APPELLATE CIVIL.

Before D. N. Mitter and Edgley JJ.

1934

July 26, 27, 30.

SHANTIKUMAR PAL

v.

MUKUNDALAL MANDAL.*

Hindu Law—Widow's estate—Surrender.

A deed of surrender by a Hindu widow of her whole interest in her deceased husband's estate in favour of the nearest reversioner at the time of the said deed, in order to be binding on the ultimate reversioners, must be *bona fide* surrender of her whole interest in the estate and not a devise to divide the estate with the reversioners.

Rangasami Gounden v. *Nachiappa Gounden* (1) followed.

APPEAL by the plaintiffs.

The facts of the case and arguments in the appeal appear sufficiently from the judgment.

Brajalal Chakrabarti and *Karunamay Ghosh* for the appellants.

Bijankumar Mukherji and *Hariprasanna Mukherji* for the respondents.

Cur. adv. vult.

MITTER J. This is an appeal from a decree of the officiating Subordinate Judge of Birbhum, dated the 28th August, 1929, by which he dismissed the suit of the plaintiffs to set aside an alienation by the widow of the last male owner Bhagirath. The plaintiffs claimed to be reversionary heirs of Bhagirath. The relationship of the plaintiffs with the last male owner Bhagirath is shown in the genealogical tree to be found in the judgment of the Subordinate Judge

*Appeal from Original Decree, No. 71 of 1930, against the decree of Atulchandra Ganguli, Subordinate Judge of Birbhum, dated Aug. 28th, 1929.

(1) (1918) I. L. R. 42 Mad. 523; L. R. 46 I.A. 72.

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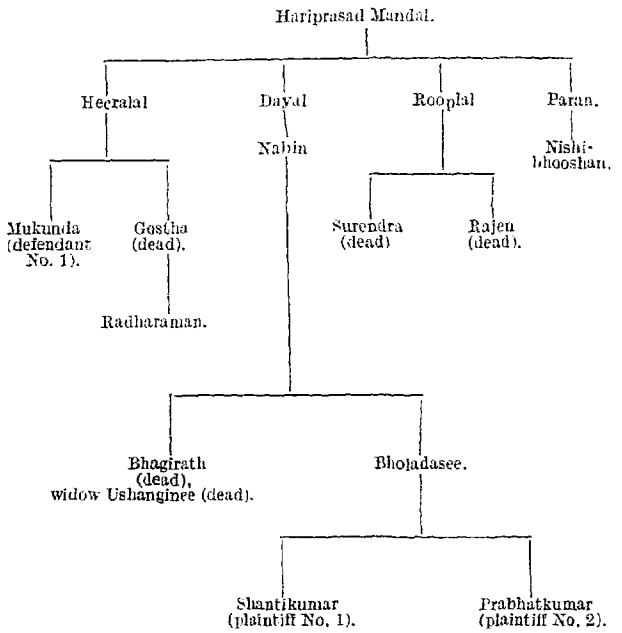
and which is printed at page 67 of the first part of the paper-book. For the sake of convenience it is reproduced here with a slight variation and the genealogical tree as given at page 51 is admitted by both parties. There is some dispute about the variation regarding Paran and Nishibhooshan.



The alienation was by a document dated the 18th *Mâgh*, 1329 B. S., corresponding to the 1st February, 1923. The document is to be found at page 11 of the paper-book (Part II). This document purports, on the face of it, to be a deed of surrender in favour of defendant No. 1, Mukundalal Mandal, who was said to be the sole reversionary heir to Bhagirath's estate at the time of the alienation. There has been some dispute as to whether Mukunda, defendant No. 1, was the sole reversionary heir or there was another reversionary heir Nishi, the son of Paran, alive at the time of the alienation. Bhagirath died on the 9th December, 1921, leaving surviving his widow Ushanginee and Ushanginee died on the 25th *Baisâkh*, 1334 B. S., corresponding to the 8th May, 1927. The present plaintiffs are the sister's sons of

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Bhagirath and the suit was commenced by them to set aside the alienation on the 20th April, 1928, a short time after the death of Ushanginee.

The transaction has been sought to be supported by defendant No. 1 on the ground that this was a surrender by Ushanginee in favour of the sole reversionary heir. There was some question raised in the court below that, even if the deed could not be supported on the ground of surrender, it could be supported on the ground that there was legal necessity for the transaction, treating it as a deed of sale in favour of the sole reversionary heir or in favour of one of the reversionary heirs, the other reversionary heir Nishibhooshan not objecting to the same. The Subordinate Judge has also considered this contention and has dismissed the plaintiff's suit. Hence the present appeal.

It has been contended by Mr. Brajalal Chakrabarti that, on a mere persual of the document of the 1st February, 1923, it would appear clear that, although, on the face of it, it purports to be a deed of surrender of a Hindu widow's estate in favour of the next reversionary heir, it was in reality a transaction by way of sale, the widow taking the major portion of the consideration of Rs. 900 odd in cash and paying Rs. 400 out of the consideration money to meet the debt of her deceased husband. In other words, it was said that, although it was described as a deed of surrender, it was really a device between the limited owner and those reversionary heirs to divide the estate as between themselves to the detriment of the ultimate reversionary heir. It must be stated that Dr. Mukherji, who has appeared for the respondents, has conceded that he cannot support this document on the basis of its being a deed of surrender or relinquishment, as it is understood under the Hindu law, so as to be binding on the ultimate reversioner. He has, however, tried to support the judgment of the Subordinate Judge by contending that, where a Hindu widow transfers, even for consideration by way of sale, the entire property of her husband to the

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next reversionary heir or to one of the reversionary heirs, the other reversionary not objecting, it really has the same effect as a surrender; and he relies on a certain passage in the judgment of their Lordships of the Judicial Committee of the Privy Council in the case of *Rangasami Gounden* v. *Nachiappa Gounden* (1) in support of his contention. This case, when carefully examined, does not lend support to the contention of the learned advocate for the respondents. After stating the two heads, under which alienation by the limited owners might fall, their Lordships of the Judicial Committee of the Privy Council said, in the passage which has been referred to at page 81 of the report, that. if the alienation be total and the reversionary heirs be the nearest, it falls within the first division; that is within the division of its being surrender. But that passage has to be read along with what precedes in the same page. Dealing with the second head, their Lordships remarked this:—

> Turning now to the second head, namely, the power of alienation, which may be alienation to any one, whether an heir or not, there is again authority of long standing. As a leading case may be taken *The Collector of Musulipatam* v. *Cavaly Vencata Narrainapah*(2) in a passage which need not be quoted at length. The purposes for which alienation is legitimate may be summarized as religious or charitable purposes, and those which are supposed to conduce to the spiritual welfare of the husband or necessity. Now, necessity must be proved, and the mere recital in the deed of alienation is not sufficient proof: *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri* (3). An equitable modification has also been admitted in the case where the alienee has in good faith made proper inquiry and been led to believe that there was a case of true necessity.
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> Thus far, if the alienee stands alone. But it may be fortified by the consent of reversionary heirs. The remaining question is what is the effect of such consent ?

This is the passage that precedes the passage, on which Dr. Mukherji has relied for contending that, if the alienation be in favour of such reversioner and be total, it falls within the first head surrender. It is to be remarked that, after reviewing the previous

(1) (1918) I. L. R. 42 Mad. 523 (533); L. R. 46 I. A. 72 (81).

(2) (1861) 8 M. I. A. 529.

(3) (1916) I. L. R. 44 Calc. 186; L. R. 43 I. A. 249.

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authorities on the subject, their Lordships summarized the conclusion thus :—

> The result of the consideration of the decided cases may be summarized thus : (1) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But *the surrender must be a* bona fide *surrender, not a device to divide the estate with the reversioner.* (2) When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved *aliunde* and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one. These propositions are substantially the same as those laid down by Jenkins C. J. and Mookerjee J. in the case of *Debi Prosad* (1). It follows that their Lordships cannot agree with a good deal of what was said in *Rangappa Naik* v. *Kamti Naik* (2).

It would appear, from the sentence in italics that, in order to be effective as a deed of surrender, it must be clearly shown that the surrender is a *bona fide* one and not merely an arrangement by the limited owner to divide the estate with the reversioner. Looking to the deed, it seems to us that this is precisely the case with reference to the transaction of the 1st February, 1923, namely, that it seems to us that it is a device to divide the estate between Ushanginee on the one hand and Mukundalal Mandal, defendant No. 1, on the other hand.

Dr. Mukherji has next relied on a decision of the Full Bench of this Court in the case of *Debi Prosad Chowdhury* v. *Golap Bhagat* (1). The Full Bench enunciated a number of propositions, as laying down the law with reference to the doctrine of surrender and alienation by limited owners under the Hindu law. Those propositions are very lucidly summarized in the judgment of Mr. Justice Asutosh Mookerjee at pages 781 and 782 of the report. The appellant seeks to bring his case within the purview of the fourth proposition laid down by the Full Bench. That proposition runs as follows :—

> When a Hindu widow has alienated her entire interest in the estate inherited by her from her husband, with the consent of the whole

(1) (1913) I. L. R. 40 Calc. 721. (2) (1908) I. L. R. 31 Mad. 366.

body of persons entitled to succeed as immediate reversionary heirs, the transferee acquires a good title as against the actual reversionary heirs at the time of her death.

This proposition cannot be held to apply to cases where the transfer is to the sole reversionary heir or the entire body of reversionary heirs for the time being, as the case may be, for this proposition contemplates a case where transfer is made to a stranger with the consent of the whole body of persons entitled to succeed as immediate reversionary heirs.

If the contention of Dr. Mukherji be accepted, we would be laying down a very dangerous doctrine, and if the proposition is true, the result would be that it would be possible for the immediate reversionary heir or heirs for the time being to come to an arrangement with the widow and purchase the property of the reversionary estate for consideration. The idea of surrender is based on different and religious considerations. In order that the reversionary heirs may acquire good title by surrender, as the authorities lay down, there must be self-effacement of the widow, in other words, there must be something in the nature of civil death of the widow, the extinction of her right in her deceased husband's estate, a circumstance which would happen if she were dead. It is, in this view, that the theory of surrender is supported under the Hindu law. The true limitations of that doctrine have also been laid down by their Lordships of the Judicial Committee in their decision in the subsequent case of *Sureshwar Misser* v. *Maheshrani Misrain* (1). That was a case of compromise after there was a dispute with reference to a will, which had been executed by the last full owner. By that will, the full owner, who died, leaving behind him an infant son and a widow and four daughters, it was provided that, on the death of the son without issue, the daughters should succeed to the immoveable property. The son died a few months later and the daughters took possession under the will. The son's

(1) (1920) I. L. R. 48 Calc. 100; L. R. 47 I. A. 233.

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next reversioner, having sued the widow and the daughters to set aside the will, the parties entered into a compromise on certain terms. The terms were that rights under the will were given up; that the widow took absolutely the moveable property, to which, in any case, she would have succeeded being governed by the Mithila School; that the widow surrendered all rights of succession to the immoveable property and the plaintiff, who, by the surrender, became entitled, as next reversioner, transferred half of it to the daughters; and that the plaintiff and the daughters each gave a small portion of the land to the widow for her life. The plaintiff, having died, the persons. who then became the next reversioner, brought the present suit for a declaration that the compromise and the transfers in pursuance of it were inoperative. In this state of facts, their Lordships of the Judicial Committee held that the compromise was a *bona fide* surrender of the whole estate and not a device to divide it with the next reversioner, the giving of small portions to the widow for maintenance being unobjectionable. The present case does not fall even within the limits of the rule of surrender as laid down in the case just cited. It is idle to say that there was any attempt to secure to her the maintenance that was required and it appears that the larger portion of the actual sale-proceeds went to the widow. We are, therefore, of opinion that the transaction cannot be supported as a surrender.

The next matter for consideration is whether this transaction could be supported on the ground that it is alienation based on legal necessity. It appears, from the recitals of the deed, as also from the evidence, that the sum of Rs. 400, which was the debt of the lady's husband and which Ushanginee was liable to pay was not paid; and a sum of Rs. 400 out of Rs. 1,500 really went to pay off the mortgage which was executed in favour of the creditor by Nabin and others—a debt which Bhagirath was liable to pay under the Hindu law. The Subordinate Judge also finds that a sum of Rs. 400 was paid for the purpose of meeting

that debt. This finding of the Subordinate Judge has been taken exception to by the appellants and our attention has been drawn to the mortgage bond for the purpose of showing that the mortgage bond had previously been paid. Necessarily, the recital in the deed that Rs. 400 went to pay off the mortgage bond executed by Nabin is an untrue statement. Our attention has been drawn to the two entries on the back of the mortgage bond and it is contended that the entry in the middle showing a payment of Rs. 397 by purchase was an interpolation. We have examined the two endorsements and, having regard to the evidence given on behalf of the respondents, that the two transactions were entered into at one and the same time and was written in the hand-writing of Shibkrishna, it is very difficult to say that the entry showing a payment of Rs. 397 was forgery. Shibkrishna could have given the best evidence on the question and it is somewhat surprising that he has not been examined at all, although he is the first person who should have been examined on this question. We are satisfied that the entry in the document was not a forgery and we agree with the Subordinate Judge that the portion of the consideration money went to pay off the debt of Ushanginee's husband's father. Consequently, there was legal necessity for Rs. 400. In these circumstances, the true rule to follow is to set aside the transaction not unconditionally but on terms. The true rule to follow in a case of this kind has been laid down by their Lordships of the Judicial Committee in the case of *Deputy Commissioner of Kheri* v. *Khanjan Singh* (1).

Following that rule, the proper direction to make in this case, having regard to the view we have taken, is to set aside the transaction evidenced by the deed of the 1st February, 1923. But this must be done on terms that the appellants do pay to the respondents a sum of Rs. 400 within two months of the arrival of the record in the lower court. On this money being

(1) (1906) I. L. R. 29 Calc. 831; L. R. 34 I. A. 72.

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paid by the appellants to the respondents, the possession of the property will be delivered to the plaintiffs. Plaintiff's suit is decreed in these terms. The appeal is allowed on the lines indicated in our judgment.

Each party must bear its own costs both in this Court as also in the court below.

If the sum of Rs. 400 be not paid within the time allowed the appeal will stand dismissed with costs.

EDGLEY J. I agree.

Appeal allowed.

A. K. D.