Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Musammat Surajmani and others v. *Rabi Nath Ojha and another, from the High Court of Judicature for the North-Western Provinces Allahabad; delivered the 5th December* 1907.

Present at the Hearing:

LORD ROBERTSON.
LORD COLLINS.
SIR ARTHUR WILSON.

[*Delivered by Lord Collins.*]

This is an Appeal from the High Court at Allahabad affirming the decision of the Subordinate Judge of Gorakhpur. The question is whether the first Appellant, Musammat Surajmani, acquired a right to alienate the property now in suit under a deed of gift or testamentary instrument of her late husband, Ishwar Nath Ojha. The material part of the document is as follows:—

> "I now of my own free will and accord while in a sound state of mind and in enjoyment of my senses make a gift of the entire village Dwarkapur Nankar in tappa Asnari and half of the village Telpurwa in tappa Pachhar to Musammat Dhanmati, my first wife, the entire village Doharia Khurd in tappa Banjarha and half of Mauza Telpurwa aforesaid to Musammat Surajmani, my second wife, and half of mauza Jamla Jot, *i.e.*, an eight anna share in it, in tappa Barikpar to Musammat Sarsuti, my daughter-in-law, out of the aforesaid property without consideration on the conditions that during my lifetime I shall remain in possession of the said property as heretofore, and my name shall remain recorded in respect of it in the public records and the Musammats

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> aforesaid shall be maintained by me, that after my death they shall under this document get their names recorded in the public records in respect of their respective properties given to them and remain in possession as owners with proprietary powers; and that if perchance I have a male issue hereafter, this deed of gift shall be considered null and void as against him."

The words translated "as owners with proprietary powers" are in the original "malik wa khud ikhtiyar." The Appellants contend that these words are amply sufficient to confer an alienable estate. The Respondents on the other hand contended, and the Courts below have held, that under these words the lady took no more than the ordinary estate of a Hindu widow, which is inalienable except in special conditions which are not alleged to exist in this case.

After the death of her husband Musammat Surajmani entered into possession of the property given to her and has purported to dispose of it by will in favour of her brother Ram Narain Ojha. The present suit is brought by the Plaintiffs (Respondents) as heirs of Ishwar Nath and of Surajmani for a declaration that the latter was incompetent to execute the said will, and it is against the decision in their favour that this Appeal is brought. The effect of the word "malik" in testamentary gifts has been often discussed in cases decided in the different Courts in India where there has been apparently some fluctuation of opinion. For instance, since this case was decided in the High Court of Allahabad, the same Court, differently constituted, has refused to follow it and expressed the opinion that the words in question passed the absolute estate, *Padam Lal* v. *Tek Singh* (I.L.R. 29 All. 217, at pp. 221—2).

In the present case the Subordinate Judge seemed to recognize that the trend of the

decisions of the Calcutta Courts was opposed to his view, but felt bound to follow what he thought was the result of the Allahabad cases, which were binding upon him.

In *Kollany Kooer* v. *Luchmee Pershad* (24 Weekly Rep. 395) decided in 1875, Mitter J., in dealing with the case of a will where the donees were the widow and daughter of the testator, and the word "malik" was used, thus expresses himself (at p. 396):—

> "As far as the words go, I think it is plain that the testator intended to make an absolute gift of his property in favour of his widow and daughter. He says that after his death they shall be (maliks) proprietors and his entire estate shall devolve upon them. In *Jotendro Mohun Tagore* v. *Ganendro Mohun Tagore* (18 W.R. p. 359) the Judicial Committee say (at p. 365): 'If an estate were given 'to a man simply without express words of inheritance, 'it would, in the absence of a conflicting context, 'carry by Hindoo Law (as under the present state of 'the law it does by will in England) an estate of 'inheritance.' In the testamentary instrument under our consideration, from the context it does not appear that the testator intended a limited gift in favour of Bani Kooer and Uma Kooer. Therefore adopting the rule of construction above quoted we must hold that the gift in question was an absolute gift unless it can be shewn that by the Hindoo law gift to a female means a limited gift or carries with it the effect of creating an estate exactly similar to the 'widows' estate' under the law of inheritance. I am not aware of any such provision in the Hindoo law nor have we been referred to any authority in support of it."

The question as to the effect of the word "malik" came before this Board in 1897 in the case of *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (L.R. 24 Ind. App. 76). The donee in that case was a man but the principles of interpretation laid down were of general application. Referring to the donee the testator said :—

> "If no children are born to me . . . or if at the time of my death they are not alive, then . . . my nephew . . . becoming on my death my sthalabhishikta and becoming owner (malik) of all my estate and properties, &c., shall, remaining my sthalabhishikta, obtaining the management of the Iswarshebas . . . enjoy with son, grandson, and

> so on in succession the proceeds of my estate . . . The minor, on reaching majority, shall exercise ownership (malikatwa) over all the properties."

In delivering the judgment Lord Davey at p. 88 says :

> "It was not disputed . . that the son of the testator if there had been one, or his daughter, if there had been one, would have taken an absolute heritable and alienable estate . . . 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 Hindoo wills and have acquired the force of technical words conveying an heritable and alienable estate."

This case seems to adopt and apply the same view of the word "malik" as was taken in the Calcutta case in the 24 W.R. above cited, with the result that in order to cut down the full proprietary rights that the word imports something must be found in the context to qualify it. Nothing has been found in the context here or the surrounding circumstances or is relied upon by the Respondents but the fact that the donee is a woman and a widow, which was expressly decided in the last-mentioned case not to suffice. But while there is nothing in the context or surrounding facts to displace the presumption of absolute ownership implied in the word malik, the context does seem to strengthen the presumption that the intention was that "malik" should bear its proper technical meaning. It is to be observed that the gift to the testator's daughter-in-law, Musammat Saraswati, is made in precisely the same terms. The learned Counsel for the Respondents was unable to adduce any reason for holding that in her case the gift should be cut down to anything less than a full

proprietary right, and, if this be admitted, the Respondents have to contend for two contradictory interpretations of the same phrase.

In the result, therefore, with the greatest respect for the learned Judges in the Courts below, their Lordships are unable to agree with their decision. Their Lordships will humbly advise His Majesty that the Appeal be allowed and the decrees of both Courts below discharged and instead thereof the Suit dismissed with costs in both Courts. The Respondents will pay to the Appellants the costs of this Appeal.