APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan, Acting Chief Judge and Mr. Justice Gokaran Nath Misra.

1928 *January*, 24.

BINDESHWARI SINGH (DEFENDANT-APPELLANT) *v.* HAR NARAIN SINGH, PLAINTIFF AND OTHERS (DEFENDANTS-RESPONDENTS).*

Transfer of Property Act (IV of 1882), sections 6A and 43—Transfer of property of which one is the reversionary heir expectant, validity of—Section 43 of Transfer of Property Act, whether can make such a transfer valid—Contract to assign property which is to come into existence in future, validity of—Hindu widow, alienations by—Gift by a Hindu widow in favour of a stranger, whether validated by the consent of reversioners—Alienations by a Hindu widow, when valid—Consent of reversioners, when makes alienations by a Hindu widow valid.

A transfer by a Hindu of immoveable property to which he on the date of the transfer is the reversionary heir expectant on the death of a widow to come into possession is forbidden by section 6A of the Transfer of Property Act, 1882 and is therefore void, and the rule of estoppel contained in section 43 of the said Act cannot have the effect of making such a void transfer valid. Section 43 of the Transfer of Property Act enacts a rule of estoppel commonly known as "feeding the grant by estoppel", and this estoppel cannot make a transfer forbidden by law good *Annada Mohan Roy* v. *Gour Mohan Mullick* (1), and *Tilakdhari Lal* v. *Khedan Lal* (2), relied on.

A man cannot in equity any more than in law assign that which has no existence; he can contract to assign property which is to come into existence in future and when it has come into existence equity treating that as done which ought to be done fastens upon that property and the contract to assign, if supported by consideration, then becomes a com-

* Second Civil Appeal No. 202 of 1928, against the decree of Thakur Rachhpal Singh, District Judge of Fyzabad, dated the 2nd of April, 1928, confirming the decree of Babu Gopendro Bhushan Chatterji, Subordinate Judge of Fyzabad, dated the 17th of January, 1928.

(1) (1923) L. R., 50 I. A., 239. (2) (1920) L. R., 47 I. A., 239.

plete transfer. *Twilby* v. *Official Receiver* (1), *Annada Mohan Ray* v. *Gour Mohan Mullick* (2), and *Sumsuddin Goolam Husein* v. *Abdul Husein Kalimuddin* (3), relied on.

There can be no case of alienation by a Hindu widow unless the alienation is made for legitimate purposes which may be proved either *aliunde* or by raising a presumption in favour of it, which presumption may, if not rebutted by contrary proof be based on the consent of reversioners. Obviously, therefore, a transfer by way of gift in favour of a stranger is not an alienation to which the presumption of its being legitimate founded on the consent of the reversioners can be applicable, *Rangasami Gounden* v. *Nachiappa Gounden* (4), relied on. *Fateh Singh* v. *Thakur Rukmini Ramanji* (5), dissented from. *Ramgouda Annagouda* v. *Bhausaheb* (6), explained and distinguished. *Christmas* v. *Oliver* (7), *Banga Chandra Dhur Biswas* v. *Jagat Kishore Chowdhuri* (8), *The Collector of Masulipatam* v. *Cavaly Venkata Narranapah* (9), *Raja Lukhee Dabea* v. *Gokool Chunder Chowdhury* (10), *Sham Sunder Lal* v. *Achhan Kunwar* (11), *Debi Prosad Chowdhury* v. *Golap Bhagat* (12), *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji* (13), and *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (14), *referred* to.

Mr. *Ghulam Hasan*, for the appellant.

Messrs. *S. C. Das* and *Faiyaz Ali*, for the respondents.

HASAN, A. C. J., and MISRA, J. :—This is the appeal by the defendant No. 1 from the decree of the District Judge of Fyzabad, dated the 2nd of April, 1928, affirming the decree of the Subordinate Judge of the same place, dated the 17th of January, 1928. In the suit, out of which this appeal arises, the plaintiff-respondent claimed to recover possession of a 5 annas 4 pies share

(1) (1888) L.R., 13 A.C., 523.
(2) (1923) L.R., 50 I.A., 239.
(3) (1926) I.L.R. 31 Bom., 165.
(4) (1918) L.R., 46 I.A., 72.
(5) (1923) I.L.R., 45 All., 339.
(6) (1927) L.R., 54 I.A., 396.
(7) 5 Man. & R., 202.
(8) (1916) L.R., 43 I.A., 249.
(9) (1861) 8 M.I.A., 529.
(10) (1869) 13 M.I.A., 209.
(11) (1898) L.R., 25 I.A., 183.
(12) (1913) I.L.R., 40 Calc., 721 F.B.,
(13) (1914) I. L. R., 41 Calc., 793.
(14) (1907) L. R., 35 I. A., 1.

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situate in pukhtadari mahal Debi Singh, patti Lakhpati Koer, in the village of Parsauli, pargana Bidhar, in the district of Fyzabad.

THE facts of the case are as follows :—

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The share in suit originally belonged to one Mangal Singh. Mangal Singh died many years ago. On his death he was survived by his minor son, Mendai Singh and widow Musammat Lakhpati. Mangal Singh's estate, in the circumstances, devolved by right of inheritance on Mendai Singh but the mutation of names in the revenue records was made in favour of Musammat Lakhpati. Mendai Singh died in 1908 unmarried. The estate then devolved on Musammat Lakhpati in the character of the mother of her deceased son, Mendai Singh. She, therefore, held a Hindu female's estate in the share in suit. On the 14th of February, 1917, one Ram Lagan sold certain specified plots of land situate in the village of Parsauli to the defendant-appellant under a deed of sale of the date just now mentioned (exhibit A4). On the 15th of May, 1918, Musamat Lakhpati made a gift of the zamindari share, which had devolved on her by right of inheritance from her deceased son, Mendai Singh, in favour of the defendant-appellant with the exception of certain *sir* lands. On the 28th of May, 1922, Ram Lagan aforementioned relinquished a certain zamindari share, to which he had become entitled, not the share in suit, in favour of the defendant-appellant. He executed a deed, which is exhibit A2. In this deed he refers to the gift made by Musammat Lakhpati on the 15th of May, 1918 and it is this reference which has given rise to a ground of contest on the part of the appellant in the present litigation. To this matter we will advert again.

Musammat Lakhpati died in April, 1925. It is agreed that on her death the share in suit devolved by

right of succession on Ram Lagan, whose name we have already mentioned twice, and on one Gopi in equal moieties and it was on the death of the widow that they became entitled in that right to the possession of the property in suit. On the 16th of September, 1926, Ram Lagan and Gopi sold the share under a deed of sale (exhibit 1) in favour of the plaintiff-respondent and the suit, which is now being considered by us, was instituted to enforce the title which came to be vested in the respondent under the transfer of the 16th of September, 1926.

In defence several pleas were taken but we are in the appeal before us concerned with two of such pleas:—(1) that the plaintiff-respondent is not entitled to a decree in respect of the specific plots of land, which were sold to the defendant-appellant by Ram Lagan under the deed of the 14th of February, 1917, by reason of the estoppel, as the argument is now put before us, arising out of the provisions of section 43 of the Transfer of Property Act, 1882, and (2) that the reference to the deed of gift of the 5th of May, 1918, made by Ram Lagan in the deed of relinquishment of the 28th of May, 1922 by way of approval thereof disentitles the plaintiff from claiming his share in the property in suit. The courts below have rejected both these pleas and decreed the plaintiff's suit as already stated. The same pleas are again urged upon us at the hearing of the appeal.

As to the plea of estoppel under section 43 of the Transfer of Property Act, 1882, the first observation which falls to be made is that it was never taken in either of the courts below. There are certain facts in relation to this plea which have to be stated to enable a proper appreciation of its bearing on the present case. Before the year 1915 the village of Parsauli

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stood divided into two distinct mahals of equal proportions. One of these mahals was called mahal Narindar Bahadur Singh and the other mahal was called mahal Debi Singh. In the former mahal Ram Lagan and Gopi held a 4 annas 4 pies share in their own right. In the latter mahal of Debi Singh is situtate the share, which formerly belonged to Mangal Singh and latterly was possessed by Musammat Lakhpati. This is the share of 5 annas 4 pies now in suit. In the year 1915 an imperfect partition of mahal Debi Singh was made by the revenue authorities and a separate patti of 5 annas 4 pies held by Musammat Lakhpati was constituted. This was called patti Lakhpati. On a comparison of the sale-deed of the 14th of February, 1917, with the partition *chitthi* in respect of patti Lakhpati (exhibit 19), we find that some portions of the land transferred under the sale by Ram Lagan in favour of the defendant-appellant are situate in the newly-formed *patti* Lakhpati. It is now argued on these facts that though Ram Lagan had no interest in those portions of the lands sold, which are now included in patti Lakhpati, on the date of the sale he has acquired a proprietary interest therein in the character of a reversionary heir after the death of Musammat Lakhpati in the year 1925 and that therefore he is entitled to those lands by the effect of the provisions of section 43 of the Transfer of Property Act, 1882.

We are of opinion that those provisions are wholly inapplicable to the facts of this case. The deed of sale which Ram Lagan executed in favour of the defendant-appellant expressly states that the property sold thereby was the property in which Ram Lagan had a title *in presenti* and was in actual possession thereof as an owner. This description of the interest transferred is clearly applicable to Ram Lagan's

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interest as a co-sharer of the village in his own right. The fact that some portions of the lands sold are actually situate in Musammat Lakhpati's *patti* formed after the partition does not lead to the inference that Ram Lagan considered himself to be the owner of anything which lay within that *patti*. It might be that at the date of the sale he had forgotten that two years previous to it an imperfect partition of mahal Debi Singh had taken place. But be that as it may, it is pefectly clear and the contrary is not shown to us to exist that when Ram Lagan lost at the partition some of the lands of the village which he held in severalty before the partition he must have received other lands in lieu thereof and the sale, if otherwise valid, must fasten on the lands so received.

The second ground, on which this plea fails, is that the provisions of section 43 of the Transfer of Property Act, 1882, cannot obviously be so given effect to as to override any other provision of the same Act. A transfer by a Hindu of immoveable property to which he on the date of the transfer is the reversionary heir expectant on the death of a widow to come into possession is forbidden by section 6A of the Transfer of Property Act, 1882. It is therefore void—*Annada Mohan Roy* v. *Gour Mohan Mullick* (1). We have no hesitation in stating as a proposition of law that an estoppel cannot have the effect of making a void transfer valid. Section 43 of the Transfer of Property Act, 1882, clearly enacts a rule of estoppel commonly known as "feeding the grant by estoppel." This estoppel cannot make a transfer forbidden by law good. This view was recognized by their Lordships of the Judicial Committee in the case of *Tilakdhari Lal* v. *Khedan Lal* (2). In that case Lord BUCKMASTER in delivering the judgment of the

(1) (1923) L. R., 50 I. A., 239. (2) (1920) L. R., 47 I. A., 239.

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Committee said:—"This principle of law, which is sometimes referred to as feeding the grant by estoppel, is well established in this country. If a man who has no title whatever to property grants it by a conveyance which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes. *Christmas* v. *Oliver* (1) discussed in Smith's Leading Cases, vol. ii., p. 724. It is unfortunate that this view of the case does not seem to have been presented either before the Subordinate Judge or to the High Court; but it appears to their Lordships that it could have been raised under issue 15(2) and it is raised in the appellant's case. In these circumstances it is not in accordance with their Lordships' practice to determine a point of law of such importance. *There may be statutory provisions or provisions of native law which would prevent the operation of the doctrine*; for the law of conveyance in England depends on special and complicated considerations."

(The italics in the above quotation are ours).

Finally their Lordships remitted the case to the court of first instance to be tried on the point just now mentioned.

The provisions of section 43 of the Transfer of Property Act, 1882, may also be stated in another form familiar in English law that is a man cannot in equity any more than in law assign what has no existence; he can contract to assign property which is to come into existence in future and when it has come into existence equity treating that as done which ought to be done fastens upon that property and the contract to assign, if supported by consideration, then becomes a complete transfer. The leading case in support of

(1) 5 Man. & R. 202.

the rule is *Tailby* v. *Official Receiver* (1). But surely, as said before, a principle of equity must yield to express provisions of a statute and if the contract to assign or the transfer itself is declared by the statute as void the principle that equity considers as done that which ought to be done must be held to be inapplicable to such a transfer. This we gather is the effect of the recent decision of their Lordships of the Judicial Committee, to which we have already referred, that is *Annada Mohun Roy* v. *Gour Mohan Mullick* (2). This precise point was considered by JENKINS, C. J. in the case of *Sumsuddin Goolam Husein* v. *Abdul Husein Kalimuddin* (3), In delivering the judgment in that case JENKINS, C. J. said with reference to clause (*a*) of section 6 of the Transfer of Property Act, 1882:—"Having regard then to the fact that the chance of an heir-apparent is thus specially excepted from the category of transferable properties I am of opinion that the principle that equity considers that done which ought to be done has no application." We therefore overrule the first plea taken before us.

The second plea is founded on the recitals contained in the deed of relinquishment dated the 28th of May, 1922. We have already said that the subject-matter of the relinquishment evidenced by this deed is not the share in suit but a different share in the village. Into the mouth of Ram Lagan are put the following words in this deed:—

"Mangal Singh, uncle of Bindeshri Singh, died after having made in his lifetime a gift of all his property in favour of his nephew, Bindeshri Singh, and Bindeshri Singh had out of his good will got the name of Lakhpati, his aunt, entered into the revenue

(1) (1888) L.R., 13 A. C., 523. (2) (1923) L. R., 50 I. A., 239.
(3) (1906) I. L. R., 31 Bom., 165.

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papers and she was accordingly in possession of the estate. Consequently she has executed a deed of gift in favour of Bindeshri Singh, grandson of Sambhal Singh, brother's son of her deceased husband, and having done this she has made him *malik* and put him in possession of the property. To this I have no objection. Bindeshri Singh is in proprietary possession of the whole of the estate of his uncle, Mangal Singh."

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It is argued that the words "To this I have no objection" conclusively establish a case of consent on the part of the reversioner, Ram Lagan, to the gift made by Musammat Lakhpati in favour of the defendant-appellant and that such a consent validates the alienation. In support of the argument we were pressed hard with the decision of a Full Bench of the High Court at Allahabad in the case of *Fateh Singh* v. *Thakur Rukmini Ramanji* (1). In the case before us the question of consent as a question of fact stands on quite a different footing. Both the courts below have pointed out and we are of opinion that there is a good deal of force in it that Ram Lagan's acquiescence to the gift made by Musammat Lakhpati is based on assumptions which have no foundation in facts. Mangal Singh was not the uncle of Bindeshri Singh nor Bindeshri Singh is the grandson of Mangal Singh's father, Sambhal Singh. Indeed it is now admitted before us that Bindeshri Singh has no blood relationship with the family of Mangal Singh. The second assumption which is of a very serious nature is that Mangal Singh had made a gift of his entire estate in favour of the appellant, Bindeshri Singh. It seems to us that the consent rests on the assumption that title to the estate of Mangal Singh had already come to be vested in Bindeshri Singh by virtue of a

(1) (1923) I. L. R., 45 All., 339.

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gift from the former to the latter and therefore it is a consent to an act which the widow did not do in her right of a female heiress but by virtue of her bare possession which she held under the good will of the donee of the estate, that is the appellant Bindeshri Singh. In the circumstances and having regard to the finding of the lower appellate court, we are unable to hold that the recital contained in the deed of relinquishment dated the 28th of May, 1922, evidences a consent by a reversioner to an act of transfer of the estate by the female heir.

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As a pure proposition of law we are not prepared to state it as broadly as it has been done by the learned Judges of the High Court at Allahabad in the case of *Fateh Singh* v. *Thakur Rukmini Ramanji* (1) mentioned above. We think as at present advised that we should go no further than what has been expressly decided by their Lordships of the Judicial Committee in the case of *Rangasami Gounden* v. *Nachiappa Gounden* (2). Nor are we prepared in this case to take the liberty of making logical deductions from or extension of the principle of that decision.

In the case of *Rangasami Gounden* v. *Nachiappa Gounden* (2) Lord DUNEDIN in giving the judgment of the Judicial Committee says:—"On the other hand, what a Hindu widow may do has often been authoritatively settled. Here arises that distinction which, as SESHAGIRI AIYAR, J. most justly observed in the present case, will, if not kept clearly in view, inevitably lead to confusion—the distinction between the power of surrender or renunciation, which is the first head of the subject, and the power of alienation for certain purposes, which is the second."

We think that the observation of Lord DUNEDIN quoted above clearly defines the limits of an act which a Hindu widow may do as such. She may do either

(1) (1923) I. L. R., 45 All., 339. (2) (1918) L. R., 46 I. A., 72.

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an act of surrender or an act of alienation. We are unable to add a third head of the subject. His Lordship, then proceeds first to consider the power of surrender. It is not argued that the case before us is a case of surrender but it is argued that it is a case of alienation. But clearly an alienation by a Hindu widow must be an alienation "for certain specific purposes," as Lord DUNEDIN says in the passage already quoted. In dealing with the case of alienation his Lordship observes:—"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 Chowdhuri* (1). 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. Thus far the alienation stands alone. But it may be fortified by the consent of reversionary heirs. (We desire to lay emphasis on the use of the word 'fortified' in this quotation.)

The remaining question is what is the effect of such consent? If the alienation be total, and the reversionary heirs be the nearest, it falls within the first division. But what if it be partial?" His Lordship then refers to and quotes a passage from the judgment of the Judicial Committee in the case of *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (2), which is as follows:—"On the other hand, it may be taken as established that an alienation by her which would not otherwise be legitimate may become so if made with the consent of the husband's kindred. The exception in favour of alienation with consent may be due to a presumption

(1) (1916) L. R., 43 I. A., 249. (2) (1861) 8 M. I. A., 529.

of law that when that consent is given, the purpose for which the alienation is made must be proper." His Lordship proceeds :—"The opinion which is here only tentatively expressed, viz., that consent does not give force *per se*, but is of evidential value—is corroborated by much subsequent authority." After referring to the case of *Raj Lukhe Dabea* v. *Gokool Chunder Chowdhry* (1) : *Sham Sunder Lal* v. *Achhan Kunwar* (2) and *Debi Prosad Chowdhury* v. *Golap Bhagat* (3) his Lordship refers to the decision of the Privy Council in *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji* (4), and says that in that case "the consent of reversioners was looked on 'as affording evidence that the alienation was under circumstances which rendered it lawful and valid.' But further, if the matter be considered on principle, it seems clear that this must be the true view. For, first, if mere consent, as such, of the reversioner could validate alienation, then the rule as to total surrender would be an idle rule. And secondly, mere consent could only validate on the theory that the reversioner, together with the widow, represented the whole estate. But that is impossible unless the reversioner has a vested interest, whereas it is settled that he has only a *spes successionis*." His Lordships then proceeds to consider the decision in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (5) and finally states the conclusion on the point of consent in the following words :—"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 dispute the transaction will be held to afford a presumptive proof which, if

(1) (1869) 13 M. I. A., 209. (2) (1898) L. R., 25 I. A., 183.
(3) (1913) I. L. R., 40 Calc., 721. (4) (1914) I. L. R., 41 Calc., 793.
(5) (1907) L. R., 35 I. A., 1.

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not rebutted by contrary proof, will validate the transaction as a right and proper one."

We do not think that we should pursue this matter any further. Our own reading of the judgment of the Judicial Committee in the case of *Rangasami Gounden* v. *Nachiappa Gounden* (1) is that there can be no case of an alienation by a Hindu widow unless the alienation is made for legitimate purposes which may be proved either *aliunde* or by raising a presumption in favour of it, which presumption may, if not rebutted by contrary proof be based on the consent of reversioners. Obviously a transfer by way of gift in favour of a stranger such as the one we have before us is not an alienation to which the presumption of its being legitimate founded on the consent of the reversioners can be applicable.

There is one more case to which reference must be made before we take leave of this appeal.—The learned Advocate for the appellant cited the decision of their Lordships of the Judicial Committee in *Ramgouda Annagouda* v. *Bhausaheb* (2) in support of the argument that even a gift by a Hindu widow may be validated by consent of the reversioners. We do not think that the decision lays down the proposition that a pure gift by a Hindu widow of her husband's estate in favour of a stranger can hold good if it is supported with the proof of consent of the reversioners. We are clearly of opinion that the consent does not operate *proprio vigore* and that in the case cited by the learned Advocate the gift and the two sales were "inseparably connected" to use the language of their Lordships of the Judicial Committee and that the reversioner had himself acquired a part of the estate out of the three dispositions which constituted one and the same transaction.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

(1) (1918) L. R., 46 I. A., 72. (2) (1927) L. R., 54 I. A., 396.