NATVARLAL PUNJABHAI AND ANOTHER

v.

DADUBHAI MANUBHAI AND OTHERS.

1953

Nov. 18.

[MUKHERJEA, VIVIAN BOSE and BHAGWATI JJ.]

Hindu law—Widow—Surrender of estate after third persons have acquired title by adverse possession against widow—Validity—Right of reversioner to recover possession before death of widow—Legal nature of surrender—Power of court to impose conditions on grounds of equity.

Where a Hindu widow surrenders her widow's estate to the reversioners, after a third person has acquired title to the properties by adverse possession against her, the reversioners are entitled to recover possession of the properties from that person immediately as heirs of the last male holder. The person in adverse possession is not entitled to remain in possession till the death of the widow. So far as the legal consequences are concerned there is no material difference in this respect between an adoption and an act of surrender by the widow.

As a surrender by a Hindu widow does not convey any title to the reversioners, but is only a voluntary act of self-effacement by the widow, she can make a valid surrender under Hindu law even after another person has acquired title by adverse possession against her. The reversioners do not take the property subject to the rights created by the widow.

Surrender by the widow and acceptance by the reversioner are not matters of contract. The estate vests in the reversioner by operation of law without any act of acceptance on the part of the reversioner.

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The view that, as the widow herself is incapable of disputing the title of the alienee, or of the person who has obtained title by adverse possession, a like disability attaches to the reversioner, is also unsound as the reversioner does not derive title from the widow even in the case of a surrender.

Assuming that the court has power to impose conditions on the reversioners' right to recover possession during the lifetime of the widow on considerations of equity, justice and good conscience and to prevent the widow, by her own act, from prejudicing the interests she has created, no such equitable considerations arise in favour of persons who have come upon the land as trespassers and claim title by adverse possession.

Subbamma v. *Subrahmanyam* (I.L.R. 39 Mad. 1035), *Sundrasiva* v. *Viyyamma* (I.L.R. 48 Mad. 933), *Arunachala* v. *Arumuga* (I.L.R. 1953 Mad. 550), *Lachmi* v. *Lachho* (I.L.R. 49 All. 334) and *Basudeo* v. *Baidyanath* (A.I.R. 1935 Pat. 175) disapproved. *Ram Krishna* v. *Kausalya* (40 C.W.N. 208), *Raghuraj Singh* v. *Babu Singh* (A.I.R. 1952 All. 875) approved.

Vaidyanatha v. *Savitri* (I.L.R. 41 Mad. 75) commented upon.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 12 of 1953.

Appeal from the Judgment and Decree dated the 31st March, 1949, of the High Court of Judicature at Bombay (Chagla C.J., Weston and Dixit JJ.) in First Appeal No. 175 of 1946, arising out of the Judgment and Decree dated the 28th February, 1946, of the Court of the Civil Judge, Senior Division at Broach in Special Suit No. 9 of 1941.

K. S. Krishnaswamy Aiyangar (*H. J. Umrigar*, with him) for the appellants.

C. K. Daphtary, Solicitor-General for India (*J. B. Dadachanji*, with him) for respondents Nos. 1 and 2.

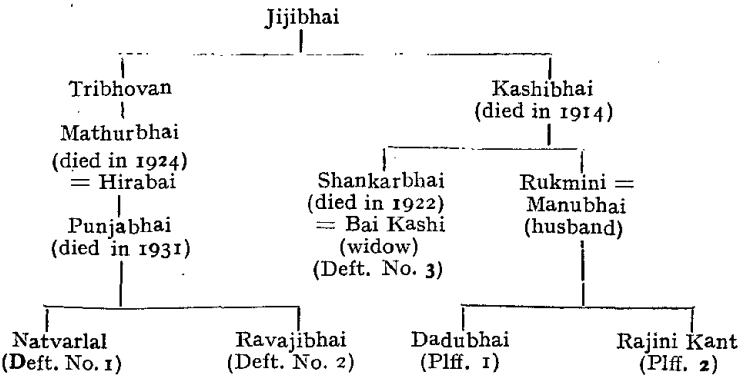
1953. November 18. The Judgment of the Court was delivered by

MUKHERJEA J.—This appeal is directed against a judgment and decree of the Bombay High Court, dated the 31st March, 1949, confirming, on appeal, the decision of the Civil Judge, Senior Division, at Broach, in Special Suit No. 9 of 1941.

The facts of the case, though a bit long, are not in controversy at the present stage and the entire dispute between the parties centres round certain points of law relating to the rights of the reversioners, in whose favour a deed of surrender was executed by a

Hindu widow, to recover possession of the properties, belonging to the last male owner, during the lifetime of the widow from persons who acquired title to the same by adverse possession against the widow.

To appreciate the contentions that have been raised by the parties before us, it will be convenient to give a brief narrative of the material facts in their chronological order. A reference to the short genealogical table given below will show at once the relationship between the parties to the present litigation.



One Jijibhai, whose name appears at the head of the table, had two sons, Tribhovan and Kashibhai. Tribhovan had a son named Mathurbhai who died in 1924 leaving, behind him, his widow Hirabai and a son Punjabhai. Kashibhai died in 1914 leaving a son Shankarbhai and a daughter Rukmini. Shankarbhai, whose property is the subject matter of dispute in the present case, died without any issue in 1922, leaving his widow Bai Kashi who is defendant No. 3 in the suit. It is said, that there was a notional partition between Kashibhai and Mathurbhai in 1913 which effected a severance of their joint status without any actual division of properties by metes and bounds. Mathurbhai died on 26th January, 1924, and on the 2nd of June following Hirabai, his widow, made an application to the District Judge for appointment of a guardian of the person and property of her minor son Punjabhai, alleging, *inter alia*, that the minor was the sole owner of the entire joint estate by right of

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survivorship. On the 1st of July, 1924, Bai Kashi, the widow of Shankarbhai, was served with a notice of this application. On the 17th of July following, she purported to adopt a son named Sivabhai and in answer to the notice in the guardianship proceeding served upon her, put forward the claim of her adopted son. The District Judge regarded the adoption to be invalid and by his order dated November 29, 1924, appointed the Deputy Nazir of his court as guardian of the properties of the minor Punjabhai, the properties including the share of Shankarbhai in the joint estate. The Deputy Nazir took possession of all the properties on behalf of the minor and it is not disputed that Bai Kashi never got possession of any portion of these properties since then. In 1926 Bai Kashi as the guardian of her infant adopted son Sivabhai brought a Title Suit, being Suit No. 180 of 1926, claiming partition of the joint family properties on the allegation that, by adoption, Sivabhai became a co-owner to the extent of a half share in them. The suit was resisted by Punjabhai represented by his court guardian and the main contention put forward on his behalf was that the adoption, by the widow, of Sivabhai was invalid in law. This contention was given effect to by the trial judge and by his judgment dated the 4th July, 1927, the suit was dismissed. An appeal was taken against this decision, on behalf of Sivabhai, to the High Court of Bombay, but the appeal was withdrawn on the 25th July, 1927. Thereafter in 1930, Rukmini, the sister of Shankarbhai and the mother of the present plaintiffs, instituted a suit, being Suit No. 350 of 1930, for a declaration that the joint status of the family was disrupted by the notional partition effected between Mathurbhai and Kashibhai in 1913 and she, as the next heir of Shankarbhai, was entitled to succeed to Shankarbhai's share of the properties on the death of Bai Kashi. The trial judge was of opinion that there was, in fact, a severance of joint status by an informal partition between Mathurbhai and Kashibhai, but he dismissed the suit on the ground that a suit of this character was not maintainable in law.

Rukmini died soon after that and her two sons, who were then minors, represented by their father as next friend, preferred an appeal to the High Court against this order of dismissal. The High Court allowed the appeal and gave a declaration in favour of the appellants to the effect that there was disruption of the joint family in the year 1913. This judgment is dated the 8th of February, 1939, and thereafter on the 30th of January, 1941, Bai Kashi executed a deed of surrender in favour of the plaintiffs relinquishing her widow's estate in favour of the husband's nearest reversioners. On the basis of this deed of surrender the plaintiffs brought the suit, out of which this appeal arises, in the Court of the Civil Judge, Broach, claiming possession of the disputed properties as the next heirs of Shankarbhai against the defendants who are the sons and heirs of Punjabhai. Bai Kashi was impleaded as defendant No. 3 in the suit.

The suit was resisted by defendants 1 and 2 who raised a number of pleas in answer to the plaintiffs' claim. The material defence was of a three-fold character. It was contended in the first place that there was no partition between Mathurbhai and Kashibhai as alleged by the plaintiffs and the family being still joint when Shankarbhai died, the entire joint estate vested in Mathurbhai by right of survivorship. It was alleged in the second place, that even if the family had separated, the adopted son of Bai Kashi, being a nearer heir, the plaintiffs had no title to the property. The last and the main defence was that the defendants having acquired a title by adverse possession against the widow, and the widow having lost whatever interest she had in her husband's property, the deed of surrender was invalid, and even if it was valid, the surrenderees could not claim possession so long as the widow was alive. The trial court overruled all these contentions and decreed the plaintiff's suit. The defendants 1 and 2 preferred an appeal against this decision to the High Court of Bombay and the appeal first came up for hearing before a Division Bench consisting of Chagla C.J. and Dixit J. The

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learned Judges, by their judgment dated the 23rd January, 1948, which has been described as an interlocutory judgment, disposed of the first two points mentioned above and affirmed the decision of the trial court thereon. It was held that the decision in Rukmini's Title Suit No. 350 of 1930, to which the defendants were made parties, precluded them from challenging the fact of there being a partition between Mathurbhai and Kashibhai in 1913 and also from contending that Sivabhai was a validly adopted son. There remained the only other question, namely, as to whether the plaintiffs could, on the basis of the deed of surrender, lay a claim for possession of the properties during the lifetime of the widow, as against persons, who had acquired title by adverse possession against her. In regard to this point, a contention was raised on behalf of the appellants that the deed of surrender was not duly proved and as there was no definite finding on this point, the learned Judges sent the case back for findings on the two following issues which they themselves framed :

(i) Whether the plaintiffs proved the deed of surrender dated 30th January, 1941 ? and

(ii) Whether Bai Kashi surrendered the whole of her husband's interest in the whole property of her husband ?

The trial court recorded its findings on both these issues after taking additional evidence and its findings were in favour of the plaintiffs. After the findings were returned to the High Court, the appeal was heard by a Full Bench consisting of Chagla C.J. and Weston and Dixit JJ. The Full Bench confirmed the decree of the trial court and dismissed the appeal. It was held by the learned Judges that even though the defendants acquired by adverse possession a title against the Hindu widow, the deed of surrender executed by her did not become infructuous or inoperative thereby ; and as there was acceleration of inheritance in favour of the plaintiffs who were the next heirs of Shankarbhai, they were competent to recover

possession of the properties at once by evicting the defendants and were not bound to wait till the widow actually died. It is the propriety of this decision that has been challenged before us by the defendants 1 and 2 in this appeal.

The arguments advanced by Mr. Krishnaswami Ayyangar, who appeared in support of the appeal, can be conveniently considered under two heads. The first branch of his contention is, that as the widow's estate was in this case completely extinguished by adverse possession exercised by the defendants, she had, in fact, no interest left in her, which she could make a surrender of in favour of the reversioners. What is said is, that the widow, by suffering the trespassers to remain in possession of her husband's estate for more than the statutory period, had placed it absolutely beyond her power to deal with it any further; and her title being already extinguished by adverse possession, no further extinction by any act of surrender on her part was possible. The other branch of the learned counsel's contention is, that assuming, that the widow could make a surrender, such surrender could not prejudice the rights of persons, acquired by grant from the widow or by prescription against her prior to the date of surrender, and these rights would, in law, endure during the entire period of the widow's natural life. Whatever rights the reversioners could assert, they could assert only after the widow's death and not during her lifetime. A number of decided authorities have been canvassed before us in this connection by the learned counsel and it cannot be disputed that judicial opinion on these points is not at all uniform.

It seems to us that for a proper determination of the questions, it is necessary first of all to formulate as clearly as possible the precise nature and effect of what is known as "surrender" by a Hindu widow. The word "surrender" cannot be said to be free from ambiguity. If it connotes nothing more than the English doctrine of merger and a Hindu widow, whose interest is usually, though incorrectly, likened to that

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of a life tenant under the English law, merely accelerates the reversion by surrendering her limited interest in favour of the reversioner, undoubtedly no surrender can be effective if the widow has already parted with her interest in the property by a voluntary act of her own or her rights therein have been extinguished by adverse possession of a stranger. The English doctrine of merger, though it may have influenced some of the judicial pronouncements in our country has really speaking no application to a Hindu widow's estate. The law of surrender by a Hindu widow, as it stands at present, is for the most part, judge-made law, though it may not be quite correct to say that there is absolutely no textual authority upon which the doctrine could be founded, at least, impliedly. So far as the Dayabhag law is concerned, its origin is attributed to Jimutabahan's commentary on the well known text of Katyayana which describes the interest of a childless widow in the estate left by her husband and the rights of the reversioners after her death(1). While commenting on Katyayana's text, Jimutabahan lays down that the persons who should be the next heirs on failure of prior claimants would get the residue of the estate after her use on the demise of the widow in whom the succession had vested, as they would have succeeded if the widow's rights were non-existent or destroyed (in other ways) [*jātādhikārāyā : patnyā : adhikāra pradhvamsēpi bhōgāvaśishtam dhanam gṛṇhīyu :*](2). It was observed by Ashutosh Mookerjee J. in *Debi Prosad* v. *Golap Bhagat*(3) that the theory of relinquishment or surrender was foreshadowed in these remarks of Jimutabahan. This much is clear from the passage referred to above that the commentator had in mind other modes of extinction of the widow's interest in her husband's properties besides the natural death of the widow, which would have the effect of letting in her husband's heirs. There is indeed no mention of surrender or renunciation in the text and it was not on the basis of any textual

(1) Vide Dayabhag Chap. 11, section 1, paragraph 56.

(2) Dayabhag Chap. 11, section 1, paragraph 59.

(3) 40 Cal. 721 at 771.

authority that the law of surrender developed in India. But it must be noticed that though certain terms and expressions of English law have been made use of in a somewhat loose sense, yet the radical idea involved in the doctrine of surrender by a Hindu widow is totally different from what is implied in the merger of a life interest in the reversionary estate under the English law. In English law the reversioner or remainderman has a vested interest in the property and his rights are simply augmented by the surrender of the life estate. In the Hindu law, on the other hand, the widow, so long as she is alive, fully represents her husband's estate, though her powers of alienation are curtailed and the property after her death goes not to her but to her husband's heirs. The presumptive reversioner has got no interest in the property during the lifetime of the widow. He has a mere chance of succession which may not materialise at all. He can succeed to the property at any particular time only if the widow dies at that very moment. The whole doctrine of surrender is based upon this analogy or legal fiction of the widow's death. The widow's estate is an interposed limitation or obstruction which prevents or impedes the course of succession in favour of the heirs of her husband. It is open to the widow by a voluntary act of her own to remove this obstruction and efface herself from the husband's estate altogether. If she does that, the consequence is the same as if she died a natural death and the next heirs of her husband then living step in at once under the ordinary law of inheritance. In spite of some amount of complexity which is unavoidable in a law evolved by judicial decisions, this fundamental basis of the doctrine of surrender can be said to be established beyond doubt. Thus Lord Dunedin in *Gounden* v. *Gounden*(1) enunciated the law in clear terms as follows :

"It is settled by long practice and confirmed by decision that a Hindu widow can renounce in favour of the nearest reversioner if there be only one or of all

(1) 46 I.A. 72 at 79.

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the reversioners nearest in degree if more than one at the moment. That is to say, she can, so to speak, by voluntary act operate her own death."

Again in repudiating the suggestion that there could be any such thing as a partial surrender, His Lordship observed:

"As already pointed out, it is the effacement of the widow—an effacement which in other circumstances is effected by actual death or by 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."

Thus surrender is not really an act of alienation of the widow of her rights in favour of the reversioner. The reversioner does not occupy the position of a grantee or transferee, and does not derive his title from her. He derives his title from the last male holder as his successor-in-law and the rights of succession are opened out by the act of self-effacement on the part of the widow which operates in the same manner as her physical death. It is true that a surrender may and in the majority of cases does take the form of transfer, *e.g.*, when the widow conveys the entire estate of her husband, without consideration and not as a mere device to share the estate with the reversioner, in favour of the latter. But "it is the self-effacement by the widow that forms the basis of surrender and not the *ex facie* transfer by which such effacement is brought about"(2). The true nature and effect of a surrender by a Hindu widow of her husband's estate have been thus summed up, and in our opinion quite correctly, by a Division Bench of the Madras High Court(3):

"It is settled that the true view of surrender under the Hindu law is that it is a voluntary act of self-effacement by the widow having the same consequences as her death, in opening up the succession to the next heirs of the last male owner. The intermediate stage

(1) I.L.R. 39 Mad. 1035.

(2) See *Vytla Sitanna* v. *Mariwada* 61 I.A. 200, 207; *Mummareddi* v. *Pitti Durairaja* [1951] S.C.R. 655, 661.

(3) Vide *Damaraju* v. *T. Narayana* I.L.R. 1941 Mad. 551, 557.

is merely *extinguished and not transferred* and the law then steps in to accelerate succession so as to let in the next reversioner. *The surrender conveys nothing in law; it is purely a self-effacement which must of necessity be complete*; for, as the Privy Council has said, there cannot be a widow partly effaced and partly not just as there cannot be a widow partly dead and partly alive. *The fiction of a civil death is thus assumed* when a surrender takes place; and when the reversioners come in they come in in their own right as heirs of the last owner and not as transferees from the widow."

As surrender conveys nothing in law and merely causes extinction of the widow's rights in her husband's estate, there is no reason why it should be necessary that the estate must remain with the widow before she could exercise her power of surrender. The widow might have alienated the property to a stranger or some one might have been in adverse possession of the same for more than the statutory period. If the alienation is for legal necessity, it would certainly be binding upon the estate and it could not be impeached by any person under any circumstance. But if the alienation is not for legal necessity, or if a squatter has acquired title by adverse possession against the widow, neither the alienation nor the rights of the adverse possessor could affect the reversioners' estate at all. These rights have their origin in acts or omissions of the widow which are not binding on the husband's estate. They are in reality dependent upon the widow's estate and if the widow's estate is extinguished by any means known to law, *e.g.*, by her adopting a son or marrying again, these rights must also cease to exist. The same consequences should follow when the widow withdraws herself from her husband's estate by an act of renunciation on her part. Whether any equitable principle can be invoked in favour of a third party who has acquired rights over the property by any act or omission of the widow may be a matter for consideration. But the learned counsel for the appellants is not right when he says that as adverse possession extinguished the rights of the widow, no fresh extinction by an act of surrender was possible.

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As the rights acquired by adverse possession are available only against the widow and not against the husband's heirs, the husband's estate still remains undestroyed and the widow may withdraw herself from that estate leaving it open to the reversioners to take possession of it at once as heirs of the last male holder unless there is any other rule of law or equity which prevent them from doing so. The first branch of the appellants' contention cannot, therefore, succeed.

This leads us to the other branch of the appellants' contention and the question arises whether in case of surrender by a Hindu widow, a person, who has, prior to the date of surrender, acquired, by adverse possession, an interest in the widow's estate, can be ousted from possession of the property so long as the widow remains alive? This question, Mr. Ayyangar argues, should be answered in the negative. His contention, in substance, is, that by reason of adverse possession for more than 12 years the title of the limited owner became extinguished under article 28 of the Limitation Act and the possessor acquired good title against the widow. This title, it is said, cannot be displaced by the surrenderee who gets the property by reason of a subsequent voluntary act on the part of the widow. In support of this contention the learned counsel has placed reliance upon a number of cases, principally of the Madras High Court, where it has been held that a reversioner in whose favour a surrender has been made by the widow cannot challenge the right of a prior alienee from the widow, even though the alienation was not for legal necessity, so long as the widow remains alive; and the same protection could be claimed by one who acquired the limited interest of a widow by adverse possession against her.

It is undisputed that there is considerable divergence of judicial opinion on this point and in these circumstances it is necessary to examine briefly the different lines of reasoning adopted by the different High Courts in dealing with the subject. In *Subbamma* v. *Subramanyam*(1), which can be taken to be the leading

(1) I.L.R. 39 Mad. 1035.

pronouncement of the Madras High Court on the point, it was held that a surrender by a Hindu widow could not affect prior alienations made by her, and even though such alienations might not be binding on the reversioner as not being made for a proper or necessary purpose, they are binding on the widow for her lifetime or at any rate during the period of her widowhood. In deciding this case the learned Judges relied mainly upon an earlier decision of the same court in *Sreeramulu* v. *Kristamma*(1), where the view taken was that an alienation, not for legal necessity, made by a Hindu widow, prior to adopting a son, could not be challenged by the adopted son so long as the widow remained alive. In other words, the effect of a surrender by a Hindu widow was treated to be the same as that of an act of adoption by her.

Two years later, a Full Bench(2) of the Madras High Court overruled the decision in *Sreeramulu* v. *Kristamma*(1) and held that where a Hindu widow alienated property for a purpose not binding on the inheritance and thereafter adopted a son, the right of the adopted son was not prejudiced by the unauthorised transfer and he could sue for possession at once. Although the Full Bench overruled the decision in *Sreeramulu* v. *Kristamma*(1) which was relied on as an authority in *Subbamma's* case(3), yet the law enunciated in the latter case as regards the effect of surrender on previous alienations made by the widow was not dissented from, and Kumaraswami Sastriyar J., who was one of the Judges composing the Full Bench, in the course of his judgment, expressed the view that the adoption of a son by a Hindu widow to her husband was quite different from surrender in favour of the reversioner, and to a relinquishment by the widow, based on no consideration of duty to her husband or his spiritual benefit, courts could

(1) 26 Mad. 143.

(2) Vide *Vaidyanatha Sastri* v. *Savithri* I.L.R. 41 Mad. 75.

(3) I.L.R. 39 Mad. 1035.

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very properly refuse to annex rights to defeat prior alienations made by her.

This view was approved in *Sundarasiva* v. *Viyyamma* (1) and has been accepted since then as good law in all the subsequent cases(2) of the Madras High Court. The Madras High Court has also expressly held that the position of a person, who has acquired by adverse possession the limited interest of a Hindu widow is exactly the same as that of an alienee from her and if the title of such person has been completed already, it could not be defeated by a surrender made by the widow(3). These decisions undoubtedly support the appellants' case.

In the Calcutta High Court the question was raised in *Prafulla Kamini* v. *Bhabani*(4) as to whether a gift made by a widow prior to surrendering her husband's estate could be challenged by the reversioner during the period of the widow's life. The two Judges, constituting the Bench, differed in their opinion ; and whereas Walmsley J. held that the gift was valid for the period of the widow's life, Page J., on the other hand, after an elaborate discussion of the law relating to the legal effect of a widow's surrender, came to the conclusion that the reversioner became immediately entitled to recover possession from the donee. In view of the difference of opinion between the two Judges, there was an appeal filed under clause 15 of the Letters Patent, but the point in controversy was not decided by the Letters Patent Bench. The matter again came up before another Bench of the Calcutta High Court consisting of D. N. Mitter and Rao JJ.(5) Both the Judges concurred in holding that the view expressed by Page J. in the earlier case was right and that on a surrender by the Hindu widow of her husband's estate

(1) I.L.R. 48 Mad. 933.

(2) Vide the cases collected in *Arunachala* v. *Arumugha* I.L.R. 1953 Mad. 550.

(3) Vide *Kamaraju* v. *Singaraju* A.I.R. 1935 Mad. 664 ; *Korabala* v. *Ratala* A.I.R. 1951 Mad. 753.

(4) 52 Cal. 1018.

(5) Vide *Ram Krishna v. Kausalya* 40 C.W.N. 208.

and the consequent extinguishment of her interest therein all prior alienations in excess of her power were liable to be challenged by the reversioner immediately on the surrender taking effect just as they could be impeached if the widow died a natural death. In the judgment under appeal the Bombay High Court has substantially accepted the view taken by the Calcutta Judges in the case referred to above.

In the Allahabad High Court a Division Bench, consisting of Boys and Sulaiman JJ. took a view similar to that of the Madras High Court, in *Lachmi* v. *Lachho*(1). Boys J. in course of his judgment observed :

"The doctrine of surrender having been imported into the Hindu law by judicial decision, we are entitled to import the complementary rule essential to the prevention of fraud that the widow cannot by making a surrender defeat rights created by herself and creation of which was within her authority."

Sulaiman J., on the other hand, was very critical of this view and he expressed his own opinion(2) as follows:

"I find great difficulty in discovering any true basis for holding that though the reversioner in whose favour the surrender has taken place has succeeded to the estate of the last male owner and derives title from him, he is nevertheless estopped from challenging any alienations made by the Hindu widow during her lifetime as if he were a grantee from her."

In spite of these observations, however, the learned Judge agreed with Boys J. in the conclusion arrived at by the latter, principally on the ground that it would not work any hardship if the reversioner, in whose favour the surrender is made, were to take the property subject to the transfers made by the widow so as to allow the transfers to remain valid for her lifetime. There has however been a definite change

(1) I.L.R. 49 All. 334.
(2) I.L.R. 49 All. 334, 346.

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in the view taken by the Allahabad High Court since then, and in a very recent pronouncement(1) of that court the learned Judges have expressly approved of the decision of the Calcutta High Court which is in entire agreement with the opinion actually expressed by Sulaiman J. as stated above.

So far as the Patna High Court is concerned, the case of *Basudeo* v. *Baidyanath*(2) was decided sometime before the case of *Ram Krishna* v. *Kausalya*(3) was heard by the Calcutta High Court and the learned Judges, without examining the principles of law independently, followed the Madras authorities which had at that time been accepted by the Allahabad High Court.

An analysis of the Madras decisions, referred to above, upon which the learned counsel for the appellant places his reliance, will show that the grounds upon which they purport to be based are of a threefold character. The first is that an alienation of property by a Hindu widow, in excess of her powers, though not binding on the inheritance, creates in the alienee an interest commensurate with the period of her natural life. A part of the interest, it is said, is severed from the husband's estate when there is an alienation by the widow, and the reversioner when he takes the estate on surrender, takes it subject to the interest already created. A person, who has acquired the widow's interest by adverse possession against her, occupies, according to the Madras decisions, as stated above, the same position as an alienee from the widow.

The second ground is, that as the widow herself is incapable of disputing the title of the alienee or of the person who has acquired interest by adverse possession against her, a like disability attaches to the reversioner also who could not have obtained the properties but for the surrender made by the widow. The third

(1) Vide *Raghuraj Singh* v. *Babu Singh* A.I.R. 1952 All. 875.

(2) A.I.R. 1935 Pat. 175.

(3) 40 C.W.N. 208.

ground assigned is that the law of surrender being a judge-made law, the courts in recognising the right of surrender by a Hindu widow can and ought to impose conditions on the exercise of her power based on considerations of justice, equity and good conscience, and surrender being a purely voluntary act on the part of the widow, she could not be allowed by her own act to prejudice the interests which she had already created.

The first line of reasoning mentioned above is based upon the dictum of Bhashyam Ayyangar J. in *Sreeramulu* v. *Kristamma*(1), which though accepted in *Subbamma's* case(2), was expressly dissented from in the subsequent Full Bench decision in *Vaidyanatha* v. *Savithri*(3). This view, in our opinion, proceeds upon a misconception regarding the true nature of a Hindu widow's estate and the rights and duties which vest in her under the Hindu law. Though loosely described as a "life estate", the Hindu widow's interest in her husband's property bears no analogy to that of a "life tenant" under the English law. As was pointed out by the Judicial Committee(4) as early as 1861, the estate which the Hindu widow takes is a qualified proprietorship with powers of alienation for purely worldly or secular purposes only when there is a justifying necessity and the restrictions on the powers of alienation are inseparable from her estate. The restrictions, as the Judicial Committee pointed out, which are imposed on the Hindu widow's powers of alienation, are not merely for the protection of the material interest of her husband's relations, but by reason of the opinion expressed by all the Smriti writers that the Hindu widow should live a life of moderation and cannot have any power of gift, sale or mortage except for religious or spiritual purposes. The Hindu law certainly does not countenance the idea of a widow alienating her property without any necessity, merely as a mode of enjoyment, as was

(1) 26 Mad. 143.

(2) I.L.R. 39 Mad. 1035.

(3) I.L.R. 41 Mad. 75.

(4) Vide *Collector of Masulipatam* v. *Cavaly Venkata* 8 M.I.A. 529.

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suggested before us by Mr. Ayyangar. If such a transfer is made by a Hindu widow, it is not correct to say that the transferee acquires necessarily and in law an interest commensurate with the period of the natural life of the widow or at any rate with the period of her widowhood. Such transfer is invalid in Hindu law, but the widow, being the grantor herself, cannot derogate from the grant and the transfer cannot also be impeached so long as a person does not come into existence who can claim a present right to possession of the property. As in the majority of cases, persons with such rights come into existence only when the widow dies it is generally said that the alienee gets the estate for the term of the widow's life. We think that the legal position has been correctly indicated by Kumaraswami Shastriyar J. in the Full Bench case(1) referred to above. On the one hand, a Hindu widow has larger rights than those of a life-estate holder, inasmuch as, in case of justifying necessity she can convey to another an absolute title to the properties vested in her. On the other hand, where there is no necessity for alienation, the interest, which she herself holds and which she can convey to others, is not an indefeasible life estate, but an estate liable to be defeated on the happening of certain events which in Hindu law cause extinction of the widow's estate. Remarriage by the widow is one such event which completely divests her of any interest in her husband's property. Adoption of a son to her husband is another circumstance which puts an end to her estate as heir to her husband, the effect of adoption being to bring in a son who has prior claims to succession under the Hindu law. In both these sets of circumstances it is not disputed that prior rights derived from the widow, if not supported by legal necessity, could be defeated by the next heir of the husband or the adopted son as the case may be. If the effect of surrender, as explained above, is to destroy the widow's estate in the same way as if she suffered physical or civil death, there is no conceivable reason why the reversioner should not, subject to any question of fraud or collusion that might arise, be in a position to recover possession of

(1) Vide *Vaidyanatha* v. *Savithri*, I.L.R. 41 Mad. 75.

the properties from an alienee from the widow or from one who has obtained title by adverse possession against her, as none of them could acquire rights except against the widow herself. Kumaraswami Shastriyar J. is of opinion(1) that a surrender stands on a different footing from adoption by a widow. According to the learned Judge, the surrender by the widow and the acceptance of the estate by the reversioner are purely matters of contract. The widow is not bound to surrender the estate, nor is the reversioner bound to accept it, except on terms which would apply to any other transfer of immovable property so far as prior alienees are concerned. This, in our opinion, involves a total misapprehension of the nature and legal effect of surrender by a Hindu widow as we have already explained. Surrender is not alienation of an interest of the widow in favour of the reversioner, and no acceptance by the reversioner is necessary as a condition precedent to the vesting of the estate in him. The estate vests in the reversioner under operation of law without any act on his part. It is also difficult to see why the learned Judge looked upon surrender as a matter of contract between the widow and the reversioner. It is true that the widow at the time of surrendering her husband's estate can, if she likes, stipulate for a right to be maintained out of the properties for her lifetime; but reservation of such small benefit absolutely necessary for her maintenance does not invalidate a surrender as has been held by the Privy Council in more cases than one(2). Mr. Ayyangar argues that a widow, who requires to be maintained out of her husband's property, cannot be said to have suffered death. But this argument is fallacious. Nobody says that the surrendering widow actually dies. It is a fiction of law pure and simple and it is for the law to determine under what circumstances this fiction of natural or civil death would arise. There is such a legal fiction involved in adoption also when a son is adopted by a widow subsequent to the death of her husband. Such adopted son is given the rights of a posthumous son and the fiction is that he was in existence from before

(1) Vide *Vaidyanatha* v. *Savithri*, I.L.R. 41 Mad. 75 at 99.

(2) Vide *Sureswar Misra* v. *Maheshrani*, 47 I.A. 233.

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the date of the proprietor's death, although the fact is otherwise. So far as the legal consequences are concerned, there is no material difference between an adoption and an act of surrender by the widow. In our opinion, there is no warrant in Hindu law for the proposition that in case of alienation by a Hindu widow of her husband's property without any justifying necessity, or in the case of a stranger acquiring title by adverse possession against her, the interest created is to be deemed to be severed from the inheritance and if a surrender is made subsequently by the widow, the surrenderee must take it subject to such prior interest. Sulaiman J. in the Allahabad case(1) cited above enunciated the law with perfect precision when he said that the effect of an alienation by a widow is not to split up the husband's estate into two parts or to give to the alienee an interest necessarily co-extensive with her lifetime. The reversionary right to challenge it is no part of the widow's estate at all and, therefore, could not be surrendered to the reversioner. The first line of reasoning, therefore, seems to us to be of no substance.

The second ground upon which the Madras decisions purport to be based is manifestly untenable. The widow herself may be incapable of derogating from her own grant and disputing the alienation which she has herself made; but as has been said already, surrender is not an alienation and as the reversioner does not derive his title from her, there is no principle of law under which the acts of the widow could bind him. As Sulaiman J. pointed out in the case just referred to, that if the reversioner were a grantee from the widow, he would not only have been estopped from challenging the alienation during her lifetime, but would have been equally estopped from challenging it after her death; admittedly that is not the case(2). It is true that the surrender benefits the reversioner but the benefit comes to him under the provision of general law as a result of self-effacement by the widow. No estoppel can possibly be founded on the receipt of such benefit.

(1) Vide *Lachmi Chand* v. *Lachho*, I.L.R. 49 All. 334.

(2) Vide I.L.R. 49 All, 334 at 346.

Coming now to the third ground, it is certainly true that a surrender is a voluntary act on the part of the widow and she is under no legal or moral obligation to surrender her estate. Instances do arise where an alienee has paid valuable and substantial consideration for a property on the expectation of enjoying it so long as the widow would remain alive and his expectations have been cut short by a surrender on the part of the widow, which no doubt benefits the reversioner in the sense that he gets the inheritance even during the widow's lifetime. On the other hand, a person, who takes transfer from a Hindu widow, acts with his eyes open. If the transfer is without any legal necessity, there is a risk always attached to the transaction, and there is no law, as we have already explained, which secures to him necessarily an estate for life. A man making a purchase of this character is not expected to pay the same value which he would pay if the purchase were made from a full owner. Be that as it may, even assuming that the court is not incompetent to impose conditions on the reversioner's right of recovering possession of the property during the widow's lifetime on grounds of equity, justice and good conscience in proper cases, it is clear that in the case before us no equitable considerations at all arise. The appellants are not alienees from the widow; they came upon the land as trespassers without any right and it is the law of limitation that has legalised what was originally a clear act of usurpation. They have enjoyed their property since 1925, and as the title which they have acquired is not available against the reversionary interest, we do not see any reason sanctioned by law or equity for not allowing the reversioners their full legal rights. The result is that in our opinion the decision of the High Court is right and this appeal must stand dismissed with costs.

Appeal dismissed.

Agent for the appellants: *Ganpat Rai.*

Agent for respondents Nos. 1 & 2: *A. C. Dave.*