mentioned case is particularly useful for its references to the judgment of the Privy Council in *Cossinaut Bysack* v. *Hurroosoondry Dossee*[5], the full text whereof I have not been able to trace in the reports available here, and for a specific consideration of the conclusion on this point stated in the Viramitrodaya to which I shall refer hereafter. In Madras also, it is recognised that the widow's powers in dealing with the immoveable property for religious purposes are limited: see *Gopaula* v. *Narraina*[6]; *Rama* v. *Ranga*[7] and *Vuppuluri Tatayya* v. *Garimilla Ramakrishnamma*[8]. The Allahabad High Court has accepted the same view in the case of *Balkishan Bharthi* v. *Sat Ram Singh*.[9] In this Presidency the earlier decisions bearing on this point are to be found in Borradaile's Sudder Adawlat Reports, Vol. I. The case in favour of a gift by way of *Krishnarpana* is the case

(1) (1861) 8 Moo. I. A. 529, at p. 551.
(2) (1803) 1 Mac. Sel. 62.
(3) (1895) 22 Cal. 506.
(4) (1915) 43 Cal. 574.
(5) (1819) 2 Morley's Digest 198.
(6) (1850) Mad. S. D. A. 74.
(7) (1805) 8 Mad. 552.
(8) (1910) 34 Mad. 288.
(9) [1908] A. W. N. 202.

of *Kupoor Bhuwanee* v. *Sevukram Seoshunker*[1] at p. 448 of that Volume. There is nothing in the report to show that the property given in *Krishnarpana* was the whole of the immoveable property of the deceased husband or anything more than a reasonably small part of the whole estate. The opinion expressed in the case of *Chooneelal* v. *Jussoo Mull Deveedas*[2] at p. 60, however, is that "the widow, without the consent of her nephew's widow, cannot make a gift of landed property to her priest". In the foot-note the passages in the Vyavahara Mayukha, which are now relied upon by Mr. Ratanlal in support of his argument, are referred to. The only other case which may be referred to in that Volume is the case of *Jugjeevun Nuthoojee* v. *Deosunkur Kaseeram*[3] at p. 436. In that case the gift in *Krishnarpana* related to cash, clothes and a family house, and the opinion expressed was that the widow concerned "ought to have reserved for the respondent the family house". The gift was, however, upheld on the ground that "the *Krishnarpana* would not be annulled". These cases are not all easily reconcilable and they must be deemed to have been decided on their special facts. The general effect, however, of these earlier decisions on the whole is in favour of recognising the limitation on the widow's power to make a gift of the immoveable property inherited by her from her husband. Later on in the case of *Bhaskar Trimbak Acharya* v. *Mahadev Ramji*[4] Arnould J. came to the conclusion that the widow would have no power to give in *Krishnarpana* the whole or practically the whole of the immoveable property inherited by her from the husband. So far, therefore, the weight of the decided cases of all the High Courts is distinctly against the respondent's contention.

(1) (1816) 1 Borradaile's Rep. 448.
(2) (1813) *Ibid* p. 60 at p. 64.
(3) (1812) *Ibid* p. 436.
(4) (1869) 6 B. H. C. R. (O. C. J.) 1.

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But it has been urged by Mr. Ratanlal that the observations in *Bhaskar Trimbak Acharya* v. *Mahadev Ramji*[1] are not binding upon this Court, and that the passage in the Vyavahara Mayukha, if properly interpreted, gives to the widow full power of dealing not only with a reasonable part of her husband's immoveable property, but with the whole or any part she likes of that property for any religious purpose for her husband's spiritual benefit. The passages relied upon are paras. 3 and 4, Ch. IV, section 8 of the Vyavahara Mayukha (see Stoke's Hindu Law Books, pp. 84-85 or Mandlik's Hindu Law, pp. 77 and 78). It seems to me that the passage is not fairly susceptible of the interpretation which the respondent seeks to put upon it. With reference to this, in the first place, it is pertinent to note that in the discussion bearing on the same point in the Viramitrodaya, (Vyavahara Adhyaya) Ch. III, sections 2 and 3, after referring to the various texts which have been referred to in the Vyavahara Mayukha, Mitra Misra comes to the conclusion that "it is established that in making gifts for spiritual purpose as well as in making sale or mortgage for purpose of performing what is necessary in a spiritual or temporal point of view, the widow's right...extends to the entire estate of her husband" (Golapchandra Sarkar's translation of the Viramitrodaya, p. 141). This conclusion was specifically considered in *Khub Lal Singh* v. *Ajodhya Misser*[2], and in spite of that conclusion, the learned Judges accepted the view that it is only within proper limits that the widow may alienate her husband's property for the performance of religious acts which are supposed to conduce to his spiritual benefit. The conclusion stated in the Vyavahara Mayukha, is certainly not so clear as in the Viramitrodaya. It is not in terms stated there that the permission

[1] (1869) 6 Bom. H. C. R. (O. C. J.) 1. [2] (1915) 43 Cal. 574.

to alienate the property of her husband for religious purposes extends to the entire estate; and the only ground upon which that conclusion is supported on behalf of the respondent is that as there is no limitation mentioned by Nilkantha, it must be taken that the powers there referred to are unlimited. It seems to me, however, that the point of the observation there is not so much to define the extent of the widow's power, as to point out that the prohibition against mortgage, sale or gift which is referred to by Katyayana does not really apply to cases of gift for religious purposes, and that view is taken as sufficiently established, in the opinion of the learned author of the Vyavahara Mayukha by referring to another text of Katyayana. But the general result of the discussion in the Vyavahara Mayukha relating to the right of a widow to inherit her husband's property, is to make it clear that she takes an estate subject to certain limitations.

The Mitakshara is silent on this point. In dealing with the right of the widow to inherit her husband's property, Vijnaneshvara does not refer to the texts of Brihaspati, Katyayana and Prajapati, which are mentioned by Nilkantha in connection with this point. In fact he does not refer in terms to any limitation as to her powers of disposition. It is no doubt a possible argument that Vijnaneshvara did not intend to restrict the widow's powers of disposition over property inherited by her from her husband. But in view of the accepted doctrine that the widow's powers of disposition are restricted as regards the property, particularly immoveable property inherited from the husband in cases governed by the Mitakshara, I do not think that Vijnaneshvara's silence on this point can be properly used as an argument in favour of the unlimited powers of the widow to make a gift of the immoveable property of her husband for a religious or spiritual purpose.

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Mr. Ratanlal has conceded that the Mitakshara does not help him on this point.

It does not seem to me that on this point there can be any real difference between the view accepted by the other High Courts and the view which this Court should take with regard to the widow's powers under the Vyavahara Mayukha. The rule on this point is not a special rule of any particular school of Hindu law, but is one of general application, and must be accepted as applicable to cases under the Vyavahara Mayukha.

The result is that while the widow has wider powers of disposition over property inherited from her husband in making gifts for religious purposes, which are calculated to benefit her husband spiritually, those powers must be exercised within proper and reasonable limits in dealing with the immoveable property of her husband. It is not necessary nor is it possible to define precisely the limits within which the widow may exercise her powers of disposition for a proper religious purpose over her husband's immoveable property. The propriety of the gift must be considered with reference to the facts and circumstances of each case. Having regard to the bulk of the property dealt with by Bai Jekore by way of gift in relation to the entire estate left by her husband, it is clear that the gift in favour of the defendant No. 1 is unquestionably in excess of the powers, which may be allowed to the widow in making gifts for religious purposes.

I desire to note that the view, which was put forward in one of the cases reported in Borradaile's Sudder Adawlat Reports, Vol. I, that a gift by way of *Krishnarpana* cannot be annulled, has not been urged in this case; and it is clear that if the gift is otherwise invalid, it cannot be saved on the ground that the *Krishnarpana* cannot be annulled.

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I am, therefore, of opinion that the gift in this case is beyond the powers of the widow and consequently invalid, and that it cannot bind the reversioner.

I agree that under the circumstances defendant No. 1 is fairly entitled to Rs. 1,500 as compensation for improvements effected by him.

The appeal should, therefore, be allowed, and the decree of the lower Court should be modified as proposed by the learned Acting Chief Justice.

Decree modified.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Batchelor.

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November 7.

RAKHMABAI KOM PIRAJI SAPKAL, HEIR OF THE DECEASED PIRAJI BIN KRISHNA SAPKAL (ORIGINAL DEFENDANT), APPELLANT *v.* MAHADEO NARAYAN BUNDRE (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Order XXIII, Rule 1—Suit for ejectment—Insufficiency of notice to quit—Withdrawal of the suit without permission of the Court—Fresh suit after proper notice—Whether the previous suit a suit for the same subject matter—Res Judicata—*Subject matter, meaning of.*

A suit was brought by the plaintiff to eject the defendant. Finding however that there was no sufficient notice to quit, he withdrew the suit without obtaining the leave of the Court. Subsequently the plaintiff having given a formal notice to quit brought a fresh suit for ejectment. The defendant contended that the withdrawal of the former suit without permission operated as a bar to the second suit under Order XXIII, Rule (1) of the Civil Procedure Code, 1908.

Held, that the withdrawal did not operate as a bar as the previous suit was not a suit for the same subject matter as the second suit within the meaning of Order XXIII, Rule 1 of the Civil Procedure Code, 1908.

* Appeal from Order No. 1 of 1917.