
(1925) 02 PAT CK 0015
In the Patna High Court

Hitendra Singh and Others

APPELLANT

Vs

Maharajadhiraj Sir Rameswar Singh Bahadur and Others

RESPONDENT

Date of Decision : 16-02-1925

Acts Referred:

Evidence Act, 1872 — Section 40

Citation : AIR 1925 Patna 625

Hon'ble Judges : Dawson Miller, C.J; Foster, J; Das, J

Bench : Full Bench

Judgement

Das, J.—This is an appeal against a decision of the learned District Judge of Darbhanga. The appellants are the junior members of the Darbhanga Raj family and they sued the respondent, the Maharajadhiraj of Darbhanga in substance for recovery of possession of a property described in these proceedings as 7-annas 8-ganda 3-kattah share of taluka Laheri. The property in dispute belonged to Durga Dutt Singh, the father of plaintiffs 1--4. On the 17th April, 1876, Durga Dutt Singh executed a document described as a heba-bil-ewaz in favour of his wife Mt. Anuragin Bahuasin (who will henceforth be referred to as the bahuasin) by which he transferred the disputed property to her after receiving from her the sum of Rs. 41,532-6-8. Various questions have been raised in this suit and in the arguments before us; but the main question turns upon the construction of the heba-bil-ewaz, dated the 17th April, 1876. On the 15th December, 1890, Babu Durga Dutt Singh and his wife the bahuasin mortgaged the disputed property to the then Maharaja of Darbhanga to secure the repayment of a certain sum of money which was then due by Babu Durga Dutt Singh to the Maharaja of Darbhanga. On the 5th April, 1897. the Maharaja of Darbhanga sued upon his mortgage and on the 3rd June, 1897, he obtained an ex parte decree against Babu Durga Dutt Singh and his wife. The Maharaja of Darbhanga then took out execution and on the 21st May, 1902, the present Maharaja of Darbhanga, the defendant in this action and the respondent before us, purchased the disputed property at the Court sale held in pursuance of the decree of the 3rd June, 1897, for three lakhs of rupees. On the 10th June, 1902, the judgment debtors applied

for setting aside the sale u/s 311 and section 244 of the Code of Civil Procedure, 1882. The bahuasin died on the 1st February, before the disposal of the application of the 10th June, 1902; and on the 29th March, 1904, the present plaintiffs were substituted in the record of the proceedings as the heirs of their mother the bahuasin on the application of Babu Durga Dutt Singh. On the 2nd January, 1904, the application was refused and the sale was confirmed. There was an appeal to the Calcutta High Court which was dismissed.

2. The plaintiffs claim to have entered upon possession of the disputed property on the death of their mother the bahuasin; and on the 23rd February, 1906, they instituted a suit, being suit No. 19 of 1906, for confirmation of their possession. They made an application in that suit for an injunction restraining the Maharaja of Darbhanga from taking possession of the disputed property until the determination of the suit. On the 30th June, 1906, the Court refused to grant an injunction. On the 16th March, 1907, the suit was withdrawn with liberty to bring a fresh suit. Delivery of possession to the Maharaja of Darbhanga followed on the 14th December, 1906. The present suit was instituted on the 24th July, 1918, and it was dismissed on the 23rd July, 1920, by the learned District Judge of Darbhanga on two grounds: first, on the ground that it was barred by limitation and, secondly, on the ground that the plaint disclosed no cause of action. In view of the decision to which the learned District Judge arrived, he did not think it necessary to try the other issues which were raised in the case. The plaintiffs appealed to this Court and on the 13th June, 1923, this Court, without expressing any opinion as to the correctness of the decision of the learned District Judge, remanded the case to him with instructions to him to try all the issues in the case. This Court drew the attention of the learned District Judge to what the Judicial Committee of the Privy Council has repeatedly pointed out, namely, that the subordinate Courts should try all the issues so as to make it unnecessary either for this Court or for the Judicial Committee of the Privy Council to remand the case afterwards should it become necessary to do so. The case then went back to the learned District Judge who took evidence and recorded his findings on the different issues raised between the parties. Although on the main question of fact his decision is in favour of the plaintiffs, he has decided the questions of law in favour of the defendants and has dismissed the plaintiffs' suit.

3. Before dealing with the arguments which have been advanced before us, it will be convenient to state shortly the case of the plaintiffs and the reply thereto and the questions which fall to be considered in this case.

4. The plaintiffs allege that upon the payment of Rs. 41,532-6-8 by the bahuasin to Durga Dutt Singh and the execution of the heba-bil-ewaz, dated the 17th April, 1876:

there was a complete change and transfer of ownership and possession with regard to the 7-annas 8-gandas 3-kattahs of taluka Laheri,

and that the bahuasin obtained possession of the disputed property from the date of the execution of the heba-bil-ewaz and that she was registered as the owner thereof in the land registration department. In regard to the mortgage of the 15th December, 1890, they say that Rs. 1,88, 962 9-2 was due by Babu Durga Dutt Singh to the then Maharaja of Darbhanga on account of revenue and cesses payable by Babu Durga Dutt Singh in respect of the bahuana properties. They assert that the bahuasin was in no respect liable for those debts and that Babu Durga Dutt Singh

taking advantage of his position of authority and influence over his wife preferred to mortgage the disputed property in the said mortgage bond, and she was induced to become a party thereto upon a misrepresentation that the debts of the husband were binding on the wife and the said Maharaja with the knowledge that the property in suit belonged to the bahuasin and with the further knowledge that it had been wrongly represented to her that the debts of the husband were binding on the wife, accepted the mortgage in his favour.

5. It appears, however, that plaintiff No. 2 actually signed the mortgage bond on behalf of his mother and that plaintiffs 1 and 3 were the attesting witnesses. In order to meet this difficulty the plaintiffs say that:

they were not at all aware of the contents of the bond and as they were fully under the control of their father they had only to act according to his dictation and on the pressure of the men of the Maharaja.

6. The plaintiffs further say that the bahuasin was a pardanashin lady and had no independent advice in the matter of the execution of the mortgage bond and that she did not execute it

knowing and understanding its contents or the importance thereof, or realising the consequences of her act.

7. In regard to the ex parte decree obtained against Durga Dutt and the bahuasin, the plaintiffs allege that summons was not served on the bahuasin according to law and that:

as a matter of fact she was purposely kept from all knowledge of the said suits or of the decrees obtained therein and that in the circumstances of the case she was neither in law nor in equity bound by the proceedings taken in the above suits, the decrees passed therein or by subsequent proceedings in execution of which also she had absolutely no knowledge.

8. In regard to the execution proceedings, they say that they were taken without the knowledge of the bahuasin and that the Maharaja purchased the property

for an inadequate price of 3 lakhs of rupees though its actual price then was not less than 6 lakhs of rupees.

9. They allege that as the heirs of the bahuasin they succeeded to the disputed property and came into possession thereof; but that they were dispossessed on

the 16th December, 1906, and they say that their cause of action arose on the 16th December, 1906,

the date of their wrongful dispossession.

10. It will be noticed that two important questions of fact are pleaded: first that there was a complete defence to the mortgage action and that the decree obtained against the bahuasin was a fraudulent decree which does not affect the rights of the plaintiffs as the heirs of the bahuasin; and, secondly, that the execution proceedings were fraudulent and that the property was purchased by the defendant for the very inadequate price of three lakhs of rupees and that all the proceedings from start to finish ought to be set aside. But it is obvious that these questions were not available to the plaintiffs. The bahuasin applied for setting aside the ex parte decree and failed. That question could not be raised by the bahuasin except on the ground that the decree against her was obtained by fraud. So far as the execution sale is concerned she again applied for setting it aside u/s 311 and section 244 of the Code of Civil Procedure. Pending the disposal of that application the bahuasin died and the plaintiffs were substituted in the record of that application as the heirs of the bahuasin. That application again failed and it is not open to the plaintiffs to reagitate the same question in a regularly constituted suit between the parties. It is quite true that although the bahuasin might have failed first in her application for setting aside the ex parte decree, secondly, in her application for setting aside the sale, she might still have maintained a suit for setting aside all the proceedings as a fraud upon her from start to finish. But to such a suit, Article 95 of the Limitation Act affords a complete reply. It is not open to doubt that the bahuasin did some time or other become aware of the fraud practised on her. Article 95 of the Limitation Act provides: "that a suit to set aside a decree obtained by fraud or for other relief on the ground of fraud must be instituted within three years from the time when the fraud became known to the party wronged."

11. It seems to me therefore that it is not open to us to consider the main questions of fact raised by the plaintiffs in this case; and if there were no other questions which could legitimately be raised by the plaintiffs on the plaint as presented by them there is no option but to dismiss the suit.

12. But a very important question was raised by the plaintiffs in the Court below, the adjudication of which does not depend on any question of fact. It was insisted on behalf of the plaintiffs that both under the Hindu Law as also under the heba-bil-ewaz of the 17th April, 1876, the bahuasin took a heritable but inalienable interest, and that consequently the plaintiffs are not embarrassed by the decree or the execution proceedings against the bahuasin and that it is not necessary for them to ask the Court to set aside the proceedings in connection with the mortgage suit as a condition precedent to this action. The question is a pure question of law, and arises on the Mithila School of Hindu Law by which the parties are governed and on the construction of the heba-bil-ewaz. It was directly raised by the plaintiffs in the Court below and the learned District Judge

has given his decision on the point. The plaintiffs assert that they are entitled to raise this point on their allegations in the plaint that there was a conveyance of the property by Durga Dutt Singh in favour of the bahuasin and that upon the death of the bahuasin they became entitled to succeed to the property as her heirs. It is quite true that they do not allege in the plaint that, in the hands of the bahuasin the property was alienable, but they contend that, if they can satisfy the Court on Hindu law and on the construction of the heba-bil-ewaz of the 17th April, 1876, that in her hands the property was inalienable, the Courts cannot refuse to consider the point merely because they have not put their case in that form in the plaint. In my opinion, it would be wrong on our part not to allow a question of law to be argued before us which fairly arises on the allegations made in the plaint, though it is not stated in that form in the plaint.

13. It is not necessary for me in the view which I take to refer to those allegations in the written statement which expressly deny that there was any undue influence exerted over the bahuasin either by Babu Durga Dutt or by the Maharaja of Darbhanga or to those which deny that there was any fraud either in connection with the ex parte decree obtained in the mortgage suit or in the course of the execution proceedings which followed the decree. The main question of fact raised by the defendant in this case is that the heba-bil-ewaz dated the 17th April, 1876, was a farzi document not intended to be acted upon. The defendant asserts that the heba-bil-ewaz was "merely a nominal and colourable transaction without consideration" and that Babu Durga Dutt Singh "was very much indebted and he took the opportunity of and taking advantage of the payment by him out of the joint family funds of the decretal dues of Rai Banwari Lal Sahu he (the said Babu Durga Dutt Singh) brought into existence the heba-bil-ewaz in favour of his wife, the said Mussammat Anuragin Bahuasin as a subterfuge and means for protection of the property from his creditors, that the said heba-bil-ewaz does not evidence a real or bona fide transaction, that no consideration passed thereunder and neither the said bahuasin paid the money recited therein nor had she means for her own to make such payment," and he alleges that the property was throughout in the possession of Durga Dutt Singh. The reference in the written statement to Rai Banwari Lal Sahu should be explained. The heba-bil-ewaz shows that there was a sum of Rs. 41,532-6-8 due by Babu Durga Dutt Singh to Banwari Lal Sahu on a decree obtained by Banwari Lal Sahu against him that the disputed property and another property were advertised for sale to recover the sum of Rs. 41,532-6-8, and that Babu Durga Dutt Singh failed to procure the money in order to pay off Banwari Lal Sahu and that the bahuasin gave him the money to enable him to save the property. The suggestion of the defendant is that, taking advantage of the proceedings in connection with the suit of Banwari Lal Sahu against him, Babu Durga Dutt Singh put this property in the name of his wife so as to defeat his creditors. This is the main question of fact raised by the defendant; and on this issue the decision of the learned District Judge is in favour of the plaintiffs. The other question raised by the defendant is that the suit is not maintainable and that it is

barred by limitation. It is obvious that if these questions be decided in favour of the defendant, the plaintiffs' suit must fail, and it will be necessary for us to discuss these questions before proceeding to deal with the more serious questions raised before us.

14. I will first deal with the question of the maintainability of the suit and whether the plaintiffs' suit is barred by limitation. Now, I quite agree that it is not open to the plaintiffs to maintain the suit on any of the grounds which were available to the bahuasin. I have dealt with the point, and I do not desire to repeat myself. But the plaintiffs contend that the property was inalienable in the hands of the bahuasin and that, as her heirs, they are entitled to recover possession of the property from anyone into whose hand the property may have passed by an act of the bahuasin. Three questions fall to be considered: first, whether there are sufficient allegations in the plaint to entitle the plaintiffs to raise such a case; secondly, whether it is open to them to ask the Court to consider such a case; and thirdly, whether the consideration of such a case is not barred by lapse of time.

15. I am of opinion that all the material facts are stated which entitle the plaintiffs to contend that the property was inalienable in the hands of the bahuasin. They allege that Durga Dutt executed a deed of gift in favour of his wife and put her in possession of the property. They also allege that upon the death of the bahuasin, they succeeded to the property as her heirs. On these facts--"the material facts" in the words of the Code--they contend that they are entitled ask the Court to hold that the property was inalienable in the hands of the bahuasin. Now, whether the property was or was not inalienable is not a question of fact; it is an inference of law, and it is not necessary to set out an inference of law in the pleading. There is no question of surprise in this case; for the point was stated to us before we remanded the case for trial of all the issues raised in the case. The question was argued at great length before the District Judge; and, in my opinion, it would be wrong on our part to refuse to hear the plaintiffs on this point on a needlessly technical view of the plaint.

16. The second question must also be answered in favour of the plaintiffs. If the property was in fact inalienable, then the plaintiffs must have the right to claim the property if it had been alienated, unless the bahuasin could herself set up the inalienability of the property as a defence to the mortgage action. But it is well established that "the grantor cannot dispute with his grantee his right to alienate the land to him." That being so, the bahuasin could not claim adversely to her own deed and her failure to set up the inalienability of the property in the mortgage action cannot operate as constructive res judicata in this case. It was contended that the mortgage decree binds the heirs and that the property having passed away in execution sale, the present suit is not maintainable. I am unable to assent to this proposition. It is true that the plaintiffs are heirs; but the property being inalienable, they are wholly unaffected by the mortgage decree. To hold otherwise is to say that property which is inalienable may be come

alienable by the act of alienation. In my opinion, the plaintiffs are entitled to maintain this suit and to show that the property was inalienable in the hands of their mother.

17. On the question of limitation, it is material to remember that, on the plaintiffs' case, they entered upon possession of the property on the death of their mother and that they were dispossessed on the 16th December, 1906. It is the common case that on the death of the bahuasin, the plaintiffs were substituted in the record of the proceeding u/s 311 of the Code which was then pending in the place of the bahuasin. It is admitted by the defendant that he obtained delivery of possession on the 16th December, 1906. That being so, the suit is governed by Article 142 of the Limitation Act and is within time.

18. But it was contended that the plaintiffs cannot sue for possession until they had cleared the way for such a suit by securing the annulment of the mortgage decree and the sale thereunder; and that, in that view, the suit is barred by the provision of Article 95 of the Limitation Act. Now I quite agree that where a person is prima facie bound by a decree, he cannot, by suing ostensibly for possession, ignore the decree and evade the operation of law; and where such a decree is an impediment to the plaintiffs' way in obtaining relief inconsistent with it, he must bring his suit within the period prescribed by law for setting aside a decree. But the argument assumes that the plaintiffs are bound by the decree obtained against the bahuasin. If I may say so with respect, the confusion in the argument is due to the fact that the plaintiffs' claim as the heirs of the bahuasin. Ordinarily a decree obtained against a person binds the heirs; and if the decree was obtained by fraud, the heirs must sue within the period prescribed by Article 95 of the Limitation Act. But the argument overlooks two important points: first, that plaintiff's are not bound by the alienation, and therefore by the mortgage decree; and secondly, it was not open to the bahuasin at any time to claim adversely to her own deed. The bahuasin could not claim to have the decree set aside on the ground that she was not competent to mortgage the property. That being so, the plaintiffs could not bring a suit to have the decree set aside on that ground. But although they were not entitled to bring a suit to have the decree set aside, they were entitled to bring a suit for possession, if, being in possession, they were dispossessed from it; but to such a suit Article 142 clearly applies. The whole question is: Are the plaintiffs entitled to recover possession without having the mortgage decree and the sale thereunder set aside? In my opinion, since they were not bound by the decree and the sale thereunder, they could treat those proceedings as a nullity without the intervention of any Court, and they showed their elsection to do so by commencing an action to recover possession of the property. In my opinion, the suit is governed by Article 142 of the Limitation Act and is consequently within time.

19. I now come to the question of benami. Now, in dealing with this question, it is to be remembered that the case is not one that Babu Durga Dutt Singh

purchased the property in the name of his wife. The property stood in his name and undoubtedly belonged to him, and he conveyed it to his wife by a document which is described as a heba-bil-ewaz. Cases are to be found in the books which lay down that where a person purchases a property in the name of his relative, the important point to be considered is, who paid the purchase money. But here the purchase money was undoubtedly paid by Babu Durga Dutt Singh and he transferred it to his wife on the 17th April, 1876. The case of the defendant is that the transfer was wholly fictitious; but before deciding this question in favour of the defendant we must ask ourselves the question. What was the motive for this fictitious transfer? The case of the defendant on this point is contained in the 14th paragraph of his written statement which runs as follows:

20. That the alleged deed of gift to Mt. Anuragin Bahuasin was merely a nominal and colourable transaction without consideration, that Babu Durga Dutt Singh was very much indebted and he took the opportunity of and taking advantage of the payment by him out of the joint family funds of the decretal dues of Rai Banwari Lal Sahu he (the said Babu Durga Dutt Singh) brought into existence the hiba-bil-ewaz in favour of his wife, the said Mt. Anuragin Bahuasin, as a subterfuge and means for protsection of the property from his creditors, that the said heba-bil-ewaz does not evidence a real or bona fide transaction, that no consideration passed thereunder and neither the said bahuasin paid the money recited therein nor had she means of her own to make such payment, and this defendant submits that upon execution of the said deed or at any time thereafter the possession of the share in question of taluka Laheri aforesaid did not pass to the alleged donee but on the other hand the said share of the property remained as before in the possession of the said Babu Durga Dutt Singh until possession thereof was delivered to this defendant under the process of the Court after this defendant's purchase thereof and after disallowance by the Courts of the plaintiffs" and their father's objection to the sale as set forth above. This defendant further submits that the said deed is otherwise invalid and inoperative and that there was no transfer of any beneficial interest thereunder.

21. The suggestion of the defendant accordingly is that the object of Durga Dutt in entering into the transaction of the 17th April, 1876, was to defeat his creditors. In view of the case made, it is important for us to consider whether at the date of the execution of the heba-bil-ewaz Babu Durga Dutt Singh was in such embarrassed condition as would induce him to enter into a fictitious transaction for the protsection of his property.

22. In dealing with this question it must be remembered that Babu Durga Dutt was in possession of babuana properties which even now yield an income of a lakh and a half of rupees. In 1873 Durga Dutt and his brother Girdari sold certain valuable properties belonging to them for six Jakhs of rupees by which they paid off all their debts then existing. At the date of the heba-bil-ewaz Durga Dutt owed Rs. 41,532-6-8 to Rai Banwari Lal Sahu Bahadur on a decree which had been obtained by the latter against the former. The heba-bil-ewaz shows that he

raised this sum from his wife and satisfied the decree of Rai Banwari Lal Sahu. The positive evidence in the case is that at the date of the transaction in question there were no other debts due by Babu Durga Dutt Singh. The case put to Amarendra Singh one of the plaintiffs, by the defendant, was that Durga Dutt was indebted to various persons including Ram Narain Thakur, Mussammat Fulbati Kumari, Tulsi Sahu, Mr. Henry Gyll, Jhumak Furbey Subans Sahu and Jailal Sahu. But no attempt has been made by the defendant to establish the case put to Amarendra Singh. In my opinion the evidence establishes that by the transaction of the 17th April, 1876, Durga Dutt satisfied his debt and that at the date of the transaction there were no other debts due by him. That being so, the positive case made by the defendant on this point fails. The defendant sought to supplement the weakness of his evidence on this point by attempting to prove an admission on the part of Babu Durga Dutt Singh. The evidence adduced on behalf of the defendant on this point is to the effect that when it was proposed that Babu Durga Dutt should in some way secure the debt which was due by him to the Maharaja of Darbhanga in 1890, and Durga Dutt offered to execute a mortgage in respect of taluka Laheri, a question arose whether the heba-bil-ewaz, which had been executed by him in favour of his wife was a genuine transaction or a fictitious transaction and that Babu Durga Dutt admitted to the Maharaja of Dharbhanga in the presence of various persons that he had entered into that transaction to save his properties as he was heavily indebted at that time. The evidence is furnished by Bhikhai Lal Missir, and Lalji Singh, both called on behalf of the defendant). In his evidence in examination-in-chief Bhikhai narrated the incident which took place in the Maharaja's durbar in 1890. His account is as follows:

23. Durga Dutt came to the Maharaja, and offered to execute a document to secure the debt which was due by him to the Maharaja. Upon that the Maharaja asked him: What kind of document he would execute? Durga Dutt said that he would execute a mortgage document. The Maharaja thereupon asked him what properties he would mortgage. Durga Dutt answered that he would mortgage Laheri. Thereupon Balbhadar Missir, who was a mushahib in the durbar, pointed out that that property stood in the name of the bahuasin. Durga Dutt thereupon said, "The property is really mine but I have kept it in her name and that if asked we both would execute the document".

24. In cross-examination the witness stated that Durga Dutt admitted that there were debts due by him and so he entered into a fictitious transaction in regard to the property. This is in substance the evidence of Lalji Singh. The learned District Judge has not accepted this evidence, and I entirely agree with his judgment on this point. It is improbable that, if Durga Dutt had entered into a fictitious transaction in order to save this property from his creditors, he should have made a solemn admission before the full durbar; and it is unlikely that these witnesses should remember the details of a conversation which took place thirty-three years ago. The story is inherently improbable since there is no evidence to establish that at the date of the heba-bil-ewaz Durga Dutt had any debts to pay

other than that which was satisfied by the execution of the heba-bil-ewaz.

25. The suggestion of Mr. Hasan Imam, for the respondent, is that although Durga Dutt was not indebted to any one at the date of the heba-bil ewaz, he knew that, being a man of extravagant habits, he would sooner or later be involved in debts and that the heba-bil-ewaz was executed not with a view to defeat any existing creditors, but with a view to save the property from future creditors. It is quite true that the affairs of Babu Durga Dutt became involved later on in his life, but it is impossible to indulge in a speculation of the kind suggested by Mr. Hassan Imam especially as the positive case made by the defendant has failed.

26. It is well established that an apparent transaction must be assumed to be real until the contrary is shown. The onus is accordingly on the defendant to show that the transaction of 1876 was a fictitious transaction. I have already shown that the definite case made by the defendant as to the motive which induced Durga Dutt to put the property in the name of his wife has failed. The only other questions are: first, whether the bahuasin in fact paid Rs. 41,532-6-8 to Durga Dutt as alleged in the heba-bil-ewaz; secondly, whether Durga Dutt continued to be in possession of the property although he had executed a document in favour of his wife; and, thirdly, whether the surrounding circumstances throw any light on the question. It is not possible to get any direct evidence at this distance of time as to a transaction which took place in 1876. It is true that there is some evidence on each side bearing directly on the character of the transaction; but this evidence has not been believed by the learned District Judge. It is therefore useless for me to go through that oral evidence as I see no reason for differing from the conclusion of the learned Judge on this point. In regard to the first question, namely, whether consideration was paid by the bahuasin, the view of the learned District Judge is on the whole in favour of the defendant. But in arriving at this conclusion the learned District Judge assumed that the onus was entirely on the plaintiffs. The learned District Judge was impressed by the fact that undoubtedly Banwari Lal Sahu had obtained a decree for Rs. 41,532 against Babu Durga Dutt and had attached taluka Laheri in the execution proceedings in connection with that decree and that undoubtedly the decree was satisfied and the property released from attachment. The inquiry being thus limited, the learned District Judge rightly thought that the only question for determination was whether payment was made out of the husband's or the lady's money. He considered the evidence of the three witnesses examined on behalf of the plaintiffs on the question of the payment of the consideration by the lady. He conceded that the witnesses on this point were all competent witnesses, but he thought that their evidence was not wholly acceptable. Conceding that the money may have come from the lady he held that "there was no sufficient evidence to show if it was her own money or her husband's" and the conclusion at which he arrived may be stated in his own words: "that being the case I am of opinion that it has not been proved that the money was her own money. Therefore I find that plaintiffs have failed to prove

that the lady had paid the money out of her private funds."

27. The conclusion of the learned District Judge is somewhat halting. It is not quite clear whether he rejected the case of the plaintiffs that the money was actually paid by the bahuasin (whether it belonged to herself or to her husband) or whether he rejected the case of the plaintiffs that the money which was in fact paid by the bahuasin belonged to her and not to her husband. If I had to come to a conclusion on this point, on the actual evidence of the three witnesses to which the learned District Judge refers, I would unhesitatingly agree with the conclusion at which the District Judge has arrived. They are speaking of an incident which took place in 1876 and, in my opinion, it is impossible for this Court to rely on that evidence.

28. But as I have said before, the onus is on the defendant and not on the plaintiffs and, in my opinion, the defendant has not shown that the money was not in fact paid by the bahuasin in regard to the transaction of 1876. It is quite true that the account books which would show the payment of the money by the bahuasin to Durga Dutt have not been produced by the plaintiffs; and I am not prepared to assent to the argument that the onus being on the defendant it was not necessary for the plaintiffs to produce the best evidence on the point. But there is one circumstance in connection with this point which should not be ignored by us; and it is this, that it is somewhat difficult for the plaintiffs to produce the account books of 1876. The account books actually produced in the case are in such decayed condition that I cannot altogether reject the plaintiffs' story that the account books other than those produced cannot be traced.

29. There being no reliable direct evidence on this point, we are bound to consider the surrounding circumstances. These surrounding circumstances are, first, that taluka Laheri was attached in execution of a decree obtained by Banwari Lal Sahu against Durga Dutt, and, secondly, that the property was released from attachment after payment by Durga Dutt of the decretal amount due to Banwari Lal Sahu. The heba-bil-ewaz recites that Babu Durga Dutt tried to procure the money from the market but failed, and that as a last resort he took the money from his wife. I can find no sufficient reason for holding that the recitals in the heba-bil-ewaz are deliberately false. A lady of the rank and position of the bahuasin might well have Rs. 41,000 in her hand, though it may be that, in point of law, the money belonged, not to herself but to her husband; and it is not improbable that she should make over the money to her husband to save her husband's property from sale. The conclusion at which I arrive on this point is that it has not been shown by the defendant that the money was not actually paid by the bahuasin to her husband, and that there is no reason why we should not rely upon the recitals in the document.

30. On the question of actual possession, the evidence adduced on behalf of the plaintiffs is, in my opinion, conclusive. The bahuasin was recorded in the Land Registration Department as the owner of the property and the public demands were admittedly paid in her name. Mr. Hasan Imam contends that if the original

transaction was fictitious all public transactions must of necessity be in the name of the fictitious owner. I entirely agree with this argument; but it is for the defendant to show that the original transaction was fictitious. It is not disputed by Mr. Hasan Imam that since September, 1882, all the accounts stand in the name of the bahuasin; but he contends that there is no evidence to show that the income of the property was appropriated by the bahuasin between 1876 and 1882. In 1881 the bahuasin instituted an account suit against her agent Turant Lal and in that suit Turant Lal raised the defence that the bahuasin was a farzidar on behalf of her husband. The defence succeeded, and it is Mr. Hasan Imam's case that since 1882 false account books were prepared by Durga Dutt in order to make it appear that the bahuasin was the owner of the property.

[His Lordship on discussion of evidence held that jamabandis and deori account books supported the case of plaintiff and rejecting the evidence of Mr. Onraet held that the evidence of Mr. King did not touch the point.]

31. It is necessary now to notice some of the arguments which have been advanced by Mr. Hasan Imam on behalf of the defendant. Mr. Hasan Imam strongly relies upon the decision in Suit No. 6 of 1881 which was a suit by the bahuasin against Tarant Lal for account in regard to his management of taluha Laheri. Turant Lal admittedly accepted the appointment from the bahuasin; and when the suit for account was brought against him he raised the plea that the bahuasin was a benamidar for her husband. How this plea was allowed to be raised in view of the admitted fact that he was appointed by the bahuasin as her agent is a matter of considerable surprise to me; but allowed to be raised it was, and the learned Judge who tried that case solemnly examined the evidence to find out whether the plea of Turant Lal was sustainable, and he came to the conclusion that the bahuasin was in fact the benamidar of her husband.

32. In my opinion the judgment in Suit No. 6 of 1881 is inadmissible in evidence as against the plaintiffs. sections 40--43 of the Evidence Act deal with the subject of relevancy of judgments, orders or decrees of Court. Judgments qua judgments or adjudications upon question in issue and proofs of the particular points they decide are only admissible either as *res judicata* u/s 40 or as being in *rem* u/s 41, or as relating to matters of a public nature u/s 42 of the Evidence Act. The judgments, orders and decrees, other than those admissible by sections 40, 41 and 42 may be relevant u/s 43, if their existence is a fact in issue or is relevant under other provisions of the Act. It is obvious that the judgment in question is not relevant either u/s 40 or u/s 41 or u/s 42 of the Evidence Act. The question which we have to decide is whether it is relevant u/s 43. As has been pointed out by the learned authors of Woodroffe and Ameer Ali on the Evidence Act, the cases contemplated by section 43 are, such as the section itself illustrates, namely, where the fact of any particular judgment having been given is a matter to be proved in the case. Under that section a judgment may be admissible as relevant under some other provisions of the Act.

33. The question was debated in the leading case of Gurju Lal v. Fateh Lal (1881)

6 Cal. 171, decided by the full Bench of the Calcutta High Court. That was a suit between A and B in which the question was whether G or D was the heir of H. If C was the heir of H then A was entitled to succeed; otherwise not. The same question had been raised in a former suit brought by X against A and was decided against A; and the question arose whether the former judgment in the suit brought by X and A was admissible in evidence in the suit between A and B. It was held by the Full Bench of the Calcutta High Court (Mitter J., dissenting) that a former judgment which was not a judgment in rem nor one relating to matters of a public nature was not admissible in a subsequent suit either as res judicata or as a proof of the particular point which it decided unless between the same parties or those claiming under them. In the view of the learned authors of Woodroffe and Ameer Ali on the Evidence Act, the decision of the Full Bench of the Calcutta High Court in Gurju Lal v. Fateh Lal (1881) 6 Cal. 171 has not been touched by the decisions of the Judicial Committee, and it is somewhat remarkable that that case has been followed by the Bombay High Court, by the Madras High Court and by the Allahabad High Court.

34. I propose to refer to three cases upon which the plaintiffs relied, and which seem to me to be directly in point. In Kashi Nath Pal v. Jagat Kishore Acharya Chowdhry 20 C.W.N. 648 it was held by Mookherji and Roe, JJ., that although a judgment not inter parties, may be used in evidence in certain circumstances, as a fact in issue or as a relevant fact or possibly as a transaction, the recitals in the judgment cannot be used as evidence in a litigation between the parties. In Devendra Nath Haldar v. Bisheshwar Haldar 20 C.W.N. 648 the plaintiff sued for recovery of his share in the land in suit. The Subordinate Judge in appeal admitted a judgment in a previous suit brought by another person against the defendants, and mainly relying on a certain passage therein, as proving an admission by the defendant, decided in favour of the plaintiff. It was held by Richardson and Mullick, JJ., that the judgment was inadmissible in evidence for the purpose of proving the alleged admission and that the error committed by the Subordinate Judge in using the judgment for a purpose for which it could not be legitimately used vitiated the decree. In Abdul Latif Kazi Vs. Abdul Huq Kazi, , which was a case of benami, it was held by Mookherji and Rankin, JJ., that the fact that a judgment was admitted in evidence in order to prove that there was a litigation which terminated in a certain way, did not make all the recitals in that judgment part of the evidence of the subsequent action. It is not necessary for me to deal with the numerous cases on the point; it is sufficient for me to say that I entirely agree with the view expressed by the learned authors of Woodroffe on Evidence that a judgment or decree is not admissible in evidence u/s 43 of the Evidence Act unless as a fact in issue or as a relevant fact under other sections of the Act. Thus if A has obtained a decree for the possession of land against B. and C. B's son, murders A in consequence, the existence of the judgment is relevant as showing motive for the crime. So again, in a suit for malicious prosecution, the judgment in the criminal proceeding is evidence to establish the fact of acquittal, the fact, namely, that the criminal proceedings

terminated in favour of the plaintiff. Again a reference to the finding of a judgment may explain the character of the party's possession and the nature of the enjoyment had in the property in suit, and so the finding of a judgment may be referred to in all other cases where the record is matter of inducement or merely introductory to other evidence. Other instances may be cited where a judgment is admissible in evidence in a subsequent litigation; but it must be shown that the existence of the judgment is a fact in issue, or that it is relevant under the other sections of the Evidence Act. This has not been shown in this case; and I must hold that the judgment in Turant Lal's case is not relevant in this case.

35. The next circumstance upon which Mr. Hasan Imam relies is the institution of a suit by Tara Dutt and Sashi Sakhar, sons of Amarendra Singh plaintiff No. 2, in which they alleged that the transaction of 1876 was a benami transaction, that the property belonged to the joint family and that, being babuana property, it was inalienable. The evidence of Amarendra in this suit is that he knew nothing about that suit. The evidence is worthless, and I have no doubt whatever that the plaintiffs were well aware of that suit. But then the question arises, What weight should we attach to the incident? I have already stated that the Maharaja of Darbhanga sued upon the mortgage executed by the bahuasin and her husband and obtained an ex parte decree on the 3rd June, 1897. The property was sold on the 21st May, 1902. There was then an application for setting aside the sale under sections 311 and 244 of the Code of Civil Procedure. That application failed and the sale was confirmed. On the 23rd February, 1906, a suit, being Suit No. 19 of 1906, was instituted by the present plaintiffs for confirmation of their possession. In that suit they alleged that the transaction of 1876 was a perfectly genuine one, and they set out various circumstances in support of their case that the sale of the 21st May, 1902, did not affect their interest. They also applied for an injunction restraining the defendant from taking possession of the property until the determination of their suit. That application failed, and the plaintiffs thereupon presented an appeal to the Calcutta High Court against the order of the learned Subordinate Judge, dated the 30th June, 1906, refusing to grant a temporary injunction. On the 15th August, 1906, the High Court dismissed the appeal. Thereupon Tara Dutt and Sashi Sakhar filed a suit on the 4th of September, 1902, in which they claimed that the property belonged to the joint family and that, being babuana property, it was inalienable. They also applied for an injunction restraining the defendant from taking possession of the property until determination of the suit. This application was dismissed on the 10th December, 1906, and the defendant recovered possession of the property on the 14th December, 1906.

36. In my opinion no weight ought to attach to the circumstance connected with Suit No. 410 of 1906. It is obvious that the family was making frantic efforts to save the property. First, the plaintiffs filed a suit on the allegation that the property belonged to their mother and the sale did not affect their interest. They failed in inducing the Court to give them a temporary injunction restraining the

Maharaja of Darbhanga from taking possession of the property. Thereupon they caused Tara Dutt and Sashi Sekhar to institute a suit on different allegations altogether with a view to induce the Court to issue an injunction. I am therefore not prepared to attach any weight to the admission made by the plaintiffs in Suit No. 410 of 1906. It may be mentioned that Suit No. 19 of 1906 and Suit No. 410 of 1906 were both withdrawn soon after the Maharaja of Darbhanga got possession of the property. Mr. Hasan Imam also relies upon the judgment in Suit No. 29 of 1900 between the bahuasin and the present defendant. The Maharaja, in execution of a decree against Durga Dutt, had attached certain properties as being in the possession of Durga Dutt. The bahuasin preferred a claim to those properties alleging that at the date of the attachment those properties were in her possession and not in the possession of her husband. The Court rejected her claim, whereupon a suit was instituted by her for declaration of her title to the properties which were the subject-matter of her claim. Now it is important to remember that the property which is in dispute in this suit was not involved in the litigation of 1900; but a question arose as to the means at the disposal of the bahuasin to enable her to acquire those properties. The bahuasin alleged that at the time of her marriage her father-in-law made a gift to her of five gold mohurs and certain kamat lands in twelve mauzas and a mauza named Sonpatha. She also alleged that she was in possession of mauza Laheri, and the Court had to consider whether mauza Laheri in fact belonged to her. It is obvious that the question as to her title to mauza Laheri arose very incidentally and was not a matter in issue in that case. The learned Judge in dealing with the case said as follows:

The second source of plaintiff's income is said to be the mauza Laheri. This property is said to have been purchased by her in 1284 from her husband. But it appears that for the debts of her husband alone, amounting to one lakh and eighty-eight thousand rupees and odd, this property was mortgaged on the 15th December, 1890, by a deed executed by the plaintiff and her husband in favour of defendant 1's predecessor-in-title. This is quite clear that because the plaintiff became the apparent owner by the execution in her favour of a deed of sale by her husband, the mortgage-deed was taken from her husband as well as from her. Of course, in the body of the deed the plural number is used both in respect of the debt and the ownership of the property; but that is merely a matter of form. The list given in that deed clearly shows that the debts for which the mortgagee-deed was executed were of the husband alone. If the mortgaged property had really been sold to her by her husband, why should she mortgage her property for her husband's debt, or why should she allow her husband to allege himself as co-owner of the property? I make these observations simply with a view to show that the alleged second source of income is also a myth and a non-entity.

37. Any attempt to come to a conclusion on this point on the judgment in Suit No. 29 of 1900 (Exhibit F. 5) would operate as a gross injustice in this case; but it is not open to me to criticise the judgment of the learned Subordinate Judge in

that case. It is sufficient for me to state that for the reasons which I have already given this judgment is not admissible in evidence against the plaintiffs.

38. I think I have dealt with all the arguments bearing on this point; it is not necessary to deal with the numerous cases on the question of benami. These cases are quoted in the judgment of Mookherji, J., in *Promode Kumar v. Madan Mohan Shah* AIR 1923 Cal. 228. I would respectfully appropriate the following passage appearing in that judgment as part of my judgment: It is important to bear in mind in this class of cases that, as pointed out by Lord Phillimore in *Seth Maniklal v. Raja Bijoy Singh* AIR 1921 P.C. 69, the decision of the Court should rest not upon suspicion but upon legal grounds established by legal testimony. This recalls the earlier pronouncements to the same effect by Lord Westbury in *Sreman Chunder v. Gopaul Chunder* (1866) 11 M.I.A. 28 and by Sir Lawrence Jenkins in *Minakumari v. Bijay Singh* AIR 1916 P.C. 238. But we are not unmindful that, in the words of Lord Hobhouse in *Uman Prashad v. Gandharpa Singh* (1888) 15 Cal. 20 and of Lord Shaw in *Muhammad Mahbub v. Bharatindu* AIR 1918 P.C. 137 as benami transactions are very familiar in Indian practice, even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose. The person who impugns its apparent character must not rely, however, slowly on probabilities, as Lord Buckmaster observed in *Irshad Ali v. Kariman* AIR 1917 P.C. 169. He must show something definite to establish that it is a sham transaction, on the principle that the burden of proof lies upon the person who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things [*Azimut Ali v. Hurdwaree* (1868) 13 M.I.A. 395, *Faez Buksh v. Fakeeroodeen* (1869) 14 M.I.A. 234, *Suleimon v. Mehndi Begum* (1898) 25 Cal. 473, *Nirmal v. Mahomed* (1899) 26 Cal. 11 and *Moti Lal v. Kundan Lal* (1912) 32 M.L.J. 468]. The most important test to be applied in these cases is, as observed by Mr. Ameer Ali in *Nrityamoni v. Lakhan Chandra* AIR 1916 P.C. 96, the source whence the consideration came. Sir George Farwell formulated the same test in different language, when he observed in *Bilas Koer v. Desraj* AIR 1915 P.C. 96 that where it is asserted that an assignment in the name of one person is really for the benefit of another person, the principle applies that the trust of the legal estate results to the man who pays the purchase money. To the same effect is the decision of the Judicial Committee in *Parbati v. Baikuntha* 18 C.W.N. 428, which recalls the earlier pronouncement by Lord Campbell in *Dhurum Das v. Shama Soondri* (1841) 3 M.I.A. 229, and by Knight Bruce, L.J., in *Gopeekrist v. Gungapersaud* (1884) 6 M.I.A. 53. Where, however, from the lapse of time direct evidence of a conclusive or reliable character is not forthcoming, as to the payment of consideration, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. Sir Arthur Wilson emphasised this when he observed in *Dalib Singh v. Chaudhrian Nawai Kunwar* (1908) 30 All. 258, that if evidence on neither side is wholly convincing as to the fundamental criterion, namely, the source of the purchase money, if the evidence given and withheld is open to adverse criticism, the Court must rely on the surrounding circumstances, the

position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct, including their dealings with or enjoyment of the disputed property [see *Upendra v. Bhupendra* 21 C.W.N. 280]. We must further look to the substance of the transaction as evidenced in the deeds of the parties, not permitting the real question to be obscured by what Knight Bruce, L.J., calls, in *Hunooman v. Babooee* (1854) 6 M.I.A. 393, the form of expression, the literal sense, nor by what Lord Macnaghten describes in *Lal Achal Ram v. Raja Karim* (1905) 27 All. 271, as exhibitions of the art of the conveyancer in the shape of recitals of obviously untrue statements introduced to impart some additional solemnity to an instrument." Applying these tests to the present case, I have no doubt whatever that the defendant has failed to establish that the transaction of 1876 was a fictitious transaction. The actual oral evidence produced is not convincing, and there is no option but to found our conclusion mainly on the surrounding circumstances. I have no doubt whatever that the bahuasin has been in possession of the property ever since the heba-bil-ewaz of 1876. I can see no motive which would lead Durga Dutt to put the property in the name of his wife; and even if I were to hold that no consideration was in fact paid by the bahuasin, my conclusion on this point would be the same. In *Ismail Mussajee Mookerdam v. Hafiz Boo* (1906) 33 Cal. 773 the defendant relied upon a document which, on the face of it, purported to be a deed of sale in her favour. The plaintiff contended that the transaction was a benami one and that it did not operate to confer any title on the defendant. It was found as a fact that no consideration was in fact paid by the defendant; but notwithstanding this, the Judicial Committee came to the conclusion that the transaction was one of gift. The decision destroys one part of the argument of Mr. Hasan Imam where he contended that if we found on the evidence that no consideration was paid, we must hold that the transaction was a fictitious one, there being no reason for putting a false recital in the document if the document was intended to have operation. I have anxiously considered all the evidence in this case and I entirely agree with the conclusion at which the learned District Judge has arrived on this point. I hold that the transaction of the 17th April, 1876, was a genuine transaction and operated as a transfer of the property to the bahuasin.

39. Before coming to the points which have been decided by the learned District Judge in favour of the respondent it will be convenient to dispose of a short question which was answered by the learned District Judge in favour of the appellants. Mr. Hasan Imam contends that section 244 of the Code of 1882 operates as a bar to this suit. In order to deal with the question it is necessary to remember that the sale took place on the 21st May, 1902, and that the bahuasin and her husband applied for setting aside the sale on the 10th June, 1902. The bahuasin died in February, 1904. Thereupon the present plaintiffs were substituted in the record of the application in the place of the bahuasin on the application of Durga Dutt. The substitution was effected on the 31st May, 1904, and the application was dismissed on the 2nd June, 1904. The contention of Mr. Hasan Imam is that the plaintiffs on being substituted, should have raised the

question whether the sale of the property affected their interests; and Mr. Hasan Imam relied upon various cases which are all (with one exception) cases of money decrees.

40. Now, in my opinion, it is impossible to regard the application of the 10th June, 1902, as an application u/s 244 of the Code. No doubt the applicants described the application as one u/s 311 and section 244 of the Code; but it is not very material how an application is headed if we know what questions are substantially raised by the application. It must be remembered that an order u/s 244 of the Code of 1882 operated as a decree, whereas an order u/s 311 did not operate as a decree. It used to be the constant endeavour of the litigants to bring their applications for setting aside a sale within the terms of section 244 in order to get a second appeal to the High Court. It is for this reason that applications for setting aside a sale used to be invariably made both under sections 311 and 244, just as they are now made under Order XXI, Rule 90 and section 47 of the present Code. It may be conceded that an application for setting aside a sale could be brought within the terms of section 244 if there were sufficient allegations to support such a case. For instance, an application for setting aside a sale on the ground of fraud could be made under the provisions of section 244 of the Code. It is therefore necessary to examine the allegations made by Durga Dutt and the bahuasin in their application, dated the 10th June, 1902, in order to determine whether their application was one u/s 311 or one u/s 311 and section 244 of the Code. The application is Exhibit M-3. Now it will be noticed that the allegations are all allegations necessary to enable a party to succeed in an application u/s 311 of the Code. There is not a single allegation made in the petition which would enable the Court to try the case u/s 244 of the Code. I am of opinion, therefore that the application of the 10th June, 1902, though described as one u/s 311 and section 244 of the Code of 1882, could only be investigated under the provisions of section 311 of the Code, That being so, section 244 cannot operate as a bar to the present suit.

41. But there is a more serious objection to the argument. It will be remembered that the decree was a mortgage decree, and there is abundant authority for the view that where a decree directs the sale of specific property the Court executing the decree has no power to go behind the decree and say, "I will not sell the property because the interest of the judgment debtor has come to an end." The exact point has been decided in cases far too numerous to mention. In *Liladhar v. Chaturbhauj* (1899) 21 All. 277 there was a decree for sale of certain mortgaged properties against Mussammat Jhuno. Mussammat Jhuno died on the 29th October, 1895, and on the 30th June, 1896, an application was made for execution of the decree which was dated the 28th June. The plaintiffs who were entitled on their case to succeed to the property on the death of Mussammat Jhuno were made parties to the execution proceedings as the legal representatives of Mussammat Jhuno. They raised several objections in regard to the application for execution, the first of which was to the effect that the decree was a decree for the sale of the life interest of Mussammat Jhuno and

that the estate having determined on her death the decree was no longer capable of execution. They also contended that Mussammat Jhuno was not competent to effect a mortgage of the property to enure beyond her life time, and that there was no justifying necessity for such a mortgage. The Court executing the decree overruled the objections and directed the sale of the mortgaged properties. Thereupon a suit was instituted by the plaintiffs and they sought a declaration that the decree of the 28th June, 1893, which was obtained by the defendants against Mussammat Jhuno became void and inoperative at her death and that the property mentioned in the plaint which was in the possession of the plaintiffs and which the defendants caused to be advertised for sale was not liable to be sold in the events which had happened. It was contended on behalf of the defendants that section 244 operated as a bar to the suit. The learned Judges deciding the case conceded that if the matter in controversy between the parties in the suit could be decided u/s 244 then there could be no doubt that the suit was not maintainable. But they came to the conclusion that the Court executing the decree could not consider the question of the validity of the decree. In delivering the judgment, the learned Judges said as follows. "A Court executing a decree is bound to give effect to it as it finds it and it is not in the province of that Court to consider whether the decree was or was not rightly passed. The decree in this case was a decree for the sale of the property; the plaintiffs, who were parties to the execution proceedings in the character of legal representatives of Mussammat Jhuno Kunwar, could only raise objections relating to the execution, discharge, or satisfaction of the decree, or to the stay of execution thereof, starting with the assumption that the decree was a valid one. That a judgment-debtor cannot dispute the validity of a decree, is a proposition for which we have abundant authority. We may refer to the recent case of Maluji v. Fakir Chand (1898) 22 Bom. 225. It is clear that a person claiming title through the original judgment-debtor cannot dispute the validity of the decree, and where a decree directs the sale of particular property, a person who does not claim through the mortgagor cannot in execution contend that the mortgagor was not competent to make the mortgage and that the decree was one which ought not to have been passed. Such questions would, in our opinion, be outside the province of the Court executing the decree; for instance, in the present case, if we assume that the present plaintiffs could properly raise the objection upon which they mainly rely, the Court executing the decree would have to determine, after taking evidence, whether the mortgage was effected by Jhuno Kunwar, that is, whether the mortgage bond was executed by her, whether there was consideration for the mortgage, and whether there was valid necessity for it. Such an inquiry is certainly not contemplated by section 244 of the CPC "With reference to the cases which were cited before the learned Judges relating to decrees for money where there was no direction in the decree for sale of specific property, the learned Judges said as follows: "The case of a decree for money in which after the death of the debtor, property is attached as the assets of the debtor, and in which the legal representative of the deceased-debtor objects to the attachment on the ground that the property attached is no part of

the assets of the deceased- debtor, is different from the case of a decree which orders sale of specific property; a case of the former class is contemplated by the ruling of the Full Bench in *Seth Chand Mal v. Durga Dei* (1890) 12 All. 313" and then the learned Judges proceeded to say as follows, "But when a decree specifically orders the sale of particular property no question of assets can arise, and the Court executing the decree is bound to execute it as it stands. Any question relating to the validity of that decree must, in our opinion, be decided in a separate suit." This is the view which has been accepted by both the Madras High Court and by the Calcutta High Court [see *Kumaretta Servaigaran v. Sabapathy Chettiar* (1907) 30 Mad. 26 and *Khetrapal Singh Roy v. Shyama Prasad Barman* (1905) 32 Cal. 265]. Mr. Hasan Imam relies upon *Rajbansi Roy v. Mahabir Roy* (1909) 9 C.L.J. 358 where the learned Judges appear to have held that when a judgment-debtor does not challenge the validity of a mortgage-decree but contends that in execution thereof certain property should not be attached and sold in consequence of circumstances arising subsequent to the decree, such contention ought to be dealt with u/s 244 of the Code, and not by a separate suit. With all respect, I am unable to agree with that decision and prefer to follow the decision of the Allahabad High Court in the case to which I have already referred. I have no doubt whatever that the decision of the District Judge on this point is right, and I must hold that section 244 of the Code does not operate as a bar to this suit.

42. I now come to the real point in controversy between the parties, namely, what was the effect of the transaction of 1876 on the power of the bahusin to mortgage the property? The plaintiffs contend that the gift in favour of the bahuasin was a *saudyaica* gift and the bahuasin by virtue of that gift took a heritable but inalienable interest in the property and that accordingly it was not in the power of the bahuasin to enter into a mortgage transaction with reference to the property so as to bind the interest of the plaintiffs who claim through the bahuasin and not through their father. Mr. Hasan Imam on behalf of the defendant contends, first, that the transaction of 1876 was a transaction of sale and not a transaction of gift and that accordingly the bahuasin took an absolute interest in the property; that if the transaction was one of gift the bahuasin took an absolute interest in the property under the Hindu Law and that in any event the consent of her husband as evidenced by the fact that he joined in the mortgage validated the mortgage if it were otherwise invalid, and that, thirdly, whatever may be the position under the Hindu law, the bahuasin took an absolute heritable and transferable interest under the terms of the *heba-bil-ewaz*. The questions raised in the arguments before us are not easy of solution, and it is necessary to proceed with care.

43. The first question which must be considered is whether the transaction of 1876 was one of sale or one of gift. The document is described as a *heba-bil-ewaz*; and Mr. Hasan Imam contends that the parties having elected to use a term which is well known in Muhammadan Law must in this instance be deemed to be governed by the Muhammadan Law in regard to the effect of the

transaction. As authorities in support of his proposition Mr. Hasan Imam relied upon *Abdul Aziz Khan v. Appayasami Naicker* (1904) 27 Mad. 131 and *Ram Narain Singh v. Chota Nagpur Banking Association* (1916) 43 Cal. 332. These cases establish that the rights of the parties to a contract are to be judged of by that law by which they may justly be presumed to have bound themselves. In the case of *Abdul Aziz Khan v. Appayasami Naicker* (1904) 27 Mad. 131, the question arose whether a purchaser at an execution sale of an impartible zamindari could be allowed to put forward the case that he had purchased an absolute interest in it. In order to understand the decision it is well to point out that it was understood in India up to the decision of the Judicial Committee in *Sartaj Kuari v. Deoraj Kuari* (1888) 10 All. 272 that a holder of an impartible zamindari had only a limited interest and that, except for special justifiable causes, he had no power of alienation beyond his life-time. While this was the view of the law, the plaintiffs purchased the right, title and interest of the holder of an impartible zamindari at a sale held in execution of a decree against such holder. Subsequently this interpretation of the law was reversed, as I have said, by the Judicial Committee in *Sartaj Kuari's* case (1888) 10 All. 272 and in the *Pithapur* case *Rama Krishna Rao v. Court of Wards* (1900) 22 Mad. 383 which decided that the holder of an impartible estate had an absolute and alienable interest in it unless a custom against alienation was proved. The plaintiff who was the purchaser of the right, title and interest of the holder of the impartible estate brought a suit against the successor by survivorship for possession of the subject of sale on the ground that the plaintiff had purchased an absolute interest in it. It was held that the reversal of the previously accepted interpretation of the law did not displace its application to the contract contained in the certificate of sale of 1876, the parties to which were bound by the law as then understood and that only the life interest of the than holder passed by the sale, in *Ram Narain Singh v. Chota Nagpur Banking Association* (1916) 43 Cal. 332 the question arose as to the meaning of the expression *istimrari mukarrari* in a lease granted by the Raja of Ramgarh. The learned Judges pointed out that at the time when the leases were granted the idea was universally held that the holder of an impartible zamindari like the Ramgarhraj could not encumber the corpus of the estate so as to bind the co-parceners except for justifiable special causes and that it was not till the decision in *Sartaj Kuari's* case (1888) 10 All. 272 that the contrary view was authoritatively formulated. Mookherji, J., referred to the words of Willes, J., in *Lloyd v. Guibert* (1865) 1 L.R.Q.B. 115 and said that the rights of the parties to a contract are to be judged of by that law by which they may justly be presumed to have bound themselves. But it will be noticed that the law by which they were held to be bound was their personal law, a law which was applicable to them, and that there was no difficulty in applying that law to them although the previously accepted interpretation of that personal law was subsequently reversed by an authoritative decision of the Judicial Committee. No authority has been cited to us to the effect that a Hindu may, by adopting a term well known to Muhammadan Law, make himself bound by the Muhammadan Law. Indeed it is impossible, in my opinion, to maintain that view.

It is not necessary to discuss the various cases which have been cited to us by Mr. Hasan Imam to the effect that a heba-bil-ewaz is looked upon in Muhammadan Law as a sale; but I may usefully refer to the following observations of Mahmood, J., in *Rahim Baksh v. Muhammad Hasan* (1888) 11 All. 1. "Heba-bil-ewaz is a transaction made up of mutual or reciprocal gift between two persons each of whom is alternately the donor of one gift and the donee of the other."

44. After all it is not very material to consider how the parties describe a transaction, if we know what the transaction is; for it is the substance of the transaction, and not the form of it, to which we must have regard. I must accordingly consider the terms of the document itself to see whether the transaction was one of sale or one of gift. In considering the terms it is only necessary to remember, as Mr. Hasan Imam has admitted before us, that the income of the property at the time of the transaction in question was anything between Rs. 30,000 and Rs. 40,000 per year. The document itself has been printed, but I have adopted the translation of Mr. Hasan Imam which has been accepted by the plaintiffs. The document runs as follows:

The decree of Raj Banwari Lal Sahu against me for Rs. 41,532-6-8/16 cr./16 ms. is under execution in the Court of the District Judge at Muzaffarpur and the shares of me, the executant in taluka Laheri, pargana Jabdi, T.N. 1522 and in mauza, Pandual, pargana Hati, T.N. 54167 have as per inventory filed by the said decree-holder, been advertised for sale on the 17th April, 1876. Although I, the executant, tried to procure money from creditors etc. for payment of the decretal amount to the said decree holder, I could not get it and I see no means to safeguard my milkiat properties from sale as mentioned in the inventory. As the sale will entail loss of the said milkiat properties on sale, belonging to me, the executant, my share of 7-8 3-4 ga. situate in taluka Laheri asli with dakhli pargana Jabdi, T.N. 1522 appertaining to Registration Office, District Darbhanga, and sub-district Madhubani, and thana Lookhe, with trees fruit-bearing and non-fruit-bearing, and ahar, pokhar and reservoir and tank and kachcha and pakka, wells and sair, and salt sair and houses occupied by tenants, and all my zamindari rights which up to now have been in my possession without the co-partnership of anyone, to my wife Mt. Anuragin Bahuasin, having taken Rs. 41,532 6-8 16 cr. 16 ms. in each, I have made, of my free-will and accord, heba-bil-ewaz and having with the said amount paid up the amount of the decree of the aforesaid decree-holder, and got the property released from sale, have put the aforesaid Mussammat in possession of the subject of the heba. The aforesaid Mussammat should by becoming possessed of the subject of the heba spend the produce of the property with sons generation after generation. (ha farzandan naslan bad naslan). I, the declarant, or my heirs and representatives (quam moqaimain), shall have no Tight or concern in demanding the subject of the heba or the consideration money from the aforesaid Mussammat or her heirs and representatives. Should I, the executant, my heirs and representatives, make any claim or put forward any demand in respect of the gift properties or the

consideration thereof, the same will be deemed null and void. I have, therefore, given in writing, these few words in the shape of a heba-bil-ewaz so that it may be of use when required.

45. No doubt the payment of a consideration of Rs. 41,532 is mentioned; but the question is whether the transaction was substantially one of gift or one of sale. If Mahmood, J., is right in his view that a heba-bil-ewaz is a transaction made up of mutual or reciprocal gifts between two persons, then it would appear that there was a gift by the bahuasin of Rs. 41,532 to her husband and a gift of taluka Laheri by her husband to her. The income of the property was anything between Rs. 30,000 and Rs. 40,000 a year; and, in my opinion, it is impossible to regard the transaction as a sale when all that was paid by the bahuasin was Rs. 41,532. I have no difficulty whatever in understanding the transaction. Durga Dutt was in need of Rs. 41,532 to save the property from sale. He had tried to procure the money from the market and had failed. The bahuasin had Rs. 41,532. In order to save the property she handed it over to her husband. The husband in return made a gift of the property to his wife. In my opinion the transaction was substantially one of gift, although Durga Dutt received Rs. 41,532 as a gift from his wife.

46. Mr. Hasan Imam has drawn our attention to certain statements alleged to have been made by the bahuasin, suggesting an inference that the transaction in her favour was one of sale. In Suit No. 6 of 1381, which was the suit instituted by her against Turant Lal Chowdhury, she is alleged to have put forward the claim that she was the purchaser of the property in question. The plaint filed by her in that case is however not in the record. But Mr. Hasan Imam relies upon the recitals in the judgment itself; but as I have said before the recitals in the judgment are not admissible in evidence against the plaintiffs in this suit. The next admission upon which Mr. Hasan Imam relies is that alleged to have been made by her in Suit No. 29 of 1900. That was a suit by her as against the Maharaja of Darbhanga under the provisions of section 283 of the Code of 1882 to establish her right to certain property which did not include the property now in suit. The Maharaja had obtained a decree against Babu Durga Dutt and in execution of that decree had attached certain properties alleged to belong to him. The bahuasin laid a claim to those properties and was defeated in the claim case. Thereupon a title suit was instituted by her. Neither the plaint filed in that suit nor her deposition is in the record. It appears that the question arose as to the source of the bahuasin's income which enabled her to acquire the properties in dispute in that suit; and in dealing with this point the learned Subordinate Judge says as follows:

The second source of plaintiff's income is said to be the mauza Laheri. This property is said to have been purchased by her in 1284 from her husband.

47. As I have said before the recital in the judgment is not admissible in evidence against the plaintiffs, and assuming that the admission as alleged was made by the bahuasin, I cannot attach any importance to it, since, on the

construction of the document itself, we are in a position to say what the transaction was. I come to the conclusion that the transaction of 1876 in favour of the bahuasin was one of gift.

48. The next question is, what is the effect of that gift? The plaintiffs contend that by virtue of the Mithila law, by which the parties are admittedly governed, the bahuasin took a heritable but inalienable interest in the property and that the terms of the gift did not confer on her a larger interest. I will first consider the case under the Hindu law. The question must be determined in accordance with the doctrine to be found in the Vivada Chintamani. Bachaspati Misra, the author of Vivada Chintamani, adopts the enumeration of women's peculiar property which is to be found in Manu and Katyayana, but says that the "six kinds of property" which is to be found in Manu "means that there cannot be a less number." In fact Bachaspati Misra gives other kinds of stridhan which are not to be found in Manu. It is not necessary for our present purpose to go through Bachaspati Misra's list, which appears to be exhaustive. The plaintiffs contend that the gift in this case is what is known as a gift subsequent and constituted the saudoyica of the bahuasin. The original text upon which the claim is founded is that of Vishnu which is referred to by Bachaspati Misra and which runs as follows in the translation of Vivada Chintamani by Mr. Tagore.

49. The property of a female is what her father, mother, son, or brother has given her; what she received before the nuptial fire; or at the bridal procession; or when her husband took a second wife; what her husband agrees should be regarded as her perquisites; what she received from his or her kinsmen as a gift subsequent to the marriage."

50. The gloss of Bachaspati Misra on the text of Vishnu as translated by Mr. Tagore is as follows:

51. "What is received by a woman after marriage from the kinsmen of her lord or those of her parents is called a gift subsequent."--(Mr. Tagore's edition, page 259).

52. Mr. Hasan Imara contends that a gift from a husband is not within the text, for the husband cannot be referred to as "the kinsman of her lord"; but there is no doubt whatever that the translation of Mr. Tagore is not very accurate. The words used in the original are bhartri kul (sic) which mean the kul or the family of her husband and includes the husband. The correct translation of the passage is as follows:

That which is received by a woman from the family of her husband subsequent to marriage is called anvadheya or gift subsequent; so also that which is similarly received from the family of her father.

53. A reference to Vivada Ratnaker, Chapter 12, verse 10, which is also of authority in Mithila, will show that this translation is correct. The passage is translated as follows by Mr. Shastri.

Whatever is received by a woman after marriage from the husband's family or from her own family is called gift subsequent.

54. I am of opinion, therefore, that the gift in the present case, being a gift by the husband to the wife subsequent to marriage, must be regarded as the stridhan of the wife. According to Bachaspati (see Mr. Tagore's edition, page 259):

Saudayica is the name by which the different kinds of the peculiar property of women are known.

55. That being so, the gift in the present case was a saudayica gift of the husband to the wife.

56. This was not seriously disputed before us; but it was contended that such a gift is neither heritable nor inalienable. That such a gift is heritable admits of no doubt whatever. Bachaspati Misra refers to the text of Manu on this point which is as follows:

On the death of the mother let all the uterine brothers (and if unmarried, the uterine sisters) divide the maternal estate in equal shares. It is fit even to the daughters of those daughters something should be given from the estate of their maternal grandmother on the ground of natural affection.

57. The words "uterine brothers" obviously do not mean the brothers of the donee, as is shown by the text of Brihaspati to which Bachaspati Misra next refers in these words:

58. "Brihaspati confirms this," namely, the text of Manu, by declaring that "a woman's property goes to her children, and the daughter is a sharer with them, provided she be unmarried; but if she be married, she shall not receive the maternal wealth. Something should be given to her that her feeling may not be wounded."

59. Bachaspati Misra makes the position perfectly clear by interpreting the words "to her children" in the text of Brihaspati as meaning "to her son." The other text to which he refers on this point is that of Gautama which lays down that a woman's separate property goes to her daughters unmarried and unprovided for. In this case at the date of the transaction, namely, the 17th April, 1876, the bahuasin had a daughter Aparajita and five sons who are the plaintiffs in this action. Aparajita was married in 1869 and was cited as defendant third party in the action. It is nobody's case that Aparajita was unmarried and unprovided for at the time when the succession opened out. That being so, the plaintiffs, as the sons of the bahuasin, were entitled to succeed to the property after her death as her heirs and not as the heirs of her husband.

60. I now come to the question whether, in her hands the property was inalienable. I propose to consider the point first on the Hindu Law itself apart from the terms of the heba-bil-ewaz. Bachaspati Misra refers to the following text

of Narada:

61. "Property given to her by her husband through pure affection, she may enjoy at her pleasure after his death or give away, with the exception of lands or houses", and draws the following conclusion from that text:

62. "Consequently a woman can dispose of movable property which has been given to her by her husband, but she can never dispose of immovable property. The same rule holds good in the case of saudayica or the gifts of affectionate kindred" [see Tagore's edition, page 261].

63. It would appear from this passage that it was the view of Bachaspati Misra, who is of paramount authority in Mithila, that a woman can under no circumstances dispose of immovable property given to her by her husband. Bachaspati Misra then refers to the text of Katyayana which provides that a woman, on the death of her husband, may enjoy his estate according to her pleasure; but that in his lifetime she should carefully preserve it. He concedes that the text admits of two meanings:

The one is that, on the death of the husband his property devolves on his wife and becomes her own in default of other heirs; the other is that the property she enjoys with the consent of her husband in the life-time is to be regarded as her peculiar property.

64. It will be noticed that the text of Katyayana is open to two interpretations, and this has given rise to a difference of opinion amongst the commentators. The word used in Katyayana is "daya". Now the dictionary meaning of "daya" is both "heritages" and "gift" and this is the sense in which Bachaspati Misra understands the term "daya" as used in Katyayana. On the other hand, the author of Smriti Chandrika, which is of paramount authority in Madras, interprets the term "daya" as meaning a "donation".

65. According to Bachaspati Misra the words, "let a woman on the death of her husband enjoy her husband's property at her discretion" refer to a heritage, that is to say, to the property which devolves on the widow in default of other heirs, and the words, "while he lives she should carefully preserve it," refer to a donation, that is to say, to what is received by the wife in the lifetime of her husband; and the conclusion at which Bachaspati Misra arrives is as follows:

66. "As a woman cannot make a present of or at pleasure dispose of immovable property given to her by her husband in his life-time, so she cannot dispose of any immovable property which she inherits on his death," and he says that the same opinion is maintained in Ratnakara and the Prakashakara which are of authority in Mithila. In my opinion, a reference to the scheme set out by Bachaspati Misra makes it abundantly clear that a wife receiving a gift from her husband is incapable of alienating it except under circumstances which would enable a widow taking the property of her husband by inheritance to alienate it. He is at some pains to show that a wife taking a gift from her husband is exactly

in the same position as a widow succeeding to the property of her husband by inheritance. If that be so, it follows that in the absence of legal necessity or the consent of those persons who are entitled to succeed to the property on her death, there is no power of alienation in a woman taking a property by gift from her husband.

67. The next question is whether the consent of her husband has the effect of validating the transaction, and, if so, whether there was "consent" in this case, within the meaning of that term as used in the Hindu texts. It is contended on behalf of the plaintiffs that Bachaspati Misra is perfectly clear on this point and reference is made to the following passage in Vivada Chintamani as translated by Mr. Setlur:

68. "Just as in the case of immovable property given by the husband the widow has no power of gift, etc., even with the permission of the husband, so also in the case of immovable property of the husband which is descended to the widow. The Prakashakara and the Ratnakara are to the same effect" (Part II, page 257).

69. If Mr. Setlur's translation be correct, then the point is concluded by the authority of Bachaspati Misra; but the original passage in Vivada Chintamani has been translated by Mr. Tagore, by Mr. Ghose and by Golap Chandra Sarkar. The translation of Mr. Tagore is as follows:

70. "As a woman cannot make a present of or at pleasure dispose of immovable property, given to her by her husband in his life time, so she cannot dispose of any immovable property which she inherits on his death. The same opinion is maintained in the Ratnakara and the Prakashakara"--(Mr. Tagore's translation, page 263).

71. Mr. Ghose adopts the translation of Mr. Tagore. Mr. Shastri translates the text as follows:

Just as in immovable property given by the husband there is incompetency of women in making gift and the like by reason of this text, so also in the husband's immovable property devolving by inheritance on the wife.

72. The text referred to in Shastri is the text of Katyayana referred to above.

73. It would appear then that Mr. Setlur stands alone in his translation that there is prohibition on the wife to dispose of immovable property taken by her under a gift from her husband even with the consent of the husband. The critical words in the original are, "etat bachanat". It is contended on behalf of the plaintiffs that there are two readings of this passage and that in one of these readings the word "etat" is omitted. The contention is that if the word "etat" be omitted, the word "bachanat" is capable of being rendered as by the command or order," and the disputed passage is capable of being rendered as follows:

74. As by virtue of the order or permission (of the husband) a woman cannot make a present of or at pleasure dispose of immovable property, given to her by

her husband in his life-time, so she cannot dispose of any immovable property which she inherits on his death," but that if the word "etat" be taken into consideration, the passage would mean that as by virtue of the text a woman cannot make a present of, etc. It is contended that the word "bachanat" may mean? either a text or order, command, permission, etc., but it appears that in the text as quoted in Shastri the word "etat" is omitted and still he renders the word "bachanat" as text.

75. In view of the authority of Tagore and Shastry, I am unable to come to the conclusion that there is a direct prohibition in Vivada Chintamani on the power of a woman to deal with immovable property even with the consent of her husband.

76. But I am of opinion that Mr. Setlur has rendered the spirit of Bachaspati Misra. The whole idea running through the mind of Bachaspati Misra is that the property taken by a woman by a gift from her husband must be protected during her life-time and that she is in the same position in regard to that property as a widow taking the property of her husband by inheritance after his death. Now a widow can alienate such property only for legal necessity or with the consent of those who are entitled to succeed to the property on her death. So also it would seem that in the view of Bachaspati Misra, a woman taking the property by gift from her husband can only alienate the property in case of necessity or with the consent of those who are entitled to succeed to the property on her death.

77. It has been urged before us that if there is no express text on this point in Vivada Chintamani we must decide the point on the interpretation of the texts of Mitakshara with such assistance as may be afforded by other commentaries (though not recognised as authorities in Mithila) and by modern text books. It is conceded that there is no express text on this point in the Mitakshara; but it is contended that both in the Mayukha and Smriti Chandrika it is expressly provided that the prohibition on the right of a woman to alienate property taken by her as a gift from her husband is not absolute, but that she may alienate such property with the consent of her husband; and a decision of the Bombay High Court in Bhau Bin Abaji v. Raghunath Krishna (1908) 80 Bom. 229, has been cited before us.

78. I will consider the case first under the Mitakshara; for the Mitakshara is of authority in Mithila except in regard to those matters where there is a difference of opinion between Vignaneswara and the Mithila commentators. Now it is conceded that there is no text in the Mitakshara dealing with the question whether a woman taking a property by gift from her husband can alienate such property with the consent of her husband.

79. But Mitra Misra, who is of very high authority in the Benares School is of opinion that:

80. "in the disposal of women's property, females have not independence without the permission of their husbands" (see Sircar's edition of Viramitrodaya, page 224).

81. At first sight the text of Mitra Misra would appear to be conclusive in this case, but on further investigation it will be noticed that the opinion of Mitra Misra is based on a text of Manu which has been interpreted in a different sense in the Mithila school. The text of Manu (Chapter 9) upon which reliance is placed in all the schools, verse 199 has been translated as follows in the Sacred Books of the East:

82. "Women should never make a hoard from (the property of) their families which is common to many, nor from their own (husband's particular) property without permission". (Volume 25, page 372).

83. It is obvious that there is wide scope for different interpretations, since the critical words "husband's particular" are missing in the text, and are left to be inferred from the context. Now Mitra Misra (and, as I shall presently show, the authors of Smriti Chandrika and Mayukha) declined to read these words in the text, with the result that he rendered the text as follows:

Women shall not make any disbursement out of family property which is common to many, or even out of their own property, without the permission of their husbands.

84. The conclusion at which Mitra Misra arrived followed directly from the text of Manu as he read it, which he accepted as of undoubted authority. Now this text of Manu is not referred to in Vivada Chintamani; but Chandreswar, who is of equal authority in Mithila, refers to it only to show that he has read the text differently. The passage occurs in chapter 7, paragraph 2, and is rendered as follows by Sircar:

Manu says, woman shall not make abstraction from family (property) common to many, nor even from her husband's own property, without permission.

85. And then follows the commentary of Chandreswar in these words:

Here by the word "family" is intended family property by reason of contextual association; hence, out of joint property, "abstractions", i.e., secret appropriation of property, should not be made by women without the permission of the owners. Likewise "from even husband's own property", i.e., from husband's property, held not in common with other members of the family, secret appropriation should not be made, without the permission of the owner of the property. This is the meaning.

86. It is obvious that there is a difference, and a serious difference, between Mitra Misra and Chandreswar on the critical text of Manu, and that the view of Mitra Misra, based as it is on his interpretation of the text of Manu, can be of no authority in Mithila.

87. The view of Mitra Misra as to the text was shared by Nilkantha, the author of the Mayukha. In the Mayukha (chapter 4, section 10, page 93 of Mr. Mandlik's edition) the text of Manu is rendered as follows:

Hence says Manu (Chapter 9, verse 199); "A woman should never make any expenditure out of the family (property) belonging to several or even (out of) her own wealth without the assent of her husband

88. This passage is prominently referred to in the judgment of Jenkins, C.J., in *Bhau Bin Abaji Gurav v. Raghunath Krishna Gurav* (1908) 80 Bom. 229, in support of the proposition that a woman's power of disposal over her stridhan is during coverture subject to her husband's consent.

89. The author of the *Smriti Chandrika* also adopts the interpretation placed upon the text of Manu by Mitra Misra and Nilkantha. That text is rendered as follows in *Smriti Chandrika*:

Manu therefore says: "Women should never make expenditure from the wealth of the family common to many, inclusive of themselves, or even from their separate property without the permission of their respective lords.

90. And the comment of the author on the text is as follows:

91. "The meaning is that women who are naturally wanting in independence cannot of their own choice, make disbursements, use, or the like, of the property belonging in common to themselves and their husbands, or of property belonging to them exclusively." (Chapter 9, sections 14 and 15, Setlur's Collection of Hindu Law Books on Inheritance, Part 1, page 259).

92. Now I quite agree that, in dealing with this point, we may take such assistance as may be afforded by other commentaries, though not recognised as authorities in Mithila; but I think that I have shown with sufficient clearness that the view presented in the *Viramitrodaya*, the *Mayukha* and the *Smriti Chandrika* on this point cannot be regarded as of authority in Mithila. The foundation of the rules enunciated in those schools is the text of Manu; and, when that text is interpreted in a different light in the Mithila school, it follows that the rule based on a particular interpretation of the text, not accepted in Mithila, cannot have any operation in Mithila.

93. And a careful examination of *Vivada Chintamani* will lead to the conclusion that there is no question of the control of the husband in property given by him to his wife. *Bachaspati Misra* refers to the text of *Katyayana*, only to put it aside. He then quotes the text of *Narada* and draws the conclusion, binding in Mithila that a wife can never dispose of immovable property given to her by her husband (*Mr. Tagore's* edition, page 261). Later in the chapter he says that; "The immovable property which a woman gets after the death of her husband, cannot be disposed of at her pleasure "and that" the meaning of this is consonant with that of the husband's donation (which can only be enjoyed but not spent)"; and lastly he points out that: "As a woman cannot make a present of or at pleasure dispose of immovable property, given to her by her husband in his life-time, so she cannot dispose of any immovable property which she inherits on his death."

94. It will be noticed that, in the scheme of *Bachaspati Misra*, the gift and the

heritage stand on the same footing and that he deduces the rule that the widow cannot dispose of any immovable property which she inherits on the death of her husband as a logical consequence of the rule that the wife cannot make a present, or at pleasure dispose of immovable property.

95. Now if the gift and the heritage stand on the same footing then it follows that the subject matter of the gift if immovable property, cannot be dealt with by the wife, except for purposes which may be denominated "necessary purposes." The consent of the husband, who has parted with his proprietary interest in the property, will not validate the transaction, though the consent of the next heirs may raise a presumption of the existence of necessity. In this case the transaction did not rest on any necessity nor is it pretended that it did. Babu Durga Dutt, it is true, owed a sum of money to the Maharaja; but he had valuable properties of his own which could be offered as a security for the debt. It is urged that Durga Dutt and his sons were under the impression that bahuana properties were inalienable; but the Maharaja was not of that opinion, and the impression of Babu Durga Dutt and his sons cannot decide the question of necessity to the prejudice of the bahuasin. It is for the party founding title on an alienation by a limited owner to show necessity in respect of the alienation; and the Maharaja obviously cannot establish necessity, since he never assented to the doctrine that bahuana properties were inalienable. I have no doubt whatever that under the Mithila Law immovable property taken as a gift by a wife from her husband is heritable but inalienable except for purposes which may be denominated necessary purposes, and that in this case there was no legal necessity to support the transaction.

96. Assuming that I am wrong in my view that the consent of the husband will not validate the alienation, I have still to enquire into the question whether there was in this case "the consent" of her husband to the mortgage. Now the case cannot be put on a higher footing than this, that, while the husband is giving, his consent will raise the presumption that there was necessity to support the transaction. But presumption is a rule of evidence, not a rule of law; and we have all the facts to enable us to decide the point on evidence. Those facts are not in dispute; and I am unable to assent to the proposition that the act of the husband in consenting to a transaction for his benefit is to be regarded as a consent which will validate the transaction. The control exercisable by the husband in regard to the dealings of the wife with property given to her by him is in no sense proprietary. It may be incident to his status as the guardian of his wife; but if his control is to be put on that footing, he is bound to exercise it for the protection of his wife and the preservation of the property. It cannot be suggested that it is in the power of a guardian to give validity to a transaction by the ward by consenting to it, when the transaction is wholly for the benefit of the guardian; and in this case, the Maharaja must be regarded as a party to the breach of trust, since he knew that the debt was of Durga Dutt Singh, and in no way binding on the bahuasin.

97. It was next contended on behalf of the respondent that the Hindu Law allows the husband, under certain circumstances, to deal with the property of his wife for his benefit, and that the transaction ought to be supported on this ground. The texts of Devala Yajnavalkya and Katyayana have been adopted by all the schools as the law on the subject; but we are concerned with the interpretation put on these texts in the Mithila school. Devala gives a complete enumeration of the peculiar property of woman. According to him, it consists of:

98. "food and vesture, ornaments, perquisites and wealth received by a woman from a kinsman (Vivada Chintamani, Tagore's edition, page 263).

99. According to him, the husband has no right to it except in extreme distress. He provides, however:

If he (the husband) give it away on a false consideration, or consume it, he must make good the value to the woman with interest; but he may use the property of his wife to relieve a distressed son.

100. Bachaspati Misra's gloss on this text is important, and I give it in full as Mr. Hasan Imam strongly relies on it in support of his case. The gloss is as follows:

The property of a woman should not be improperly given away or consumed without her consent, but it may be used for the relief of a distressed son. It is declared by the same writer that the husband has power to use it with or without the consent of his wife. If the husband having obtained her consent used the property amicably, he shall be required to pay the principal when he becomes rich. If the wife give her peculiar property through affsection, when her husband is ill, or in danger, or has been confined by a creditor, he may give her the value of it when he pleases. The meaning of the above is that if the wife, observing her husband's illness and the like, give her wealth, it may be repaid by him at his pleasure.

101. Mr. Hasan Imam contends that the text gives the husband the power "to use the property amicably having obtained her consent"; but it is obvious that the rule is confined to such properties as are enumerated by Devala which according to him, constitute "the several kinds of peculiar property of woman." They are (1) food and vesture, (2) ornaments, (3) perquisites, that is, wealth given to a damsel on demanding her in marriage, and (4) wealth received from a kinsman. We are not concerned in this suit with the first three classes of stridhan, for property given by a husband to a wife does not fall within these classes. Does it fall within the words "wealth received from kinsman?" The word in the original for kinsman is "bandhu" which word is also used in Yajnavalkya and which is rendered in the Mitakshara as matribandhus and pitribandhus, that is to say, persons related to mother and father (see Colebrook, 2-xi 6, Gharpure's edition of the Mitakshara, page 273, and Banarji's Stridhan, page 299). It is obvious that the husband is not comprehended within the term, and that the text of Devala cannot be cited as authority for the proposition that the husband may deal with the property given by him to his wife with her consent.

102. In the next place it seems to me that neither in form nor in substance was the transaction one in which the husband, "having obtained her consent, used the property amicably." Now what was the transaction? In point of form the mortgage was by Durga Dutt and the bahuasin on the footing that the property be longed to them, and that the debt, to secure which the mortgage was executed, was binding on both. If, however, the substance is to be regarded then obviously the Maharaja secured the execution of the mortgage by both of them for his own safety, because there was a habanamah in favour of the bahuasin and it might be urged if he took the mortgage from the bahuasin that the heba did not operate to convey any title to the bahuasin. The transaction was not a transaction of the husband with the consent of the wife, but a transaction of the husband and wife on the footing that the title was in both of them, so that the Maharaja would have a claim good on the mortgage, if the title was in either.

103. Lastly, I am of opinion that it has not been established that the bahuasin consented to her husband mortgaging the property for her personal benefit. Now I am quite aware that the plaintiffs cannot, in this action, raise the question whether there was not undue influence exerted on the bahuasin in regard to the execution of the mortgage by her. On the hypothesis that the property was alienable by her, no question of undue influence can now arise, since the bahuasin had the right and the opportunity to establish a case of undue influence in the mortgage action against her. But if I am right in holding that the property was not alienable by her, then the question of "consent" becomes material in discussing whether there is an answer to the plaintiff's suit. The plaintiffs say that the property was inalienable and that accordingly they became entitled to recover the property on the death of the bahuasin. To that, the defendant relies that under the Hindu Law, Durga Dutt had complete power to mortgage the property with the consent of the bahuasin. Thereupon the plaintiffs retort, "Prove that the bahuasin consented to her husband mortgaging the property for his personal benefit." Now this question was not in issue in the mortgage action, either directly or constructively, for it was a simple suit to enforce a mortgage executed by Durga Dutt and the bahuasin, on the footing that the property belonged to both of them. The only defence that could be put forward by the bahuasin in that litigation would be that there was undue influence exerted on her in the matter of the execution of the bond. That issue cannot be raised by the plaintiffs in this Court. But at the same time it must be remembered that the question as to the inalienability of the property could not be put in issue in that litigation; for, as I have said before, the bahuasin could not claim adversely to her own deed. The plaintiffs raise the question of inalienability in this action, and, in answer to the defendant's case that though the bahuasin could not mortgage the property, her husband could mortgage it with the consent of the bahuasin, they are entitled to ask the defendant to prove that the bahuasin did consent to her husband mortgaging the property for his personal benefit.

104. It is, therefore, necessary to examine the circumstances connected with the execution of the mortgage bond. In dealing with the point, it is to be

remembered that the bahuasin was an illiterate pardanashin woman living with her husband at the date of the transaction. The evidence of Amarendra Singh, one of the plaintiffs in this action, is as follows:

105. "The Maharaja had several decrees against Durga Dutt which were under execution. Mr. Duff, a sub-manager of the Darbhanga raj, brought an account of the money due to the raj and informed Durga Dutt that the Maharaja wanted a mortgage document to secure the debt. After some conversation Mr. Duff left but came back again after a few days and said that the Maharaja wanted the Laheri property to be mortgaged. Durga Dutt said: The property is not mine. I have given a heba of it to my wife. Mr. Duff went away, but came back again and said, "Maharaja has ordered me to get the mortgage deed executed by both of you as the property is in the name of your wife." Durga Dutt thereupon directed the maternal uncle of the witness to ask the bahuasin, and said "whatever decrees there are on me, she also ought to pay." The person so directed went to the bahuasin, and related everything to her. The bahuasin said: "I know nothing. What is proper may be done." Durga Dutt on hearing this, informed Mr. Duff that the deed would be executed by both of them. The witness denied that the bahuasin had any independent legal advice.

106. This is substantially the evidence of Amarendra Singh; and whatever difficulty there may be in accepting the whole of that evidence, this at least is clear that the lady did not have any independent advice and that she executed the document; because she was asked to do so by her husband for this part of the evidence of Amarendra Singh remains unchallenged and contradicted.

107. The defendant's version of what took place in connection with the transaction is as follows:

Durga Dutt Singh accompanied by his son, Amarendra Singh, came and saw the Maharaja and said: "I owe you money but I am unable to pay it now. So I want to execute a mortgage bond for the whole amount". The Maharaja asked him what property he wanted to mortgage. He said that he would mortgage Laheri. Balbhadra Misir, a senior musahib of the Maharaja, thereupon said that Durga Dutt had already executed a farzi deed in respect of that property in favour of his wife. To this Durga Dutt said: "This is true. But the property is mine, but I have actually executed the farzi deed. This should not stand in the way as I and my wife would jointly execute the mortgage." The Maharaja thought over the matter and said that he was agreeable if there was a joint execution of the document by Durga Dutt and his wife.

108. It is not necessary for me to say which of the two versions is true. It is sufficient for me to point out that, whether the suggestion that a mortgage bond should be executed to cover the debt proceeded from the Maharaja or from Durga Dutt, the parties are agreed that the whole of the negotiation was conducted by Durga Dutt without any reference to his wife, and that her consent was assumed rather than taken, and that, if her consent was at all taken, it was

taken as a matter of form, and that no opportunity was given to her to consult her interest in the matter. It is, in my opinion, not open to doubt that her consent was obtained by pressure through her husband, and without independent advice.

109. In these circumstances the question arises whether a Court of Equity will give effect to the argument advanced on behalf of the Maharaja that the bahuasin consented to her husband mortgaging her property for his personal benefit. In *Turnbull and Company v. Duval* (1920) A.C. 429 Lord Lindley said as follows: "Whether the security would be upheld if the only ground for impeaching it was that Mrs. Duval had no independent advice has not really to be determined. Their Lordships are not prepared to say it could not. But there is an additional and even stronger ground for impeaching it. It is in their Lordships opinion quite clear that Mrs. Duval was pressed by her husband to sign, and did sign, the document, which was very different from what she supposed it to be, and a document of the true nature of which she had no conception. It is impossible to hold that Campbell or Turnbull and Company, are unaffected by such pressure and ignorance." In *Bank of Montreal v. Stuart* (1911) A.C. 120 the evidence was summed up in these words by Lord Macnaghten: The evidence is clear that in all these transactions Mrs. Stuart, who was a confirmed invalid, acted in passive obedience to her husband's directions. She had no will of her own. Nor had she any means of forming an independent judgment even if she had desired to do so. Upon this evidence, the House of Lords had no hesitation in refusing to support the transaction by which Mrs. Stuart gave her own properties as securities for advances made by the Bank to her husband. Other cases may be cited; but it is not necessary to pursue the subject. In my opinion, "consent" has not been proved as a fact. If, however, it is to be inferred from the circumstances that she was a party to the mortgage bond, I have no difficulty in coming to the conclusion that a Court of Equity will disregard that consent, having regard to the fact that the bahuasin, an illiterate pardanashin lady, acted in passive obedience to her husband's direction, not having a will of her own, nor having any means of forming an independent judgment, even if she had desired to do so.

110. I now come to the text of *Yajnavalkya*, which, in my opinion, creates no difficulty whatever. The text is as follows:

A husband is not liable to make good the property of his wife, taken by him in a famine, or for the performance of a duty or during illness or while under restraint.

111. The conditions which would enable *Durga Dutt* to deal with the property of his wife were not present, and the Maharaja was aware that those conditions were not present.

112. The only other text on this point is that of *Katyayana* who declares that "money taken by a man from his wife, for performing some imperative duty, when he has no means of doing so, shall not be re-paid."

113. The text has no application, and it is not necessary to pursue the point.

114. In my opinion, the subject-matter of the gift was under the Hindu Law heritable, but inalienable except under circumstances which were not present, and if the terms of the gift did not confer on the bahuasin, the right to alienate the property, the plaintiffs as the heirs of the bahuasin are entitled to succeed in the action. This brings me to the question whether the bahuasin took an alienable interest under the terms of the gift.

115. Now in construing the heba-bil-ewaz executed by Durga Dutt in favour of his wife, we are bound to proceed on the assumption that a Hindu knows that, as a general rule, women do not take absolute estates of inheritance which they are enabled to alienate. This was laid down by the Judicial Committee in *Moulvie Mohamad Shumsool Hooda v. Shewukram alias Roy Dorga Pershad* (1874) 2 I.A. 7 and repeated by their Lordships in *Radha Prasad Mullick v. Ranee Mani Dassee* (1908) 35 Cal 896. This does not mean that, where there are words of sufficient amplitude conveying in the terms of the gift itself the fullest rights of ownership, including the power to alienate, the Court will refuse to construe the deed of gift so as to deny to the donee the right to alienate. But I think that in construing a deed of gift executed by a Hindu husband in favour of his wife, the Court would be right in leaning towards a construction which is in consonance with the ordinary notions and wishes of the Hindus with respect to devolution of property and in harmony with the law by which the parties are governed. The ordinary notions and wishes of Hindus are well known and have been recognised by the Judicial Committee in the cases to which I have referred. In regard to the law by which the parties are governed, I have already expressed my opinion that the Mithila law recognises that immovable property taken as a gift by a wife from her husband is inalienable except for purposes which may be denominated "necessary purposes."

116. The question then is, to quote the language of Lord Buckmaster in *T.B. Ramachandra Rao v. A.N.S. Ramachandra Rao* A.I Rule 1922 P.C. 80, has the donor made use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including the power to alienate? It is not necessary that there should be an express declaration to that effect; but it must follow, as a matter of construction, that something more has been granted than what the law would give, that in fact the fullest rights of ownership, including the power to alienate, have been conveyed.

117. I have set out the document earlier in this judgment and it is not necessary to set it out again. It is conceded that there is no express declaration to the effect that the bahuasin would have the power to alienate; but it is contended that there are various expressions in the grant itself which suggest the inference that the fullest rights of ownership were conveyed to the bahuasin.

118. It was argued that the donor, having described himself as a malik and having conferred all his zamindari rights upon his wife, has said as plainly as be

could that she should have the power to exercise the fullest rights of ownership. The argument is an attractive one; but it is necessary to consider the passage upon which the argument is founded That passage is as follows:

119. Having taken Rs. 41,532. I have made heba-bil-ewaz to my wife of my share of 7-annas 8?-gandas situate in taluka Laheri ... with trees, fruit-bearing and non-fruit-bearing and ahar and pokur and reservoirs and tank and kachcha and pakka wells and sair and salt sair and houses occupied by tenants and all my zamindari rights which up to now have been in my possession without the co-partnership of any one in possession."

120. Mr. Hasan Imam's argument is that the words, "zamindari rights" mean rights over the zamindari and that, as the rights of the donor over the zamindari were absolute, nothing short of an absolute estate were by these words granted to the bahuasin. With great respect, I am unable to assent to the argument. Here general words--"zamindari rights"--follow an enumeration of specific things--"trees, fruit bearing and non-fruit bearing, and ahar and pokur, and reservoirs and tanks and kachcha and pakka wells and sair and salt sair and houses occupied by tenants"--which undoubtedly have some common characteristic which constitutes them as genus; and the general words can be properly regarded as in the nature of a sweeping clause designed to guard against accidental omissions. That being so, the rule of ejusdem generis will apply, and the general words will be restricted to things of the same nature as those which have been already mentioned. The expression "zamindari rights," in my opinion, means rights to specific properties of the same nature as those specified, and not rights of a zamindar in the properties specified. If there was any doubt as to this interpretation, the words which precede and the words which follow remove that doubt. The document says:

I am making a heba-bil-ewaz.

121. Now in respect of what properties? The grantor enumerates the specific properties and ends with the sweeping clause, "all my zamindari sights," and he puts the matter beyond doubt by adding the words "which up to now have been in my possession without the co-partnership of any one." Now I can understand a heba-bil-ewaz of specific properties; but I do not understand a heba-bil-ewaz of an abstract right, the right of a proprietor to alienate the properties. Nor is it possible to speak of an abstract right as being in the possession of the donor without the co-partnership of any one. In my opinion, the full description of what was intended to be conveyed shows conclusively that the expression "zamindari rights" means rights or title to properties constituting the zamindari, those properties being of the same nature as those already specified.

122. It was next contended that a gift by a husband to his wife, generation after generation (ba farzandan, naslan bad naslan) carries with it the right to alienate. Now I entirely agree that these words, in the absence of anything showing a contrary intention) pass a general estate of inheritance according to Hindu Law.

This is the primary signification of these words, which denote heritability and connote an estate of unlimited duration. I also agree that the right of alienation, speaking broadly, is a necessary part of the ownership of an estate of inheritance. Hence there is a secondary signification of those words, which denote an absolute estate and connote alienability. A grant of an estate to a person "ba farzandan, naslan bad naslan" is a grant of an estate of inheritance. An estate of inheritance is a heritable estate. A heritable estate is an absolute and alienable estate. Therefore an estate granted to a person "ba farzandan, naslan bad naslan" is an absolute and alienable estate. If I am right in this view, then the words "ba farzandan, naslan bad naslan" are apt for conferring an estate of inheritance and therefore an absolute and alienable estate, not an estate of inheritance and an absolute and alienable estate.

123. Now it is quite true that, both in this country and in England, the right of free disposition is generally inherent in an estate of inheritance; but the holder of such an estate might be prevented by personal incapacity from exercising the right of alienation: and a restraint on alienation might be imposed by family custom or local law. For instance, an infant, though holding an estate of inheritance, is not permitted to exercise the right of alienation. So, in England, wives married before 1883, could not dispose of any property to which their title accrued before that year. So also, where the personal enjoyment of the property is essential to the performance of certain public duties no alienation of such property can be made. So also, as I have already said, a restraint on alienation might be imposed by family custom or local law. If I am right in this view, then an estate of inheritance would not carry with it the right of alienation, when such an estate is conveyed to a person suffering under a personal incapacity or subject to a family or local custom prohibiting alienation. If this be so, than clearly a right of alienation is not necessarily inherent in an estate of inheritance, and a grant of property to a person "ba farzandan, naslan bad naslan" would not necessarily give that person the right to alienate the property, though these words would confer on him an estate of inheritance. For instance, a grant of property to a ghatwal "ba farzandan naslan bad naslan" to enable him to perform certain public duties would not confer on him the right to alienate the property. I arrive at the conclusion that these words--ba farzandan, naslan bad naslan--are generally sufficient to confer an estate of inheritance; that a right of alienation is generally inherent in an estate of inheritance; but that, as the incidents of every estate in land may be affected by the personal incapacity of the holder for the time being or, by the existence of the personal law by which the holder may be governed, it may be shown in any particular instance that the grant of an estate of inheritance did not carry with it the right of alienation.

124. Now the personal law by which the bahuasin was governed prohibited her from alienating the immovable property which she took as a gift from her husband. Bachaspati Misra has laid down in distinct terms that though a woman can dispose of movable property which has been given to her by her husband, she can never dispose of immovable property. In my opinion, the ordinary

incident of an estate of inheritance was so affected by the personal law by which the bahuasin was governed that in this case the grant of such an estate as evidenced by the words "ba farzandan naslan bad naslan," did not carry with it the right of alienation.

125. I will now consider some of the cases on the subject; but I may begin by giving the opinion of Mr. Mayne on the point:

126. Gifts by a husband to his wife of immovable property," says Mr. Mayne in his Hindu Law, "even though accompanied by express words of inheritance, are not alienable unless distinctly declared to be so. It is a quality of such gifts that though they descend to wife's heirs, she cannot alienate them." (8th edition, paragraph 397, page 542).

127. I am informed that this passage is omitted in the latest edition of the book: but the latest edition is not by Mr. Mayne. The only criticism that can legitimately be directed against this passage is that there is a suggestion in it that there is no power of alienation unless that power is expressly conferred. This would not be correct; nor do I think that Mr. Mayne has so stated the proposition. But the passage is valuable as indicating that an estate of inheritance granted by a husband to his wife does not carry with it the right of alienation.

128. In *Bhujanga Rau v. Ramayamma* (1884) 7 Mad. 387 the Madras High Court held that "where property is given to a Hindu lady by her husband, and the gift is expressed only in such terms as create a heritable estate, it must be taken that it was the intention of the donor that she should acquire such an interest as the personal law of the parties recognises to be created by the transaction." The gift in that case was by a Hindu to his wife "putra poutra paryantan", which expression has the same significance as that conveyed by the expression "ba farzandan naslan bad naslan." This decision was followed in *Nannu Meah v. Krishnaswami* (1891) 14 Mad. 274, but was disapproved of in *Muthuvenkatanarayanan Chetti v. Athipanduranga Naidu* (1919) M.W.N. 103. In the latter case, however, the question did not fail to be considered, as a power of alienation was expressly conferred on the wife. It was also disapproved of in *Ramachandra Rao v. Ramachandra Rao* (1919) 42 Mad. 283 where Seshagiri Ayyar, J., considered that it was inconsistent with the conclusions of the Judicial Committee in *Surajmani v. Rabi Nath Ojha* (1908) 30 All. 84. In delivering his judgment that learned Judge referred to the terms of section 8 of the Transfer of Property Act and held that, unless a different intention is expressed or necessarily implied, a transfer of property by a husband to his wife passes forthwith to the wife all the interest which the husband is capable of passing in the property or in the legal incidents thereof; and the learned Judge said: "This is what was laid down in *Surajmani v. Rabi Nath Ojha* (1908) 30 All. 84."

129. Now if that is what was laid down in *Surajmani's* case (1908) 30 All. 84, then it is obvious that *Bhujanga Rau v. Ramayamma* (1884) 7 Mad. 387 can no longer be followed. The decision of the High Court in *Ramachandra Rao v.*

Ramachandra Rao (1919) 42 Mad. 283 was, however, reversed by the Judicial Committee on another point [see T.B. Ramachandra Rao v. A.N.S. Ramachandra Rao A.I Rule 1922 P.C. 80] but their Lordships thought it their duty to state in clear terms what was actually decided by them in Surajmani's case (1908) 30 All. 84, as there was some misapprehension as to the effect of that decision. "In the case referred to," said their Lordships, "when originally heard before the High Court [Surajmani v. Rabi Nath (1903) 25 All. 351], it had been stated that under the Hindu law in the case of a gift of immovable property to a Hindu widow, she had no power to alienate unless such power was expressly conferred. The decision of this Board did no more than establish that that proposition was not accurate, and that it was possible by the use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including, of course, the power to alienate, which the High Court had thought required to be added by express declaration. In that case, it is true that there is some comparison drawn between the gift to a widow and a gift to a person not under disability but that was not the foundation of the decision which depends entirely upon the wide meaning attributed to the words in which the gift to the widow was clothed. More recent decisions of this Board in Sasiman Chowdhurain v. Shib Narayan Chowdhury AIR 1922 P.C. 63 and Bhaidas Shivadas v. Bai Gulab AIR 1922 P.C.193 do nothing but repeat this same proposition in other words." I think that it is perfectly clear that their Lordships did not decide in Surajmani's case (1908) 30 All. 84 that, to quote the words of Seshagiri Ayyar, J., "unless there is an expressed or implied qualification to the contrary, the donor must be deemed to have conveyed all that he was possessed of in the property granted."

130. The decisions of the Indian Courts on this point afford an interesting study. Moulvie Mohamed Shumsool Hooda v. Shewukram alias Roy Doorga Pershad (1874) 2 I.A. 7 was decided by the Judicial Committee in 1874. The rule of construction formulated in that decision gradually came to be treated as a rule of law, and a tendency appeared in the decisions to treat gifts by Hindu husbands to their wives as conveying only a limited estate unless a power of alienation was conferred by express declaration. This tendency found its fullest expression in Surajmani's case (1908) 30 All. 84 which was decided by the Allahabad High Court in 1903. An appeal was taken to the Judicial Committee which decided in 1907 that the expression "malik wa khud ikhtiyar" imported full proprietary rights and that, in order to cut down the full proprietary rights that the words imported, something must be found in the context to qualify it. Now this was all that was decided by the Judicial Committee in Surajmani's case (1908) 30 All. 84: but it was thought that the decision came to this, that a gift by a Hindu husband to his wife should be construed as conveying an absolute estate unless there was something in the contest to qualify it. But, as the Judicial Committee has now plainly intimated to the Indian Courts it decided nothing of the kind. Their Lordships found an expression in the grant, malik wa khud ikhtiyar, which they construed as importing full proprietary rights. The decision therefore rested on the view that the grantor had used words of sufficient amplitude to convey in

the terms of the gift itself the fullest rights of ownership. It is obvious that there is no conflict between the decision in Surajmani's case (1908) 30 All. 84 and the decision in Bhujanga Rau v. Ramayamma (1884) 7 Mad. 387. In my opinion the latter case was correctly decided, and there is no reason why we should not follow it.

131. I should like to say a word about section 8 of the Transfer of Property Act on which Seshagiri Ayyar, J., strongly relied in Ramachandra Rao v. Ramachandra Rao (1919) 42 Mad. 283. That section provides that unless a different intention is expressly or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof. But section 8, which is in the second chapter of the Act, must be read subject to the provision of section 2 which provides that nothing in the second chapter of the Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist law. Now, it is a rule of Hindu law as it is understood in Mithila, that a gift by a Hindu to his wife does not carry with it the right to alienate. In my opinion, therefore, we cannot have recourse to section 8 in construing the gift in this case.

132. In the Tagore case Ganendra Mohan v. Upendra Mohan (1870) 4 B.L.R.O.C. 103, Sir Barnes Peacock said as follows: "It is certainly true, as stated by the learned Judge, that a gift to a man and his sons and grandsons, or to a man and his son and son's son, would, in the absence of anything showing a contrary intention, pass a general state of inheritance according to Hindu Law. I believe the words usually used in Bengal are putra poutradikrame and in the upper province naslan bad nadan, the literal meaning of the former being "sons and grandsons, etc., in duo succession ", and of the latter, "in regular descent or succession." If I may say so with the utmost respect, this is a very accurate statement of what those expressions import. The opinion of Sir Barnes Peacock was accepted by the Judicial Committee as the basis of their decision in Ramlal Mookerjee v. Secretary of State (1881) 7 Cal. 304. A Hindu died leaving a widow, a daughter's daughter and a brother. By his Will, he left his properties to his daughter's daughter in these terms:

If no daughter or daughter's son of mine should be living at the time of the death of my wife then my grand-daughter (daughter's daughter) shall become the proprietress of my property and shall remain in undisputed possession thereof putra poutradikrame.

133. The question raised in the appeal turned upon the construction of the terms of the gift to the daughter's daughter. Their Lordships quoted with approval the passage from the judgment of Sir Barnes Peacock in the Tagore case (1870) 4 B.L.R.O.C. 103 and proceeded to say as follows: "The correctness of these observations was not questioned in the judgment on appeal. It was not denied at the Bar that these words, though undoubtedly importing the male sex in their primary signification, would in the case of a gift to a male, be read as words of general inheritance and would include female as well as male heirs, where, by

the law, his estate would descend to females." Stopping here for a moment, it is to be noted that the force of these words may be profoundly affected by the law by which the grantee may be governed, and that this is what their Lordships expressly decided. This is exactly what was decided by the Madras High Court in *Bhujanga Rau v. Ramayamma* (1884) 7 Mad. 387. Their Lordships continued as follows: "Their Lordships feel no greater difficulty in applying them to the female heirs of a female, where, by law, the estate would descend to such heirs, and see no sufficient reason for narrowing the construction of words which have been often recognised in India as apt for conferring an estate of inheritance." If there was nothing else in the judgment of their Lordships, it could not be contended that there is anything in the decision to encourage the argument that these words are regarded as apt for conferring an absolute estate. Mr. Hasan Imam, however, strongly relies upon the next passage in the judgment which is as follows: "They are of opinion that Clause 7, if it stood alone, would confer an absolute estate on Haridasi (the granddaughter) upon the death of the widow."

134. Now, in my opinion, the decision of the Judicial Committee cannot be regarded as an authority for the proposition that the words, *putra poutradikrame* or *naslan bad naslan*, import, of their own force, an absolute estate. Their Lordships have already said that the force of these words may be qualified by the personal law of the grantee. Now, what is the actual decision? The exact signification of these words has already been considered; and their Lordships have said very definitely that these words are recognised "as apt for conferring an estate of inheritance." But then in the passage which followed, their Lordships said that the terms of the gift conferred an absolute estate on Haridasi. And so they did, unless there was something in the personal law by which Haridasi was governed (which there was not) which prevented her from alienating the property which she got from her grandfather. As I have said before, an estate of inheritance is, *prima facie*, an absolute estate; and Haridasi took an absolute estate, unless she suffered from a personal incapacity or was subject to a personal law which imposed a restriction on her right to alienate the property. Obviously there was no personal incapacity which affected her in any way; and the personal law by which she was governed imposed no restriction on her right to alienate. [See *Dayabhaga*, 4-1-23, *Setlur*, Part 2, page 32].

135. The case of *Lalit Mohan Singh Roy v. Chukkulal Roy* (1897) 24 Cal. 834 does not carry us any further. A Hindu testator who had no children devised his estate to his nephew in these terms.

If no children are born to me, then the eldest son born of the womb of my third sister *Srimati Kshiroda*, my nephew *Sriman Lalit Mohan Roy*... becoming on my death my *sthalbhishikta* and becoming owner (*malik*) of all my estate and properties, etc., shall, remaining my *sthalbhishikta*, obtaining the management of the *Iswar Sheba* ... keeping the estate intact, enjoy with son, grandson and so on in succession, the proceeds of my estate." The question raised in the appeal was whether Lalit Mohan took an absolute heritable and alienable estate, or

whether there was an attempt by the testator to tie up the estate for ever, in which case the gift would fail, subject to a life estate in favour of Lalit Mohan. Their Lordships said as follows: "The words "become owner (malik) of all my estate and properties" would, unless the context indicated a different meaning, be sufficient for that purpose even without the words "enjoy with son, grandson and so on in succession" which latter words are frequently used in Hindu Wills and have acquired the force of technical words conveying a heritable and alienable estate." Their Lordships further said: Their Lordships do not find any express prohibition in this Will against alienation of the estate, the beneficial enjoyment of which is given to the devisees, as there is of the estates appropriated to religious and charitable purposes. If there were such a clause added to a gift of a heritable estate, it would be repugnant and void.

136. I have no doubt whatever that their Lordships were dealing with the particular case before them, and not laying down a rule applicable to all cases. As I have said before, a heritable estate is prima facie alienable, and a clause prohibiting alienation added to a gift of a heritable estate would be prima facie void. In the case before their Lordships, the grantee took a heritable estate and therefore an alienable estate, because he was not affected by any personal incapacity nor subject to a personal law which imposed a restriction on his power of alienation. But supposing a gift was made to a person, "naslan bad naslan" on condition of rendering services of a public nature? If the wide interpretation sought to be placed on the decision of the Judicial Committee were to be accepted as correct, then obviously the grantee would have the right to alienate the lands. But exactly the opposite was held by the Judicial Committee in Nilmoni Singh Deo v. Bakranath Singh (1883) 9 Cal. 187. Although the point is not made clear in the decision of their Lordships, there is no doubt that the grant was naslan bad naslan". I may usefully refer to the argument of Counsel on this point. The argument was put as follows: "Again it was to be noticed that it did not follow that, because the Government might disallow the succession of an unfit person, the jagir could not be hereditary. It was hereditary, and because it was hereditary, it was alienable. Grants held "naslan bad naslan", "buntan pad buntan ", as the jagir was, were transferable by gifts, sale or otherwise, by the terms of Regulations 37 of 1793 and 12 of 1805." Their Lordships found that the jagir was hereditary, but came to the conclusion that it was inalienable. I take the basis of the decision to be that where the personal enjoyment of the property is essential to the performance of certain public duties, no alienation of such property can be made, although the grant may be hereditary. This is one instance where the words "naslan bad naslan" did not convey an alienable estate, though they did convey an heritable estate. Other instances may be cited; for instance in Raj Ramgarh, there is a well-understood custom that jagirs are resumable on failure of heirs in the male line, though the grant may be to a person and his putra-poutradic [see Ram Narayan Singh v. Ram Saran Lal AIR 1918 P.C. 203]. The Calcutta High Court, relying upon the decision of the Judicial Committee in Ramlal Mookherjee v. Secretary of State (1881) 7 Cal. 304 and in Lalit Mohun

Singh Roy v. Chukkun Lal Roy (1897) 24 Cal. 834 had come to the conclusion that those words imported an estate of inheritance. The decision of the High Court was, however, reversed by the Judicial Committee. So also the force of the words, "putra poutradic" may give way to a family custom. This was held by the Judicial Committee in Ehradeshwar Singh v. Janeshwari Bahuasin AIR 1914 P.C. 76. The grant in that case was to a lady and in these terms: "You and your sons and grandsons, etc., (putra-poutradic), shall cultivate or get cultivated the mauza aforesaid, and enjoy the usufruct thereof yourself."

137. Their Lordships held that these words as used in the sanad must be regarded as words of limitation, consistent with the custom, and not as words of general inheritance.

138. I have laboured this point at unnecessary length because it was contended at the Bar that the decision of their Lordships in the two cases to which I have referred concludes the matter, and that the words, "naslan bad naslan" or words having the same signification, wherever used, must be regarded as conferring an estate of inheritance with power of alienation. In those cases, these words undoubtedly did confer estates of inheritance with power of alienation; but I am unable to read those decisions as establishing a fixed and unalterable rule applicable in every case, although the grantee may be prevented by personal incapacity from exercising the right of alienation, and although the personal law governing the grantee may impose a restriction. In Ekradeswar Singh v. Janeshwari Bahuasin AIR 1914 P.C. 76, their Lordships held that those words must be read as consistent with the custom and not as words of general inheritance. I am of opinion that, in this case, those words must be read as consistent with the personal law by which the bahuasin was governed. That law imposed a restriction on her right to alienate the lands; and reading the words, "ba farzandan, naslan bad naslan," as consistent with the Mithila Law, I must hold that these words, although they conveyed to her an estate of inheritance, did not confer on her the right to alienate the property.

139. It was lastly contended that it ought to be held, on a construction of the covenant for title, that an alienable interest was conveyed to the bahuasin. The covenant is in these terms:

I, the declarant, or my heirs and representatives (quam moquaiman) shall have no right or concern in demanding the subject of the heba or the consideration money from the aforesaid Mussammat or her heirs and representatives. Should I, the executant, my heirs and representatives, make any claim or put forward any demand in respect of the gift properties or the consideration thereof, the same will be deemed null and void.

140. It was contended that by the use of the words "heirs and representatives," the grantor clearly intimated that he had conferred the fullest proprietary rights on the grantee including the right to alienate the property. In my opinion the argument is without substance. I have expressed my opinion that in the actual

dispositive words used by the grantor there is nothing to indicate that an alienable interest was conveyed to the grantee. That being so, can a covenant of this nature be construed as in any way enlarging the grant. In my opinion, the covenant secured the grantee in the possession of that which was previously granted, and gave an additional remedy, namely, an action for damages, if the grantee was deprived of that which was previously professed to be granted, but did not enlarge that which was previously granted [see *Leech v. Schweder* (1874) 9 Ch. 463 and *Davis v. Town Properties Investment Corporation, Limited* (1903) 1 Ch. 797. In *Nottidge v. Dering* (1910) 1 Ch. 297 Cozens-Hardy, M.R., said as follows: "Covenants for title are really ancillary to the assurance of the property, and ought not, in the absence of clear words, to be extended so as to confer a larger estate than is expressly assured." This is a sufficient answer to the argument: but I think the argument must fail on broader grounds. The estate which was expressly granted to the bahuasin was an estate of inheritance, that is to say, an estate of unlimited duration. Now whether a power of alienation is incident to such an estate must depend, in my view, upon the personal law of the person who happens, for the time being, to be the holder of the estate. If the holder happened to be a person who is not subject to a law prohibiting him from alienating the land, clearly he could exercise the power of alienation; and the covenant would operate so as to prevent the grantor, his heirs and representatives from "demanding the subject of the heba" from the alienee. This is how I construe the covenant in question.

141. Mr. Hasan Imam referred to *Ram Narain Singh v. Peary Bhugat* (1888) 9 Cal. 830 in support of his argument on this point. That was a case of a gift of immovable property by a husband to his wife. The grantor stated in distinct terms that he was conveying all his rights to his wife without exception and that neither he nor his heirs shall at any time have any claim either to the property or to the price or value of it. The Calcutta High Court held that, looking at the fact that the husband divested himself of all his rights, and that he prohibited his descendants from claiming the property or its price, the gift was a gift "out and out." I do not see how the decision throws any light on the subject. The decision proceeded on the terms of the dispositive words used in the gift, and no other conclusion could be reached on the terms of the grant.

142. I have anxiously considered the terms of the hebanamah, and I am of opinion that the grantor has not, to quote the words of Lord Buckmaster, "made use of words of sufficient amplitude conveying in the terms of the gift itself the fullest rights of ownership, including the power to alienate." It must be remembered that the language used by Hindus in instruments relating to grants of immovable property is very often merely descriptive of the course of legal succession. A grant of immovable property by a Hindu husband to his wife is heritable under the Mithila Law. The words used by Durgha Dutt do no more than describe the course of succession under the law by which he was governed. Such a grant is inalienable except under circumstances which are not present here. Durga Dutt was presumably aware of the restriction placed by law on the right of

the wife to alienate immovable property received by her as a gift from her husband. It is not disputed that Durga Dutt could, by use of apt words, convey the fullest rights of proprietorship in the property to his wife. The question is, Has he done so? I have come to the conclusion that, reading the whole hebanamah consistently with the law by which the parties were governed there is no indication in the terms of the gift that the fullest rights of proprietorship, including the right to alienate the property, were conferred on the bahuasin. That being so, the plaintiffs are entitled to succeed in the action.

143. My learned brother and I wish to acknowledge the assistance we have received in this case from Counsel and Vakils on both sides. We in this Court are accustomed to get every assistance from the leading Counsel engaged in the case; and that assistance was ungrudgingly given. But we would especially like to express our appreciation of the industry and learning shown by Mr. Lachmi Kanta Jha, himself a Maithil Brahmin, in his wide survey of the Hindu Law texts.

144. I would allow the appeal, set aside the judgment and the decree of the Court below and give the plaintiffs a decree for possession with mesne profits which must now be assessed in the usual way. The plaintiffs are also entitled to their costs both in this Court and in the Court below.

145. As my learned brother and I differ in opinion on two points both being points of law, namely:

146. First, whether the present suit is maintainable by the plaintiffs, and whether it is barred by limitation; and

147. Secondly, whether, on the interpretation of the heba-bil-ewaz the fullest rights of ownership, including the power to alienate the property were conveyed by Babu Durga Dutt Singh to his wife, this appeal must be heard, in accordance with section 93 of the Code, on these points only, by one or more of the other Judges of this Court. The papers must be laid before the Chief Justice for the necessary order.

Foster, J.

148. The following pedigree and statements appended thereto which I gather from the plaint will explain some of the facts of this case: (vide Page 660, Col. 1.)

I.--No. 3 received from the Maharaja settlement of babuana properties in pargana Jabdi and purchased (inter alia) 16-annas taluha Laheri.

II.--Nos. 4 and 5 partitioned Laheri, No. 5 getting as his separated share a 7-annas 8-gandas 3-kauris share.

III.--No. 5 made a gift of this Laheri, share to No. 6 (1876).

IV.--Nos. 5 and 6 executed a mortgage of the Laheri property in favour of No. 5's creditor to satisfy No. 5's debts (1890).

1.	Maharaja	Madhab	Singh	Bahadur	
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| | 2. Maharaja Chattu 3. Kirat Singh had babuana Singh Bahadur. properties pargana Jabdi and purchased other properties including 16 annas Laheri. |
_____ | | 4. Girdhari Singh. 5. Durga Dutt Singh, married to 6. Anuragin Kuer bahuasin. | | plaintiffs.

149. The plaintiffs, the eldest of whom was born about the year 1860, belong to a junior branch of the Darbhanga raj family and are Mithila Brahmins. Their father Durga Dutt Singh, after partition of babuana and other properties (which included taluka Laheri) in 1876 conveyed to his wife Mussammat Anuragin Kuer, whom I shall call the bahuasin, his share in taluka Laheri by way of heba-bil-ewaz. Whether this transaction was benami or genuine is an issue in this case. plaintiffs say there was a complete change and transfer of ownership and possession; defendants say it was merely nominal. In 1890 Durga Dutt Singh, being in debt to the Maharaja to the extent of about Rs. 1,89,000, at the Maharaja's instance, executed along with his wife a mortgage of the Laheri property afore-mentioned in favour of his creditor. The Maharaja had always been paying the land revenue of the babuana properties, and so a debt had accumulated. Whether this mortgage could affect the present plaintiffs' interest as heirs of the property is the main question in this case. That the plaintiffs claim as heirs of their mother is stated in the plaint. In 1897 this mortgage was decreed, the Maharaja being plaintiff and Durga Dutt Singh and his wife defendants. In 1902 the whole interest in the Laheri property was sold in execution of the mortgage-decree and purchased by the Maharaja who is now defendant. In February, 1904 the bahuasin died, at a time when an application to set aside the sale made by her and her husband was pending; and her sons were at Durga Dutt's instance substituted as her heirs who had inherited the Laheri property. Two months or so later this application was rejected and the sale confirmed on the 2nd June, 1904. In February 1906 the plaintiffs instituted Suit No. 19 of 1906, for a declaration of their title and confirmation of possession in Laheri, on the ground that the mortgage bond was got by fraud without the knowledge of their mother the owner, and that the mortgage decree was fraudulent. Durga Dutt Singh was pro forma defendant in this case; he died in July, 1907. In June, 1907 the plaintiffs withdrew the suit with permission to bring a fresh suit. On the 24th July, 1918, the plaintiffs instituted the present suit. The cause of action in the previous plaint had been stated as having arisen in February, 1906, when the frauds therein stated had been discovered. The cause of action in the present plaint is dated 16th December 1906 the delivery of possession to the Maharaja as auction-purchaser. The declarations sought in the plaint are that the property belonged to the plaintiff's mother, and that Durga Dutt Singh had no right to execute the mortgage bond; so the rights of the bahuasin and the plaintiffs were not affected by the mortgage suit, the decree, the sale and the delivery of possession. The plaintiffs pray for recovery of possession and mesne profits. It is important to note that there is no prayer for setting aside the mortgage decree--seemingly because of limitation--and the

word "fraud" does not occur in the statement of reliefs sought. It is also important to note that the plaintiffs sue not as reversionary heirs of their father, but as heirs of their mother, the position which in fact they had occupied in the execution proceedings. The present suit having been dismissed the plaintiffs are appealing and there is a cross-objection: all the important issues are thus re-opened.

150. It is obvious that the mortgage decree obtained against Durga Dutt Singh and his wife must stand in this case as a fundamental fact. So long as the decree stands it must bind the heirs. The decree and the execution directed the sale of the whole interest--not of a life estate or any restricted interest in the Laheri property, and the decree has been accordingly enforced in the sale. But the plaintiffs' case, which does not deny these facts, is that the decree and the sale could pass only the bahuasin's estate. It is urged that she had a heritable but not an alienable estate, and she had no power to mortgage the whole estate so as to disinherit her heirs. The contention purports to be based upon the Mithila Law.

151. Before proceeding to consider the main issue, I wish for convenience sake to take up the issue raised by the Maharaja defendant whether the heba-bil-ewaz of 1876 was benami. I have had the advantage of reading my learned brother's judgment on this point and I need not repeat his arguments, with every one of which I am in agreement. I find that the heba-bil-ewaz was not a benami transaction and that the issue has been correctly decided by the learned District Judge.

152. It yet remains to see what was the legal result of this heba-bil-ewaz of 1876. It appears to me that if Durga Dutt Singh wanted to grant an estate with restrictions on alienation, he need merely have executed a heba or a simple gift. By making a transfer in the form of a heba-bil-ewaz, which ordinarily carries the incidents of a sale, he must be taken to have intended the usual legal consequences of such a common form of transfer. I admit that in this argument I am paying more attention to form than substance; but so, I think, did Babu Durga Dutt, whose intentions I am attempting to discover. He, a Mithila Brahmin of wealth, having some knowledge himself and no doubt numerous advisers within reach, must have known the difference between a heba and a heba-bil-ewaz. Why did he choose the latter expression instead of "heba" or the corresponding term in Hindi Daupatra especially if he intended that his wife should take property as a Mithila Hindu wife. Are we justified in thinking that so much of the document was a pure mistake? After a careful examination of all the expressions of the document, I can find none which clearly indicate a limited estate. It is noticeable that the document mentions that the property transferred is to pass into the possession of the Mussammat and the produce thereof is to be enjoyed generation after generation:

And I, the executant, and my heirs and representatives neither have nor shall have any demand or dispute with respect to the gift properties or consideration

thereof as against the said Mussammat her heirs and representatives.

153. The adjectival word "gift" is in the original "mahuba" a term which is used to describe properties transferred by either a heba or (as in this case) a heba-bil-ewaz. Now, the noticeable points are firstly that no mention is made of any specified heir such as a daughter or son, though such existed: the expressions of the document in this respect are such as might be used in a transfer to an utter stranger: secondly, as the learned Judge remarks;

The use of the words "warisan wa qaem moqamian" in respect of both the donor and the donee shows that the donor contemplated that the donee may have "qaem moqamian," i.e., representatives other than her heirs;

154. In the third place the passage quoted recalls the case of *Ram Narain v. Pearay Bhagat* (1888) 9 Cal. 830, and certainly supports the contention that this was an absolute transfer. No doubt the facts are not set out in this reported case, and at first sight the only question appears to have been whether the wife, the donee, took an estate of inheritance or for her life-time. But the issue must have been also as to whether the gift conveyed an absolute estate ("a gift out and out"). For that is the conclusion arrived at, and the two Calcutta cases quoted dealt with what purported to be absolute alienations by a wife (devisee in one case, donee in the other). The issues governing those cases were whether she, the wife or widow, took an absolute and therefore freely alienable estate. The cases are *Kunj Behari Dhur v. Prem Chand Dutt* (1879) 5 Cal. 684 and *Srimati Pabitra Dasi v. Damudar Jana* (1873) 7 B.L.R. 697.

155. As I read the Privy Council decisions they lay down uniformly the rule that the Courts should examine the documents of transfer with an eye to the ordinary Hindu's inclinations; he does not usually intend to make a wife absolute owner by a deed of transfer. In the earlier interpretations of this rule of the Privy Council the Courts went almost so far as to import a strong presumption that the grantee was to receive a limited estate, and it was held that something express is necessary to exclude what is tacitly implied. *Expressio facit cessare tacitum*. But I conceive that the rule adopted in modern times is that if by a construction of the document the grant of an absolute estate can reasonably be extracted, there is no need to insist on an express and distinct grant of an absolute estate *Expressio eorum quae insunt nihil operatur*. Express words are not essential; the fact that the donor is a Mithila wife is not fundamental; it is to be seen whether the words are of sufficient amplitude to convey an absolute estate [*Ramachandra v. Ramachandra* A.I Rule 1922 P.C. 80.]

156. It appears from the pedigree and the statements given above quoted from the plaint that mauza Lahari was (in spite of the recital in the heba-bil-ewaz) ancestral property held in co-parcenership by Durga Dutt and his sons. The gift of 1876 was made in the life-time of some of the sons, but in the circumstances it must, I think, be held that the transfer, though effected by the father, was made by him as agent of the joint family who ratified and affirmed the

transaction.

157. After a prolonged consideration of the document, I am disposed to think that this was the transfer of an absolute estate.

158. The heba-bil-ewaz was evidently, we see from its recital, rather an act of gratitude than a sale for value. In spite of its form it seems to me to be reasonable to regard this transfer of the Laheri property as in substance a gift (dattam) within the meaning of the Hindu texts--unless of course it be an absolute grant.

159. The learned vakil for the appellants urges that on the Mithila text whatever immovable property the husband grants to the wife, unless distinctly stated to be alienable, even though accompanied by express words of inheritance, cannot be alienated even with the consent of the husband. As he forcibly put it in his argument, so far as such property is concerned, the husband is "as a dead man." The proposition is of course surprising and it is unfortunate that it was not put forward in the plaint; for in a case like this evidence of local usage in Mithila tracts would have been of great value. My learned brother's discussion of the texts has entirely unsettled my original impression that the Mithila law had no divergence from the law of the other schools in regard to the alienation by a wife with her husband's consent of immovable property granted to her by him in his life-time. At the same time I am still impressed with some difficulties which do not amount to substantial doubts. As I have said, we have no evidence of local usage, a matter which is important when there is no authoritative text expressly and positively supporting the alleged Mithila rule. The rule is gathered by inference and is nowhere explicitly stated.

160. The ruling of the Madras Court, *Bhujanga Rau v. Ramayyama* (1884) 7 Mad. 387 has been declared to be inconsistent with later Privy Council decisions and to be no longer law by the Editor of the 9th edition of Mr. Mayne's *Hindu Law* (paragraph 397); but this statement is a marked departure from the 8th edition. The case refers to alienations by the widow, not by a wife with her husband's consent. The form of alternative proposition in the Mitakshara school would, I conceive, be different from the form of alternative proposition in the Mithila school though both might be expressed loosely as "if not an absolute estate, inalienable." But it would have to be understood that in the Mitakshara law the word "inalienable" in such a context would mean "inalienable without the husband's consent" and in Mithila law "inalienable without legal necessity." That is how I understand the *Smriti Chandrika* (Chapter IX, section 1, verses 13 and 14, and section 2, verse 4, et passim) in regard to the Mitakshara law as applied in Madras. But on the whole I arrive at the conclusion that the rule that the wife must preserve the corpus of the property while her husband lives, spending only the income subject to his permission, and after his death must preserve it for her heirs, is fairly deducible from the Mithila texts; and I defer in this matter to my learned brother's arguments.

161. Reverting to the question whether the gift was absolute, as I understand Bhujanga Rau's case (1884) 7 Mad. 387 it laid down that gifts by a husband to his wife of immovable property, even though accompanied by express words of inheritance, are not alienable by her unless distinctly stated to be so, though they descend to the wife's heirs. I think this is put forward as a rule of Mitakshara law and I take the meaning to be that such a gift even though it creates an estate of inheritance does not free the wife in respect of alienation from her husband's tutelage, or after his death from the limitations of a widow's estate, unless the matter is made distinctly clear. I am not convinced that such a demand for a distinct statement in the document could be applied in Mithila law, where the husband's tutelage can never exist in such circumstances and the grantor would (on one of the alternative constructions) be rendering his property absolutely inalienable. In Mithila law the alternative is ordinarily between absolute alienability, and absolute inalienability, where there are no special limitations reserving control by some one. So I am not disposed to import the rule of Bhujanga Rau's case (1884) 7 Mad. 387, as I construe it, into the present case. A husband, karta and father under Mithila law would be taking a very serious step in making such a gift to his wife as is suggested on the plaintiff's side: he would be surrendering his authority and control, and tying up the property for an indefinite period. In my opinion the hiba-bil-ewaz of 1876 was an absolute transfer, and I find that the intention deducible from its expressions was an absolute transfer. The finding is pertinent at this point because it shows why I think that the special rules of Mithila law as to absolute inalienability remain outside the facts of the present case.

162. I come now to the questions that have arisen in connection with the execution of the mortgage bond. In the first suit it was the plaintiffs' case that the mortgage was fraudulently executed and that the bahwasin never gave her consent at all. The discovery of this fraud was stated to have occurred in February, 1906 (though the documentary and oral evidence show that three of the plaintiffs had a close connection with the document evidencing the transaction). The only evidence to suggest undue influence--which is all that is now asserted--is the statement that Babu Durga Dutt Singh, when he was being pressed by the Maharaja, sent a message to the bahwasin through her own relative Raghunandan Jha (a very important fact in itself) that she ought to meet the decrees against her husband. On this point as to undue influence I entirely agree with the learned District Judge who finds that there was no undue influence and that the lady had her uncle's independent advice. The matter is not in fact within the legal scope of the present case.

163. The position of the plaintiffs is anomalous. From the fact set out in paragraphs 1 to 3 of the plaint (the details of which I have quoted at the commencement of this judgment), I gather that taluka Laheri was ancestral property. In paragraph 17 of the plaint, the relief (e) is stated.

164. That should the Court for any reason hold that the said deed of gift was

only a colourable transaction, the Court may be pleased to hold that the said mortgage-bond, the decree passed thereon in the absence of the plaintiffs Nos. 1 to 4 and the proceeding in execution thereof, affected, if at all, only the right, title and interest of the said Babu Durga Dutt Singh and not that of the said plaintiffs; and the said plaintiffs are entitled to recover possession of their legitimate share in the disputed property and with this declaration the Court may be pleased to pass in favour of the said plaintiffs a decree for possession of their legitimate share and for mesne profits with regard to that share from the date of this suit until the date of recovery of possession."

165. Now the property being coparcenary and having been, on the facts which are assumed in this relief and asserted in the plaint, mortgaged by the father for his previous debts which were neither immoral nor illegal, and the whole property having been sold in enforcement of the mortgage-decree, it is difficult to see what the plaintiffs expect to get under this prayer; but, as I have found that the property was sold in execution of a mortgage executed by their mother who was the absolute owner thereof, and as that mortgage was decreed against her, and the whole property was sold in execution, this relief need not be considered.

166. The next fact to note is that the mother was not a co-parcener or a manager or anything but absolute owner, and the sons, the present plaintiffs, were not co-parceners or reversionary heirs, but direct heirs who would have succeeded to the property, after the death of their mother, by simple inheritance: they derive title from their mother and are her heirs and legal representatives, they are therefore claiming under their mother. The mortgage decree still stands good, therefore the sale thereunder. In the previous suit, which was on a different cause of action from that of the present suit, as I have mentioned already, there was an express prayer for a declaration that the mortgage bond and the decree were vitiated by fraud and there was an express prayer for setting aside that decree. That suit was withdrawn and has never again been instituted. The opportunity passed away, and was lost. The present suit is quite different. I do not see how the question of undue influence can be raised in the present suit so as to have the effect of annulling the mortgage decree and the sale thereunder. As I have said before, the plaintiffs have no title independent of their mother.

167. I agree with the learned District Judge that the plaintiffs could not sue for possession until they had cleared the way for such a suit by securing the annulment of the mortgage decree and the sale thereunder. The point is raised in the written statement, paragraph 3, in the issues Nos. 2 and 4, and has found a place in the arguments in this Court. The policy of restraining multiplicity of suits is not merely a matter for parties to invoke in their own interest, but it is a matter of public concern, and therefore, I have no hesitation in giving it importance. The contention of the plaintiffs is that they can ignore the decree and sale, as they put it, "we are not bound by them." In my opinion, the

property Laheri has passed away in the execution sale and it is now too late to set that sale aside, and so the suit is maintainable. No doubt there are cases where a person's interests are not affected by Court sales; the commonest example is where the decree and sale were without jurisdiction, as when the property of a stranger to the suit is sold in execution, that property being outside the property ordered to be sold under the decree [Kadar Hossain v. Hossain Saheb (1897) 20 Mad. 118]. Another instance is of course where the sale has not passed any property; as in Motilal v. Karaudhin (1898) 25 Cal. 179. In that case there were two sales of the same property, and it was found that in the second sale there was no right, title or interest of the judgment-debtor left to be sold, so the first purchaser was secure. I do not find that the present case falls within this class. There is a second class of cases in which the Court sale is valid to the extent of the judgment-debtor's life interest, but the reversioners can elect to avoid the sale and indicate their election by bringing a suit for possession [Bijoy Gopal Mukherjee v. Krishna Mahishi Debi (1907) 34 Cal. 329].

168. But this latter rule must be subjected to weighty reservations. I venture to put forward in a lengthy sentence what I conceive to be an enunciation of the law governing this case: (Later I shall refer to this as my main proposition). I am assuming, of course, that the case falls under Hindu Law.

169. If the bahuasin, as mortgagor defendant, represented the whole estate in the mortgage suit; if the trial of that suit has not been shown to have been unfair; and even if the bahuasin was personally estopped from raising certain pleas, for instance, the absolute inalienability of the Laheri property; still, if the evidence before us shows that the debt was in fact due, and if we find nothing to show collusion or fraud in the obtaining from the Court of the decree in that suit, then the plaintiffs are bound by it, unless and until they get that decree set aside.

170. In order to be quite fair to the plaintiffs, I am assuming that they are in the favourable position--in view of the peculiar provisions of Mithila Law accepted in this judgment--of reversioners, and therefore not "claiming under" the bahuasin in the sense of section 11 of the Code of Civil Procedure.

171. I have premised in my main proposition that there must be nothing to show collusion or fraud. We have before us the following facts: (a) intelligent adult members of the family, the father and three sons, either joined or took some part in the execution of the mortgage; (b) the father took a noticeable part in the litigation and so did the son, after the sale in execution; (c) the oral evidence before us consists in mere negations--attesting witnesses know nothing of the contents of the mortgage bond, processes were not served in the mortgage suit, and so forth--there is no positive evidence of fraud having the effect of misleading the Court; (d) the suit to annul the mortgage decree was withdrawn by the present plaintiffs and never revived.

172. So, to come back to my main proposition. What weight are we to give to the fact that the bahuasin was subjected to a personal estoppel, when so far as

we can see in this suit, the mortgage debt was in fact due and there was no proved fraud or collusion in the mortgage suit? For the sake of brevity, I do not propose to go at length in the authorities. My findings of fact and law are that the bahuasin in the mortgage suit was the one person in the world capable of defending the property; that she was under a duty to protect it; and that she did not, because so far as we know, she could not, contest the suit; and that her personal estoppel did not detract, so far as we know, from the fairness of the trial of the suit. I agree with the learned Judge's discussion of issue 14. He might have quoted Exhibit G-3. I find that the bahuasin had due notice in the suit. These being my findings, I invite attention to Mayne's Hindu Law (9th edition) section 664, read with sections 641 to 643 and Mulla's Commentary on the CPC (7th edition), pages 50 and 51. But I quote as authorities specially pertinent *Subbammal v. Avudaiyammal* (1907) 30 Mad. 3 and *Gur Nanak v. Jai Narain* (1912) 34 All. 385.

173. I also quote the case of *Parekh Ranchor v. Bai Vakhat* (1887) 11 Bom. 119 as I think it is useful to indicate my point of view. A widow, in spite of her duty to protect the estate, suffered a collusive decree and sale and the nearest heir of the widow's husband brought a suit for a declaration that the sale was inoperative as against him. His suit was out of time under Article 12 but timely under Article 95 of the Limitation Act. It was held that Article 12 did not apply to the case and he was entitled to a decree. Now, in the present case, the plaintiffs do not allege that the mortgage decree was collusive, and they are out of time under both Articles. In the previous plaint the fraud there alleged was stated to have been discovered in February, 1906 and the present suit was instituted on the 24th July, 1918.

174. If the plaintiffs assert, as they do in the plaint, that they are the heirs of the bahuasin, it is clear that the decree must bind them as her heirs and legal representatives. If they attempt to assert, that, having regard to the special conditions of the Mithila law, they are very much in the same position as reversioners, because it is the duty of the wife to preserve the property for the heirs, I would refer to my previous discussion of the legal position of reversioners. As to their claim to ignore the decree and the sale, I refer to the Privy Council decision in *Malkarjun v. Narahari* (1901) 25 Bom. 337. In that case, notice of execution of a money decree was issued upon the nephew of the deceased judgment-debtor as his heir and legal representative, when in fact the judgment-debtor had left his properties by Will to his two daughters. The daughters had no notice. It so happened that a mortgagee of the property sold had purchased the property in this execution. The daughters sued the mortgagee for redemption and possession. It was held that the plaintiffs must clear the ground for redemption by a suit to set aside the sale. The omission to serve notice on the two legal representatives, though a serious irregularity, did not operate to divest the execution Court of jurisdiction. In such circumstances the plaintiff could not ignore the sale. The jurisdiction being there, the Court was empowered to decide wrongly as well as rightly. The case was barred under

Article 12 of the Limitation Act. There was a similar case in *Raghavendra Ayyar v. Karuppa* (1897) 20 Mad. 33, a suit to recover land, with no prayer to set aside a sale effected under a Rent Recovery Act. The suit failed, being barred by Article 12.

175. It is also to be remembered that the plaintiffs were present in Court as heirs and representatives of their mother and prosecuted her application to set aside the sale early in 1904. In their presence that application was rejected and the sale confirmed by the Subordinate Judge on the 2nd June, 1904, and, an appeal from that order was dismissed in the High Court in January, 1906. The order of the 2nd June, 1904, was an order "against" the present plaintiffs, in the sense of section 312 of the old Code of Civil Procedure, So the plaintiffs were by that enactment debarred from bringing a suit to set aside the sale on grounds which would re-open the questions decided in the proceedings u/s 311. It is clear that any suit to cancel the mortgage bond would be barred under Article 91 or 125 of the Limitation Act and any suit to have the decree set aside on the ground of fraud would be barred under Article 95. Article 141 is inapplicable, for, at the death of the bahuasin, the plaintiffs being equally bound with her to submit to the mortgage decree and sale were not entitled to the property in the sense of the Article. How could they be when that sale was subsequently confirmed and certified? Article 142 cannot refer to mere possessory title (as it is called); there is a special provision for that in Article 3. At the time of delivery of possession the plaintiffs were divested of all title. No other Articles of the Indian Limitation Act appear to me to be apposite.

176. In my opinion with great respect to my learned brother, whose judgment I have had the advantage of reading this appeal should fail on the two grounds, that the mortgage of 1890 was, a valid transfer made by the plaintiffs' mother, and that the present suit, which could not lie as long as the mortgage decree and the sale thereunder remain in force, is now barred and not maintainable.

[On application by the appellants for judgment in favour of the appellants under Clause 28 of the Letters Patent the following judgment was delivered:]

Judgment

177. Mr. K.B. Dutt, appearing on behalf of the appellants, draws our attention to the decision of the Judicial Committee in *Bhaidas Shivadas v. Bai Gulab* AIR 1921 P.C. 6 and contends that on the authority of that decision his clients are entitled to judgment in their favour. The first question is whether we have any jurisdiction to entertain the application which is now made before us.

178. It is well established that there is no authority to alter or add to a judgment after it is dated and signed, save as provided by section 152 or on review. Our Code recognises the rule in Order 20, Rule 3. But in this case we are not asked to alter or add to the judgment. The judgment pronounced by us remains. The only question is as to the procedure for giving effect to the judgment. We have differed in opinion on points of law; and the question is whether there should be

a reference to a third Judge u/s 98 of the Code or whether the appellants are entitled to judgment in their favour under Clause 28 of the Letters Patent. The order which Mr. Dutt is asking us to vary did not decide anything as of right between the parties; it merely referred the matters to the decision of a third Judge. We are now asked to vary that order because of what the Judicial Committee is said to have held in the case to which I have referred. It has been held in England that, in matters of mere procedure, a Judge has power, in dealing with what has been directed by a previous interlocutory order, when new facts are brought before him, which show that following the precise directions of that previous order will cause what he considers inconvenience or other injury to the parties, to give directions that, notwithstanding the previous interlocutory order, a different mode shall be adopted for carrying into effect the substance of the previous order. [See *Prestney v. Golchester Corporation* (1833) 24 Ch. D. 376] The question before us is of a somewhat different nature; but we are of opinion that the order which we are asked to vary not having decided anything as of right between the parties but merely laying down the procedure by which the right should be decided, we have complete jurisdiction to vary the order if we are satisfied that the right between the parties cannot be ascertained in the mode indicated by us.

179. Coming to the merits of the application, it seems to us that the order passed by us is right. No doubt the Judicial Committee held in the case cited that Clause 36 of the Letters Patent of Bombay (corresponding with Clause 28 of our Letters Patent) prescribes a special form of procedure by which, if the Judges hearing an appeal are equally divided, the opinion of the senior Judge prevails and that that clause is not controlled by section 98 of the CPC which provides for a reference of the point in dispute to one or more other Judges. But it must be remembered that the Judicial Committee was dealing with a case which was heard on the Original Side of the Bombay High Court; and this was prominently referred to in the arguments of Mr. DeGruyther who pointed out that the case was on the Original Side and the procedure in appeal was regulated by Clauses 15 and 36 of the Letters Patent of Bombay. Now there is no doubt that the provisions in section 98 of the Code create a totally distinct method of procedure in the event of difference between two Judges from that which is laid down by Clause 36 of the Letters Patent of Bombay. Under Clause 36 the judgment of the Judge who is the senior Judge would be the judgment which the parties before the Court would have a right to obtain; u/s 98 the judgment to which they are entitled is the judgment of the majority of all the Judges who have heard the appeal, including the Judges to whom the points in difference may be referred.

180. In our opinion there is no conflict between the Code and the Letters Patent. The special procedure indicated in the Letters Patent applies to Letters Patent appeals; the procedure indicated in section 98 of the Code applies to appeals from subordinate Courts. The matter was fully considered by the Bombay High Court in *Bhuta Jayatsing v. Lakadu Dhansing* (1919) 43 Bom. 433 and we concur so completely in the judgment of the Full Bench that we think it unnecessary to

state our reasons in support of the order which we have already passed. In our opinion the application must be refused.

[The appeal was laid before the Chief Justice, owing to the difference in opinion between the learned Judges:--]

Dawson Miller, C.J.

181. This appeal has been referred to me u/s 98 of the CPC for determination upon two points of law upon which the learned judges before whom the appeal came originally have differed in opinion.

182. The points as formulated in the judgment of Das, J., are:--First, whether the present suit is maintainable by the plaintiffs, and whether it is barred by limitation; and secondly, whether, on the interpretation of the heba-bil-ewaz, the fullest rights of ownership, including the power to alienate the property, were conveyed by Babu Durga Dutt Singh to his wife.

183. The facts are fully recorded in the judgment of Das, J., and it is unnecessary to repeat them.

184. The argument before me was mainly directed towards the second point and it will be convenient to deal with it first.

185. It was conceded at the outset by Sir Binode Mitter, who appeared on behalf of the appellants, that if the heba-bil-ewaz passed all rights of ownership to the grantee, the suit is not maintainable. Again it is not disputed that the instrument of 1876 conveys an estate of inheritance which would, after the death of the grantee, devolve upon her own heirs and not upon those of her husband as in the case of property inherited by a Hindu widow from her husband. It is further conceded that if the grantee had been a male or even a female under no personal disability, there is nothing in the Hindu law which would exclude the right of alienation incident to a grant of an estate of inheritance.

186. It is contended, however, that in determining the intentions of the grantor it must be taken that Durga Dutt Singh was well aware that a Hindu wife governed by the Mithila law could not alienate immovable property, the gift of her husband, and that presumably his intention would be to transfer only such powers as the ordinary law recognised, and even if he erroneously supposed that the grantee might alienate the property with his consent, this can make no difference in the present case if in fact, as now found, his consent did not validate the transaction.

187. The proposition contended for is stated in the judgment of the Judicial Committee in *Moulvi Mahomed Shamsool Hooda v. Shewakram* (1874) 2 I.A. 7 in the words: "In construing the Will of a Hindu, it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property of Hindus. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a

general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate," Bearing that in mind and having regard to all the expressions in the Will, which must be taken together, their Lordships held in that case that the testator's intention was to grant to his deceased son's wife a life interest only with remainder to her two daughters who were also mentioned in the Will as heirs and Maliks. This principle was again recognised by the Judicial Committee in *Radha Prasad Mullick v. Rane Mani Dassee* (1908) 35 Cal 896. There is no doubt that the principle is one which must be given due weight. In both the cases cited, there were, however, indications in the Will itself that an interest for life only was intended to be given to the daughters with remainder over to other persons named. So clearly was this intention expressed in the later case that, notwithstanding the provisions of section 82 of the Indian Succession Act of 1865, which was applicable u/s 2 of the Hindu Wills Act of 1870 to the case in question, their Lordships were satisfied that only a restricted interest was intended to pass.

188. A somewhat similar principle is sometimes expressed by saying that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention. [See *Lloyd v. Guibert* (1865) 1 L.R.Q.B. 115.]

189. But, after all, the intention is primarily to be gathered from the words of the instrument itself, and the application of this and similar doctrines, although they must be given due weight, must not be allowed to overrule the clear indications of intention to be gathered from the words of the document. Perhaps it may not be out of place to repeat here what was said by Lord Justice Turner in delivering the judgment of the Judicial Committee in *Sreemutty Soorjeemoney Dassee v. Denubundoo Mullik* (1854) 6 M.I.A. 526. The case was one of the construction of a Will. "In determining that construction," said the learned Lord Justice, "what we must look to, is the intention of the testator. The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily, the words of the Will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the Will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the Will or the surrounding circumstances displace that assumption."

190. In applying these principles to testamentary and other forms of gift, the Courts in India appear to have inclined from time to time towards two extremes: one view being that a gift of an estate of inheritance to a Hindu wife did not pass the right of alienation except when conferred by express words; the other that such a gift always gave the right of alienation except when expressly excluded.

191. I think it may be gathered from the decisions of the Judicial Committee that neither of these views quite correctly expresses the proper rule of construction in such cases. In *Surajamani v. Rabinath* (1903) 25 All. 351, the High Court at Allahabad following earlier decisions of the same Court had held that under the Hindu law a testamentary gift of immovable property by a husband to his wife, although made in terms creating an heritable estate, did not confer upon her any power of alienation unless such power was given by express words in the instrument. The High Court considered that in the absence of such express power it must be presumed that as regards her power of alienation the testator intended that she should be under the same restrictions as the Hindu law imposes upon a widow in the case of property inherited from her husband. On appeal to His Majesty in Council, their Lordships overruled the decision and held that where full proprietary rights are clearly granted over the property this conferred the power of alienation, unless there was something in the context or the surrounding circumstances showing a different intention and the fact that the donee was a woman was not in that case sufficient in itself to impute a different intention. [See *Surajamani v. Rabinath Ojha* (1908) 30 All. 84]. It is important to remember that that case, although it applied to a Will made after the year 1870, did not come within the operation of section 2 of the Hindu Wills Act of that year and section 82 of the Indian Succession Act had therefore no application. In that case also the decision of Mitter, J., in *Kollany Kooer v. Luchmee Pershad* (1875) 24 W.R. 395 was cited with approval.

192. The High Court at Madras on the other hand, appears in more recent decisions to have inclined towards the opposite extreme. In *Ramachandra Rao v. Ramachandra Rao* (1919) 42 Mad. 283 a case of a testamentary gift to a Hindu wife, it was held by Seshagiri Ayyar, J. that the earlier decisions of the same High Court in *Bhujanga v. Ramayamma* (1884) 7 Mad. 387 and *Nannu Meah v. Krishna Swami* (1891) 14 Mad. 274, "must be deemed to have been overruled by the decision of the Judicial Committee in *Surajmani's* case (1908) 30 All. 84. and that unless there is an express or implied qualification to the contrary the donor must be deemed to have conveyed all that he was possessed of in the property granted including the power of alienation. The words of the grant in that case were: "Out of the remaining property my adopted son shall be entitled to enjoy one-half of the property. Out of the remaining half my two wives shall take half and half." I do not wish to be understood either as questioning the propriety of that decision or expressing concurrence with it; I merely wish to point out that on appeal to the Judicial Committee, where the decision was overruled upon another point, their Lordships, although it was not necessary for them to determine the effect of the deed of gift at the same time thought it expedient to

issue a note of warning, as some misapprehension appeared to them to exist in the High Courts in India as to the effect of certain decisions of the Board and notably that of *Surajmani v. Rabinath Ojha* (1908) 30 All. 84. Lord Buckmaster, in delivering the judgment of the Judicial Committee, says: "In the case referred to (*Surajmani*'s case), when originally heard before the High Court, it had been stated that under the Hindu law in the case of a gift of immovable property to a Hindu widow she had no power to alienate unless such power was expressly conferred. The decision of this Board did no more than establish that that proposition was not accurate, and that it was possible by the use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including of course the power to alienate, which the High Court had thought required to be added by express declaration. In that case it is true some comparison was drawn between the gift to a Hindu widow and the gift to a person not under disability, but that was not the foundation of the decision, which depended entirely upon the wide meaning of the words in which the gift to the widow was clothed. More recent decisions of this Board [*Sasiman Chowdhurain v. Shib Narayan Chowdhury* AIR 1922 P.C. 63 and *Bhaidas Shivdas v. Bai Gulab* AIR 1922 P.C.193] do nothing but repeat the same proposition in other words. [See *Ramachandra Rao v. Ramachandra Rao* A.I Rule 1922 P.C. 80.]

193. The effect of these decisions appears to me to be that there is nothing in the Hindu law which prohibits a woman, whether wife or widow, from acquiring an absolute estate in property including the power of alienation. If words of grant are used importing the transfer of full proprietary rights, then effect must be given to them irrespective of the sex of the grantee. It may appear, however, from the context or from the surrounding circumstances that a limited power of disposal was intended to be conferred, even where an estate of inheritance is granted. Where ambiguity exists in the document itself or where the words are not of sufficient amplitude to confer full powers of alienation it is legitimate to assume that the grantor had in mind the ordinary disability which the Hindu law attaches to a woman's rights over property and this may be considered in determining the intention even where an estate of inheritance is granted. But where words are used which in their context express an intention of transferring full rights of ownership, it seems to me that the other principles of interpretation relied on are of minor importance and should not be allowed to restrict the natural meaning of the words.

194. Before considering the interpretation of the document, I desire to point out that I am bound by the findings already come to by the learned Judges who heard the appeal in so far as they are agreed. I do not therefore propose to discuss the question whether under the Mithila law as expounded in the *Vivada Chintamani*, the property was alienable during the husband's life-time and with his consent. Whether the learned judges were agreed that the *heba-bil-ewaz* was a gift or a sale is perhaps not altogether free from doubt. Das, J. held a clear view that the transaction was a gift. Foster J., thought that it was rather an act of gratitude than a sale for value and says:

In spite of its form it seems to me to be reasonable to regard this transfer of the Laheri property as in substance a gift (dattam) within the meaning of the Hindu texts,

but he adds

unless of course it is an absolute grant.

195. I have some difficulty in seeing how the nature of the transaction could depend upon whether it was an absolute or a restricted grant. I think what the learned Judge probably had in mind was that the ordinary Hindu law would not prevail over an absolute grant carrying a power of alienation, and not that the quality of the estate granted would affect the nature of the transaction. If full rights of ownership were transferred it would not matter whether the transfer was effected by gift or by sale. In either case the right of alienation would subsist. I think however I ought to assume that the learned Judges were agreed that the transaction was one of gift, and whatever my own views on the subject may be, I must hold that on the terms of the reference I am precluded from re-opening the point. This question arose in argument in discussing the intention of the grantor in connection with what may be called the surrounding circumstances. It was urged by Mr. Hasan Imam, on behalf of the respondents that Durga Dutt Singh would never have transferred the property to his wife in the form of a heba-bil-ewaz, which text-book writers appear to agree, carries with it the incidents of a sale, if he really intended the Hindu law restraining alienation in the case of a gift to a wife to apply. Foster, J., appears to accede to this argument, although as I have stated, he eventually agreed that it was a gift. It was also argued that although it has now been decided that the instrument is one of gift it does not follow that Durga Dutt Singh took the same view some 50 years ago when he transferred the property to his wife and therefore the presumption which would arise in the case of a gift either disappears or is materially weakened.

196. In the same connection it was also argued on behalf of the respondents that in all the cases in which the principle enunciated in Shamsool Hooda's case (1874) 2 I.A. 7 has been applied, the Hindu law applicable was well known and established and knowledge thereof might well be imputed to the person making a disposition of his property whereas in the present case it does not follow that the law now laid down, after a critical examination of the texts, was so universally acknowledged in 1876 as to carry any presumption that the grantor was then aware of it. It is argued that even if it be clearly stated in the Vivada Chintamani, and it appears to be so, that a wife cannot at her pleasure alienate immovable property given to her by her husband, the finding that she cannot do so even with his consent during his lifetime and in order to pay his creditors is arrived at rather as an inference drawn from the text of Bachaspati Misra than from any direct prohibition therein contained, and that there has hitherto been no decided case in which the Mithila law has been so expounded. The question then arises how far it would be safe in the present case to presume that Durga

Dutt Singh in effecting the transfer was aware of the restraint on alienation imposed by the Mithila law as now expounded, upon a wife during her husband's life time with his consent and for the purpose of satisfying his creditors. I am not sure that it would be safe to presume more than this, namely, that the grantor was aware that in the Mithila country a wife could not at pleasure dispose of the property given to her by her husband. Sir Binode Mither contended that even than the husband's consent would not make the alienation valid if in fact the law prohibits it in spite of his consent. I quite agree but the question is not, for this purpose, what the law is, but how far it can be presumed that the grantor was aware of it and intended the transaction to be governed by it.

197. It was also argued by Mr. Hasan Imam for the respondents that the subsequent action of Durga Dutt Singh in joining in the mortgage transaction was in itself a strong indication that when he made the gift in 1876 he did not intend the property to be inalienable even with his consent. I think, however, it would be highly dangerous and hardly legitimate to interpret his intentions in 1876 by reference to his conduct 14 years later when the considerations which then influenced him may have been entirely different. He has not been charged and no question of estoppel by his conduct arises. I have referred to these matters somewhat fully out of respect to the learned Counsel who argued them at some length, but in the view I take of the meaning of the hiba-bil-ewaz it is not necessary to determine how far the presumption of intention contended for by the appellants is affected by the considerations mentioned. I should be prepared to hold, if necessary, that there are circumstances present in this case which tend to weaken the presumption which, speaking generally, arises in such cases. I refer more particularly to the form in which the transfer took place and the fact that a substantial consideration passed from the donee to the donor as indications that Durga Dutt Singh may, after all, not have had in mind the restraint on alienation in the case of gifts to a wife when he transferred the property. I do not however wish to base my decision upon the strength or weakness of the presumption in the present case and it is unnecessary to discuss it further, for, giving full weight to the principle enunciated in the cases already cited, there was, in my opinion, in the heba-bil-ewaz a clearly expressed intention to transfer full rights of ownership including the right of alienation.

198. The document begins by describing Durga Dutt Singh as the proprietor (malik) of the Laheri property. It then recites that a decree obtained against him by his creditor for Rs. 41,532 is in course of execution in the Court of the District Judge and that the property in suit and another property of his have been advertised for sale on the following day; that he has tried and failed to raise the money and as the sale will entail loss of both the milkiat properties, having taken the sum stated above from his wife, he makes heba-bil-ewaz to her, his wife, of his share in taluka Laheri, "With trees, fruit-bearing and non-fruit-bearing and ahar and pokhar and reservoir and tank and katcha and pakka wells and sair and salt sairs and houses occupied by tenants and all my zamindari rights which up to now have (or has) been in my possession without the co-partnership of any

one."

199. It then recites that he has paid off the sum due under the decree and got the property released from sale and put musammat in possession and directs that by becoming possessed of the property she should spend the produce with sons, generation after generation and the declarant, his heirs and representatives shall have no concern in demanding the subject of the heba or the consideration money from musammat or her heirs and representatives. It is admitted that the words "with sons generation after generation" used in their context convey an estate of inheritance. There is no restraint either express or implied on alienation but on the contrary all the zamindari rights are transferred by the donor. The zamindar is the proprietor and the zamindari rights are proprietary rights. I cannot accept the view of my brother Das, J., that the words "and all my zamindari rights" add nothing to the words immediately preceding them or that they must be construed by reference to the ejusdem generis rule. The preceding words, as he truly observes, appear to be specific items of property, but they are of a corporeal nature such as trees, wells, etc., whereas the zamindari rights are intangible or incorporeal and not of the same genus. I can hardly believe that such words would have been used had they been intended merely as descriptive of the proceeding category. It would have been sufficient to say "and other things" or similar words if that were the meaning. The learned Judge appears to have had a difficulty in holding that abstract rights could be the subject of gift or could be possessed. I confess I do not share the difficulty. In connection with this point some discussion arose before me in argument as to the word which is rendered "have" in the expression.

which up to now have been in my possession without the co-partnership of anyone.

200. Mr. Hasan Imam said the word in the original document, which was translated by him in Court and taken down by the learned Judge, was "has" and not "have", and that either he had made a slip in dictating the translation or he had not been properly understood. I do not think the question is one of material importance; but to set the matter at rest I sent for the translator who originally translated the document as it appears at page 7 of Part III of the record. It seems that in the original the word is "has" and as a matter of syntax it must be governed by the earlier words "my share, etc., in taluka Laheri" and not to the zamindari rights and other matters mentioned. This reading would no doubt obviate the difficulty felt by Das, J. It was further argued on behalf of the respondents that the reference to the heirs and representatives of the grantee indicated an intention to grant an alienable estate as the word "representatives" would include assigns who were not heirs. The word translated "representatives" is qaim moqaimian which literally means "those who stand in another's place" and is correctly translated "representatives". I believe the word "representatives" when used in an English conveyance has a technical meaning and includes executors or administrators but not assigns. However this may be, I am not

aware that the word "qaim moqaimian" is a term of art in such a document in India. But it is clear that the expression coming as it does in what amounts to a covenant for quiet enjoyment cannot add anything to the extent of the grant. It might possibly throw some light upon the earlier part of the document if there were any ambiguity; but even assuming that it includes "assigns" the use of such a word would not indicate an absolute power of alienation, for it is admitted that in certain events, such as legal necessity, the grantee might alienate. I do not think any importance can be attached to the use of the word.

201. It was argued on behalf of the appellants that the words directing the grantee to spend the produce indicated that she was given the usufruct only. Those words are coupled with the words "with sons generation after generation" which admittedly passed an estate of inheritance. But it is not suggested that the sons who followed after would be in any way restrained from alienating the property. Moreover, although the grantee was directed to spend or enjoy the produce, the enjoyment was that of a person having full rights of ownership which were also conferred. Such words are not uncommonly used in India in conveyances which transfer an heritable and alienable estate. An instance will be found in the case of *Lalit Mohun Singh Roy v. Chukkun Lal Roy* (1897) 24 Cal. 834. The words used there were "my nephew ... becoming on my death my sthalabhishikta and becoming owner (malik) of all my estates and properties, etc., shall ... enjoy with son, grandson and so on in succession the proceeds of my estate."

202. Lord Davey, in delivering the judgment of the Board, said: "Nor was it disputed that the words of gift to the appellant were such as to confer on him also an heritable and alienable estate. The words "become owner (malik) of all my estates and properties" would, unless the context indicated a different meaning, be sufficient for that purpose even without the words enjoy with son, grandson and so on in succession" which latter words are frequently used in Hindu Wills and have acquired the force of technical words conveying an heritable and alienable estate." So far as I am aware such words have never been interpreted as restricting the full rights of ownership conferred in an earlier part of the instrument of grant.

203. In my opinion the heba-bil-ewaz was intended to and did pass an heritable and alienable estate and the words used were of sufficient amplitude for that purpose.

204. If this view of the meaning of the document is accepted it is admitted that the suit is not maintainable. But as this case may go before a higher tribunal, I propose to express shortly my opinion on the question of maintainability and limitation on the assumption that an unrestricted power of alienation was not conferred.

205. The plaintiffs who obtained possession of the property after their mother's death in 1904 and remained in possession until the 14th December 1906, when

they were dispossessed by the Maharaja, would in the ordinary course have 12 years from that date in which to sue for recovery of possession under Article 142 of the Schedule to the Limitation Act. The suit was instituted in July 1918 within the period of limitation. But it is contended that they were barred by section 47 of the CPC as they ought to have raised the question of their mother's right to alienate when they were substituted in her place in the execution proceedings. As pointed out by Das, J., the application made by them to set aside the sale on the ground of irregularity u/s 311 of the old Code, although purporting to be an application u/s 244 also, did not in fact raise any question coming under the latter section and did not cover the point now raised. In my opinion it was not open to the appellants to raise the question in those proceedings. The executing Court is bound to execute the decree and could not, apart from fraud, consider whether the decree ordering sale of the property was one which the trial Court ought rightly to have passed. The representatives of the mortgagor could not successfully reopen the question which, if it were open at all, should have been urged before the trial Court.

206. Next it was contended that the suit was barred by section 11. of the Civil Procedure Code. It is pointed out that the appellants claim under their mother as her heirs. They are not reversioners taking as heirs of their father subject to the life interest in their mother, nor are they remainder men taking under their father's Will. Primarily therefore they would be bound by the acts of their predecessor-in-title as well as by any decree obtained against her. But in truth it can hardly be said that the mother in this case represented the estate for all purposes so as to bind those who succeeded her. Ex hypothesi she had no power of alienation. In this respect her position is very like that of a Hindu widow taking by inheritance. She could no more bind the estate in the hands of the heirs by an alienation than a Hindu widow inheriting from her husband could bind the reversioners. She assumed a power which the law denied her. She could not transfer a good title to the mortgagee. If the mortgage was not binding upon the heirs, then, as long as their possession was not disturbed, they could, I think, ignore it and treat it as non-existent. Being in possession they were under no obligation to assert their title by a declaratory suit or to sue for possession. Does it then make any difference that a mortgage decree was passed in favour of the mortgagee? I think not. The mortgagor did not, and could not, in that suit plead her disability, she could not derogate from her grant and the question was, neither substantially, or at all in issue within the meaning of section 11 of the Civil Procedure Code, nor could the inalienability be made a ground of defence in that suit within the meaning of Explanation IV of the section.

207. It is contended, however, that a decree against a Hindu widow can bind even the reversioners taking as heirs of her husband, and a fortiori her own heirs must be bound. Shivagunga's case [1861] 9 M.I.A. 539 [Katama Natchiar v. Raja of Shivagunga] and Sisal Singh v. Balwant Singh A.I.R 1918 P.C. 87 were relied on in support of the argument. But in both those cases the question for decision had arisen and been determined in the previous suit to which the widow was a

party and all the pleas available to the reversioners had been taken by her and after a fair trial had been determined against her.

208. In the present case I think the principle followed by their Lordships of the Judicial Committee in *Bijoy Gopal Mukherji v. Krishna Mahishi Debi* [1907] 34 Cal. 329 is applicable. That case, it is true, was a case of alienation by lease by a Hindu widow followed by a suit by the reversioners after her death to recover the property; but the ground of the decision was that the alienation was not binding on the reversioners who could therefore treat it as a nullity without first seeking the intervention of the Court to set it aside and I think the same principle is applicable to the heirs whom the alienation did not bind. Nor do I consider that the fact that a decree has been passed against the mortgagor in the present case can give the transaction any more binding force if the mortgagor's power of alienation was not in question before the Court which passed the decree.

209. I agree, however, that if, contrary to the view just expressed, it is necessary to set aside the decree before the present suit is maintainable, the period within which the decree could be set aside has long since passed and the suit in that case could not proceed. In my opinion, however, on the assumption that the right of alienation did not exist the suit is maintainable and is not barred by limitation.

210. The result of my findings is that the suit fails and the appeal should be dismissed