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APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Lindsay.

KHAWANI SINGH (DEFENDANT) *v.* CHET RAM AND ANOTHER (PLAINTIFFS) AND UDA KUAR AND ANOTHER (DEFENDANTS).*

1916
June, 14.

Hindu Law—Hindu widow—Succession—Transfer by widow to reversioner—Acceleration of succession.

Where a Hindu widow transfers an estate to the nearest reversioner, such transfer, in order to have the legal effect of accelerating the succession, must be of the whole estate which the widow possesses. The doctrine does not apply to the transfer of a portion of the estate, though it be of the widow's entire interest in that portion. *Behari Lal* v. *Madho Lal Ahir Gayawal* (1), *Pilu* v. *Babaji* (2) and *Marudamuthu Nadan* v. *Srinivasa Pillai* (3) referred to.

The rule laid down by the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (4) that a transfer made by a Hindu widow with the consent of the nearest reversioner will take effect as against the more remote reversioner, is applicable to cases of transfer for consideration. It has not been extended to a case where a transfer has been made by way of gift. If the transfer be with the consent of the nearest reversioner, it takes effect because it affords evidence of the propriety of the transaction, in other words, it justifies the transaction on the ground of legal necessity.

THE facts of this case were as follows :—

Badam Singh, Lalji, Bakhti and Khushali were four brothers. Lalji was separate in estate from his brothers. He died about 30 years ago and on his death, his widow Musammat Uda Kunwar succeeded to his estate. On the 7th of February, 1914, Musammat Uda Kunwar executed a document purporting to be a transfer, or rather a release in favour of Khawani Singh, the son of Badam Singh. This document embraced nearly the whole of the property left by Lalji, with the exception of a certain piece of land measuring 21 bighas odd. There was a recital in the document that Lalji and Khawani Singh were members of a joint Hindu family,

* First Appeal No. 162 of 1915, from a decree of Sudershan Dayal, Second Additional Subordinate Judge of Aligarh, dated the 15th of March, 1915.

(1) (1891) I. L. R., 19 Calc., 236. (3) (1897) I. L. R., 21 Mad., 128.
(2) (1909) I. L. R., 34 Bom., 165. (4) (1907) I. L. R., 30 All., 1.

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that the property in question had been acquired by Lalji out of the joint family funds, and that on the death of Lalji, Khawani Singh became the owner by right of survivorship. In June, 1914, this suit was brought by a grandson of Bakhti and a grandson of Khushali against Khawani Singh and Musammat Uda Kunwar for a declaration that the deed of the 7th of February, 1914, would be void and ineffectual after the death of Musammat Uda Kunwar. Another grandson of Bakhti who did not join in the suit was made a *pro formâ* defendant. The defence raised by Khawani was that Lalji had been joint with him but separate from Bakhti and Khushali, that on the death of Lalji he became the owner of the property by right of survivorship, but even if it were held that Lalji was separate from him, he, and not the plaintiffs, would be the next reversioner and the deed in question would operate as an acceleration of the succession by a Hindu widow in favour of the next reversioner (himself) and be perfectly valid. The court of first instance found that Lalji was separate, but that, having regard to the recitals in the deed, it could not be said that Musammat Uda Kunwar transferred or relinquished anything, for according to those recitals she did not profess to have any interest in the property of her husband, and that the plea of acceleration was therefore groundless. The suit was decreed. Khawani Singh appealed.

Munshi *Gulzari Lal*, (with him Munshi *Panna Lal*), for the appellant:—

The lower court has misinterpreted the terms and effect of the deed in question. Notwithstanding the recitals contained therein, there is no doubt that Musammat Uda Kunwar intended to surrender and did surrender her interest, whatever it was. As found by the lower court, she held a widow's estate in the property left by her husband Lalji. She surrendered or relinquished her estate in favour of the appellant, who is the next reversioner. The deed was in effect an acceleration of the succession of the next reversioner and was valid: *Behari Lal* v. *Madho Lal Ahir Gayawal* (1), *Musammat Gawri* v. *Gopal* (2), *Surajbale Singh* v. *Birthu* (3), *Sheo Das Dube* v. *Dalganjan Dube* (4). Cases of

(1) (1891) I. L. R., 19 Calc., 236.
(2) (1914) 25 Indian Cases, 503.
(3) (1914) 24 Indian Cases, 482.
(4) (1912) 15 Indian Cases, 697.

alienation by the widow with the consent of the nearest reversioners are analogous. The case of *Raj Kishore* v. *Durga Charan Lal* (1) was based upon the ruling in *Ramphal Rai* v. *Tula Kuari* (2), which itself was overruled by the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (3). If the opinion of the lower court that the deed did not amount to a transfer or relinquishment of any rights be correct, then no harm has been done and the plaintiffs have no cause of action for a declaratory suit. Taking another aspect of the case, the deed may be regarded as a transfer by a Hindu widow with the consent of the sole next reversioner; being, in fact, executed in his favour, and is, therefore, valid. In the case in I. L. R., 30 All., 1, already cited, no point was made of the presence or absence of consideration for the transfer made by the widow; sales and gifts were treated on the same footing.

Babu *Piari Lal Banerji* (with him Pandit *Braj Nath Vyas*), for the respondents:—

The recitals in the deed cast a cloud on the plaintiffs' title. The widow was giving out to the world that the property was joint, in which case she would not have a Hindu widow's estate therein. False recitals do give a cause of action; the appellant's argument that if the deed does not create a transfer the plaintiffs have no *locus standi* is not correct. It is conceded that a Hindu widow can accelerate the succession of the next reversioner by surrendering to him her entire estate; but the surrender should be of the whole of her estate and not of a portion only. She must divest herself entirely, so that the whole estate may at once vest in the next reversioner; *Behari Lal* v. *Madho Lal Ahir Gayawal* (4), *Marudamuthu Nadan* v. *Srinivasa Pillai* (5) *Pilu* v. *Babaji* (6) *Wazir Chand* v. *Makhu* (7). The reasons for the rule requiring surrender of the whole inheritance are that it furnishes a check on the frequency of such surrenders and prevents the anomaly of two successive classes of heirs becoming owners of the inheritance at one and the same time. In the present case part of the property, namely 21 bighas odd, was

(1) (1906) I. L. R., 29 All., 71.
(2) (1883) I. L. R., 6 All., 116.
(3) (1907) I. L. R., 30 All., 1.
(4) (1891) I. L. R., 19 Calc., 236.
(5) (1898) I. L. R., 21 Mad., 128.
(6) (1909) I. L. R., 34 Bom., 166.
(7) (1902) Punj. Rec., C.J., 72

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excepted from the operation of the deed. Therefore, this is not a case of the surrender of the whole estate. As to the contention that the deed is valid, being a transfer by a Hindu widow with the consent of the next reversioner, this Court has held that the rule applies to the case of sales for consideration and not to the case of mere gifts; *Abdulla* v. *Ram Lal* (1), *Beni Madho Singh* v. *Jagat Singh* (2).

Munshi *Gulzari Lal*, in reply :—

There is a conflict of opinion between the High Courts as to whether the rule requiring the surrender of the whole estate means that the whole of the property in the widow's hands must be surrendered or whether it is sufficient if she surrenders the whole of her rights in the portion of the property surrendered. The latter view is taken by the Calcutta High Court; *Pulin Chandra Mandal* v. *Bolai Mandal* (3). This view was approved of in the Allahabad case reported in 15 I. C., 637, already cited. It appears that almost simultaneously with the execution of the deed in question the widow executed a deed of gift of the 21 bighas odd to a relation of hers, with the consent of Khawani Singh. The view may be taken that Khawani Singh's consent to this gift was a consideration for the alienation of the rest of the property to him. The objection that the deed in question did not comprise the whole of the property was not taken in the lower court, although the appellant himself, in his plaint, described the deed as a deed of relinquishment. It was for him to raise the point that the relinquishment was void as it was only partial. It would not be proper to allow that objection to be taken here and to be decided without having before the court all the facts and circumstances connected with the relinquishment which it is necessary to consider for this purpose.

PIGGOTT and LINDSAY, JJ. :—This is the appeal of Khawani Singh, who was a defendant in a suit brought by Chet Ram and others for the purpose of obtaining a declaration that a certain document, dated the 7th of February, 1914, and registered on the 10th of February, 1914, and which was executed by Musammat Uda Kunwar in favour of Khawani Singh, is null and void and

(1) (1911) I. L. R., 34 All., 129. (2) (1912) 10 A. L. J., 33.

(3) (1908) I. L. R., 35 Calc., 939.

ineffectual as against them after the death of Musammat Uda Kunwar. It appears from a pedigree which is to be found in the first paragraph of the plaint that one Mansa Ram had four sons, Badam Singh, Lalji, Bakhti and Khushali. Musammat Uda Kunwar, the lady who executed the document which forms the subject-matter of this suit, is the widow of Lalji. Khawani Singh, who is the appellant in the present case, is the son of Badam Singh, and, therefore, nephew of Uda Kunwar's deceased husband. The plaintiffs in the case are the descendants of Bakhti and Khushali, the other two sons of Mansa Ram. The case set out in the plaint was to the effect that Lalji, the husband of Musammat Uda Kunwar, had died about 80 years before the suit leaving Musammat Uda Kunwar in possession of his estate as a Hindu widow. It was claimed, therefore, that having this estate she had no right to make the transfer of the property which was evidenced by the document referred to in the plaint. It was further stated in the plaint that all the declarations made by Musammat Uda Kunwar in this document of transfer were untrue statements. It appears from the document itself that Musammat Uda Kunwar declared that the property which she was purporting to dispose of had been joint property held by her deceased husband and the father of Khawani Singh. The plaintiffs' case was that this property was the separate property of Lalji which was held by his widow for the limited estate which a Hindu widow possesses. The defence raised by Khawani Singh was that the plaintiffs could not maintain the suit. In the 11th paragraph of the written statement a further plea was taken that Khawani Singh and his father had been living jointly with Lalji, husband of Musammat Uda Kunwar. In the 12th paragraph of the written statement it was pleaded that the property in suit had been bought by Lalji in his own name out of the joint family funds. The 14th paragraph of the same document sets out that the plaintiffs were not reversioners. In the last paragraph of the written statement a ground is taken that, even if Badam Singh and Lalji were found to be separate in estate, the deed of relinquishment simply operated as an acceleration of the succession in favour of Khawani Singh. There can be no doubt on the pedigree set up in the plaint that, on the assumption that Lalji was a

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separate owner of the property in suit, Khawani Singh is at the present time a nearer reversioner of Lalji than any of the plaintiffs. The principal matter to be considered is that of the interpretation of the deed of the 7th of February, 1914, printed at page 1A. According to the construction put upon this document by the court below, there was no transfer at all on the part of Musammat Uda Kunwar. The learned Subordinate Judge came to the conclusion that as a matter of fact Lalji, the husband of Musammat Uda Kunwar, had been separate from the rest of his family, and this finding, we may say, is not contested here in appeal. He went ont o point out that in drawing up this document Musammat Uda Kunwar professes to be dealing with joint family property. She did not profess to deal with it as having been separate estate of her deceased husband, and so the Subordinate Judge came to the conclusion that the document would not operate as transfer of any interest in favour of Khawani Singh; for if the property, as it has been declared to be in the said document, was joint property, there could be no transfer of it made by this lady Uda Kunwar. The consequence was that the Subordinate Judge decreed the suit. In appeal here it is contended that the court below has placed a wrong interpretation upon the terms of this document. According to the argument of the learned vakil who supports the case for the appellant this document amounts in one view to a total surrender of the interests of Musammat Uda Kunwar in this property. We must take it now for the purpose of disposing of the case that the property was in fact the separate property of Lalji. Unfortunately, however, for this argument of the appellant we find that in this document of transfer executed by Musammat Uda Kunwar a certain area consisting of 21 bighas, 10 biswas, of land was reserved from the operation of the deed. It is not for us to inquire where the property so reserved has since gone to. We have only to look to the deed as we find it on the record. It being found that a portion of the property was reserved from the operation of the deed, the clear inference is that Musammat Uda Kunwar did not surrender the whole of the widow's estate in favour of Khawani Singh. The doctrine of surrender has been laid down by their Lordships of the Privy

Council in the case of *Behari Lal* v. *Madho Lal Ahir Gayawal* (1). It is true that since that case has been decided the various courts in India have taken different views as to what is meant by a particular passage in the judgement of Lord MORRIS in which he has laid down the principle that there must be a surrender of the entire estate. The Calcutta High Court has taken the view that the rule laid down by their Lordships of the Privy Council means nothing more than that the widow is bound to divest herself of all her interest in the particular portion of the estate which she is transferring. Other High Courts, on the contrary, have held that the judgement of the Privy Council intends to lay down a much wider rule, namely, that the widow is bound to withdraw from the entire estate which she holds so as to accelerate succession in favour of the nearest reversioner. In this connection we may refer to the decision of the Bombay High Court in *Pilu* v. *Babaji* (2), and the judgement of the Madras High Court in the case of *Marudamuthu Nadan* v. *Srinivasa Pillai* (3). A similar view, we may observe, has been taken in the Punjab Chief Court. The balance of authority is certainly in favour of the proposition that there must be complete surrender of the widow's estate in order to accelerate the vesting of the estate in the nearest reversioner. Accepting this view, we hold that in the present instance there not having been a complete withdrawal from the estate of Lalji by Musammat Uda Kunwar, the document in suit cannot be said to have vested the estate of Lalji in the appellant Khawani Singh. Then it has been contended that Khawani Singh being the nearest reversioner, this transfer will take effect on the principle which is laid down by the Privy Council in the case of *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (4), namely, that a transfer made with the consent of the nearest reversioner will take effect as against the more remote reversioner. That rule, as we understand, is applicable to cases of transfer for consideration. It has not been extended, so far as we are aware, to a case where a transfer has been made by way of gift. Further, if the transfer be with the consent of the nearest reversioner, it takes effect because it affords evidence of the propriety of the transaction;

(1) (1891) I. L. R., 19 Calc., 236.
(2) (1909) I. L. R., 34 Bom., 165.
(3) (1897) I. L. R., 21 Mad., 128.
(4) (1907) I. L. R., 30 All., 1.

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in other words, it justifies the transaction on the ground of legal necessity. It cannot, we think, be said that the consent of the beneficiary himself is such a consent as would give rise to any such presumption. In either of these views it appears to us that the appellant here is not entitled to rely upon this document as being a transfer in his favour and to claim that the estate of the deceased Lalji has vested in him. We are of opinion that the plaintiffs were entitled to the declaration sought, and we, therefore, dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL.

1916
June, 20.

Before Mr. Justice Walsh and Mr. Justice Sundar Lal.

BHAGWAN DAYAL AND ANOTHER (PETITIONERS) *v.* PARAM SUKH DAS (OPPOSITE PARTY).*

Civil Procedure Code, 1908, *section* 151; *order IX, rule* 13—*Procedure—Minor—Decree against minor set aside on ground of want of proper appointment of guardian* ad litem—*Remedies open to plaintiff.*

Under the Code of Civil Procedure a suit may be instituted against a minor by name. It is the duty of the court to appoint a proper guardian *ad litem*. The institution of the suit is complete and saves limitation, but its further progress depends upon the appointment of a suitable guardian *ad litem*.

Where proceedings taken to appoint a guardian *ad litem* for a minor in a suit have been declared to be invalid, and a decree passed against a minor has been set aside because the minor was not properly represented in the suit, the court whose duty it ultimately is to appoint a guardian has inherent power under section 151 of the Code of Civil Procedure to revive the suit under order IX, rule 13, of the Code. *Raj Kumar Roy* v. *Hara Krishna Chakarvarti* (1), referred to.

THE facts of this case were as follows:—

In 1911 Param Sukh Das instituted a suit against Parbhu Lal and Bhagwan Dayal, minors and their uncle Raghubar Sahai on a mortgage, dated the 17th of September, 1904, for sale of property. Raghubar Sahai, the uncle, was named by him as a fit and proper person to be appointed as guardian of his minor nephews. Raghubar Sahai refused to act as guardian and in doing so he informed the court that the minors were living with their mother,

* Civil Revision No. 6 of 1916.

(1) (1911) 10 Indian Cases, 855.