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the defendants, for if they had not, they might have been met with the plea that their title had really never been denied. They were, however, not bound to wait indefinitely after the defendants' attorneys' letter of July 27, 1933. The suit was filed in August, 1933, and is not therefore out of time.

On both these grounds I am of opinion that this appeal should be allowed, and the suit remanded for hearing on the other issues.

B. J. Wadia J.

Attorneys for appellants: Messrs. *Thatte & Co.*

Attorneys for respondents: Messrs. *Crawford, Bayley & Co.*

Appeal allowed and suit remanded.

N. K. A.

APPELLATE CIVIL

Before Mr. Justice Rangnekar.

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HARIBHAI ANNAJI PATIL AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS v. NARAYAN HARI PURWANT AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Widow—Surrender of estate in favour of next reversioner—Requisites for a valid surrender.

Under Hindu law, in considering the question whether a surrender by a widow of the life estate in favour of the next reversioner is valid or not, the principles that should guide the Court are these:

(1) that there must be a complete self-effacement of the surrendering widow with the intention of accelerating the succession of the next apparent heir;

(2) that the surrender must be *bona fide* and must not be a mere cloak, the real object of which was to divide the estate between the reversionary heir and the widow;

(3) that it is the substance of the transaction that has to be considered in determining the question whether a conveyance operates as a good surrender or not.

Behari Lal v. *Madho Lal Ahir Gyawal*[1] and *Bhagwat Koer* v. *Dhanukhdhari Prashad Singh*,[2] referred to.

* Second Appeal No. 34 of 1934.

[1] (1891) L. R. 19 I. A. 30, s. c. 19 Cal. 236.

[2] (1919) L. R. 46 I. A. 259, s. c. 47 Cal. 466.

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SECOND APPEAL against the decision of D. D. Nanavati, District Judge of Poona, confirming the decree passed by J. I. Ranade, Subordinate Judge at Junnar.

Suit for possession.

The facts material for the purposes of this report are fully stated in the judgment of Rangnekar J.

P. V. Kane, with *P. S. Joshi*, for the appellants.

A. G. Desai, for respondents Nos. 1 and 4 to 10.

RANGNEKAR J. This is a second appeal from a decision of the District Judge of Poona, and it raises an interesting question under Hindu law. The facts which gave rise to the suit may be briefly stated as follows:

One Tanaji died, possessed of certain properties, leaving him surviving his widow Janubai and a daughter Salubai. Long after his death, Janubai executed a deed (Exhibit 115) which, on the face of it, is called "a deed of relinquishment of heirship of the moveable and immoveable property" left by Tanaji and to which she had succeeded as his widow, in favour of her daughter Salubai on October 31, 1917. On May 18, 1926, Salubai exchanged the lands in suit, which she had obtained under the deed passed by Janubai, for certain other lands belonging to the defendants, and the defendants came into possession of the lands thus exchanged and at the date of the suit were in possession of the same. These lands are the subject-matter of the suit, being Survey Nos. 203, 213, 238 and 312. On February 13, 1927, Salubai died, and on October 10 of the same year Janubai died. On December 13, 1929, Manaji, Dhondu, Bala and Shankar, claiming to be the reversioners of Tanaji, sold certain lands to the plaintiffs, including the lands which are the subject-matter of the suit. On July 12, 1930, the present suit was instituted by the plaintiffs to recover possession of the lands which admittedly are with the defendants. The

plaintiffs' case was that they had become owners of these lands by reason of a sale in their favour by the reversioners after the death of Janubai. The defence to the suit was that the sale was a sham transaction, and that the defendants had become the owners of the lands under the exchange with Salubai, who was the owner of the lands under the deed, Exhibit 115. Their case was that by this deed Janubai surrendered her estate in favour of Salubai, who admittedly was then the next reversioner. It is clear from these facts that if the surrender was valid, the title of the defendants would prevail over the title of the plaintiffs. The trial Court accepted all the contentions of the defendants and dismissed the suit. It was found by that Court that the alleged sale by the reversioners in favour of the plaintiffs was hollow; that there was no consideration for it; and that the defendants had successfully proved that Janubai surrendered her whole estate to Salubai and that the exchange by Salubai in favour of the defendants was a valid transaction. In appeal the District Judge held that the sale was not hollow and that there was consideration for it. But on the construction of the surrender deed, Exhibit 115, he reached the same conclusion as the trial Court and in the result dismissed the suit.

The main question, therefore, which now falls to be determined is, whether the surrender by Janubai in favour of her daughter Salubai was a valid surrender and constituted Salubai the owner of the properties surrendered to her by her mother Janubai. Mr. Kane, on behalf of the appellants, contends that the surrender is bad and invalid, inasmuch as some properties—which, however, are not the subject-matter of the suit—, belonging to Tanaji, and after his death, coming into the hands of Janubai, were not included among the properties conveyed by Exhibit 115, and that the surrender not being a transfer

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of the whole interest of the widow in her entire estate was bad under Hindu law.

It is not disputed that there are no texts of Hindu law bearing on the doctrine of surrender. As observed by Mr. Justice Kumaraswami Sastriyar in the full bench case of *Vaidyanatha Sastri* v. *Savithri Ammal*[1] (p. 99) :

"The whole doctrine of surrender and consequent accelaration of the estate of the reversioners has no basis in Hindu Smritis but has been evolved by courts of justice on general principles of jurisprudence."

This doctrine, which is similar to the doctrine of merger known to English law, was incorporated in Hindu law for the first time by their Lordships of the Privy Council in *Behari Lal* v. *Madho Lal Ahir Gyawal*.[2] The principle was there stated in these words (p. 32) :

"It was essentially necessary to withdraw her own life estate so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life estate is a practical check on the frequency of such conveyances."

Later authorities lay it down that the surrender must be a *bona fide* surrender and not a device to divide the estate with the reversioner [see *Rangasami Gounden* v. *Nachiappa Gounden*[3] and *Bhagwat Koer* v. *Dhanukhdhari Prashad Singh*[4]]. The principle underlying the doctrine of surrender is the complete self-effacement of the widow surrendering so as to accelerate the estate of the person who, if she had died then, would, in the ordinary course, have become the true owner. The doctrine has come up for examination both in the Courts in this country as well as in the Privy Council in many reported decisions and sometimes it becomes almost impossible to reconcile the views expressed by the Courts in these decisions. The doctrine, as I understand it, is nothing more than this, that the widow, to use the words of Lord Dunedin, operates her own death. She withdraws her life estate in the

(1) (1917) 41 Mad. 75, F. B.
(2) (1891) L. R. 19 I. A. 30, s. c. 19 Cal. 236.
(3) (1918) L. R. 46 I. A. 72, s. c. 42 Mad. 523.
(4) (1919) L. R. 46 I. A. 259, s. c. 47 Cal. 466.

property and divests herself of her ownership and vests that ownership from the moment of surrender in the next reversionary heir, if he be one, or in all the reversionary heirs, or, as it is sometimes called, the whole body of reversionary heirs, if there happen to be more than one in the same degree. I do not propose, therefore, to discuss the various cases in which this doctrine has been discussed, some of which have been referred to by the learned advocate for the appellants. It is sufficient to refer to *Bhagwat Koer* v. *Dhanukhdari Prashad Singh*,[1] where, if I may say so with respect, the true principles applicable to the doctrine of surrender are laid down by Viscount Cave. His Lordship observes (p. 270):

"The power of a Hindu widow to surrender or relinquish her interest in her husband's estate in favour of the nearest reversioner at the time has often been considered and was fully dealt with by the Board in the recent case of *Rangasami Gounden* v. *Nachiappa Gounden*.[2] As pointed out in that case, it is settled by long practice and confirmed by a series of decisions that a Hindu widow can renounce the estate in favour of the nearest reversioner, and by a voluntary act efface herself from the succession as effectively as if she had then died. This voluntary self-effacement is sometimes referred to as a surrender, sometimes as a relinquishment or abandonment of her rights; and it may be effected by any process having that effect, provided that there is a *bona fide* and total renunciation of the widow's right to hold the property."

Then, later on, His Lordship referred to the facts of the case, and observed (p. 271):

"It is true that the documents were drawn up on the footing, not of a surrender of an acknowledged right, but of an admission that the right did not exist; but in substance, and disregarding the form, there was a complete self effacement by the widow which precluded her from asserting any further claim to the estate."

That the law as to surrender has undergone some development at least cannot now be denied, in the light of the reported decisions. Thus it has been held that if, as part of the surrender, the reversioner agrees to maintain the

[1] (1919) L. R. 46 I. A. 259, s. c. 47 Cal. 466.
[2] (1918) L. R. 46 I. A. 72, s. c. 42 Mad. 523.

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widow during her life, or conveys a small portion of the property back to her, or a small portion of the property is set apart for that purpose, the surrender will not be voidable. [See *Rama Nana* v. *Dhondi Murari*[1] and *Sakharam Bala* v. *Thama.*[2]] It has been also held that, if as part of a compromise of disputes between the widow and the next reversioner, an agreement is entered into by them, by which the widow relinquishes her life interest in the bulk of the properties in favour of the next reversionary heir, and the latter agrees that she should keep a small portion of the property, the surrender will still be valid under the law. [See *Sureshwar Misser* v. *Maheshrani Misrain.*[3]] I only refer to these two instances to show that at least one principle underlying the doctrine as originally laid down in the earlier Privy Council decisions, namely, that the surrender must be of the widow's whole interest in the whole estate, has not always been strictly adhered to. Sir John Wallis in *Vytla Sitanna* v. *Marivada Viranna*[4] observed as follows (p. 207):

". . . though the doctrine of surrender by a widow has undergone considerable development in recent years, it must be remembered that the basis of it is the effacement of the widow's interest, and not the *ex-facie* transfer by which such effacement is brought about."

The principles, therefore, which I gather from these decisions and others referred to in the course of the argument are these: (1) That there must be a complete self-effacement of the surrendering widow with the intention of accelerating the succession of the next apparent heir; (2) that the surrender must be *bona fide* and must not be a mere cloak, the real object of which was to divide the estate between the reversionary heir and the widow; (3) that it is the substance of the transaction that has to

[1] (1923) 47 Bom. 678.
[2] (1927) 51 Bom. 1019 at p. 1025.
[3] (1920) L. R. 47 I. A. 233, s. c. 48 Cal. 100.
[4] (1934) L. R. 61 I. A. 200, s. c. 57 Mad. 749.

be considered in determining the question whether a conveyance operates as a good surrender or not. It may incidentally be noticed that in the last mentioned case it has been clearly conceded that even if provision for the maintenance of a widow is made by reserving a small portion of the property for that purpose, that provision will not affect the validity of the surrender as a whole.

These, then, being the principles, the question is whether the surrender in this case is valid or invalid. The evidence shows that in 1917 Janubai was an old woman, being sixty-five years of age. She had only one daughter, Salubai, who admittedly would be the next reversionary heir, in the course of events, if she survived Janubai. It is found that they were on the most affectionate terms and that even after the surrender the widow lived with her daughter and was maintained by her. The next reversioners under whom the plaintiffs claim are the grandsons and great-grandsons of a deceased brother of Tanaji. It was in these circumstances that exhibit 115 came to be made. Unfortunately, the document has not been set out in any of the judgments under appeal. The document is headed "A deed of relinquishment of the rights of heirship over moveable and immoveable properties of the value of Rs. 1,500", and the names of the parties are set out. Then the document runs as follows :—

"You are my daughter; my husband, that is your father, has been dead for the last twelve years; I have now become old and I am not able to do any work or to look after the estate. You are the next heir after my death. Besides you, there is no other heir. For this reason, I give up all my rights as an heir over the undermentioned properties and hand over possession of the same to you."

Then five survey numbers are mentioned. After that the house in which the widow resided is mentioned, along with the open space in front of it. Thereafter, some other open site is referred to. Then the last two lines refer to pots and pans

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and everything contained in the house of copper, zinc and brass and other metals. After having set out the property in that way, the document proceeds to say:—

"I have handed over possession of the same to you. I have no right left over this property either as an owner or as an heir. You can deal with it in any way you like and enjoy it in any manner you like."

Reading the document as a whole, it is impossible to escape the conclusion that *ex facie* the document is a complete deed of surrender in favour of the daughter by her old mother. It has been found by both the Courts that this was not a device to divide the estate with the daughter. It has also been found that there was a complete self-effacement of the widow on the date of the deed, and that it was a *bona fide* transaction. These findings are binding upon me in this appeal. It is clear, therefore, that if nothing else transpired, the plaintiffs' suit must fail. But it is said that besides the properties mentioned in the deed there were three survey numbers which belonged to Tanaji and came into the hands of Janubai after his death, which were not conveyed by the surrender and were not included in the list of properties set out in the deed; and that is the sole ground on which the surrender is impeached as a valid surrender.

Now, these three properties are Survey Nos. 236, 239 and 211. The properties conveyed and set out in the deed measure twenty-five acres and fourteen gunthas, assessed at Rs. 26-9-0. These three properties measure four acres and twenty gunthas, assessed at Rs. 3. Of these, Survey No. 236 measures only thirty-one gunthas and the assessment on it is ten annas. The trial Court, after a very careful consideration of the whole of the evidence in the case, both documentary and oral, came to a definite conclusion that at the date of the deed of surrender these three properties were not looked upon by

the widow as belonging either to Tanaji or to her; that they were appropriated by other persons to themselves and were in their enjoyment; that both before the deed of surrender and after it, until her death, no income was received by Janubai who looked upon these properties, if she knew that they belonged to her husband, as having been lost to the family, and therefore did not think it necessary to include them in the deed of surrender. In these circumstances there is only one conclusion to which I can come, and that is that the widow did not believe that these properties belonged either to her or to her husband. The exclusion of these properties from the deed of surrender was entirely due, as the Courts below have held, to a *bona fide* mistake on the part of the widow or was due to her ignorance as to the true ownership of the properties. Where that is the case, and there is nothing in the circumstances to show that the surrender was a device to divide the estate between the widow and the reversioner or to retain a benefit for herself; where, as here, the deed on the face of it shows that the widow was surrendering what she believed to be the whole estate, including her own residential house, and pots and pans, etc., it would be difficult, in my opinion, to hold the surrender to be invalid, merely because it was afterwards discovered that a very small property was found to belong to her husband and was not specifically included among the items of property enumerated in the deed. I am satisfied in the circumstances and having regard to the recitals in the deed that here there was the effacement of the widow, and she was, so to speak, operating her own death as from the date of the surrender.

I have so far assumed that the three properties belonged to Janubai's husband, but in my opinion it would be

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difficult to hold that they did, upon the evidence. The actual finding of the District Judge was this:—

"An examination of the revenue record shows that there is some basis for the contention that Janubai has inherited the lands from her husband Tanaji. Survey No. 236, pot hisa No. 2 appears to have been entered in her name in 1908, it having originally stood in the name of Tanaji; Survey No. 239 appears to have been transferred to her *khata* in 1913-14; and Survey No. 211 appears to have been put into her *khata* in the year 1921."

I am unable to hold that this is a definite finding that the three properties belonged to the widow or her husband. The last survey number clearly did not appear in her *khata* until four years after the deed of surrender. As to the other two lands which, as stated above, were very small, all that appears is that they stood in the Government records in the name of the widow herself. But a mere entry in the Government records of these two lands is not enough to discharge the burden that rested on the appellants, particularly as the evidence showed that Janubai at no time derived any income from them.

The learned advocate for the appellants argues that the burden of proving that Janubai had no title to these properties was on the respondent. I am unable to accept the contention. The defendants relied upon the deed of surrender, and they undoubtedly had to show, under the law, that it was a good surrender. *Prima facie* they succeeded in discharging that burden. The plaintiffs then attacked the surrender on the ground that three properties belonging to Janubai had not been included in the surrender deed. Obviously, the burden of proving that there were properties belonging to Janubai and they were omitted from the surrender deed would be on the plaintiffs.

The next contention of the learned advocate was that as there is no definite finding on this question of the District

Judge the case should be remanded for that purpose. Having regard to the value of these three plots, and the circumstances of the case, I am not disposed to accept that application, as I have before me a definite finding of the Courts below as to these three lands. The finding is that the three properties were appropriated and enjoyed by the separated co-sharers of Janubai's husband and Janubai never received a penny out of their income. It is also found that since the surrender, she was maintained by the daughter. Lastly, the deed of surrender, it is clear, makes no reservation as to these lands in favour of Janubai.

But assuming that the properties belonged to Tanaji, even so, I think, on the principles to which I have referred, the surrender is a valid surrender. If a widow can keep a small portion of the property for her maintenance, or if a small portion of the property can be conveyed to her as a matter of compromise, and the surrender would be good, it is difficult to see why an honest omission, due either to ignorance or to oversight, regarding a very small portion of the whole of the property, should be considered as affecting the validity of a surrender, which, apart from it, was a *bona fide* transaction. A similar view was taken by the Madras High Court in *Vadlamudi Gopalakrishnayya* v. *Vadlamudi Gangayya*,[1] where it was held that the fact that a small and inappreciable portion of the whole property is not included in the deed of surrender will not invalidate the surrender.

In this view, therefore, the appeal fails and must be dismissed with costs.

Appeal dismissed.

J. G. R.

[1] (1917) 52 I. C. 749.