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by a civil court and the question of the forum of appeal from that order has to be decided in the light of the provisions of section 476B read with section 195 of the Criminal Procedure Code. In accordance with those provisions the appeal would lie, as stated above, in the court of the District Judge and not in this Court. I therefore hold that this appeal does not lie in this Court and accordingly order that it should be returned for presentation to the proper court.

APPELLATE CIVIL

Before Sir John Thom, Chief Justice, and Mr. Justice Ganga Nath

SRI MADAN MOHANJI AND ANOTHER (DEFENDANTS) *v.* KISHNA KUAR (PLAINTIFF)*

1939 *September*, 12

Hindu law—Acceleration—Surrender by widow in favour of next reversioner—Surrender of the residue after a prior alienation by the widow of a part of her husband's estate—Validity—Civil death—Co-widows—Endowment for religious purposes by one, after partition between them, of part of the husband's estate without the consent of the other—Validity.

A Hindu widow is entitled to make an absolute surrender in favour of the nearest reversioner of such part of the estate as she holds as a Hindu widow at the time when the deed of surrender is made. A deed of surrender is not invalid because the widow prior to the execution of the deed has made alienations of part of the estate. If the deed effects a complete surrender of the widow's entire interest in her husband's estate at the date of the execution of the deed it is valid and effective.

A Hindu widow is no doubt entitled to make an endowment for religious purposes of a small portion of her deceased husband's estate, but when there are two widows the one can not make an endowment without the consent of the other. Upon the death of the husband the widows take a joint interest in their deceased husband's estate and no alienation can be effected by the one, without the consent of the other, so as to prejudice the rights of the survivor or a future reversioner. The mere fact of partition between the two, while it gives each a right to the fruits of the separate estate assigned

*First Appeal No. 179 of 1934, from a decree of Zamirul Islam Khan Civil Judge of Budaun, dated the 9th of April, 1934.

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to her, does not imply a right to prejudice the claim of the survivor to enjoy the full fruits of the property during her lifetime.

The two widows of a deceased Hindu partitioned among themselves the estate to which they had succeeded; and then one of them, without the consent of the other, built a temple on part of the property which fell to her share and endowed it with certain items of that property. After her death, the surviving widow brought a suit for possession of the site of the temple and of the property which had been endowed; during the course of the litigation the plaintiff made a complete surrender of her estate in favour of the next reversioner, who was thereupon substituted in her place: *Held* that the alienations, which had been made without the consent of the plaintiff by the other widow alone, were not binding on the plaintiff or on the next reversioner, and the claim must succeed.

Dr. *S. N. Sen* and Messrs. *A. M. Gupta* and *P. M. L. Verma*, for the appellants.

Mr. *G. S. Pathak*, for the respondents.

THOM, C. J., and GANGA NATH, J.:—This is a defendants' appeal arising out of a suit in which the plaintiff Mst. Kishna Kuar claims a decree for possession over certain property. This property is detailed in the plaint. It consists of (1) a shop, (2) a zamindari share in village Orchhi and (3) a temple in Chandausi. The third item is described as follows: "A moiety share in the pucca built double-storied haveli together with all the four boundary walls, enclosure appertaining thereto, situate in Chandausi, muhalla Kaithal Darwaza, known as temple, of the value of Rs.14,000." What the plaintiff claims under this head is the temple, not a half share in the temple. The temple itself was built upon the half share of an enclosure which was allotted in a partition to the plaintiff.

The plaintiff is the widow of Chadammi Lal who died in 1887. Chadammi Lal was survived by two widows, Mst. Parbati and the plaintiff Mst. Kishna Kuar. Mst. Parbati at the time of Chadammi Lal's death was 18 years old and Mst. Kishna Kuar 17 years.

Chadammi Lal left considerable estate valued at the time of his death at Rs.1,50,000. The property in suit formed a part of his estate.

On Chadammi Lal's death he was succeeded by Mst. Parbati and Mst. Kishna Kuar. Mst. Parbati died in 1933. On her death Mst. Kishna Kuar as the surviving widow claimed possession of the whole of Chadammi Lal's estate as a Hindu widow.

The defendants to the suit were in possession of the property in suit. The defendants are the idol Shri Madan Mohanji and the mutwalli of the temple in which the idol is situate, Ganeshi Lal. Ganeshi Lal died during the pendency of these proceedings and now is represented by his sons Radha Ballabh and Brij Kishore.

The defendants resisted the claim of Mst. Kishna Kuar upon the allegation that during her lifetime Mst. Parbati had built a temple to Shri Madan Mohanji and dedicated the property in suit to it.

During the pendency of this appeal Mst. Kishna Kuar the plaintiff executed a deed of surrender in favour of Girdhari Lal. In the course of this deed of surrender it is recited that this appeal was pending in the High Court and it is provided that "Girdhari Lal aforesaid should get himself impleaded in the array of respondents in that appeal and look after the same." Consequent upon the execution of the aforesaid deed of surrender Girdhari Lal preferred an application under order XXII, rule 10 of the Code of Civil Procedure. This application was accompanied by an affidavit in which the fact that Mst. Kishna Kuar had executed a deed of relinquishment in his favour was stated. The application was also accompanied by a certified copy of the deed of relinquishment. Upon the presentation of the application this Court ordered that notice thereof should be issued to the defendants and Mst. Kishna Kuar. Conformably to this direction notice was duly issued. No counter affidavits were filed

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and no objection was taken to the application. Consequently an order was passed impleading Girdhari Lal in the array of respondents, the interest of Mst. Kishna Kuar the plaintiff having devolved upon him during the course of the proceedings in this suit.

When the appeal came before this Bench for hearing learned counsel for the appellants stated that the appellants had effected a compromise with Mst. Kishna Kuar. Under this compromise, which has been filed accompanied by an affidavit, Mst. Kishna Kuar withdraws her claim to the property in suit. The compromise is not registered. Learned counsel for the appellants moved the Court to send the compromise down to the lower court for verification. This prayer we have refused upon the ground that Mst. Kishna Kuar has no interest now in the present litigation, her interest in the property in suit having devolved in virtue of the deed of relinquishment upon the respondent Girdhari Lal.

It was contended for the defendants that the deed of relinquishment was invalid in respect that Mst. Kishna Kuar had at about the same time as the deed of relinquishment was executed made another alienation of property of the estate namely a gift to her brother's grandson and that also she had executed a wakf. The deed of gift which was in favour of Badri was executed on the 22nd December, 1937; the deed of wakf on the 19th January, 1938, and the deed of relinquishment on the 19th January, 1938. It was urged for the defendants that inasmuch as Mst. Kishna Kuar had alienated part of the estate of Chadammi Lal she was not entitled to relinquish in favour of the reversioner her remaining interest therein. It was further contended that the so-called deed of relinquishment was not a *bona fide* surrender by a Hindu widow of her interests in her husband's estate but the division by the widow of the estate amongst a number of persons and that therefore it was invalid.

The law governing the surrender of her interests in her husband's estate by a Hindu widow is well settled. A Hindu widow is entitled to make an absolute surrender in favour of the nearest reversioner of such part of the estate which she holds as a Hindu widow at the time when the deed of surrender is made. There is no authority for the proposition that a deed of surrender is invalid because the widow prior to the execution of the deed has made other alienations. As to the effect of the deed of surrender upon these prior alienations there is a considerable divergence of judicial opinion. The matter is referred to in Mayne's Hindu Law, tenth edition, page 801, paragraph 666. The learned author there refers to a number of cases in which the point was considered. It is only necessary to say that the questions considered in those cases would never have arisen if the law were that a deed of relinquishment was necessarily invalid because of a prior alienation. There can be no question that in the present instance the deed of relinquishment effects a complete surrender of Mst. Kishna Kuar's entire interest in her husband's estate at the date of the execution of the deed. It is true that it is recited in the body of the deed that the executant has made a gift of certain property to Badri who supports her. The executant further states that she has no apprehension regarding her maintenance in the future. The executant further relates that she has executed the deed of wakf on the 19th January, 1938. The deed proceeds: "Now I, the executant, am not possessed of any other funds and movable or immovable property, etc., except the property mentioned below. I, the executant, of my own free will and accord and without any inducement and instigation on the part of anyone else, relinquished the entire remaining property out of the estate of my husband which is in my possession and occupation, specified below, together with all the rights and interests appertaining thereto and the rent of kharif

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1345 Fasli due by the tenants with the exception of Rs.51-15-0 the rent for the kharif 1345 Fasli which has been realised from the tenants specified below, in favour of Girdhari Lal, son of Lala Janki Das, caste Vaish Baraseni, resident of Chandausi, muhalla Chah Dhobian . . . ." The property surrendered is detailed at the end of the deed and includes the property in suit. The effect of this deed therefore was to divest Mst. Kishna Kuar of any interest which she had in her husband's estate on the 19th January, 1938. There is nothing in the body of the deed itself or in the evidence which has been adduced by the parties in this case to support the contention that this deed was not a *bona fide* deed of relinquishment. Mst. Kishna Kuar did not retain to herself any interest in the estate. There was no division of the estate between her and the reversioners, or between her and any other party. In our judgment therefore the deed of relinquishment operates as a valid surrender by Mst. Kishna Kuar of her right in Chadammi Lal's estate. We would refer in this connection to the decision of the Privy Council in the case of *Rangasami Gounden* v. *Nachiappa Gounden* (1). At page 536 their Lordships observe in the course of their opinion: "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." This statement of the law was approved in a later decision of the Privy Council in *Sureshwar Misser* v. *Maheshrani Misrain* (2). In this latter case despite the fact that the widow had retained to herself

(1) (1918) I.L.R. 42 Mad. 523. (2) (1920) I.L.R. 48 Cal. 100.

a small portion of the corpus of the estate in lieu of maintenance the validity of the relinquishment was upheld.

The result is that Girdhari Lal must be taken as having succeeded to the estate of Chadammi Lal and to Mst. Kishna Kuar's interest in this litigation. Although learned counsel for the defendants claims that a compromise has been concluded between them and Mst. Kishna Kuar, no compromise has been concluded between the defendants and Girdhari Lal. In these circumstances we proceed to dispose of the appeal upon its merits.

As already observed, Chadammi Lal the husband of the plaintiff Mst. Kishna Kuar died in the year 1887 survived by the plaintiff and his other wife Mst. Parbati. On his death his estate was claimed by Ganga Ram and Gokal Chand who were reversioners. Litigation followed between them and Mst. Kishna Kuar and Mst. Parbati which lasted for a period of seven or eight years. Eventually the claims of the reversioners were dismissed.

On the 22nd June, 1898, some time after the termination of the litigation between the widows and the reversioners a partition was effected by the widows. Under the deed of partition each took a half share in Chadammi Lal's estate. The house property, zamindari property and movables were equally divided. The property in suit went to Mst. Parbati. Between 1898 and 1899 Mst. Parbati constructed the temple which is part of the property in suit. The temple is alleged to have been constructed at a cost of Rs.15,000. The area occupied by the construction is alleged to be 580 square yards. In addition to building this temple Mst. Parbati on the 12th January, 1905, made a wakf of certain property which she dedicated to the temple; this is the shop and the share in the village of Orchhi which is part of the property in suit. In this deed of wakf there is a reference to a will alleged

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to have been made by Chadammi Lal. The reference is as follows: "I have, therefore, of my own free will and accord, in my sound state of body and mind, according to the will of Lala Chadammi Lal deceased, my husband, made a wakf and gift of the shop and enclosure at the back thereof and the zamindari aforesaid together with all the appurtenances thereof in favour of the temple of Madan Mohanji, situate in muhalla Kaithal Darwaza, Chandausi, pargana Bilari." In the present suit the defendants pleaded that inasmuch as the property in suit was endowed in accordance with the will of Chadammi Lal it cannot be challenged by the plaintiff. The defendants further pleaded that Mst. Kishna Kuar had consented to the endowment of the site for the temple and to the endowment of the property in suit.

As regards the will, no written will was executed by Chadammi Lal. It is alleged, however, that shortly before his death he made an oral will in the presence of a number of persons. . . . . Having seen and heard the witnesses the learned Judge has rejected their testimony and we see no reason to differ from him in regard to the value of their evidence. . . . . Upon the whole matter we see no reason whatever to differ from the learned Civil Judge in the conclusion which he has reached upon this branch of the case.

So far as the defendant's contention that Mst. Kishna Kuar had consented to the building of the temple and to the endowment is concerned it is only necessary to say that there is little evidence to support this contention. The evidence, which has been accepted by the learned Civil Judge, is to the effect that relations all along between Mst. Parbati and Mst. Kishna Kuar had been strained and that when Chadammi Lal married Mst. Kishna Kuar, Mst. Parbati had left the house and that the two widows had not lived together since. It is true that Mst. Kishna Kuar does not appear to have taken any open objection to the building of the temple

by Mst. Parbati. In law, however, this does not imply consent upon her part. On the death of Mst. Parbati she was entitled to the land upon which the temple was built. She might, it is true, have filed a suit for a declaration that Mst. Parbati was not entitled to construct a temple without her consent. There was no obligation on her to do so, however. She was entitled to wait until the death of Mst. Parbati and until she succeeded to the estate before claiming the site upon which the temple has been constructed. Mst. Kishna Kuar has further deposed that she never gave her consent to the building of the temple, that she was not a worshipper at the temple, and further that she did not consent to the endowment of the property in suit. So far as the endowment of the property in suit is concerned there is no evidence that Mst. Kishna Kuar knew anything about it. Certainly there is no evidence that she consented to the endowment.

It was urged on behalf of the defendants that the endowment ought to be allowed to stand so far as a portion of the endowed property is concerned. It was maintained that a Hindu widow is entitled to endow a small portion of her deceased husband's estate for religious purposes. In this connection reference was made to the case of *Debi Dayal* v. *Radha Krishna* (1) and Mayne's Hindu Law, page 779. No doubt there is authority for the proposition that a Hindu widow is entitled to make an endowment of a small portion of her deceased husband's estate, but when there are two widows the one cannot make an endowment without the consent of the other. Upon the death of the husband the widows take a joint interest in their deceased husband's estate and no alienation can be effected by the one without the consent of the other. In this connection we may refer to the decision of the Privy Council in the case of *Gauri Nath Kakaji* v. *Gaya Kuar* (2). In the course of the opinion of the

(1) A I.R. 1939 Oudh, 145. (2) (1928) 55 I.A. 399(403).

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Board in that case it is observed: "The general law is so well settled that it scarcely requires re-statement. If a Hindu dies leaving two widows, they succeed as joint tenants with a right of survivorship. They are entitled to obtain a partition of separate portions of the property so that each may enjoy her equal share of the income accruing therefrom. Each can deal as she pleases with her own life interest, but she cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the rights of the survivor or a future reversioner. If they act together they can burden the reversion with any debts contracted owing to legal necessity, but one of them acting without the authority of the other cannot prejudice the right of survivorship by burdening or alienating any part of the estate. The mere fact of partition between the two, while it gives each a right to the fruits of the separate estate assigned to her, does not imply a right to prejudice the claim of the survivor to enjoy the full fruits of the property during her lifetime." Upon the finding therefore, with which we are in agreement, that Mst. Kishna Kuar never consented to Mst. Parbati's endowment of the property in suit the endowment must be held to be invalid.

The position therefore is as follows: The estate of Chadammi Lal was divided equally between Mst. Parbati and Mst. Kishna Kuar on the 22nd June, 1898. Upon part of the property which fell to her share Mst. Parbati constructed a temple. Further she endowed the temple with certain property on the 12th January, 1905, without the consent of Mst. Kishna Kuar who had a joint interest with Mst. Parbati in the estate of Chadammi Lal. Mst. Parbati alone was entitled neither to build the temple nor to endow the property. So far as the temple is concerned Mst. Kishna Kuar claims possession. She is entitled undoubtedly in the circumstances to possession of the site. She has intimated, however, that she has no intention of

demolishing the temple, she wishes the temple to remain. She deposed in the course of her evidence: "I have never been to the temple myself. I will maintain the temple. I wish to maintain it. It shall remain a temple of Madan Mohanji. I will divest it, however, of the Orchhi property and the shop for the present. I may or may not dedicate any property for the temple. It depends upon me." In the deed of wakf of the 12th January, 1905, Mst. Parbati provided that her brother Ganeshi Lal shall manage the wakf property. No definite provision is made for the appointment of a mutwalli upon the death of Ganeshi Lal. In the deed, however, there is the following provision: "I do covenant that till my lifetime I shall be meeting the expenses of the said temple from the income of the property gifted and made a wakf of under the management of Lala Ganeshi Lal, my own brother. After me one who will be worthy in the family of my father shall meet the expenses. So long as I, the executant, am alive I shall understand the account of income and expenditure every year. After me one who will be worthy in the family of my father along with the *pujari* of the temple shall understand the account. I or my representatives have no concern whatsoever with the property gifted and made a wakf of."

Upon the death of Mst. Parbati in these circumstances the right to nominate a manager of the temple and the wakf property devolved upon Mst. Kishna Kuar who inherited Mst. Parbati's entire interest in Chadammi Lal's estate. Ganeshi Lal who was appointed under the deed of wakf is dead and there is no provision in the deed of wakf which entitles his sons Radha Ballabh and Brij Kishore to assume the office of mutwalli and it is to be noted in this connection that Brij Kishore is a minor.

This matter, however, is not one of very great importance. Mst. Kishna Kuar has surrendered her interests in her husband's estate to the respondent

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Girdhari Lal. Girdhari Lal has intimated during the hearing of this appeal through counsel that he has no intention of demolishing the temple, that he desires to maintain the temple and that further he intends to dedicate to it property with an annual income of Rs.600. He indicates that he intends himself to assume the office of mutwalli. In view of the surrender by Mst. Kishna Kuar in his favour he is in our judgment entitled to nominate the mutwalli of the temple, Ganeshi Lal having died.

The interest of Mst. Kishna Kuar having devolved upon Girdhari Lal who is entitled to succeed to Chadammi Lal's estate as nearest reversioner upon her death there is no necessity for a transfer of the decree in this suit in his favour. If the decree stands he is entitled to execute it as the heir of Chadammi Lal and the successor of Mst. Kishna Kuar the original plaintiff.

Upon a consideration of the evidence we hold that Chadammi Lal made no will. We further hold that Mst. Kishna Kuar gave no consent to the construction of the temple of Madan Mohanji or to the endowment of the property in suit. Upon the death of Mst. Parbati, therefore, Mst. Kishna Kuar was entitled to assume possession of the site of the temple and of the property in suit. She has by a deed of relinquishment surrendered her entire interest in Chadammi Lal's estate in favour of Girdhari Lal who has been impleaded without objection as a respondent in the present appeal. By this deed of relinquishment so far as the estate of Chadammi Lal is concerned Mst. Kishna Kuar has completely and effectively effaced herself. So far as the property is concerned the deed of relinquishment operates as civil death. The respondent Girdhari Lal, therefore, in these proceedings is entitled to maintain the claim which was advanced by Mst. Kishna Kuar for possession of the property in suit. We find ourselves in complete agreement with the decision which has been arrived at by the learned Civil Judge

in the lower appellate court. The learned Judge has decreed the reliefs as prayed for. So far as the shop property and the zamindari property in Orchhi village are concerned there is no reason to alter his decree. So far as the temple is concerned, in view of the undertaking given by the respondent Girdhari Lal we consider it expedient to modify the order of the learned Judge.

In the result the appeal is dismissed. The order of the learned Civil Judge relating to the temple, however, is modified. In place of a decree for proprietary possession we grant a decree for possession as mutwalli and further a declaration that Girdhari Lal is entitled himself to assume the office of mutwalli or make a nomination thereto provided within three months he endows the temple with property to the value of Rs.600 a year. Should Girdhari Lal fail within three months to implement his undertaking to endow the temple as aforesaid the office of mutwalli will be filled by the District Judge. In case of any dispute as to the value of the property endowed the matter will be referred to the District Judge for decision. We further declare that the defendants have no interest in the temple and have no right to interfere with the management thereof.

The respondent Girdhari Lal is entitled to his costs.