APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

AHMED ASMAL MUSE (ORIGINAL PLAINTIFF), APPELLANT *v.* BAI BIBI, WIDOW OF ADAM AMANJI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS *.

1919. *December* 18.

Waste—Gift by a life-tenant—Bhag property—Interest taken by widow of Mahomedan Bhagdar—Gift by Mahomedan widow for spiritual benefit of her husband—Intention of widow to make gift of her husband's property—Danger to reversion—Receiver, appointment of.

The gift of a portion of the property of which the donor is a life-tenant constitutes waste, unless some necessity can be set up by the person making the alienation.

A Mahomedan widow, who according to custom is only a life-tenant of the Bhagdari property which belonged to her husband, cannot make gifts of the estate as if she were in the position of a Hindu widow who is entitled to make alienations to secure spiritual benefit to her husband.

The fact that a life-tenant is anxious to get the lands transferred to the name of another person does not by itself constitute waste, but it might constitute a danger to the interests of the reversioner which a Court might take into consideration on the question whether his interests should be protected by appointing a Receiver.

SECOND appeal from the decision of M. S. Advani, District Judge of Broach, reversing the decree passed by N. V. Desai, Subordinate Judge at Broach.

Suit for a declaration.

The property in dispute originally belonged to one Adam Amanji, a Mahomedan Bhagdar, who made before his death a will whereby he disposed of his property, inclusive of Bhag property, in favour of his wife (defendant No. 1) and daughter (defendant No. 2).

According to custom, by which Adam Amanji was governed, on the death of a Bhagdar without male

* Second Appeal No. 604 of 1918.

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issue, his Bhagdari property first devolved upon his widow for life, and on her death, upon the nearest male agnate of the deceased Bhagdar.

The widow of Adam Amanji first of all gave two of the fields out of the Bhagdari property by way of gift to a Masjid for securing spiritual benefit to her deceased husband. She also made preparation to transfer the rest of the property to her daughter, defendant No. 2.

The plaintiff, who was the nearest male agnate of Adam Amanji, sued for a declaration that defendants Nos. 1 and 2 acquired no rights under the will of Adam Amanji; and prayed for the appointment of a Receiver. He alleged that defendant No. 1 was guilty of waste inasmuch as she had conveyed in gift two of the Bhagdari fields to a Masjid; and that she was making preparations to convey the rest of the property to her daughter, defendant No. 2.

The Subordinate Judge was of opinion that neither of the acts alleged constituted waste and disallowed appointment of a Receiver. He held that the will was valid only to the extent of one-third of the property; but that the Bhagdari property was not affected by the will. The plaintiff was, therefore, given a declaration that he was entitled to succeed to the Bhagdari property on the death of the widow.

This decree was, on appeal, reversed by the District Judge who dismissed the suit on the grounds that as the plaintiff was a residuary and not an inheriting relation of the deceased his want of consent did not invalidate the will; that the inheriting relations whose consent would be required were defendants Nos. 1 and 2; and that the will was valid.

There was a further appeal to the High Court. The appeal was heard by Scott C.J. and Heaton J., and

their Lordships held that the will was invalid according to Mahomedan law and that the plaintiff was, under Bhagdari custom, the presumptive heir of Adam Amanji. The decree passed by the District Judge was reversed, the case was ordered to be reheard on other issues arising in the case. The judgment of the High Court is reported at 41 Bom. 377.

On remand, the District Judge held that the widow had given by way of gift two fields belonging to her husband to a Masjid, but it did not constitute waste; that though the widow did, at the time of survey, represent other lands of her husband to be of the ownership of defendant No. 2, there was no evidence to show that she had transferred the lands to defendant No. 2. The learned Judge further held that as no waste was established the suit should be dismissed.

The plaintiff again appealed to the High Court.

G. S. Rao, for the appellant.

G. N. Thakor, for the respondents.

MACLEOD, C. J.:—This suit was originally brought at the beginning of 1913 by the plaintiff. He sued to have a declaration that he was the nearest agnate of the deceased Adam Amanji and that the defendants Nos. 1 and 2 acquired no rights by his will, and that therefore, he, the plaintiff, was entitled to the property in suit after the death of defendant No. 1. Admittedly the property in suit is Bhagdari property and comes within the provisions of the Bhagdari Act.

The trial Court on the 15th October 1914 passed the following order: "Declared that the plaintiff is the nearest agnate of the deceased Adam and is entitled to succeed to his Bhag property in suit after the death of defendant No. 1. Declared that the will of the deceased Adam is inoperative in so far as the Bhag

property in suit is concerned, and defendant No. 2 does not acquire any right to the said property under the said will against the plaintiff. Plaintiff's prayer for the appointment of a Receiver is rejected."

An appeal was filed against that order and the suit was dismissed with costs throughout on the plaintiff by the learned District Judge. On the question whether or not the will of Adam was invalid under Mahomedan law, the learned Judge held that the will was not invalid, and further that the plaintiff was not entitled to impugn it. He therefore did not deal with the question whether the plaintiff was entitled to a Receiver.

An appeal was filed in the High Court, and that decree of the learned appellate Judge was set aside, and the case was remanded for disposal upon the other questions discussed in the trial Court. The learned Judges said: "if there has been waste or there is danger to the estate established, a possible reversionary heir may come in and ask for relief. There are cases of waste alleged and there is a danger of transfer to the second defendant suggested". The case therefore went back to the District Judge, and he was of opinion that as no waste had been established and as no transfer of any lands to defendant No. 2 was proved, there was no necessity to appoint a Receiver. In spite of the findings of the High Court he dismissed the plaintiff's suit with costs throughout. That in any case was a decree which cannot for a moment be supported. Clearly the plaintiff was entitled to have the order of the trial Court restored with regard to the first two declarations, that he was the nearest agnate of the deceased Adam, and that the will of the deceased Adam was inoperative. Now it is admitted on the question of waste that the 1st defendant had given away two Survey numbers on a demand by the Panch.

after the death of her husband, and the 1st defendant alleged that her husband agreed orally to give this property to the Masjid. There was no provision in the will about giving any land to the Masjid, and so we have this to consider, that the widow made a gift of these two lands to the Masjid when she was only entitled to a life interest in the Bhagdari property. It is quite true that nothing was said about the provisions of section 3 of the Bhagdari Act, and the question whether this alienation is valid or invalid under section 3 would depend upon whether these two Survey numbers constitute a recognised sub-division of a Bhag. It seems to me pretty obvious that they cannot possibly do so.

But apart from that we have to consider whether the gift of a portion of the property of which the donor is a life tenant constitutes waste. On general principles it certainly must be considered waste unless some necessity can be set up by the person making the alienation. That is not suggested in this case. But the authority of *Khub Lal Singh* v. *Ajodhya Misser* [1] has been dragged in on the false analogy that a Mahomedan widow who according to custom is only a life tenant of the Bhagdari property which belonged to her husband, can on that account make gifts of the estate as if she were in the position of a Hindu widow who is entitled to make alienations to secure spiritual benefit to her husband. That is an absolutely false argument, and it shows the necessity of exercising great care when one is considering the succession to the estate of a Mahomedan when it appears to be governed by a particular law as regards the property concerned. It is only because there is a particular custom with regard to the succession of Bhagdari property that the 1st defendant has a life interest with remainder to the

[1] (1915) 43 Cal. 574.

reversioner instead of having a widow's share in her husband's property. But by no process of reasoning can you come to the conclusion that on that account she is for all intents and purposes exactly in the position of a Hindu widow.

There is also evidence that the first defendant was anxious to get the lands transferred to the name of the 2nd defendant. That by itself might not constitute waste, but it might constitute a danger to the interests of the reversioner which a Court might take into consideration on the question whether his interests should be protected. Considering the attitude of the defendants, and the fact that they are probably collecting the rents of the property through some agency, there is no reason why the Court should not protect the interests of the plaintiff by appointing a Receiver. The decree of the lower appellate Court will be set aside. There will be the two declarations as ordered by the trial Court on the 15th October 1914, and the case will be remanded to the trial Court for the appointment of a Receiver. The costs up to the remand order of the High Court were due to the fact that the testator had made a will, and whether it was valid or invalid in the circumstances of the case was a question which required to be decided by the Courts. Therefore following the ordinary rule costs must come out of the estate up to the date of the remand order. But the costs after the remand order dealt purely with the question of waste and must be paid by the defendants.

Decree set aside.

R. R.