APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1921
July 5.

BASAPPA BIN DODFAKIRAPA HEBBALLIYAVAR, MINOR, BY HIS GUARDIAN SANNA YELLAPA BIN GHATIGEPA HEBBALLIYAVAR AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS *v.* FAKIRAPPA BIN SHANKRAPA HEBBALLIYAVAR (ORIGINAL PLAINTIFF), RESPONDENT*.

Hindu Law—Widow—Reversioner—Alienation—Gift made by widow with the consent of next reversioner—Reversioner estopped from contesting the validity of the gift.

A gift made by a Hindu widow of a portion of her husband's property in favour of her husband's brother's grandson with the consent of the next reversioner, another brother of her husband, held valid, on the principle of estoppel, as against the particular reversioner who consented to it.

Bai Parvati v. *Dayabhai Manchharam*[1], discussed.

SECOND appeal against the decision of L. S. Coutinho, Assistant Judge of Dharwar, reversing the decree passed by B. G. Kadkol, Second Class Subordinate Judge at Dharwar.

Suit to recover possession.

Fakirappa (plaintiff), Ghatigeppa and Basappa were three brothers. They were divided in interest.

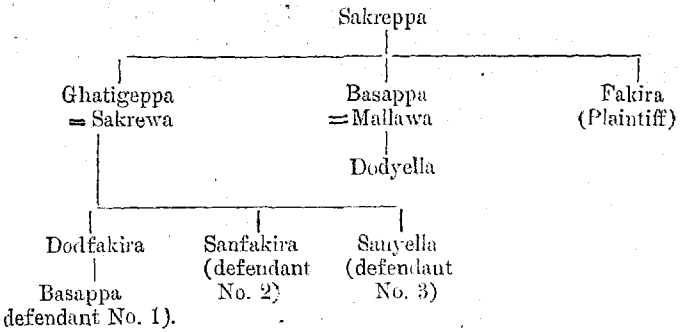
Ghatigeppa died leaving behind him his grandson Basappa (defendant No. 1) and defendants Nos. 2 and 3 as sons.

Basappa died leaving his widow Mallawa and a son Dodyella.

* Second Appeal No. 794 of 1920.

[1] (1920) 44 Bom. 488.

The following genealogical tree shows the relationship between the parties :—



Dodyella died leaving as his heir his mother Mallawa. On the 14th February 1917, Mallawa gifted a portion of her husband's property to Basappa (defendant No. 1). Fakirappa (plaintiff) consented to the alienation. Mallawa died a few months after passing the deed of gift.

Thereafter, the plaintiff sued to recover possession of the property from Basappa (defendant No. 1).

The defendants contended that the property belonged to defendant No. 1 under the deed of gift passed by Mallawa and the plaintiff was estopped from contesting the validity of the gift.

The Subordinate Judge held that the gift was proved, that it was valid under Hindu law and was binding on the plaintiff. He rejected the plaintiff's claim.

On appeal, the Assistant Judge, relying on *Bai Parvati* v. *Dayabhai Manchharam* 22 Bom. L. R. 204, held that the gift was invalid so far as the plaintiff's interest was concerned. He, therefore, reversed the decree and allowed the plaintiff's claim.

Defendants appealed to the High Court.

H. B. Gumaste, for the appellant :—As the plaintiff consented to the alienation by joining in the deed

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I submit that he would be estopped from contending that the gift is not valid: see *Rangasami Gounden* v. *Nachiappa Gounden*[1] and *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*[2].

The mere fact that the deed is a deed of gift and not alienation for legal necessity does not affect the question of estoppel. In *Vinayak* v. *Govind*[3] the plea of necessity was negatived and still the alienation was upheld on the ground of consent.

The decision in *Bai Parvati* v. *Dayabhai Manchharam*[4] can be distinguished on the ground that it did not turn on the ground of estoppel at all but on the question whether a reversioner could legally convey his interest in the property. The point of estoppel was not argued. The alienation can also be supported on the theory of surrender.

S. B. Jathar, for the respondent :—The plaintiff is not estopped because the question, viz., whether a reversioner's alienation of his interest in the property is or is not valid, is a question of law and there can be no estoppel on a point of law.

This case is on all fours with *Bai Parvati's case*[4]. In that case the learned Chief Justice has specifically ruled in the course of his judgment that there could be no estoppel on a point of law. The cases cited by the appellant have no application to the facts of the present case for the question before the Court in this case is whether a *joint* deed of gift by a widow and a reversioner is valid. We submit that it is not. It is repugnant both to the Hindu law and to the Transfer of Property Act. This is not a case of a Hindu reversioner consenting to an alienation. This is a case of the reversioner joining in the deed of gift by a Hindu

(1) (1918) L. R. 46 I. A. 72.
(2) (1907) L. R. 35 I. A. 1.
(3) (1900) 25 Bom. 129.
(4) (1919) 44 Bom. 488.

widow. We, therefore, rely on *Bai Parvati* v. *Dayabhai Manchharam*[1], which we submit, was rightly decided and is binding on this Court.

First, an alienation by a Hindu widow can be good if it is for legal necessity. But a deed of gift cannot possibly be upheld on the ground of necessity: see *Abhesang* v. *Raisang*[2]. The decision of *Vinayak* v. *Govind*[3] has no application because the decision therein was based on the ground of consent alone.

Secondly, an alienation by a widow can be upheld if it is with the consent of the next reversioner. But as we have already submitted this case does not depend on the consent at all. In this case the Court is asked to uphold an alienation itself—not a consent to the alienation—by a reversioner of his interest in the property. Such an alienation is invalid.

MACLEOD, C. J.:—The plaintiff sued to recover possession of the land and house specified in the plaint. He alleged that he had two brothers Ghatigeppa and Basappa who were divided in interest; that Ghatigeppa died leaving behind him defendant No. 1, his grandson, and defendants Nos. 2 and 3 his sons; that Basappa had a wife Mallawa and a son Dodyella; that the father predeceased his son, and that subsequently the son Dodyella also died without any heirs except his own mother who also died about three months before suit after enjoying the plaint property. The plaintiff further alleged that he was the sole heir after Mallawa's death and that the defendants had been, without any right, holding the property. The defendants pleaded that Mallawa and plaintiff had passed the plaint property by gift, on the 14th February 1917, by executing a duly registered instrument in favour of the 1st defendant. The plaintiff in his reply denied having

(1) (1919) 44 Bom. 488. (2) (1912) 14 Bom. L. R. 602.

(3) (1900) 25 Bom. 129.

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passed a deed of gift along with Mallawa and contended that Mallawa was incompetent to give away the property, and to alienate the same to a person who was not the next reversioner, and that the deed referred to by the defendants in their written statement was executed in the circumstances set forth in para. 2 of Exhibit 16, under misrepresentation without knowing its contents.

The learned trial Judge found that the gift passed by the plaintiff and Mallawa in defendant No. 1's favour was not passed without the plaintiff's understanding the contents thereof; that it was binding on the plaintiff; that the gift was valid under Hindu law; and accordingly rejected the plaintiff's claim. The learned Judge said:—

> Thus being a consenting party to the deed, plaintiff is not at all justified and competent to revoke or resume the gift capriciously as he now attempts to do. Plaintiff cannot be allowed to take advantage of his own wrong or mistake as he says, and if any consideration for the transfer of interest were really needed to complete the essentials of section 43 of the Transfer of Property Act, it is the natural affection which is also referred to in the deed, Exhibit 61. Plaintiff is thus estopped from contesting the validity of the gift and from contending that the deed is not binding upon him and he is incompetent to repudiate the gift and resume the property."

In appeal the learned Assistant Judge, relying on the decision in *Bai Parvati* v. *Dayabhai Manchharam*[1], reversed the lower Court's decree and awarded the plaintiff's claim. Now the case of *Bai Parvati* v. *Dayabhai Manchharam*[1], was a case in which the widow together with one of her daughters passed a joint deed of gift of the suit property in favour of the children of a deceased daughter's son. The case was argued on the footing that the deed of gift conveyed the entire property to the donee. But the appellant's counsel contended that as the persons who executed the deed of gift were not entitled between them to the whole estate, Bai Parvati having only a contingent

[1] (1919) 44 Bom. 488.

interest in it which she could not convey, the deed was valid only with regard to the life estate of the widow. Respondent's counsel did not contend that it was a case in which an alienation was made by a widow with the consent of the next reversioner, but maintained that the widow and the next reversioner were competent to convey an absolute estate. With the case presented to the Court in that way, the Court came to the conclusion that there could not be a transfer of a contingent interest, and that the plaintiff was not estopped from raising the question of law that the Transfer of Property Act did not permit of the conveyance or transfer of a *spes successionis*. The question whether the next reversioner was estopped from contesting the validity of the gift by the widow owing to his having consented to it was not argued.

The cases which we have now been referred to decided by the Privy Council, viz., *Rangasami Gounden* v. *Nachiappa Gounden*[1] and *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*[2], were not cited in the course of the argument. In the first case their Lordships laid down that the widow can surrender her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation, but the surrender must be *bona fide* and not a device to divide the estate with the reversioner. In those circumstances the question of necessity does not arise. Nor could it arise in the case of a gift by a widow to an outsider. Secondly, when an 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

(1) (1918) L. R. 46 I. A. 72. (2) (1907) L. R 35 I. A. 1.

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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.

In *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*[1], this decision was discussed and explained, and it would appear that their Lordships would have approved of the proposition that if all the the reversioners in being consent to an alienation by the widow they will be bound by their own consent, and post-nati will be held to claim through those that are bound. Their Lordships also pointed out that if the deed of transfer by the widow and the next reversioner be looked upon as a transfer of their respective interests, then it would not transfer the whole estate.

If, therefore, the case is treated as an alienation by the widow with the consent of the next reversioner, then that dictum of their Lordships of the Privy Council would apply, and the plaintiff in this case would be bound by the consent which was implied by his being a party to the deed of gift in favour of Basappa. It seems to me, therefore, that the decision of the trial Court in the facts of the case was right. The appeal must be allowed and the plaintiff's suit dismissed with costs throughout.

SHAH, J.:—I agree. The question of law in this second appeal is whether a gift made by a Hindu widow in favour of her deceased husband's brother's grandson with the consent of the next reversioner, who in this case was a brother of her deceased husband, is valid. I state the question in this form, though in the present case the next reversioner Fakirapa really joined in the deed of gift in conveying the property to his brother's grandson. No doubt his interest in the property then was contingent and he could not convey such interest

[1] (1907) L. R. 35. I. A. 1.

to his brother's grandson. But the fact of his having joined the widow in making this gift in favour of the donee necessarily implies his consent to the act of the widow in making the gift. Therefore it must be treated, in spite of the argument to the contrary urged by Mr. Jathar, as a case of an alienation by way of gift by a Hindu widow with the consent of the next reversioner. It is the very reversioner who now seeks to establish that the gift is not valid; and the question is whether he is bound by the consent which he undoubtedly gave during the life time of the widow to the gift in question.

The property given by way of gift is not shown to be the whole of the widow's estate, and there is no scope for the application of the doctrine of acceleration by surrender of the estate on the part of the widow.

It is not necessary to examine all the cases which have been referred to in the course of the argument. But referring to the case of *Rangasami Gounden* v. *Nachiappa Gounden*[1] where the earlier decision of the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*[2] has been fully considered it seems that as regards the plea of estoppel their Lordships of the Privy Council distinguished *Bajrangi Singh's case*[2] on the ground that in that case all the reversioners in being had consented to the alienations, and that they were bound by their own consent, and that the post-nati were held to claim through those that were bound.

In the present case the consenting reversioner himself contests the alienation. It is quite true that in the present case the alienation purports to be a gift. It is pointed out by their Lordships in the earlier part

(1) (1918) L. R. 46 I. A. 72. (2) (1907) L. R. 35 I. A. 1.

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of the judgment in *Rangasami's case*[1] that being a deed of gift, it cannot possibly be held to be evidence of alienation for value for purposes of legal necessity. In *Pilu* v. *Babaji*[2] it has been stated that ordinarily the consent of the next reversioners would not be sufficient to validate a gift by a Hindu widow, as in the case of a deed of gift there can be no necessity. But in that particular case the question as to whether the consenting reversioner to the gift could question the validity of that gift after the death of the widow did not arise; and in the case of *Abhesang* v. *Raisang*[3] Mr. Justice Batchelor, who was one of the Judges who decided *Pilu* v. *Babaji*[2], has distinctly emphasized the consideration that the observations made in that case must be read with reference to the facts of that case.

In *Bai Parvati* v. *Dayabhai Manchharam*[4] no doubt the reversioner contesting the validity of the alienation had consented to the alienation. The consenting reversioner in that case was a female. I do not think, however, that that circumstance can afford any basis for distinguishing the case, so far as the point under consideration is concerned. But, as pointed out by the learned Chief Justice, the case was really decided not on a consideration of the plea of estoppel based on consent, but on the ground whether it was competent to the next reversioner in that case to convey her contingent interest during the life-time of the widow. It is clear that so far there could be no question that the reversioner could not convey such interest. But apparently the point that we have to decide was not considered, though no doubt the case affords an instance in which the consenting reversioner was held to be not bound by the alienation. Beyond this case not a single decision, in which the alienation without any

(1) (1918) L. R. 46 I. A. 72.
(2) (1909) 34 Bom. 165.
(3) (1912) 14 Bom. L. R. 602.
(4) (1919) 44 Bom. 488.

legal necessity to which the next reversioner has consented has been held not to be binding upon that reversioner after the death of the widow, has been cited to us. Having regard to the observations as to *Bajrang Singh's case*[1] in *Rangasami Gounden* v. *Nachiappa Gounden*[2] at p. 86 of the report, it seems to me that it is open to this Court to hold that the consenting reversioner is estopped from contesting the validity of the gift by the widow to which he has consented.

So far as the consenting reversioner is concerned, I see no substantial difference between a gift and an alienation by way of sale when the legal necessity is negatived on the evidence apart from the consent. In *Vinayak* v. *Govind*[3] though the plea of legal necessity was negatived the alienation of two plots by the widow was upheld on the ground of Venkatesh's consent. In both the judgments delivered in that case it has been pointed out that if Venkatesh had survived the widow, he would undoubtedly have been bound by his own consent: and on the facts of that case the Court held that Venkatesh's consent was sufficient to validate the sale as against the reversioner who was Venkatesh's son.

Apart from the decisions, it seems to me that where, as in the present case, we have a gift by a Hindu widow in favour of the grandson of her deceased husband's brother for whom she would naturally have affection, and where that gift is consented to by the next reversioner, there is no reason why at least the consenting reversioner should not be held bound by his consent, and why he should not be estopped from questioning the validity of such a gift. Both on general considerations, as also on the decided cases, it seems to me that in spite of the general paucity of

[1] (1907) L. R. 35 I. A. 1. [2] (1918) L. R. 46 I. A. 72.

[3] (1900) 25 Bom. 129.

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reported cases where a gift by a Hindu widow consented to by the next reversioner has been called in question by that very reversioner, I think that the gift ought to be upheld as against the particular reversioner who has consented to the gift by the widow during her life time.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

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ABDULLA AVJAL MOMIN (ORIGINAL DEFENDANT No. 1), APPELLANT *v.* ISMAIL MUGAL FODA AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANT No. 2), RESPONDENTS[*].

Mahomedan law—Pre-emption—Payment of price and delivery of possession effected—No registered sale deed—Right of pre-emption arises—Transfer of Property Act (IV of 1882), section 54.

Where there has been an oral agreement to sell land followed by payment of price and delivery of possession to the purchaser, a right of pre-emption arises according to Mahomedan law even though there is no registered sale deed executed as required by section 54 of the Transfer of Property Act, 1882.

Begam v. *Muhammad Yakub*[1], followed.

Budhai Sardar v. *Sonaullah Mridha*[2], distinguished.

SECOND appeal against the decision of M. I. Kadri, Joint Judge of Ahmedabad, reversing the decree passed by N. N. Master, Subordinate Judge at Godhra.

Facts material for the purposes of this report are stated in the judgment of His Lordship the Chief Justice.

G. N. Thakor, for the appellant.

R. W. Desai and *M. H. Mehta*, for respondents Nos. 1 to 3.

[*] Second Appeal No. 46 of 1921.

(1) (1894) 16 All. 344. (2) (1914) 41 Cal. 943.