CALCUTTA HIGH COURT

Ram Krishna Prodhan

Vs

Kousalya Mani Dasi

(D Mitter ,J.)

16.05.1935

JUDGMENT

D.N. Mitter, J.

1. This is an appeal by defendant 1 and arises out of a suit brought by the plaintiffs who are the daughters of Bhagabat to whom the properties in suit belonged, for declaration of title to the half-share of the plaint properties, to a decree for recovery of possession after such declaration for partition of the properties by metes and bounds and for costs. The suit has been partially decreed by the Subordinate Judge and a preliminary decree for partition has been passed. Hence the appeal by defendant 1. A genealogical table has been appended to the plaint (see p. 8, part I of the paper-book) and shows the relationship between the parties to the suit:

MADHAB PRODHAN (deceased) _____|_____ | | Bhagabat (deceased) Khetra Mohan (deceased) | _____|_____ | | | | Gobind Prodhan Ram Krishna Prodhan | defendant 2. defendant 1.

|_____

_____|_____

| | |

First wife Second wife Third wife

Doulati (deceased) Srematya Rupa Bewa Sreematya Annada Bewa

| defendant 4. defendant 5.

|_____

_____|_____

| | | |

Son Daughter Daughter Daughter

Sital Prosad Sreematya Sreematya Sreematya

(deceased) Dhattrimoni Kausallya Padmabati Dassi
plaintiff 1. plaintiff 2.

2. It is necessary to state a few salient facts, in order to understand the question of law which falls for determination in this appeal. They are these: On 8th July 1920 a deed of adoption was executed by Bhagabat Prodhan in favour of defendant 1 and threedays later Bhagabat died. On 13th August 1920 the deed of adoption was presented forregistration. Defendants 4 and 5, the two surviving widows of Bhagabat viz., Rupa Bewa and Annada Bewa, put in objections to the registration of the deed Sital Prosad, son of Bhagabat, predeceased his father. Defendant 5, the youngest widow of Bhagabat, started proceedings under Section 107, Criminal P.C. An inquiry was held on 11th September 1920. There was village arbitration with the result that four documents were executed: (1) one Nadabi deed was executed by Rupa Bewa, defendants, in favour of defendant-appellant on "29th September 1920, Ex. E, p. 1. By this document on receipt of Rs. 560 for maintenance, pilgrimage etc., she gave up her rights to the inheritance. On the same day she also executed a deed of relinquishment, Ex. E, p. 4 (part. II). By this document she received 5 bighas 19 cottahs as life tenant and 3 bighas absolutely. The third and fourth documents were executed by defendant 1 confirming the grant of these properties. They are Ex. F, p. 7, Part II and Ex. J, p. 9, Part II, and are both dated 2nd October 1920.

3. By these two documents defendant 1 conveyed 5 bighas 19 cottahs, etc., of mourasi mokarrari Jal lands to defendant 5, Ananda Bewa, for life and 3 bighas of lands absolutely to the said defendant respectively, and the proceedings under Section 107, Criminal P.C. terminated. The younger widow wanted to reopen these transactions, and on 23rd December 1920 defendant 5 instituted a suit for a declaration that defendant 1's adoption was invalid and for a further declaration that the Nadabi deed was an invalid and fraudulent document. The suit was numbered as Title Suit No. 140 of 1920. On 9th January 1922 the suit was dismissed for default. In this suit the co-widow was joined as a party. On 30th January 1923 defendant 5 disposed of the properties obtained by her from defendant 1 by two separate kobalas one in favour of Niranjan Bera (Ex. A) and the other in favour of defendant 1 (Ex. A, p. 17, Part II). She sold 5 bighas 19 cottahs to defendant 1 for Rs. 500, and out of this sum of Rs. 500, Rs. 200 was applied in liquidation of her costs in Title Suit No. 140 of 1920 and the balance was paid in cash. We will have to advert to this document (Ex. A-l) again when considering one of the questions of law which falls for determination in this appeal.

4. Another chapter of events must now be narrated. Plaintiffs 1 and 2 as remote reversioners instituted a suit on 20th November 1923 for a declaration that the adoption was not valid. The

suit was decreed on 30th November 1925 as the adoption was not proved. On 20th February 1926 the two widows of Bhagabat, defendants 4 and 5, executed a deed of surrender in favour of the plaintiffs, the two daughters of Bhagabat, they being the next reversioners (see Ex. 1, p. 31, Part II) and the present suit was brought by the plaintiffs on the strength of this deed of surrender for the reliefs indicated in the beginning of the judgment. The defences to the suit were: (1) the surrender was a partial surrender and therefore invalid under the Hindu law; (2) assuming the surrender was valid the daughters cannot get possession so long as the widows are alive, and the suit for possession is premature. The Subordinate Judge framed 13 issues in the suit which are to be found at pp. 59 and 60 of the judgment. After taking evidence he has granted a partial decree in favour of the plaintiffs. In this appeal by defendant 1 two questions have been debated before us. It is argued in the first place that the surrender is not a total surrender but a partial one and is invalid under the Hindu law. That there must be a total surrender in order to make the surrender valid is now firmly established by the pronouncement of their Lordships of the Judicial Committee in several recent eases: see Rangaswami Goundan v. Nachiappa Goundan, 1918 PC 196 and Suresher Missir v. Mt. Maheshrani, 1921 PC 107. It appears however that while the defendant took in his written defence the plea of partial surrender he did not state specifically what part of the estate of Bhagabat has been omitted from the deed of surrender. It is contended before us that about 7 bighas of lands recorded as belonging to Bhagabat's estate has not been included in the deed. This was not the objection which was taken in the trial Court. In the trial Court reference was made only to C.S. plot No. 22. From the settlement record it appears that it measures 56 acres only. With regard to this plot it appears that this plot has passed out of the family on the basis of a compromise decree to which defendant 1 and his father was a party, see Ex. 6, p. 55, Part 2.

5. But even if it be supposed that the widows had a subsisting interest in the same at the date of the surrender it was such an insignificant part of the inheritance that it might be disregarded as substantially on the terms of the deed of surrender every thing which belonged to Bhagabat was intended to pass: see Sakharam Bala v. Thama Bala, 1928 Bom 26. In para. 3 the deed of surrender, p. 32, Part 2, it was expressly stated that the widows relinquished whatever interests they had in the estate of their husband. In para. 4 of the deed the reversioners were asked to take possession of "all movable and immovable properties left by our husband." There can be no doubt therefore that the widows intended to surrender the entire inheritance in favour of their daughters. In this case the alienation was in favour of the daughters who take life estates. The principle of Hindu law that a widow can accelerate the succession to her husband's estate by relinquishing to his reversionary heir the whole or the whole less what is necessary for her maintenance, applies although the heir to whom the estate is transferred is a female and consequently takes a life estate only: see Sitanna v. Viranna, 1934 PC 105; see also Sartaji v.

Ramjas, 1924 All 166. We agree with the Subordinate Judge that there was a valid surrender. On this finding a very important question of Hindu law falls to be determined. That question is this: whether the plaintiffs are bound by the alienation by the widows who made the surrender in excess of their powers, i.e., not for justifying necessity, so long as the widows are alive, in other words whether they are bound by the alienation by Ex. A-l in favour of defendant 1 and Ex. A in favour of Niranjan Bera who is no party to the suit during the life-time of the widows? The Subordinate Judge has not determined the question for reasons which may best be expressed in his own words which follow:

It defendant 1's purchase of 6 bighas of land from defendant 5 by kobala Ex. A-l be bona fide and for valuable consideration no question of refund of that consideration money arises, for the land would be allotted to the plaintiff's share in the partition and defendant 1 would be competent like Niranjan to sue for it in a suit separately framed for the purpose.

6. Niranjan is no party to the suit; we are not therefore concerned with the alienation by Ex. A. It is argued for the appellant that the trial Court should not have left the determination of the question in a separate suit but should have decided it in the present suit. As to the genuineness and bona fides of Ex. A-l there can be no question on the evidence before us. At the same time it appears that the alienation was not for justifying necessity. That being so we are asked by the appellant to hold that the alienation of lands covered by Ex. A-l cannot be challenged by the plaintiffs so long as the widows are alive, for the alienation, even if unauthorized, is good during the widows' life time; on the other hand it is said on behalf of the respondent that the widows' surrender of their husband's estate has the effect of causing their civil death and should have the same effect as if the widows had died a natural death and the alienation can be challenged at once. There is divergence of opinion in this Court on the question, but the Madras, the Allahabad and the Patna High Courts have taken the view contended for by the appellant; while in this Court, Page, J., as he then was, has taken the view favourable to the respondent; Walmsley, J., on the other hand being of opinion that the view contended for by the appellant is right. There was a difference of opinion between Walmsley, J., and Page, J., and although there was an appeal under Section 15 of the Letters Patent the question now in controversy was not decided: Prafulla v. Bhabani, 1926 Cal 121. We have the difficult task of deciding in the present case which of the conflicting opinions is right.

7. It is necessary to premise at the outset that the theory of surrender by a Hindu widow of her husband's estate in favour of the entire body of reversioners for the time being is one which finds a place in the texts of Hindu law and it is not correct to say as has been said by Kumaraswami Sastri, J., that the whole doctrine of surrender and consequent acceleration of the reversioners has no basis in Hindu Smritis but has been evolved by Courts of justice on general principles of

jurisprudence: Vaidya Nath v. Savithri, 1918 Mad 469 at p. 99. So far as the Bengal School of Hindu law is concerned, the theory of surrender or relinquishment finds support in the ancient Smritis. See the following text of Katyayana quoted in Dayabhaga, Ch. 11, Section 1, para. 56: "Aputrashaya nag vartu-shala-yanti teroyu-sthita vhunji-ning-Umaranyatkshanto daradaurdha-mapthayu" which has been translated thus:

The childless widow preserving unsullied the bed of her lord and abiding with her venerable protector should enjoy the property with moderation until her death. After her the heirs should take it: Ch. IX, Section 1, para. 56.

8. Jimutvahana evolves out of the above text of Katyayana the rule that the persons who would be the next heirs on failure of prior claimants succeed to the residue of the estate remaining after her use of it upon the demise of the widow in whom succession has vested in the same manner as they would have succeeded if the widow's right had never taken effect. As has been pointed out by Sir Asutosh Mookerjee, J., in Debi Prosad v. Golap Bhagat (1913) 40 Cal 721 at p. 772, the words used by Jimutvahana "Jatadhi karaya patna adhikar prabdhang shehopi vogabashishtang dhanag grinhiyou...."

(If her right ceases or never takes effect are comprehensive enough to include not merely the case of the death of the Hindu widow but all cases where her right ceases, in other words, the reversioners take the estate not merely when the widow dies but also when her title is extinguished by renunciation, remarriage or the like).

9. It has been an accepted principle of Hindu law that the widow can destroy her life estate in her husband's inheritance by surrendering the entire estate in favour of the immediate reversioners for the time being. The earliest case that I have been able to discover is Protab Chandra v. Joymoni (1864) 1 WR 98 where Trevor and Campbell, JJ., said this:

We think it admits of no reasonable doubt that under the Hindu law, a Hindu lady in possession can relinquish and by relinquishing anticipate for the reversioner their period of succession.

10. In Behari Lal v. Madho Lal (1892) 19 Cal 236, Lord Morris in delivering the judgment of the Judicial Committee explained the theory of relinquishment in these words:

It may be accepted that according to Hindu law the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. It was essentially necessary to withdraw her own life estate, so that the whole life estate might get vested at once in the grantee.

11. The scope of the doctrine of surrender has been more fully explained_in the more recent

decision of their Lordships of the Judicial Committee in Rangaswami Goundan v. Nachiappa Goundan, 1918 PC 196 where their Lordships point out:

That it is the effacement of the widow and an effacement which in other circumstances is effected by actual death or civil death-which opens the estate of the deceased husband to his next heirs at that date. Now there cannot be a widow who is partly effaced and partly not so.

12. If the surrender means the self-effacement of the widow, the destruction of her life-estate or the withdrawal of her life estate it would seem to follow logically that it should have the same consequences as if the widow had died, and just as the reversioner would be permitted to challenge alienations without necessity on her death, it would seem that it would be open to him to challenge the alienation immediately on the surrender of the life estate.

13. This brings me to consider the decision of the Madras High Court in Subbamma v. Subrahmanyam, 1917 Mad 473, in which it was held that a surrender by a Hindu widow of her interest in her husband's estate in favour of the nearest male reversioner cannot affect alienations which were made by her prior to the surrender and which though not binding on the reversioners were binding on her during her life. It is necessary to analyse the reasoning on which this decision is founded. At the time when this decision was given the view taken by Bhasyam Aiyangar, J., one of the most eminent Judges of the Madras High Court prevailed, viz., that on the adoption by a widow although it destroyed the widow's estate it could not affect prior alienations made by the widow in excess of her authority which enured during her life-time. See Sreeramalu v. Kristamma (1903) 26 Mad 143. A large part of the decision in Subbamma v. Subrahmanyam, 1917 Mad 473 is based on the analogy between the effect of adoption on a Hindu widow's estate and the effect of surrender in favour of the nearest reversioner, and as the law prevailed in Madras then was that adoption did not affect prior alienations during the widow's life-time surrender could not be placed on a higher footing. But this view of Bhasyam Aiyangar, J., was overruled by a Full Bench of the Madras High Court in the case already referred to, Vaidya Nath v. Savithri, 1918 Mad 469, Sadasiva Aiyar, J., observed:

The artificial medieval doctrine of a widow having no full power of alienation and the consequent doctrine Super-imposed by the Bengalee lawyers on this doctrine namely the doctrine of acceleration of the reversion through a surrender by the widow of her rights as her husband's heir (this second doctrine having been adopted for South India also by the Madras High Court) cannot, in my opinion, be pushed to the extent to which Mr. Narasimha Rao wishes that they should be extended, namely, so as to defeat the claims of alienees for value who as Sir Bhashyam Ayyangar said in Sreeramalu v. Kristamma (1903) 26 Mad 143 were entitled to be protected in their reasonable expectation that they obtain a transfer valid for the widow's life

except in the rare case of remarriage: see Subbamma v. Subrahmanyam, 1917 Mad 473 at p. 1040.

14. I am not unmindful of the fact that even after the decision of the Full Bench in Vaidya Nath v. Savithri, 1918 Mad 469 with regard to the effect of adoption on prior alienations by the adopting widow the Madras High Court has stuck to the view taken by Sadasiva Aiyar, J. and Napier, J., in Subbamma v. Subrahmanyam, 1917 Mad 473: see Sundara Siva Rao v. Viyyamma, 1925 Mad 1267 (Coutts Trotter, C.J. and Krishnan, J.). Another reason given at the end of the judgment in Subbamma v. Subrahmanyam, 1917 Mad 473 is that the reversioner can stipulate for a right to be maintained out of the husband's property for her life time and this shows that she does not become civilly dead by the surrender nor does she cease to retain the status of widowhood. It is now established by the pronouncement of the Judicial Committee that the circumstance that a small portion of the inheritance is retained by the widow for her maintenance does not make the surrender invalid. The widow can by her own voluntary act cause her civil death. As their Lordships of the Judicial Committee put it: that is to say she can so to speak by voluntary act operate her own death: see Rangaswami Goundan v. Nachiappa Goundan, 1918 PC 196 and Suresher Missir v. Mt. Maheshrani, 1921 PC 107. These Madras decisions above referred to as Page, J., observed in Prafulla v. Bhabani, 1926 Cal 121, are vitiated by two fallacious assumptions. The learned Judge observed:

In my opinion, the ratio decidendi of these two cases in substance was the same, namely that during the life-time or widowhood of the widow unauthorised alienations by the widow made while she was in the enjoyment of her widow's estate are valid and unimpeachable. With great respect to the learned Judges who decided those cases the reasoning upon which the decisions rest, in my opinion is vitiated by two fallacious assumptions; (1) that a Hindu widow inherits from her husband an estate for a term which is coterminous with her life-time or at any rate with her widowhood; (2) that while she is in the enjoyment of the estate a Hindu widow possesses absolute power to alienate the property, or any part thereof, for a term which does not exceed the period of her life-time or of her widowhood. No doubt, an estate inherited by a Hindu widow from her husband in some cases has been loosely described as her "life-estate" or an "estate for her widowhood", but such expressions must be read with reference to the context in which they appear, and for the reasons which. I have stated in my opinion the estate which passes to a Hindu widow by way of inheritance from her husband subsists until it is determined by the happening of some event which, according to the principles of Hindu law, puts an end to it. It is settled law that one of the events which effect the determination of a widow's estate is the surrender of her entire interest in the inherited property to the next reversioner.

15. I agree in the reasoning of Page, J. A Hindu widow's estate is not a life estate, but it is an

estate of inheritance to herself and to the heirs of husband: Moniram Kolita v. Keri Kolitani (1880) 5 Cal 776. She represents the estate absolutely for some purposes. Her estate determines not only on her death but also by her own voluntary act which causes her civil death, i.e., by surrender of her life estate. I agree with Page, J. when he considers it a fallacious argument to say that while in the enjoyment of the estate a Hindu widow has absolute power to alienate the property for a term which does not exceed her lifetime. In my opinion she may give, sell or transfer the estate for her own life ordinarily, but this sale or gift is liable to be questioned by the reversioners if by her voluntary act she causes her death. The powers of a Hindu widow to deal with her limited estate has been likened to that of a shebait of an endowment and we have the recent pronouncement of the Judicial Committee in Ram Charan v. Naurangi, 1933 PC 75 at p. 130 that A Mohant has power (apart from any necessity) to create an interest in property appertaining to the math which will continue during his own life or to put it perhaps more accurately which will continue during his tenure of office of Mohant of the Math.

16. Their Lordships in the same case laid down at p. 131:

In each case the operation of the purported grant is effective and endures only for the period during which the Mohant had power to create an interest in the property of math.

17. Applying what has been said with regard to the Mohant of a math to a Hindu widow's estate we may say that the widow has power apart from any necessity to create an interest in her husband's estate which will continue during her own life or to put it more accurately which will continue so long as she does not destroy her life estate by her own voluntary act or so long as she is not dead or civilly dead and the passage in the Dayabhaga quoted before would seem to place both kinds of death on the same footing. The Allahabad High Court has taken a similar view, similar to the Madras High Court. In Lachmi v. Lacho, 1927 All 258 Boys, J. observed in the course of his judgment that the doctrine of surrender having been imported by judicial decisions the complementary rule that a widow cannot by making a surrender defeat the rights created by herself and creation of which was within her authority should be imported. Here again it seems to me that the learned Judge has made the erroneous assumption that the doctrine of surrender is not sanctioned by Hindu law texts but has been imported by judicial decisions. As I have already shown the theory of relinquishment or surrender finds support in Hindu law. Sulaiman, J., as he then was, observed that if the matter was res integra he would have adopted the view that it was open to the reversioner to challenge the alienation immediately on the surrender taking effect but yielded to the weight of authority and thought that to take the other view might open a wide door to fraud. The Patna High Court, Fazl Ali, J., adopts the Madras view and they follow the Madras view without any independent discussion of the soundness of the view: see Basudeo v. Baidya Nath, 1935 Pat 175. Fazl Ali, J. uses language which suggests that it was not a final opinion. The

learned Judge says:

It appears to me, however, that it is unnecessary to decide this question because having regard to the state of authorities on the subject, even if the surrender was valid, the plaintiffs could not challenge the family arrangement between Mt. Loha and the reversioners of Maheshdut during the life-time of Mt. Loha. Reference was made on behalf of the appellants to the dissenting judgment of Page, J. in Prafulla v. Bhabani, 1926 Cal 121; but as at present advised I feel inclined to agree with the view expressed by the Madras High Court in Sundara Siva Rao v. Viyyamma, 1925 Mad 1267 and by the Allahabad High Court in Lachmi v. Lacho, 1927 All 258.

18. It remains to notice a remark of Ashutosh Mookerjee, J. in Mohsenuddin v. Bhagaban Chandra, 1921 Cal 444 at p. 611 to which my learned brother drew my attention. In the course of argument in a case of surrender by a tenant under the Bengal Tenancy Act the learned Judge put the question in this way: Take the case of a Hindu widow transferring a part of the property of her husband and then surrendering the whole property to the next reversioner. Can the reversioner turn out the transferee?.... Do you not see the injustice? The remarks were made in the course of discussion with reference to the general effect of surrender on prior alienations and cannot be regarded as the considered opinion of the learned Judge on the question with reference to surrender under Hindu law. Such remarks have less weight than even obiter dicta of learned Judges in a particular case.

19. In a case which came before the High Court of Bombay, Sakharam Bala v. Thama Bala, 1928 Bom 26, where the limited owner had made a gift of the entire inheritance and then made the surrender it was held that the surrender was inoperative seeing that there was nothing on which surrender could operate. The learned Judge rather inclined to the view that Page, 1's. opinion might not represent the correct rule of Hindu law. This is the state of the authorities in the different High Courts and they reveal a divergence of opinion. So far as this Court is concerned the question is an open question. For the reasons we have given we think the logical consequence of the doctrine of surrender which means a self-effacement of the widow and amounts to a civil death and complete extinguishment of the title of the widow in her husband's estate is that all prior alienations in excess of her powers are liable to be challenged immediately on her civil death just as they could be impeached after she had died. In some instance this may possibly work out an injustice, but those who deal with limited owner take a certain amount of risk. On the question of injustice again it has to be observed that the object of Hindu law is to prevent improper alienations by the widow or other limited owner. If the alienation is for necessity the surrender does not affect the alienee. The alienee who deals with a limited owner without any inquiry as to necessity takes a risk in a case of surrender by the widow which has the same effect as her death.

20. The analogy of surrender by a tenant to his landlord need not detain us very long. The principle of those decisions in such class of cases is that a surrender only affects what the surrenderor can surrender and when he has granted subordinate terms or subleases they are not discharged: see Beadon v. Pyke (1816) 5 M & S 146, where Lord Ellenborough lays down the proposition that a surrender operates between the parties as an extinguishment of interest which is surrendered, it does not so operate as to third persons who at the time of surrender have rights which such extinguishment would destroy: see Parker v. Jones (1910) 2 KB 32 and Wilkes v. Spooner (1911) 2 KB 473 at pp. 479 and 487 C.A. In these cases we are not troubled with the fiction of Hindu law that in certain circumstances a Hindu widow can be civilly dead and thereby accelerate the succession of the next reversioner and that such civil death has the same consequences as if she had died a natural death. From the date of the surrender the reversioner gets the property freed from any alienation in excess of the powers of a Hindu widow as if she had died.

21. The result therefore is that the decree of the Subordinate Judge must be varied in this way: (1) the lands of Ex. A must be kept out of partition as Niranjan is no party to the suit; (2) the lands covered by Ex. A (1) must be included in the partition and should be included in the plaintiff-respondent's allotment when allotments are made by the Commissioner. There must be a further variation with regard to mesne profits. In assessing mesne profits the trial Court has not excluded the land of Ex. A which was sold by Ananda to Niranjan Bera who is not a party. The area of the land being 3 bighas there should be a proportionate reduction taking the entire area to be 24 bighas. The mesne profits should be reduced to 3/24 of Rs. 972 or roughly Rs. 120; (3) the amount of mesne profits therefore decreed against the defendant-appellant should be Rs. 972 minus Rs. 120, i.e. Rs. 852. Subject to these three variations the appeal will stand dismissed with two-thirds costs of the appeal including the hearing fee. The hearing fee is assessed at nine gold mohurs.

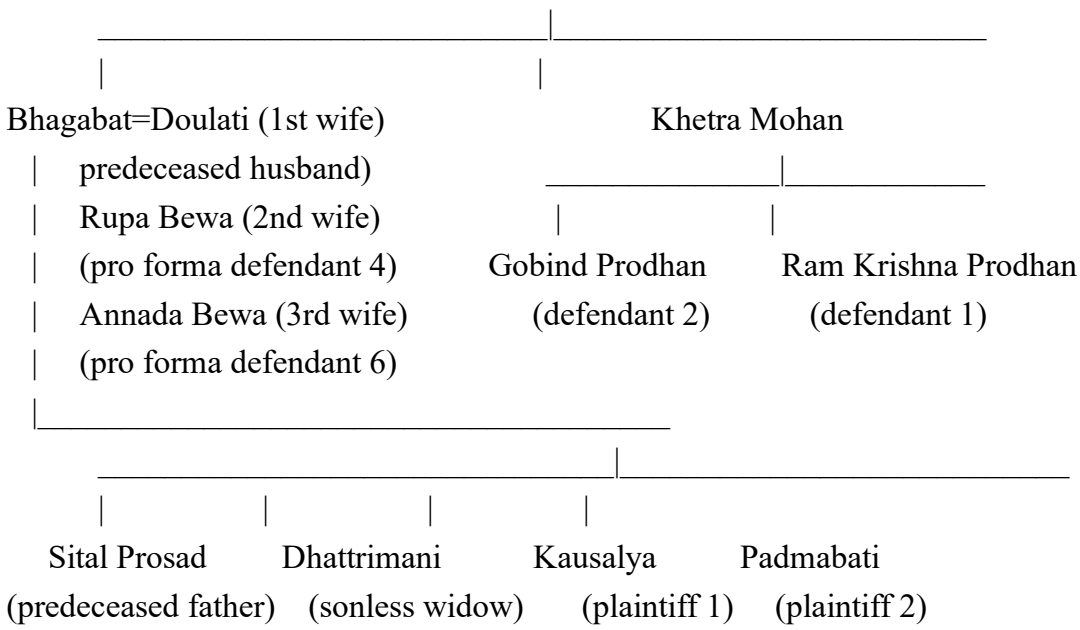
Narsing Rau, J.

22. This appeal arises out of a suit brought by the plaintiffs-respondents for the establishment of their right to a half-share of the lands described in Schs. (ka) and (kha) to the plaint and for recovery of khas possession of the same after partition. There was also a prayer for mesne profits against defendants 1 and 3. The suit was decreed in part, the plaintiffs' right to a half share of the lands of Schedule (kha) with the exception of certain plots being declared, and a direction for partition being made. Specific directions were given that at the partition, the land of certain sale-deeds, viz., Ex. A and Ex. A (1), were to be allotted to the plaintiffs and plot No. 10 of Schedule (kha) was to be kept joint. As regards mesne profits, the learned Subordinate Judge made a decree for Rs. 972 against defendant 1 in respect of the three years preceding the institution of

the suit. Defendant 1 has filed the present appeal. To understand the nature of the plaintiffs' claim, it is necessary to bear in mind the relationship between the parties as shown in the genealogical tree given below:

[For genealogical tree, see next page]

23. Bhagabat Prodhan died on 11th July 1920 leaving surviving him two widows Rupa Bewa (pro forma defendant 4) and Ananda Bewa (pro forma defendant 5), three daughters Dhattri Mani (a sonless widow), Kausalya (plaintiff 1) and Padmabati (plaintiff 2) a brother Khettra Mohan, and Khettra Mohan's two sons, Ram Krishna (defendant 1) and Gobind (defendant 2). The plaintiffs' case is that the property in suit was joint between Bhagabat and his brother Khettra Mohan, and that on Bhagabat's death, his widows inherited his estate, with the two plaintiffs as the next reversioners. (The family being governed by MADHAB PRODHAN.



the Dayabhaga Law, the sonless and widowed daughter Dhattri Mani is excluded). But it is said, Khettra Mohan, taking advantage of the youth and inexperience of the widows set up his own son Ram Krishna (defendant 1) as the adopted son of Bhagabat and not only produced a deed of adoption, but also got it registered. Then there was further harassment of the widows, whereupon one of them commenced proceedings under Section 107, Criminal P. C, which however ultimately failed. Khettra Mohan continued to oppress them and, by cleverly misrepresenting the nature of the documents, got them to execute two separate nadabi ekrarnamas in which, amongst

other things, they admitted Ram Krishna to be Bhagabat's adopted son.

24. As a corollary to this admission, they declared in the same documents that they had no right, title, or interest in their deceased husband's property. When subsequently one of them, Annada Bewa (pro forma defendant 5) discovered the true nature of the documents, she brought a suit in the Subordinate Judge's Court (No. 140 of 1920) to have them as well as the deed of adoption declared fraudulent and inoperative, but Khettra Mohan was too clever for her, won over the tadbirkar (defendant 3), and got the suit dismissed. The present plaintiffs then took up the fight and brought another suit for the same purpose, as the nearest reversioners entitled to succeed on the death of the widows. This time the suit was decreed, the Court holding that Ram Krishna was not the adopted son of Bhagabat and that the deed of adoption was wholly unreliable. There was an appeal against the decree, but it did not succeed. Nevertheless Ram Krishna and his father continued illegally to possess all the disputed lands and after the father's death, Ram Krishna alone possessed them, the only exception being a small plot of 2 1/2 bighas with which the father won over to his side defendant 3.

25. We now come to the last stage of the story. On 20th February 1926 the widows surrendered their estate in favour of the plaintiffs thereby accelerating the inheritance and entitling them to bring the suit out of which this appeal has arisen. Such in substance is the case of the plaintiffs. Defendant 1, who is the appellant in this Court, contested the suit. In the written defence he filed, he maintained that the deed of adoption was in fact executed by Bhagabat and that the nadabi deeds and certain connected transactions represented a family settlement of the disputes arising out of the adoption. These connected transactions were (1) that Rupa Bewa received Rs. 560 in cash for maintenance and (2) that Annada Bewa received for the same purpose (a) an absolute gift of 3 bighas of land and (b) the gift of a life-interest in another 5 bighas 19 cottahs 2 chittaks. The nadabi deeds were executed on 29th September 1920, and the deeds of gift on 2nd October 1920.

26. The defendant also mentioned that on 30th January 1923, Annada Bewa, in order partly to defray the costs of her unsuccessful suit, sold back to him for Rs. 500 the life-interest (b) which she had received from him; of this sum, she received Rs. 300 in cash, the balance being applied in liquidation of the costs decreed to him in that suit. This sale-deed is Ex. A (1) in the case. She also sold, in 31st January 1923, the other 3 bighas to one Niranjan Bera, who is not a party to the present suit. Ex. A is a certified copy of the sale-deed. The importance of these transactions from the point of view of the defence will appear presently.

27. The defendant further claimed the lands of Schedule (ka) and plots 16 and 19, Sch.(kha) as the separate property of his father Khettra Mohan; he disclaimed any interest in certain other

dags of Schedule (kha); he denied having transferred any property to defendant 3. On these points the decree under appeal is in his favour; but he contends that on certain other points also the lower Court should have found for him. His main contentions in appeal are: (1) that the surrender relied upon by the plaintiffs was invalid, inasmuch as it was not in respect of the entire estate; (2) that it was not a bona fide surrender, because it was obviously a mere device to defeat the family settlement embodied in the nadabi deeds and connected transactions; (3) that in any case the decree is erroneous as to the lands of Exs. A and A (1); and (4) that the basis on which mesne profits have been allowed by the lower Court is wrong. I shall proceed to discuss these points seriatim. First, as to the surrender not being in respect of the whole estate, it has been argued that besides the cadastral survey plot No. 22 of interest No. 201 dealt with in the Subordinate Judge's judgment, there are certain other plots which though belonging to Bhagabat's estate do not figure in the deed of surrender (Ex. 1).

28. These are plot No. 7 of interest No. 14 in mouza Mahesdarbar Baibartachak and plots Nos. 16 and 87 of interest No. 32 in mouza Ukilchak; it is pointed out that these are mentioned amongst the joint lands of Bhagabat and Khettra Mohan in the record-of-rights [Ex. O (1) and O (5)], but find no place in the deed of surrender. It would appear, however, that so far as these additional plots are concerned, no objection was taken either in the written statement or even subsequently in the lower Court. If it had been taken in good time, the plaintiffs might have been able to produce evidence to explain the position, e.g. it is possible that these plots ceased to form part of Bhagabat's estate in consequence of some valid alienation between the record-of-rights and his death. It is impossible to entertain the objection at this late stage.

29. The next contention is that the surrender was not a bona fide one. It is argued that the nadabi deeds were part of a perfectly good family settlement and were in no way vitiated by the circumstance that the widows had entered into them under a mistake of fact or law as to the adoption of Ram Krishna by Bhagabat. Even if there was such a mistake and the Courts subsequently found against the adoption the settlement, it is urged, must stand; and if the settlement stands the surrender must fall, for you cannot surrender that of which you have already divested yourself. To this argument, there is at least one fatal objection; it has been found by a competent Court that not only was there no adoption, but that the deed of adoption set up was "a highly suspicious document" and utterly unreliable (vide Ex. 6). Out of this fictitious adoption grew the disputes which led to the alleged family settlement. When a party, by its deliberate fraud, creates a dispute, it can hardly be called a bona fide dispute and any resulting family settlement can hardly be upheld. If the family settlement alleged in the present case falls on this ground, as I think it must, it cannot be an obstacle to any subsequent surrender. As the Subordinate Judge has justly observed, no device was needed to avoid the nadabi deeds; they

were doomed, once the adoption was pronounced a myth. The real reason for the surrender in this case is to be found in the deed of surrender itself, Ex. 1; the widows, defrauded and defeated at every turn by defendant 1 and his father felt that they were incapable of looking after their husband's property and consequently surrendered their estate to their more capable step-daughters-a perfectly natural step to take in the circumstances. There is therefore no substance in this contention.

30. The third contention is that in any event the decree is erroneous as to the lands of Ex. A and A (1). I think this contention is clearly right so far as Ex. A is concerned. By this sale deed, Annada Bewa sold to Niranjan Bera 3 bighas of land in mouza Ukilchak which formed part of the property in suit and which Ram Krishna had purported to transfer to her, as Bhagabat's adopted son. The sale as well as the transfer took place while Annada Bewa was still under the impression that the adoption was a fact. Ultimately it turned out that the adoption was not a fact, so that, in reality, at the time of the sale to Niranjan Bera, Annada Bewa had an interest in the land as one of Bhagabat's widows and not the absolute interest which might have been hers if the adoption had been true. What was the effect of a sale in such circumstances is a question which cannot be decided in the absence of the vendee Niranjan Bera, who, as already stated, is not a party to the present suit. It follows therefore that so far as this suit is concerned, we must exclude the lands of Ex. A from the property to be partitioned. Ex. A (1), however, stands on a different footing: The vendee in this instance is defendant 1 himself and the effect of the sale has therefore to be decided. Let us see exactly what the document purported to convey; for this purpose it must be read with Ex. F. By Ex. F Ram Krishna, in his assumed capacity as Bhagabat's adopted son, made over to Annada Bewa in lieu of maintenance, etc., 5 bighas 19 cottahs 2 chittaks of land for the term of her life and by Ex. A (1) she sold that life-interest back to him for Rs. 500.

31. One view to take of this double transaction possibly the correct view-is that as in fact Ram Krishna was not Bhagabat's adopted son at all, nothing passed under Ex. F and as Ex. A (1) purported to convey back precisely what the widow obtained under Ex. F, nothing could pass under Ex. A (1) either, in spite of the fact that she had at the time an independent; title to the land, derived not from Ram Krishna under Ex. F, but from her deceased husband. Let us, however, assume that Ex. A (1) must, in the circumstances, be deemed to be an alienation from whatever estate she actually had in the property. What she actually had was a Hindu widow's interest (the co-widow is said to have been a consenting party to Ex. A (1)-vide para. 11 of the written statement): what she conveyed in terms by means of Ex. A (1) was her life-interest. It is now a commonplace that a Hindu widow's estate is not an estate for life, being (among other incidents) terminable by such events as remarriage, adoption and surrender. Strictly speaking, therefore, the conveyance ceased., to have effect as soon as the widow's estate itself was

extinguished by the surrender. But there have been differences of opinion on the effect of surrender on prior alienations. The general question may be put thus: When a Hindu widow who has made an alienation of her deceased husband's estate in excess of her powers subsequently makes a bona fide surrender of her estate to the nearest reversioner, what is the reversioner's position as regards the right of challenging the alienation? Two views have been taken: (A) that the reversioner may challenge the alienation at once; (B) that he must wait until the widow's death.

32. The Madras and Allahabad High Courts have adopted (B), although even they appear sometimes to admit that (A)is the more logical view: (see Curgenven, J.'s judgment, in the Madras case reported in Karuppa Pillai v. Irulayee, 1927 Mad 429 and Sulaiman, J.'s judgment in the Allahabad case reported in Lachmi v. Lacho, 1927 All 258. So far as this Court is concerned, the question arose in Prafulla v. Bhabani, 1926 Cal 121 where Walmsley, J., took view (B) while Page, J., took view (A); on a Letters Patent Appeal, it was held that there had been no proper surrender in the case at all, so that the question of the effect of a proper surrender was left open. In addition must be mentioned Mookerjee, Ag. C.J.'s expression of opinion in favour of view (B) in the course of the hearing of the case Mohsenuddin v. Bhagaban Chandra, 1921 Cal 444 which related to surrender by an occupancy raiyat.

33. Analysis of the decisions and opinions in favour of view (B) whether in this Court or in other High Courts shows that they are mainly based on the principle that no one can be permitted to derogate from his own grant. Having made an alienation, the widow ought not to be permitted to defeat it by a wholly voluntary act like surrender: such is the argument. Speaking with great respect, this does appear to give due weight to three factors peculiar to the problem under discussion: (1) that the grantor in our case-a Hindu widow-is not a full owner, but only a qualified owner, (2) that the original grant, even apart from any question of surrender, is, generally speaking, not only in excess of her disposing power, but also known to be so to both parties (e.g., everybody knows that a Hindu widow cannot, except within certain narrow limits, make an absolute gift of any portion of her deceased husband's property); (3) that the subsequent surrender, though in some respects akin to a grant is really equivalent to renunciation of, or retirement from the estate. Translated into these terms, the principle that no one can be permitted to derogate from his own grant would almost seem to take the form: No qualified or limited owner can be permitted to retire from his estate after making a grant in abuse of his powers-which is by no means a self-evident proposition. But apart from this, view (A) does not really violate the principle; for, once it is settled by authority that (A) is the right view, every grantee would know beforehand that the grant made to him, whatever its face value, is liable to be impeached immediately upon a surrender. The grant being thus known to be terminable by

surrender, the surrender, when it comes, cannot be said to derogate from the grant.

34. In answer to this, it will probably be said that such would doubtless be the position when view (A) has been established by authority but, it will be asked, what about grants already made? They may already have created expectations that they would not be affected by surrender and it would be most unjust to allow those expectations to be defeated. Now the question as to what are the expectations of an alienee in a particular case and to what extent they deserve recognition must depend largely on the facts of that case. Take, for instance, a case of gift. It is well-known that a Hindu widow cannot, except within certain narrow limits, make an absolute gift of any portion of her deceased husband's estate. The donee in such a case does not expect to get its full face value; he knows that sooner or later it is likely to be impeached, and as he has paid nothing for it, it cannot matter very much that it is impeached sooner rather than later. There is no obvious injustice involved in holding in such a case that the gift comes to an end as soon as there is a valid surrender. Or, take the case of a sale without justifying necessity. Here again the legal position is well-known, and it may safely be asserted that the alienee, though he purports to buy an absolute title, usually pays only the price of a limited interest. We have not here the case of a person who buys in good faith his vendor's life estate and expects to get what he has bought: rather have we a transaction in the nature of a gamble whose object is to secure the chance of an absolute title for the lowest possible price. A Hindu widow's estate lends itself to such a gamble, because for certain purposes it is more than a life estate and in certain events it may prove to be less; the buyer often profits from the former circumstance and cannot fairly ask to be relieved of the latter risk. Let us look at the matter for a moment from the reversioner's point of view. On a strict interpretation of the doctrine of surrender, he has undoubtedly the right to impeach the alienation at once. Ex hypothesi, he was no party to the alienation; if he were, the question of his challenging it would not arise at all. Again, the surrender postulated being a bona fide one, we have no right to assume that it was procured by his fraud. Now it is a well-recognized rule that a person in whom a legal right is vested is not to be deprived of its benefit by equity unless some fraud, negligence, or other misconduct can be proved against him. On what ground, then, is the reversioner to be deprived of his right to impeach the alienation immediately upon the surrender? In a good many cases, therefore, view (A), which rests on the principle that when the original estate ceases, that which is derived from it also ceases, can be rigorously enforced without any injustice. It seems to me to be an unwarrantable assumption to make that in every case equity requires us to hold in favour of view (B). So much for considerations of equity Let us now consider a few analogies. When a widow re-marries, there is the same fiction of death as in the case of surrender. The relevant part of Section 2, Hindu Widows' Remarriage Act (Act 15 of 1856) runs:

All rights and interests which any widow may have in her deceased husband's property... shall, upon her remarriage, cease and determine, as if she had then died; and the next heir of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same.

35. Surrender also has been authoritatively described as an act whereby the widow operates her own death: Rangaswami Goundan v. Nachiappa Goundan, 1918 PC 196. Now the effect of re-marriage on prior alienations was discussed in the case of Nitya Madhab Das v. Srinath Chandra (1908) 8 CLJ 542 and Mookerjee, J., had no difficulty in rejecting the contention urged before him that the reversionary heir ought not to be permitted to recover possession of the property alienated until the termination of the widow's natural life. In other words, the learned Judge holds the view corresponding to (A), and so far as the effect of remarriage under the Act is concerned, the correctness of the view does not appear ever to have been questioned.

36. Consider now another class of cases, namely those where the widow renounces the world, as in Hafzoonissa v. Radha Binode (1856) SDA 595. In this case, Radha Binode sued for possession of certain properties improperly alienated by his widowed aunt Taramonee, on the ground that as she had renounced the world by becoming a bairagini he had succeeded as reversioner to her husband's estate and was entitled to impeach the alienations. Against him, it was contended that the so-called renunciation was no renunciation at all; that the widow had taken the step with the fraudulent object of getting rid of her debts and liabilities, and that the Court should not assist a party claiming on the ground of such fraudulent act. An issue was framed in the following terms:

Whether plaintiff's allegation that Taramonee has become a bairagini be proved or not; and even if it be, whether plaintiff has a right to bring a suit like the present, whilst she is living?

37. On both points the Sudder Dewany Adalat decided in the affirmative, observing:

the act (i.e., renunciation) having been proved to have been done, the legal effect of the act followed by the immediate succession of plaintiff in this suit as full heir to the rights of his maternal uncle Ramdoolal Roy, and with that succession, the right to sue for them.

38. Although the suit ultimately failed on other grounds, it is clear from the above that when a widow's estate is terminated by her renouncing the world, the reversioner is held to be immediately entitled to impeach any alienations made by her in excess of her powers. Surrender being supposed to be equivalent to renunciation of the world, the same rule should apply to cases of surrender also. Let us next take the case of adoption. It is now settled that the adopted son can at once proceed to avoid any improper alienations made by the adoptive widow; he need not wait

until her death. At one time, a different view prevailed in certain parts of India, mainly on those very grounds of equity which are now urged in the case of surrender: see, for instance Sreeramalu v. Kristamma (1903) 26 Mad 143. But since the Privy Council judgment in Banomali Roy v. Jagat Chandra (1905) 32 Cal 669 there has been no doubt in the matter and the decision in the Madras case cited above has been overruled by a Full Bench in Vaidya Nath v. Savithri, 1918 Mad 469.

39. Indeed, in one respect, cases of surrender stand on stronger ground than cases of adoption; for whereas in cases of adoption, the Courts may to some extent recognize the validity of ante-adoption agreements reserving a life interest to the adopting widow, any such reservation by the widow in a deed of surrender invalidates the surrender. In other words, the widow's estate may to a certain extent co-exist with adoption, but never with surrender. For a proper surrender there must be a complete withdrawal of the widow's estate and it is this necessity which is said to operate as a check on the frequency of such transactions: Behari Lal v. Madho Lal (1892) 19 Cal 236. If so, it is difficult to see how any portion of that estate can be held to survive in the hands of an alienee. Take again the case of a shebait or mahant, who like a Hindu widow, is a qualified owner of property. It now appears to be settled that when a mahant makes a disposition of a portion of the property appertaining to the math (apart from any question of necessity) the disposition is effective and endures only for the period during which he had power to create an interest in the property of the math: Ram Charan v. Naurangi, 1933 PC 75. It does not necessarily endure for the term of his life; it is valid only during his tenure of office, and can be impeached by his successor as soon as that tenure ceases:

Whatever the intended duration of the attempted grant may be, it is good, but good only for the limited period indicated.

40. The only analogy on the other side would appear to be from the law of landlord and tenant. When a lessee surrenders his term to the lessor, the surrender does not as a rule affect under-leases. But supposing an under-lease was in excess of the lessee's powers (just as in our case, the alienation postulated is in excess of the widow's disposing power) how far would the rule apply? In Parker v. Jones (1910) 2 KB 32, there was such an under-lease, the lessee having sublet in breach of a covenant that he would not do so without the lessor's consent; and it was held that the lessee's subsequent surrender did not terminate the under-lease. But Darling, J., pointed out that if the question had arisen between the lessor and the under-lessee, that is, between the reversioner, and the holder of the interest derived from the surrender the decision might have been otherwise. In the class of cases we are considering, the question is in fact between the person corresponding to the reversioner (this person also happened to be called a reversioner, although in a different sense from that of the English law of real property) and the holder of the

interest derived from the surrender, so that even this limited analogy can hardly be said to point in favour of view (B).

41. For all these reasons I am of opinion that (A) is the right view; if in any particular case its strict enforcement leads to injustice, the Court can, in setting aside the alienation, impose such terms as it thinks fit in order to compensate the alienee.

42. Applying this rule to the facts of the present suit, it is clear that the plaintiffs-respondents must be allowed to impeach the sale effected by Ex. A (1), the vendor's estate having been extinguished by surrender on 20th February 1926. There is nothing in the circumstances to entitle the vendee to any compensation from the plaintiffs-respondents. Coming now to the last of the appellant's contentions, namely as to the basis on which mesne profits have been allowed, it is clear that a modification of the Subordinate Judge's order is necessary. In computing the area available for mesne profits, the 3 bighas sold to Niranjan Bera, who is not a party, should have been excluded. The amount of mesne profits awarded against the defendant-appellant should therefore be reduced proportionately. In the result I agree in the order proposed by my learned brother.