of an exactly similar description, and in which the Division Bench held that the suit must be dismissed by reason that no cause of action was disclosed in it.

It is contended by the pleader for the special respondent that the thak proceedings are not shown to have been conducted with his knowledge. But on this point, we think that the record of the Court below clearly shows that those proceedings were actually the act of the plaintiff himself.

The issues between the parties were not, whether those proceedings were the act of the plaintiff, but whether those proceedings having been the act of the plaintiff, he could, in the words of the second Court, "proceed with his present suit in contravention of his own act."

Both the Courts have tried the case as if the plaintiff had admitted that the survey-proceedings were the acts of the plaintiff. The first Court said that it would be an injustice for the plaintiff if he were precluded from obtaining redress in contravention of his errors, which clearly proceeded from ignorance. And the second Court, in the words which I have already quoted, distinctly referred to the survey-proceedings as the act of the plaintiff.

We think, then, that the plaint discloses no cause of action against the defendants, and that this is quite a case in which we ought to admit the objection taken, even at the last moment, and we direct that the plaintiff's suit be dismissed with costs of all Courts.

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The 7th June 1869.

*Present:*

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

**Alienation by Hindoo widow—Suit by reversioner—Declaratory decree.**

Case No. 246 of 1868.

***Regular Appeal from a decision passed by the Judge of Patna, dated the 1st September 1868.***

Shewuk Ram Pershad (Plaintiff), *Appellant,*

*versus*

Mahomed Shumsool Hada and another (Defendants), *Respondents.*

*Mr. G. C. Paul* and *Baboos Toolsee Doss Seal* and *Umurnath Bose* for Appellant.

*Messrs. A. T. T. Peterson* and *R. E. Twidale, Baboo Romesh Chunder Mitter* and *Moonshee Mahomed Yusuff* for Respondents

A reversioner can, during the lifetime of the alienor, commence a suit to declare that a conveyance is not binding upon him beyond the life of the alienor.

A deed of conveyance by a Hindoo widow is an act hostile to and invades a reversioner's rights, and as such, warrants his suing for a declaratory decree.

*Kemp, J.*—THIS is a suit the substantial object of which is to have a deed of conveyance by one Ranee Dhun Koer, dated the 13th of November 1854, declared to be not binding as against the plaintiff beyond the lifetime of Dhun Koer. The plaintiff has asked to have the deed of sale cancelled, but it does not follow that, because he has asked too much, the Court will refuse to give him that relief which he may be entitled to.

The plaintiff claims as reversionary heir to Hur Narain. The defendant No. 2, Dhun Koer, is the alienor. The defer No. 1, Moulvie Shumsool Hada, is alienee.

The Judge raised the following issues for trial:—

*1st.*—Has the suit been undervalued?

*2nd.*—Is the suit barred under the general or any special law of limitation?

*3rd.*—Is the plaintiff entitled to a declaratory decree?

*4th.*—Whether the plaintiff is the heir of Hur Narain or not; and, if so, whether the alienation by Ranee Dhun Koer, the daughter-in-law of Hur Narain, is valid or not?

*5th.*—Whether the properties alienated belong exclusively to Ranee Dhun Koer, or not?

The Judge disposed of the suit on the *third* issue. He observes that granting the suit is in time, he was of opinion that there is no sufficient reason for making a declaratory decree, inasmuch as the alienation which took place fourteen years ago may be as effectually questioned on the death of Ranee Dhun Koer whenever that event may take place, as now that it is by no means certain whether the plaintiff will be alive to question the alienation

when the succession opens out to him on the death of the alienor. The Judge then quotes certain rulings of the High Court which are given in the margin in support of his opinion that the suit of the plaintiff is premature, and dismisses it with costs.

IX. W. R. 104.
VIII. W. R. 64.
IX. W. R. 325.
IX. W. R. 380.
IX. W. R. 460.
X. W. R. 133.
2 Wyman 271.

There is a cross-appeal by the defendant No. 1, which we shall notice hereafter.

We are of opinion that the suit of the plaintiff has been dismissed on insufficient grounds.

The first case quoted by the Judge is to the effect that, in suits where no substantial relief is sought, the Court ought to be particular in giving a declaratory decree. In this suit, a substantial relief is sought. A reversioner can, during the lifetime of the alienor, commence a suit to declare that a conveyance is not binding upon him beyond the life of the alienor. The relief sought for is plain and substantial, *viz.*, that the deed of conveyance be declared to be not binding upon the plaintiff beyond the lifetime of the alienor. It is, of course, in the discretion of the Court to make a declaratory decree, or to refuse to do so, but this discretion must be guided by reason, and not be arbitrary A plaintiff asking for a declaratory decree must show that some act has been done which is hostile to or invades his right. In this case, the act of Dhun Koer clearly invades, and is hostile to, the plaintiff's rights as reversioner, and a suit during the lifetime of the alienor will most clearly lie. This has been ruled by the Full Bench in their decision in the case of Gobind Monee Dossee *versus* Sham Lall Bysack, dated 7th April 1864, published in the Special Number of the Weekly Reporter, pages 165—167.

The other cases alluded to by the Judge refer to suits to set aside thakbust awards, which did not invade the right of the plaintiff in those suits.

In the case of Pranputty Koer,* cited by the Judge, there had been no alienation by the widow, but a simple declaration made by her in a warasutnamah, which, of course, was no evidence against the reversioner, and could not bind him.

We are, therefore, of opinion that, under the ruling of the Full Bench quoted above, this suit will lie.

*2 Hay 608.

The plaintiff may not be entitled to ask to have the deed cancelled, but he is competent to ask for a declaration that it is not binding upon him beyond the life of the alienor.

We now proceed to notice the cross-appeal of the defendant, which opens out the question whether the plaintiff is the reversionary heir of Hur Narain. This question has not been tried by the Judge, no evidence was taken, and moreover it is a question which was put in issue and is dependent upon many circumstances which we are not in a position to consider and decide upon without evidence.

Hur Narain, the common ancestor, had a son, Kalika Pershad, who pre-deceased his father. The son left a widow, the daughter-in-law of Hur Narain; this is defendant No. 2, Ranee Dhun Koer. Under the Hindoo Law, this lady would not be the heiress of Hur Narain; but it is said that, by a certain petition presented by Hur Narain to the authorities, she has become vested with an absolute title in the disputed properties.

Ranee Dhun Koer had two daughters, one who died childless in the lifetime of Narain, and another who has left the plaintiff in this suit. Now, the iff's right to succeed on the death of Koer to the estate of Hur Narain depends upon whether the petition above referred to gave her only a life-interest in the estate of Hur Narain, or an absolute interest.

It has been said in the course of the argument on the cross-appeal that the plaintiff cannot under any circumstances be the heir of Hur Narain. This will mainly depend upon whether the plaintiff is a Bandhu, and entitled or not entitled to offer the funeral blations to Hur Narain. It has been ruled by the Privy Council in the case of Gridharee Lall Roy *versus* The Government of Bengal,* July 17th, 1868, that the enumeration of Bandhus given in the Mitakshara, Chapter II., Section 6, is not exhaustive. At any rate, this is a question which must be tried after giving the parties an opportunity to produce evidence, and after argument.

The *fourth* and *fifth* issues raised by the Judge embrace the whole contention between the parties, and as no evidence has been given, and the parties have not been heard, we think that the suit must be re-

* 10 W. R. 31.

manded. The decision of the Judge, to the effect that the plaintiff's suit is premature and will not lie, is reversed, and the suit sent back for trial on the merits. Costs of this appeal to be borne by the respondents.

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The 8th June 1869.

*Present:*

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

**Revival of a decree.**

Case No. 157 of 1869.

*Miscellaneous Appeal from an order passed by the Officiating Judge of Dacca, dated the 22nd January 1869, affirming an order of the Moonsiff of Naraingunge, dated the 28th July 1868.*

Nilambur Sein (Judgment-debtor), *Appellant,*

*versus*

Kalee Kishore Sein (Decree-holder), *Respondent.*

*Baboo Nil Madhub Bose* for Appellant.

*Baboo Hem Chunder Banerjee* for Respondent.

When a decree-holder allows his decree to be struck off, and does nothing to revive it, it cannot be revived on the motion of the judgment-debtor.

*Bayley, J.*—In this case it appears that the appellant Nilambur Sein was a co-sharer of certain property with his brother Pitambur Sein, and was sued by him (Pitambur) for certan money expended in the improvement of that property. The Court in that case passed a decree in favor of Pitambur, or rather in favor of his son Kalee Kishore Sein, to the effect that, should the defendant Nilambur, judgment-debtor, contribute towards the payment of the expenses of *bhuratee*, or improvement of the soil by filling up cavities, he would be entitled to a proportionate share of the profits, but that, if he did not, he should pay rent in proportion to the extent of land previously held and of rent before paid by him, and that the decree-holder Pitambur would continue to get the whole extra profits derived from the improvements above referred to.

This decree was struck off in the year 1863, and has never since been revived by the decree-holder, and it may be here noticed that, with the exception of this decree of the Moonsiff, there was no other decree given to the judgment-debtor, appellant before us, Nilambur Sein.

The present appellant Nilambur now in miscellaneous special appeal asks from us—

*1stly.*—That the decree obtained by the decree-holder Pitambur against him, and struck off in 1863, as above stated, may be restored to the file; and

*2ndly.*—That after paying the Ameen's fees and the share of expense of the *bhuratee*, he (petitioner) may be put in possession of the homestead of Kundurpo Khan.

The Moonsiff and the Judge have both rejected this prayer. The Judge has held that under no circumstances could the judgment-debtor be put in possession of the lands, as the decree does not provide for such possession, but only for a share in the extra profits.

The judgment-debtor appeals against this order, and urges that he is so far a decree-holder as that by the decree it has been ordered that he shall participate in the profits of the property if he paid a certain sum of money, and that, therefore, on payment of that sum, which he is ready to pay, he is entitled to be put in possession.

Now, in the first place, we cannot allow that, when a decree-holder himself allows his decree to be struck off, and does nothing to revive it, the decree should be revived on the motion of the judgment-debtor; and in the next place, as the judgment-debtor in this case can show us no cross-suit or decree in which any order has been passed in his favor for the possession he seeks for, we cannot grant his prayer for possession. But we think that the whole proceedings taken in this case from the date of the revival of the execution of the decree up to the present moment have been taken without jurisdiction. No application of the judgment-debtor could restore a decree of the judgment-creditor which that creditor, for reasons best known to himself, refused to execute, and no Court could revive a decree abandoned by the only person who could execute it, *viz.*, the decree-holder, or one precisely in his place.

We therefore quash the whole proceedings of the Lower Courts subsequent to the revival of the execution of the decree, as without jurisdiction.