ALLAHABAD HIGH COURT

Lala Nand Lal

Vs

Sunder Lal

(Yorke, J)

06.09.1943

JUDGMENT

Yorke, J.

1. This is a first appeal by the plaintiff Nand Lal whose suit for possession of a house and a shop in the town of Etawah has been dismissed. The property in Suit admittedly belonged originally to one Mangal Sen. A short pedigree showing the relationship of the plaintiff and defendants 1 to 4 will be useful:

(2) Mt. Mithani = MANGAL SEN = (1) Mt. Rani 1 _____| | | Chhedi Lal (1) Mt. Janki=Jagannath=Mt. X | | Thakur Prasad Babu Ram | Nand Lal (plaintiff) KASHI RAM _____|_____ | | Sundar Lal (deft. 1) Mt. Meria _____|_____ | | | Mahabir Prasad Mahadeo Prasad Mathura Prasad (deft. 2) (deft. 3) (deft. 4).

It will be noted that the plaintiff is the daughter's grandson of Mangal Sen, deceased, while defendants 1 to 4 are the brother and nephews of Mt. Meria widow of Chhedi Lal, son of Mangal Sen, who admittedly predeceased his father. The remaining defendants are Mt. Chimna Kunwar to whom Sundar Lal is said to have sold a portion of the property. Defendant 6 is the daughter's son of one Ram Dayal who obtained a money decree in Suit No. 40 of 1923 against defendants 1 to 4 and in execution on 30th January 1934 purchased the properties in suit as being the properties of defendants 1 to 4. He subsequently on 30th October 1934, executed a deed of gift in favor of his grandson Ram Gopal. Defendant 8 claims to be the adoptive son of the said Ram Dayal, while defendant 7 Mt. Mahraj Kunwar was Ram Dayal's widow.

2. It was the plaintiff's case that Mangal Sen died as far back as the 80's of the last century, that the deceased's son Chhedi Lal and daughter Mt. Janki having died during the life-time of their father the two widows Mt. Rani and Mt. Mithani entered into possession of his property with a widow's estate and that after some time Mt. Rani having died Mt. Mithani was left in sole possession. On 27th November 1919, Mt. Mithani executed a deed of surrender in favor of Thakur Prasad son of Mt. Janki, thereby accelerating the succession of Thakur Prasad to the property. Thakur Prasad, it is said, died in 1921, leaving the plaintiff Nand Lal as sole owner of the property; but at that time the plaintiff was a minor under the de facto guardianship of his father's step-brother Babu Ram son of Jagannath Prasad husband of Mt. Janki by another wife.

On 27th October 1921, two documents were executed. One of these was by Babu Earn, step-brother of Thakur Prasad, who purported to execute it in the capacity of guardian of Nand Lal plaintiff, while the other was executed in favor of Nand Lal plaintiff by Mt. Meria. This latter deed was a deed of relinquishment in respect of the whole of the property of Mangal Sen mentioning the property in detail and was evidently intended to serve as a kind of guarantee that Mt. Meria had no title to any portion of the estate of Mangal Sen. The document executed by Babu Ram is a document described as a "tamliknama" in favor of Mt. Meria and one of the two main issues in the present case is as to the interpretation of that document. On behalf of the plaintiff it was contended that the property in suit was given into the possession of Mt. Meria for her livelihood, maintenance and residence for her life to enable her to reside in it so long as she might live and appropriate its profits towards her maintenance (para. 7 of the plaint). The plaintiff thus contended that on the death of Mt. Meria he was entitled to possession of the houses which had been the subject of the tamliknama.

3. On 10th April 1923 about a year before her death Mt. Meria executed a will in respect of those properties which were mentioned in the tamliknama in favor of the three sons of Sundar Lal. Sometime in the same year Ram Dayal obtained a decree aganist Sundar Lal and the legatees and under this decree ha brought the property which had been devised to Sundar Lai's sons to sale on 30th January 1934. That sale was confirmed on 1st May 1937, and possession was obtained by Ram Gopal, daughter's son of Ram Dayal, on 27th October 1937. The main defence taken was that the property in question was given to Mt. Meria as an absolute owner because she had relinquished her life interest in the entire property of Mangal Sen. The second main plea taken was that the suit was barred by limitation. The learned civil Judge framed a number of issues but he dealt with the questions which arise in connexion with the tamliknama, namely, issue (1), "Has the plaintiff right to sue?" and Issue (3), "Whether the plaintiff is the owner of the property?" simultaneously. He has first interpreted the tamliknama and he had concluded that by this document Mt. Meria was not the absolute owner of the property but in any case he proceeded to rely upon a passage in Gour's Hindu Code, 4th Edn., 1938, Section 364, Clause (4) at p. 1181, for the proposition that property given for the purpose of or in lieu of maintenance constitutes a woman's stridhan. Hence he took the view that she was entitled to dispose of this property by will. He drew the inference that it was the sons of Sundar Lal who were the owners of the property having obtained it under the will of Mt. Meria and therefore the plaintiff was not the owner of the property and had no right of suit.

4. On the issue in regard to limitation he held that Mt. Meria died on 19th June 1924 and the present suit was filed on 1st June 1936, a little less than 12 years from the date of her death and that Ram Dayal was to be deemed to have purchased this property on 22nd January 1934, but as the defendant Ram Gopal was not actually impleaded until 1st September 1938 more than 12 years after the death of Mt. Meria, the suit, to which Article 141, Limitation Act, was applicable, was barred as against Ram Gopal. Presumably this finding rests upon the assumption that Ram Gopal was entitled to add to his adverse possession the period of adverse possession enjoyed by the sons of Sundar Lal under Mt. Meria's will. This appeal thus raises two main questions, first the question of the correct interpretation of the tamliknama read along with the simultaneous transaction, namely, the deed of surrender executed by Mt. Meria on the same day, and secondly, the question of limitation. We find it difficult to accept the view taken by the learned civil Judge of the effect of the two documents executed on 27th October 1921. It has to be remembered in this connexion that although Babu Ram, the de facto guardian of Nand Lal, made a pretence in

the tamliknama of having some rights of his own in the property in question, he actually had none as the property was the property of Mangal Sen to which Babu Ram, as the son of Jagannath by another wife and therefore not himself in any way related to Mangal Sen, could have no claim. What Babu Ram was doing was seeking to protect the interest of Nand Lal the son of his step-brother Thakur Prasad. With this apparent object in view he obtained from Mt. Meria a complete relinquishment of all rights in the property of Mangal Sen gifted by Mangal Sen's widow Mt. Mithani (by the deed of surrender of 27th November 1919 called in this document a deed of gift) to Thakur Prasad deceased father of Nand Lal. In this document the lady in two successive sentences said first of all:Lala Babu Bam aforesaid as guardian of the minor aforesaid and in his own right has under a tamliknama dated this day made a tamlik in my favor of a shop along with a balakhana inside Bazar Homganj Etawah for my maintenance and a kotha and a house situate in Etawah, mohalla Purabia Tola for purposes of my residence which are quite sufficient for my maintenance. I have therefore of my own accord and free will without any compulsion or coercion on the part of any one else and while in my proper senses hereunder made a relinquishment of the entire property aforesaid mentioned in the deed of gift aforesaid....She goes on to say that she shall have no claim to or concern with the property and if there could have been any title in her favor in the property, she has relinquished it. And she goes on further to say that she or her heirs or representatives have no right or claim left to the property relinquished or to any portion thereof or any other right as against Nand Lal minor aforesaid or his heirs or representatives. Included in the list of properties which were thus relinquished are the properties which were the subject of the tamliknama, namely, Nos. 2, 5 and 6 of the deed of relinquishment. Prima facie we should have supposed that in the light of the terms of this document it would be difficult to hold that Mt. Meria was entitled to claim any right of ownership in the property which was the subject of the tamliknama. Turning now to the tamliknama, the objects of its execution are clearly stated in these terms : " It is therefore our duty to support, give maintenance to and console Mt. Meria aforesaid also." The document goes on to mention the deed of relinquishment in respect of the whole of the property gifted by Mt. Mithani to Thakur Prasad. Thereafter the executant states:
I have therefore...made a tamlik for purposes of residence of the Musammat a double-storeyed pucca built shop...situate inside Bazar Homganj in the city of Etawah bounded as given below and a house and a kothri situate in Etawah, mohalla Purabia Tola bounded as given below worth Rs. 8000 for purposes of residence of the Musammat (owned by the minor aforesaid...under a registered rent agreement) in favor of Mt. Meria aforesaid widow of Chhedi Lal, caste Kurmi Chhatri, resident of Btawah, mohalla Purabia Tola and made her the owner (malik).This clause is followed by a guarantee clause which runs as follows:If any portion or the whole of the property made a tamlik of for the purpose (s) mentioned above passes out of the possession of the Musammat aforesaid on account of a claim of Nand Lal minor aforesaid, I and my property of every sort shall be responsible and liable for the same.

5. As it appears to us, the wording of this document is most significant and indicates that the property mentioned in the deed is conferred upon Mt. Meria for the'purposes of residence and maintenance and that Babu Ram guarantees to compensate Mt. Meria in case she should be dispossessed on account of some claim made by the minor Nand Lal at some future date. It is significant that there is at no stage any reference to the heirs or legal representatives of Mt. Meria and the guarantee of compensation is clearly worded as being a personal guarantee given by Babu Ram to the lady herself and to no one else. Beading the two documents together, we find it difficult to give any other interpretation to them. The learned civil Judge has been very much

impressed by the use of the word 'tamliknama', by the repetition of the words 'tamliknama' and 'tamlik' and the use of the phrase 'malik kardia' in the middle of the document. He has discussed a considerable number of rulings in which it was held that the word 'malik' ordinarily connoted the grant of an absolute estate and he thought that if that had not been the intention, it was easy for the executant Babu Lal to have inserted such words as "hin hayati" or the like. Thejearned civil Judge referred to and discounted the remarks made in Ganpat Rao v. Ram Chander ('89) 11 All. 296 and the observations of their Lordships of the Privy Council in *Rameshar Bakhsh Singh v. Arjun Singh*[1] As to the former he said that in that case it was laid down that there was nothing in the deeds under which the donor obtained possession of the property which placed beyond doubt the intention of the parties that she should be entitled to the absolute ownership of the property.It is not clear whether the word used in that case was "milkiat" or not but the argument of the learned Judge proceeds upon the footing that there is something in the deeds in this case which does so place the matter beyond doubt. As to the case in Rameshar Bakhsh Singh v. Arjun Singh ('01) 23 All. 194, their Lordships quoted apparently with approval the following remarks:There seems to be no doubt that where the purpose of the grant is the 'guzara', or maintenance of a grantee, such purpose goes to show that the grant is intended to be for the life of the grantee. This was so held in select case No. 291 on the authority of Woodoy Aditto Deb v. Mukoond Narain Aditto ('74) 22 W.R. 225. There seems also to be no doubt that in the case of a grant for maintenance the words 'proprietor' and 'for ever' will not per se create an inheritable estate.The above quoted remarks are in direct contradiction of the rule laid down by Dr. Gour mentioned above that property given for the purpose of or in lieu of maintenance constitutes a woman's stridhan. And we may note that the cases quoted by Dr. Gour as supporting the rule do not support it and were all cases depending on their own special circumstances. Their Lordships went on to remark:Their Lordships may observe that in the case in *Mahomad Abdul Majid v. Fatima Bibi*[2] where this was held, the gift by a will was of the management of property, but it is also applicable in the construction of the gift in this case.We think we are justified in applying this last remark to the present case and in taking the view that, where what has to be done is to construe a document whose purpose is a grant for maintenance and residence of a widow in circumstances such as are present in the case before us, it is not correct to construe the word "malik" as implying at all necessarily the conferment of an absolute estate. On the contrary, unless, as for example, by mention of the heirs and legal representatives of the beneficiary, the 'intention to confer such an estate is clearly to be inferred, we do not think that it is right so to interpret the document. The true rule was, we think, well laid down in *Mt. Chhatarpali v. Mt. Kalap Devi*[3] in which Niamatullah and Allsop, JJ. said:It is true that the use of the word 'malik' imports an absolute estate; but it has been repeatedly held by their Lordships of the Privy Council that it is not a term of art and that its real significance should be considered in the light of the setting in which it occurs. If there is nothing in the context to indicate a contrary intention, the word 'malik' certainly denotes full ownership; but it is consistent with a limited estate if it is controlled by other clauses in the will.

As was pointed out by their Lordships of the Privy Council in Radha Prasad Mullick v. Rani Mani Dassee ('08) 35 Cal. 896 quoting from the decision of the Judicial Committee in *Mahomed Shumsool Hooda v. Shewukram*[4] 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. 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 as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate.There are, of course, numerous cases in which it has been held in regard to wills that the

use of the expression "malik" by itself would not in the case of a disposition in favor of the testator's widow confer an absolute estate, because, although the use of the expression 'malik' by itself might be sufficient, prima facie, to confer such an estate, yet the knowledge of the testator as to the incidents of a widow's estate and the ordinary notions and customs of Hindus must be considered in construing a will. The same principle is clearly applicable to the construction of such a document as the tamliknama in the present suit. The learned civil Judge relied upon the decision of their Lordships of the Privy Council in *Bishunath Prasad Singh v. Chandika Prasad* [5]*Kumari* in which their Lordships referred with approval to the decision of this Court in *Naulakhi Kuwar v. Jai Kishan Singh*[6] Both these cases however were cases in which the donor described the donee in the deed as "malik mustaqil" and their Lordships remarked:But here the donee is described in the deed as 'malik mustaqil' and the comprehensive intendment of that expression is illustrated in the second of the two authorities to which their Lordships think it desirable to refer.The case in question was *Surajmani v. Rabi Nath Ojha* [7]in which the Board had held that the word 'malik' alone, unless there was something definite to the contrary in the surrounding circumstances to qualify the meaning of the expression indicates an absolute estate;
but here they had the word 'malik' followed by the word 'mustaqil' which even makes it stronger. But in the present case the word 'mustaqil' is not to be found and the surrounding circumstances (quite apart from the very individual wording of the document) go to indicate that there was not any intention to create an absolute estate. In our judgment, there is nothing in the wording of this document which could be said to put it beyond doubt that the intention of Babu Ram was to confer absolute rights in the three houses on Mt. Meria. On the other hand, there are a number of facts which seem to us to be conclusive and to lead with certainty to the inference that she was being given only personal rights which would not continue beyond her life-time. In the first place, the document is expressed to be executed in order to provide for the support and maintenance of Mt. Meria herself, that is it was for her specific benefit and not that of any one else, as for example, her heirs or legal representatives. Secondly, these houses are expressed to be given for the purpose of residence of the Musammat specifically. Thirdly, there is the fact that Babu Ram guaranteed to compensate Mt. Meria herself, but no one else, in case of her dispossession at the instance of Nand Lal. Lastly, there is the fact that at the very time at which a grant was being made in respect of these three houses Mt. Meria was herself executing a deed of relinquishment in respect of all the property gifted by Mt. Mithani to Thakur Prasad father of Nand Lal including these very three houses which were made the subject of the tamliknama. It is difficult to, see what purpose could be served by obtaining a relinquishment of these houses if simultaneously an outright gift was being made of those houses to the person executing the relinquishment. In our judgment, the learned civil Judge has taken an entirely wrong view of the tamliknama and there can be no room for doubt that so far as the tamliknama is concerned, the plaintiff was the owner of the property and had a right to institute the present suit.

6. We come next to the question of limitation. The position so far as the facts go is as follows: On the death of Mt. Meria on 19th June 1924, the plaintiff Nand Lal became the full owner of the property in suit, that is the shop and the house which are items 1 and 2 of the tamliknama. He instituted his suit on 1st June 1936, impleading defendants 1 to 4, Sundar Lal and his three sons, and defendant 5 Mt. Chimna Kunwar, transferee of a portion of the property from Sundar Lal. Ram Dayal had obtained his decree in the year 1923 but it was not until the year 1934 that he brought this property to sale and purchased it himself in an auction sale on 30th January 1934. The sale was confirmed on 1st May 1937 and meanwhile on 11th August 1936 Ram Gopal had applied to be made a party to the present suit, but that application was opposed by the plaintiff

and Ram Gopal was not impleaded. Subsequently however he was impleaded on 1st September 1938, as the person in possession of the property, presumably owing to the fact that he had by this time on 27th October 1937 obtained formal possession. The above facts show that the present suit was instituted within 12 years from the death of Mt. Meria and was within limitation as against the persons in possession of the property at the date of its institution. The learned civil Judge took the view that Ram Dayal must be deemed to have become the purchaser on 22nd January 1934 (the date of the auction sale) and on that date to have stepped into the shoes of his judgment-debtors. He was therefore entitled to tack the period of adverse possession of his judgment-debtors on to his own and therefore the suit against him (or his successor-in-interest Ram Gopal) not having been instituted until no less than 14 years from the date of the death of Mt. Meria is to be considered to be barred by limitation. It was suggested in argument on behalf of the respondents that, assuming that the tamliknama did not confer an absolute estate upon Mt. Meria, the article of the Limitation Act whicli should have been applied was really Article 140 and not Article 141 because Nand Lal was really in the position of a remainderman entitled to possession of the estate upon the death of the person who was put into possession with a life estate. The question whether Article 140 or Article 141 is applicable is really almost academic as it does not affect the date from which the period of limitation of 12 years would begin to run. The estate would fall into possession (Article 140) on the same date on which the female died (Article 141). Learned Counsel for the respondents admits that the only way in which the respondents can succeed on the point of limitation is by showing that they are entitled to tack their own adverse possession to that of the judgment-debtors; but it is not in dispute that an auction purchaser only gets whatever title his judgment-debtor may have had. It would therefore appear that if the judgment-debtor never had anything more than an immature title which was assailed and therefore, as it were, came under suspension before it ever did mature, then the auction purchaser can be in no better position than his judgment-debtor was at the date of the decree or the date of the actual dispossession. The effect of the institution of a suit within limitation is to destroy previously existing adverse possession with effect from the date of institution or at any rate to suspend it from that date until the suit is finally decided one way or the other. Prima facie it seems to us that the possession of defendant Ram Gopal in continuation of that very possession which was the subject of the present suit cannot be of any assistance to him. The question of the vesting of the property in Ram Dayal in January 1934, is immaterial. In a matter of limitation founded upon adverse possession it is the possession only which has to be considered. Ram Gopal's possession therefore in continuation of a suspended possession can be of no benefit to him. Some reliance has been placed on Section 22, Limitation Act, which provides:

Where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.But it does not appear to us that this section has any effect in the circumstances of the present case. The defendant respondent was made a party when he succeeded in asserting his possession over the property in suit and the only question which arises is whether he is entitled to tack his own possession or his own notional possession subsequent to the auction sale to the possession of his judgment-debtors, which possession was suspended by the institution of the present suit before it could mature into title. In effect it appears to us that there is no force whatever in the contention that the suit against Ram Gopal is barred by limitation because on any view of the case Ram Gopal has done nothing more than step into the shoes of his judgment-debtors upon the maturing of whose possession into title a bar was put by the institution of the present suit. One other point has been argued and that was in regard to Section 41, T.P. Act. The learned civil Judge held upon issue 3 that the suit was barred by Section 41, T.P. Act. That section provides:Where, with the

consent, express or implied, of the person interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it : provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

The defendant Ram Gopal had taken in paragraph 19 of his written statement the bare plea that the suit was barred by Section 41, T.P. Act. In paragraph 18 he pleaded that:

Ram Dayal, maternal grandfather of the plaintiff (sic. contesting defendant) had the property in suit sold by auction after several years litigation with the judgment-debtors. The plaintiff was fully aware of it. By his acts and omissions the plaintiff showed that the judgment-debtors were the owners of the property in suit.The suggestion appears to be that with the consent express or implied of the present plaintiff Nand Lal, Sundar Lal and his sons were the ostensible owners of the property in suit and transferred it for consideration. But there is no question in the present case of a transfer for consideration by Sundar Lal and his sons.It has been held by this Court in *Mangat Lal v. Ghasi Khan*[8] that an auction purchaser cannot come under Section 41, T.P. Act. For a transfer there must be a person who conveys and in an auction sale which is a transfer by law there is no person who conveys.That decision was followed in *Puranmal v. Ghasi Khan*[9] and again in *Dwarika Halwai v. Sitla Prasad*[10] (to which one of us was a party) and in which it was held:that there was no principle of law which applies to an auction sale the principle of Section 41, T.P. Act.In our judgment, the learned civil Judge was certainly wrong in holding that the defendant respondent is entitled to the protection of Section 41, T.P. Act. Upon these findings, we are satisfied that the learned civil Judge has wrongly dismissed the plaintiff's suit. We accordingly allow this appeal with costs, set aside the decree of the lower Court and direct that the plaintiff's suit be decreed as claimed for possession with costs.

Cases Referred.

1('01) 23 All. 194 at p. 205
2('84) 8 All. 39
3('36) 23 A.I.R. 1936 All. 50
4('74) 2 I.A. 7
5('33) 20 A.I.R. 1933 P.C. 67
6('18) 5 A.I.R. 1918 All. 255
7('08) 30 All. 84
8('29) 16 A.I.R. 1929 All. 800
9('35) 22 A.I.R. 1935
10('40) 27 A.I.R. 1940 All. 256