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As to this last-mentioned case, it was very properly admitted for the appellant that, if the reasoning on which it was based was correct, it would conclude the present question; but it was argued that that reasoning had been practically overruled by the Privy Council in *Moniram Kolita* v. *Keri Kolitani* (1). We have, however, shewn above that that is not so, and that their Lordships in the case of *Moniram Kolita* v. *Keri Kolitani* had not before them the commentary of Raghunandana with the full text of Katyayana therein cited, upon which Mr. Justice Romesh Chunder Mitter's judgment is really based; and they could not have pronounced any authoritative opinion upon matters that were not before them.

While the foregoing authorities support the view which the respondents contend for, no text or case under the Bengal School of Law was cited, nor are we aware of any, in favour of the opposite view. The cases cited by the learned vakil for the appellant, namely, *Advyapa* v. *Rudrava* (2), *Ganga Jati* v. *Ghasita* (3), and *Kojiyadu* v. *Lakshmi* (4), are in the first place not all in point, and in the second place they are all under Schools of Hindu Law other than the Bengal School, and were decided with reference to authorities different from those that are specially followed in the district with which we have now to deal. They do not, therefore, in our opinion affect the decision of the present case.

The result then is that the appeal fails and must be dismissed with costs.

J. V. W. *Appeal dismissed.*

Before Mr. Justice Norris and Mr. Justice Banerjee.

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May 23.

HEM CHUNDER SANYAL (PLAINTIFF) *v.* SARNAMOYI DEBI AND ANOTHER (DEFENDANTS.) *

Hindu Law—Reversioners—Arrangement between widow and reversioner—Relinquishment by Hindu widow of her life interest to reversioner—Gift by reversioner to widow of moiety of estate—Declaratory decree, Suit for—Suit by reversioner in lifetime of widow—Specific Relief Act (I of 1877), section 42.

* Appeal from Original Decree No. 29 of 1893, against the decree of Babu Shumbhoo Chunder Nag, Subordinate Judge of Pubna and Bogra, dated the 30th of January 1893.

(1) I. L. R., 5 Calc., 776.
(2) I. L. R., 4 Bom., 104.
(3) I. L. R., 1 All., 46.
(4) I. L. R., 5 Mad., 149.

M died, possessed of certain immoveable properties, and leaving two widows, one of whom died shortly after him, leaving a daughter's son *R*. The other widow *S* came to an arrangement with *R*, under which, on 9th December 1889, two deeds were executed, by the first of which *S* relinquished to *R* her life interest in the properties she inherited as widow of *M*, and by the other *R* conveyed to *S* an absolute right in half the properties so relinquished, retaining the other half himself, *R* died on 27th November 1890, and his widow *P* came into possession of the half share of the properties belonging to him. In a suit by the plaintiff, as the next reversionary heir of *M* for a declaration that the deeds were invalid, and did not affect his reversionary right,—

Held, that the suit was maintainable in the lifetime of the widow. *Isri Dut Koer* v. *Hansbutti Koerain* (1) referred to ; *Pirthi Pal Kunwar* v. *Guman Kunwar* (2) ; *Bhujendro Bhusan Chatterjee* v. *Triguna Nath Mookerjee* (3) ; and *Kattama Natchiar* v. *Dorasinga Taver* (4), distinguished.

Held, also, following the case of *Nobokishore Sarma Roy* v. *Harinath Sarma Roy* (5), that the moiety of the properties, which was given by *S* to *R*, was absolutely alienated in his favour, and the plaintiff was not entitled to question the validity of the alienation, so far as that portion of the properties was concerned.

Held, further, that though the effect of the decision in *Nobokishore Sarma Roy* v. *Harinath Sarma Roy* is to make the widow and the presumptive reversioners competent to deal with the estate absolutely for certain purposes, the widow cannot, with the consent of the presumptive reversioner, convert her life interest in any portion of her husband's estate which she retains for herself into an absolute interest freed from all restraint on alienation. *Behari Lal* v. *Madho Lal Ahir Gayawal* (6), referred to. The plaintiff was, therefore, entitled to a declaration that the deeds were inoperative in affecting his reversionary interest, so far as regarded the moiety in possession of *S*.

THE plaintiff brought this suit for a declaration of his reversionary right to certain immoveable properties left by one Madhub Chunder Sanyal, and to set aside as null and void two deeds, one of relinquishment and other of gift, affecting the said properties.

Madhub Chunder Sanyal died, leaving two widows, Hara

(1) I. L. R., 10 Calc., 324 : L. R., 10 I. A., 150.
(2) I. L. R., 17 Calc., 933 : L. R., 17 I. A., 107.
(3) I. L. R., 8 Calc., 761.
(4) 15 B. L. R., 83 : 23 W. R., 314 : L. R., 2 I. A., 169.
(5) I. L. R., 10 Calc., 1102. (6) I. L. R., 19 Calc., 236.

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Sundari Debi and Sarnamoyi Debi. Hara Sundari Debi died leaving a daughter's son named Radhika Nath Bhaduri. Sarnamoyi Debi, the first defendant in this suit, adopted a son to her husband Madhub Chunder, naming him Mohima Chunder Sanyal, and after the death of the other widow Hara Sundari, Radhika Nath brought a suit to set aside this adoption, and obtained a decree in 1292 (1885) declaring the adoption invalid. On 25th Aughran 1296 (December 9th, 1889) the first defendant, Sarnamoyi Debi, and Radhika Nath Bhaduri came to a settlement with respect to the immoveable properties left by Madhub Chunder, in accordance with which Sarnamoyi, by one of the deeds it was sought to set aside, relinquished her life interest in the properties in favour of Radhika Nath, and in consideration of this relinquishment Radhika Nath, by the other deed, conveyed an absolute right in half the properties to Sarnamoyi, retaining the other half himself. Radhika Nath died on 12th Aughran 1297 (November 27th, 1890), leaving a widow Padma Kamini Debi, the second defendant, in possession of his half share of the properties.

The plaintiff, who was the next reversionary heir of Madhub Chunder, prayed for a declaration that his reversionary right was not affected by the two deeds; that the deed of relinquishment created no right in favour of Radhika Nath Bhaduri, and was null and void as against the plaintiff; and that the deed of gift made by Radhika Nath to Sarnamoyi created no absolute right in her, but that she only had a life estate in the properties left by her husband Madhub Chunder.

Issues were raised as to whether the suit was maintainable in the lifetime of Sarnamoyi, and as to the validity or otherwise, and the effect if valid, of the two deeds.

The Subordinate Judge held that the suit being not for a mere declaration, but also for substantial relief, was maintainable, under section 42 of the Specific Relief Act, during the lifetime of the widow; but that the deeds were *bonâ fide* and valid, and the plaintiff was not entitled to have them set aside. He therefore dismissed the suit.

The plaintiff appealed to the High Court, and the defendants

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filed a cross-objection that the lower Court was wrong in holding that the suit was maintainable.

Sir *Griffith Evans*, Babu *Srinath Das*, Babu *Kishory Lal Sarkar*, and Babu *Behary Lal Mitter*, for the appellant.

Dr. *Rash Behary Ghose*, Babu *Golap Chunder Sarkar*, and Babu *Dwarkanath Chakravarti*, for the respondents.

The judgment of the Court (NORRIS and BANERJEE, JJ.) was as follows :—

This appeal arises out of a suit brought by the plaintiff, appellant, who claims to be the nearest reversionary heir to one Madhub Chunder Sanyal, after the death of Madhub Chunder Sanyal's widow Sarnamoyi Debi, defendant No. 1, for a declaration that a deed of relinquishment of her life-estate executed by Sarnamoyi on the 25th Aughran 1296 in favour of the then next reversioner Radhika Nath Bhaduri, the husband of defendant No. 2, and a deed of gift executed by the said Radhika Nath Bhaduri on the same date in favour of Sarnamoyi in respect of one-half of the said estate, are inoperative and void as against the plaintiff.

The defence was that the plaintiff, a contingent reversioner, was not entitled to maintain a suit like this in the lifetime of the widow, and that the deeds in question were operative and valid.

The Court below, whilst holding that the plaintiff, as the next reversionary heir, was entitled to maintain a suit like this, has dismissed his suit on the ground that the deeds in question were operative and valid.

Against that decision the plaintiff has preferred this appeal, and contends that the Court below is wrong in holding that the deeds in question were valid and binding as against him ; and the defendants have preferred a cross-objection under section 561 of the Code of Civil Procedure to the effect that the Court below is wrong in holding that this suit was maintainable.

The cross-objection of the defendants ought to be considered first, because, if it prevails, it will be unnecessary to enter into the questions raised in the appeal of the plaintiff.

It is contended for the defendants, respondents, that as section 42 of the Specific Relief Act (1 of 1877) leaves it in the discretion

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of the Court to grant a declaratory decree, and as section 43 of that Act makes the decree in a case like this binding only on the parties to the suit and persons claiming through them, it will not be a proper exercise of discretion for the Court to grant a declaratory decree in this case, when such a decree may not after all be of any use, in the event, by no means an improbable one, of the plaintiff predeceasing the widow, and of some other person being the next heir to her husband at the date of her death; and in support of this contention the cases of *Pirthi Pal Kunwar* v. *Guman Kunwar* (1), *Bhujendro Bhusan Chatterjee* v. *Triguna Nath Mookerjee* (2), and *Kattama Natchiar* v. *Dorasinga Taver* (3), were relied upon.

At first sight it appeared that there was some force in this contention. But after careful consideration we are satisfied that it ought not to prevail. The provisions of the Specific Relief Act do not really support the defendant's contention. Illustration (*e*) of section 42 shews that a suit, like the present, by a presumptive reversionary heir for a declaration that an alienation by a Hindu widow is void beyond her lifetime is clearly maintainable under that section. The cases cited for the defendants are all distinguishable from the present. In the first case cited, that of *Pirthi Pal Kunwar* v. *Guman Kunwar* (1), the suit was brought by a Hindu widow to obtain a declaration that a certain person, said to have been adopted by her mother-in-law, was not a validly adopted son. The adoption did not, and could not upon the admitted facts of the case, in any way affect the plaintiff's rights, and all that could be suggested on behalf of the plaintiff in support of a declaratory decree was, as we gather from the judgment of their Lordships of the Privy Council, this, namely, "that at some time or another, after the death of the present plaintiff, the person who, according to the plaintiff's contention, is not an adopted son, may, by some means, either by an act of the Government or otherwise, obtain possession as an adopted son." This their Lordships held was no ground for entitling the

(1) I. L. R., 17 Calc., 933 : L. R., 17 I. A., 107.
(2) I. L. R., 8 Calc., 761.
(3) 15 B. L. R., 83 : 23 W. R., 314 : L. R., 2 I. A., 169.

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plaintiff to ask for a declaratory decree. The plaintiff there had no right which was affected by the adoption; her case could not possibly come under section 42 of the Specific Relief Act; and so she was held not entitled to sue for a declaration that the adoption was void. The case of *Bhujendro Bhusan Chatterjee* v. *Triguna Nath Mookerjee* (1) was of a very peculiar nature. The suit was brought by a purchaser of a reversionary interest, and the learned Judge who decided it did not lay down any general rule beyond this, that the discretion of the Court in granting a declaratory decree should be exercised with great caution; and having regard to the circumstances of the case before him, which are very different from those of the present case, he held that no declaration ought to be granted. In the last case cited, that of *Kattama Natchiar* v. *Dorasinga Taver* (2), the general principle is no doubt laid down that a declaratory decree cannot be made unless there be a right to consequential relief capable of being had in the same Court, or in certain cases in some other Court, but that case was decided under the old law, section 15 of Act VIII of 1859, which was different from the present law on the subject as embodied in section 42 of Act I of 1877. On the other hand the case of *Isri Dut Koer* v. *Hansbutti Keorain* (3), is a strong authority against the defendants' contention. In that case their Lordships of the Privy Council observe: "The only reason assigned for refusing relief on the ground of discretion is that part of the case raises a difficult point of law, the decision of which, though involving expense and delay, may after all not be binding upon the actual reversioners. That may be a reason more or less weighty according to circumstances. In this case it does not apply to the original estate of Budnath as to which the plaintiffs are clearly right and the defendants clearly wrong in their contention. Nor is it readily conceivable that the decision will be fruitless, because the question of law is of such a nature that its decision, though not binding as *res judicata* between the widows and a new reversioner, would be so strong an authority in point as probably to deter either party from disputing it." These observations apply

(1) I. L. R., 8 Calc., 761.
(2) 15 B. L. R., 83 : 23 W. R., 314 : L. R., 2 I. A., 169.
(3) I. L. R., 10 Calc., 324.

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with full force to this case; and we must, therefore, disallow the cross-objection of the defendants, and hold that this suit for a declaratory decree is maintainable.

Turning now to the appeal of the plaintiff, let us see what is the nature of the alienations which he asks us to declare invalid as against him. They are two alienations effected by two deeds, bearing the same date, by one of which the widow, defendant No. 1, relinquished in favour of the then next reversioner the whole of her interest in her husband's estate, and by the other the reversioner transferred to her in absolute right one-half of that estate. Looking to the apparent nature of the transaction, the Court below has held that the relinquishment of her interest by the widow in favour of the next reversioner had the effect of vesting the estate absolutely in him; and that, having thus acquired an absolute interest in the whole, he had full authority to transfer one-half of it absolutely to the widow. But though that may be so, if we look merely to the apparent nature of the transaction, yet if we look to its real nature, to its substance rather than to its form, we clearly find, on the face of the deeds themselves, that the relinquishment of her interest in the whole estate of her deceased husband was made by the widow in favour of the next reversioner in consideration of the latter making a gift to her absolutely of one-half of that estate; so that what was really intended to be parted with by the widow in favour of the reversioner, and was actually parted with, was her interest in one-half of the estate inherited by her from her husband, and as a consideration for this the reversioner released in favour of the widow his contingent claims in the other half. And this being the real nature of the transaction, it is contended for the plaintiff, appellant, that neither of the two deeds can be operative beyond the widow's lifetime; that the deed in favour of the reversioner can operate neither as a relinquishment, for there cannot be any relinquishment of anything less than the entire estate, nor as an alienation with the consent of the reversioner, for it is not in favour of a third person; and that the deed executed by the next reversioner, which really is only a release of his claim on half the estate, can have no binding effect on the plaintiff.

The defendants, on the other hand, seek to support the two

deeds on the broad ground that the widow and the next reversioner are jointly competent to deal with the estate in any way they like, and they rest their argument on the decision of a Full Bench of this Court in *Nobokishore Sarma Roy* v. *Harinath Sarma Roy* (1).

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We do not think that the contention of either side is correct to the full extent to which it goes. Touching the Hindu widow's power of alienation otherwise than for legal necessity, two propositions appear to us to be well established.

First, the widow may relinquish the whole of her interest in her husband's estate, and then the next reversioner will acquire the estate absolutely. The reason of this is that it is the intervention of the widow that postpones the succession of the reversioner, and if she walks out of the scene, she thereby anticipates for the reversioner the time of his succession. This view, which is quite in accordance with reason, is also amply supported by the authority of decided cases. See *Shamu Soonduree* v. *Shurut Chunder Dutt* (2); *Protap Chunder Roy Chowdhry* v. *Joymonee Dabee Chowdhrain* (3); and *Behari Lal* v. *Madho Lal* (4).

Second, the widow may convey to the next reversioner, or to a third party with the consent of the next reversioner, the whole or any portion of the estate, and the transferee will acquire an absolute interest.

The second proposition, though amply supported by the authority of decided cases (see *Nobokishore Sarma Roy* v. *Harinath Sarma Roy*, and the cases there cited) is not, it must be owned, reconcilable in its broad generality with the strict principle of Hindu law, as laid down by the original authorities. According to that principle, the reversioner, after a Hindu widow, is the person who is the nearest heir to her deceased husband at the date of her death. And if by death we understand civil death or renunciation of the world or relinquishment of worldly interests as well as natural death, the first of the above two propositions will not conflict with the foregoing principle. But before the event, which is to determine the actual reversioner, namely, the cessation of the widow's estate by death or relinquishment, happens, no

(1) I. L. R., 10 Calc., 1102. (2) 8 W. R., 500.
(3) 1 W. R., 95. (4) I. L. R., 19 Calc., 236.

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contingent reversioner can say that the estate will vest in him; and it is not easy to understand on what principle the widow, by making an alienation (not in the nature of a relinquishment of her estate) either in favour of the next presumptive reversioner or in favour of a third party, with the consent of such presumptive reversioner, can affect the rights of the actual reversioner when the succession opens to him. There is no doubt authority in the Hindu law for the proposition that the widow may make gifts of suitable portions of her husband's estate to her husband's relations, and with their consent to her paternal relations; and that in the disposal of property by gift or otherwise she is subject to the control of the members of her husband's family: See Dayabhaga, Chapter XI, section I, 63, 64. But who those members of the husband's family are whose consent or sanction is necessary to make the widow's alienation valid has not been definitely stated in the text. And the Privy Council, in the case of *Raj Lakhi Debia* v. *Gakul Chandra Chowdhry* (1), while affirming the general proposition that the widow can make a valid alienation of her husband's estate with the consent of her husband's kindred, did not specifically define who they were. The text of the Dayabhaga referred to above evidently formed the basis upon which the earlier decisions, upholding the Hindu widow's alienations with the consent of the reversioner, are based. See the case of *Jadomoney Dabee* v. *Saroda Prosono Mookerjee* (2), and the cases therein referred to. In the case of the *Collector of Masulipatam* v. *Cavaly Vencata Narainapah* (3), it was said by the Judicial Committee that "the exception in favour of alienation with the consent of kindred may be due to a presumption of law that, when that consent is given, the purpose for which the alienation is made must be proper." The real ground, however, upon which the decision of the Full Bench in *Nobokishore Sarma Roy* v. *Harinath Sarma Roy*, in favour of the second proposition stated above is based, is, as the judgments of the learned Judges who composed the Full Bench shew, that it would be wrong to upset a long course of decisions, such as there was on the point, and thereby to disturb numerous titles that have been acquired on the strength of those decisions.

(1) 3 B. L. R., P. C., 57 : 12 W. R, P. C., 47 : 13 Moo. I. A., 209.
(2) 1 Boulnois, 121. (3) 2 W. R., P. C., 61 : 8 Moo. I. A., 529.

Though the effect of the decision in *Nobokishore Sarma Roy* v. *Harinath Sarma Roy* is to make the widow and the presumptive reversioner competent to deal with the estate absolutely for certain purposes, we are not prepared to hold that it warrants the proposition that they are competent to deal with it so as to convert the widow's estate, the property still remaining in her, from a qualified into an absolute one.

Following the case of *Nobokishore Sarma Roy* v. *Harinath Sarma Roy*, we must hold that the moiety of the estate which was really intended to be given to the then next reversioner Radhika Nath Bhaduri, and which really passed to him, has been absolutely alienated in his favour, and the plaintiff is not entitled to question the validity of the alienation, so far as that portion of the estate is concerned.

But neither the case last cited, nor any other case or text of Hindu law that we are aware of, goes the length of laying it down that the widow can, with the consent of the presumptive reversioner, convert her interest in any portion of her husband's estate which she retains for herself into an absolute interest freed from all restraint on alienation. The two deeds that are sought to be declared invalid after the widow's death must, so far as they relate to the moiety of the estate that the widow has retained for herself, be regarded as a mere contrivance to convert the qualified estate of the widow into an absolute estate to be enjoyed by her free from all restraint on alienation. And we can find no authority for holding that such a conversion or enlargement of her estate is valid. On the contrary it has been held by their Lordships of the Privy Council in *Behari Lal* v. *Madho Lal* (1) that "it was essentially necessary to withdraw her own life estate, so that the whole estate should get vested at once in the grantee," in order that an absolute estate might be created.

It was argued for the appellant that if the moiety of the estate that remains in the widow fails to be converted into an absolute estate, as such conversion by transfer from the reversioner was the consideration for the alienation of the whole estate to him, and as that consideration fails, the whole transfer to the reversioner

(1) I. L. R., 19 Calc., 236.

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must be declared to have become inoperative. We do not think the plaintiff is entiled to ask for any such declaration. Whether it is competent for the widow to sue to have her conveyance to the reversioner Radhika Nath set aside on the ground of the retransfer to her of the moiety of the estate being inoperative in effecting the purpose for which the two deeds were intended, is a question which we need not here consider. All we now say is that it is the widow alone who can raise that question. If she does not choose to raise it, as it was competent to her to make a gift to the reversioner without any consideration, the moiety of the estate that has passed to the presumptive reversioner Radhika Nath cannot be recovered.

The result then is that the decree of the Court below must be set aside, and a declaratory decree given to the plaintiff to the effect that the deeds in question are inoperative in affecting the reversionary interest of the plaintiff, as regards the moiety of the estate of the late Madhub Chunder Sanyal that is in possession of the defendant No. 1, with proportionate costs against her in both Courts. The other defendant is entitled to have her costs in this Court and in the Court below from the plaintiff.

J. V. W. *Appeal allowed.*

Before Mr. Justice Norris and Mr. Justice Banerjee.

1894
December 18.

SOSHI BHUSUN GUHA, RECEIVER OF THE FIRM OF PUDDO LOCHUN SHAH (DEFENDANT No. 2) AND OTHERS (PLAINTIFF) *v.* GOGAN CHUNDER SHAHA AND ANOTHER (DEFENDANT No. 1)*

Bengal Tenancy Act (VIII of 1885), sections 65, 148, clause (h), 176, 161, 167—Estoppel—Mortgagor and Mortgagee—Order in execution proceedings against mortgagee—Decree obtained before Bengal Tenancy Act came into force—Execution under former Rent Law—Incumbrance—Mode of annulling incumbrance—Sale for arrears of rent—Charge of rent as first charge on tenure—Sale in execution of mortgage decree—Decree for sale.

By a mortgage bond, dated 22nd August 1884, and registered, *K* created a charge in favour of the plaintiff on six *taluks* for repayment of the mortgage

* Appeal from Appellate Decree No. 1845 of 1893, against the decree of Babu Girindro Mohun Chuckerbutty, Officiating Subordinate Judge of Tipperah, dated the 8th July 1893, modifying the decree of Babu Bhuggobutty Churn Mitter, Munsif of Kusba, dated the 27th of June 1892.