Privy Council Appeal No. 32 *of* 1917.

Rangasami Gounden - - - - - - - *Appellant*

v.

Nachiappa Gounden - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

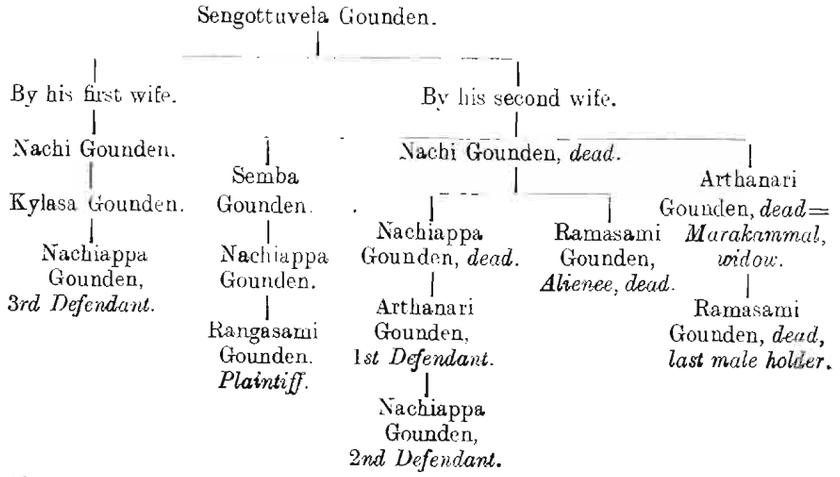
JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH DECEMBER, 1918.

Present at the Hearing:

LORD BUCKMASTER.
LORD DUNEDIN.
SIR JOHN EDGE.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD DUNEDIN.]

The subjoined pedigree will explain the position of the persons to be mentioned.



This suit is brought by the plaintiff as one of the reversionary heirs entitled to one-half of the property last held by Marakammal, the widow of Arthanari Gounden, who had succeeded thereto as upon the death of her childless son, Ramasimi Gounden. It was directed against 32 persons who were in possession of different pieces of the property. The suit was only contested by three defendants. The third defendant, who was only of the half blood, as the pedigree will show, was held on that account to have no claim as a reversionary heir, and that finding is acquiesced in. He may be therefore dismissed from further notice. The first and second defendants were reversionary heirs, and as such entitled to the other half. But they were also in possession of two-fifteenths of an estate called Kongapuram Mitta, one-fifteenth of which was claimed by the plaintiff, and they resisted this claim. The first defendant is now dead, and the second defendant is in his right and is the sole respondent before the Board.

The grounds on which the claim was resisted arise out of the following facts. After the death of her husband Marakammal entered into possession of the estate. At that time Ramasimi Gounden (designated in the pedigree as the "alienee") was the nearest reversionary heir. Marakammal executed in 1893 in his favour a conveyance of parts of the estate including the disputed part of the Kongapuram Mitta. The deed so far as material to the present questions ran as follows :—

> "As you have performed the funeral rites to my husband the deceased Arthanari Gounden and my son the deceased Ramasami Gounden, as you have the right to inherit as surviving heir all my properties after my death, as you have spent on my behalf and on behalf of my son your own (monies) and after borrowing monies required for conducting O.S. No. 5 of 1883 on the file of the District Court of Salem conducted by my son the deceased Ramasami Gounden as Plaintiff and all other civil and criminal proceedings in conection therewith in other Courts, as I am advanced in age and unable to supervise and manage the mitta and other lands and to collect the amounts due on the hypothecation debt bonds, and as you have consented to my possession and enjoyment with all rights and interests of all the properties other than those mentioned below which belong to me under the razinama decree in O.S. No. 5 of 1883 on the file of the District Court of Salem and which I am enjoying and of which I make a gift to you, and as you have promised to support me during my lifetime at your expense and to have the marriage of my unmarried daughter performed according to our custom and to perform also *seeru* and *sirappu* for this and to another daughter who has been married, I have made a gift of the undermentioned properties valued at about Rs. 10,000 to you who is the elder brother's son of my husband, deceased, Arthanari Gounden and delivered possession to you. Therefore you shall in comfort possess and enjoy the undermentioned properties from generation to generation and with powers to give away by gift, sale, etc. I have no manner of right or interest over the said gift properties."

Ramasimi Gounden entered into possession but died prior to 1896, and was succeeded by his two nephews, the sons of his undivided brother. The nephews were Sandara, now deceased, and Arthanari, the first defendant.

In 1896 the nephews conveyed to the plaintiff by deed of sale two small properties which had been included in Marakammal's

deed, and in the same year they borrowed from the plaintiff a sum of money, and in security therefor mortgaged four-fifteenths of Kongapuram Mitta on the recital that they held two-fifteenths in respect of their own succession, and two-fifteenths in respect of Marakammal's deed.

The learned District Judge gave judgment in favour of the plaintiff. The judgment being for one-half of all the property held by Marakammal included *inter alia* one-fifteenth of Kongapuram Mitta. This judgment was acquiesced in by all concerned except the present respondent and his father, who as before stated subsequently died, so that the present respondent alone further proceeded with the litigation.

The grounds on which the suit was resisted were: (1) that the deed by Marakammal was valid and carried the property in question: (2) that even if it did not, the plaintiff had either ratified the deed by reason of his taking the conveyances and mortgage above set forth, or was at least estopped from saying that the deed was bad.

Appeal being taken to the High Court, the case was heard by Miller, J., and Sadasiva Aiyar, J. Miller, J., agreed *in omnibus* with the District Judge. Sadasiva Aiyar, J., dissented from this view and considered that the deed by Marakammal was good, it being in his view a correct proposition that "a partial alienation by a widow to the nearest reversioner is valid in law when he is a male, and gives him full ownership right in the alienated property."

The Judges thus differing in opinion, the appeal was dismissed. It was then again appealed under the Letters Patent to a Full Bench, and was heard by Wallis, C.J., and Seshagiri Aiyar and Kumaraswami Sastri, JJ. The learned Judges all agreed with Miller, J., and the District Judge as to the law applicable to the deed, but they held that the plaintiff was estopped from denying its validity in respect of the mortgage transaction. The suit was therefore dismissed as against the present respondent. Appeal was then taken to this Board.

The first matter to be considered is the dictum of Sadasiva Aiyar, J., that a partial alienation by a widow to the nearest reversioner is valid in law when he is a male, and gives him full ownership right in the alienated property. It is true that this did not find acceptance with any of the learned Judges of the Court of Appeal, but it is founded in the opinion of the learned Judge on the most recent judgment of the Privy Council, viz., *Bajranji Singh Manokarnika Bakhsh Singh*, L.R. 35, I.A. 1, and it is obvious that if it is sound it disposes at once of the case in favour of the respondent.

This raises the consideration of the whole subject of the power of a Hindu widow over estate which belonged to her husband to which she has succeeded, either immediately on the death of her husband, or as here on the death of her own childless son, her husband being already dead. This subject has been dealt with in many cases which are too numerous to cite indi-

vidually ; it has given rise to different currents of judicial opinion, and, as in this case and some others, to actual difference in judicial determination. The most recent examination of the subject in full in the Courts of India will be found in the case of *Debi Prosad Chowdhury* v. *Golap Bhagat*, I.L.R. 40, Cal. 721, and their Lordships wish to acknowledge how much they have been assisted by the lucid and able judgments of Jenkins, C.J., and Mookerjee, J., in that case, which though expressed in terms which are not identical, are in substance the same.

It has often been noticed before, but it is worth while to repeat, that the rights of a Hindu widow in her late husband's estate are not aptly represented by any of the terms of English law applicable to what might seem analogous circumstances. Phrased in English law terms, her estate is neither a fee nor an estate for life, nor an estate tail. Accordingly one must not, in judging of the question, become entangled in Western notions of what a holder of one or other of these estates might do. On the other hand, what a Hindu widow may do has often been authoritatively settled. Here arises that distinction which, as Seshagiri Aiyar, J., most justly observed in the present case, will if not kept clearly in view inevitably lead to confusion—the distinction between the power of surrender or renunciation, which is the first head of the subject, and the power of alienation for certain specific purposes, which is the second.

To consider first the power of surrender. The foundation of the doctrine has been sought in certain texts of the Smiritis. It is unnecessary to quote them. They will be found in the opinions of the learned Judges in some of the cases to be cited. But in any case 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 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. The landmark of decision as to this may be taken as the case of *Behari Lal Madha Lal Ahir Gyawal*, L.R. 19, I.A. 30, where in delivering the judgment of the BoardLord Morris said :—

> " 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 estate should get vested at once in the grantee."

That this was no new doctrine but was only the final sanction of a long series of decisions may be taken from the opinions of Garth, C.J., and Mitter, J., in the case of *Nobokishore Hari Nath Sarma Roy*, I.L.R. 10, Cal. 1102, which had been decided six years before *Behari Lal's* case.

It has been suggested that the expressions in *Behari Lal's* case only meant that the widow should retain no interest in what was surrendered, and that therefore a partial surrender provided that the surrender was absolute as to that part was valid. This however is quite against the principle on which the whole transaction rests. 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, and consequently the suggestion was in their Lordships' view rightly rejected by the Calcutta Full Bench in the case of *Debi Prosad* already cited, and by the Full Bench in Madras in *Marudamuthu Nadan* v. *Srinivasa Pillai*, I.L.R. 21, Mad. 128, and by all the learned Judges in this case.

The surrender once exercised in favour of the nearest reversioner or reversioners the estate became his or theirs, and it was an obvious extension of the doctrine to hold that inasmuch as he or they were in title to convey to a third party, it came to the same thing if the conveyance was made by the widow with his or their consent. This was decided to be possible by the case of *Nobokishore* already cited. The judgment went upon the principle of surrender, and it might do so for the surrender there was of the whole estate, but it is worthy of notice that the order of reference showed that the alienation was ostensibly on the ground of necessity, so that it might have been supported on the grounds to be mentioned under the second head above set forth.

Turning now to the second head, viz., the power of alienation, which may be alienation to any one whether an heir or not, there is again authority of long standing. As a leading case may be taken *The Collector of Masulipatam* v. *Cavaly Vincata Narrainapah* 8, M.I.A. 529, in a passage which need not be quoted at length. The purposes for which alienation is legitimate may be summarised as religious or charitable purposes, and those which are supposed to conduce to the spiritual welfare of the husband, or necessity. Now necessity must be proved, and the mere recital in the deed of alienation is not sufficient proof (*Banga Chandra Dhur Biswas* v. *Jagat Kishore Chowdhuri*, L.R. 43, I.A. 249). An equitable modification has also been admitted in the case where the alienee has in good faith made proper enquiry and been led to believe that there was a case of true necessity.

Thus far if the alienation stands alone. But it may be fortified by the consent of reversionary heirs. The remaining question is what is the effect of such consent. If the alienation be total and the reversionary heirs be the nearest it falls within the first division. But what if it be partial?

The matter is mooted in the case of *The Collector of Masulipatam* just mentioned. Their Lordships there say:—

> "On the other hand it may be taken as established that an alienation by her which would not otherwise be legitimate may become so if made with the consent of the husband's kindred. The exception in favour of alienation with consent may be due to a presumption of law that when that consent is given, the purpose for which the alienation is made must be proper."

The opinion which is here only tentatively expressed, viz., that consent does not give force *per se*, but is of evidential value, is corroborated by much subsequent authority. In the case of

Raj Lukhee Dabea v. *Gokool Chunder Chowdhry* 13, M.I.A. 209, Sir James Colvile says :—" There should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindoo law." Lord Davey uses the same form of expression in *Sham Sunder Lal* v. *Achhan Kunwar*, L.R. 25, I.A. 183. It was deliberately accepted in the case of *Debi Prosad* and was again affirmed by the Privy Council in *Bijoy Gopal Mukerji* v. *Garindra Nath Mukerji*, 41, Cal. 793, where it is said, that the consent of reversioners was looked on " as affording evidence that the alienation was under circumstances which rendered it lawful and valid."

But further if the matter be considered on principle, it seems clear that this must be the true view. For first if mere consent as such of the reversioner could validate alienation, then the rule as to total surrender would be an idle rule. And secondly mere consent could only validate on the theory that the reversioner together with the widow represented the whole estate. But that is impossible unless the reversioner has a vested interest, whereas it is settled that he has only a *spes successionis*.

The view that consent operates *proprio vigore* is, apart from casual expressions, really based on the authority of *Bajranji Singh's* case. It is therefore expedient to examine what was really there decided. The only real point at issue (apart from the question as to a particular custom of succession which is *nihil ad rem*), was whether the strict rule which had been laid down by the Allahabad High Court should be followed, or whether the extension permitted by the High Court of Calcutta was allowable. The Allahabad Court had laid down that where necessity was not proved *aliunde* then the consent of any number of reversioners would not bind a reversioner who possessed that character at the death of the widow, and who had not himself been one of the consenters. The Calcutta Court had decided that if the consent of the reversioners at the time being was of an adequate character then the eventual reversioner could not challenge the transaction.

The Judicial Committee examined the various cases which had been decided from the beginning. They set forth the cases of surrender and those of partial alienation without discriminating for the purposes of the case before them between the two principles. They did not in any way throw doubt on the former judgment in *Behari Lal's* case which settled that a surrender must be total. Having set out the cases the judgment after quoting the opinion of Ranade, J., in *Vinayak* v. *Govind*, 25, Bomb. 129 : " The consent of the reversioners must be of such kindred the absence of whose opposition raises a presumption that the alienation was a fair and proper one," continues : " The principle being thus admitted by the High Courts in India the question of the *quantum* of consent necessary only remains." And then as the consent in that case had been given by the whole of the reversioners then in existence it decided that the Allahabad rule was too strict, and that the transaction must stand in a question with two reversioners who

had not been parties to the transaction but were sons of those who had. The judgment affirmed the Calcutta as against the Allahabad rule, but it did not particularise on what exact ground the alienation was supported.

Now it is to be observed that in the particular case it might possibly have been supported on either ground. Although there were three successive alienations they *in cumulo* amounted to an alienation of the whole immovable property, and it is just possible that the fact was overlooked which was noticed by the learned Chief Justice in this case, that the widow was also possessed of movable property. But apart from that the alienations were all made for purposes of ostensible necessity. Their Lordships have examined the record and find that two of the alienations were to meet money spent in litigation presumably connected with the estate; and the third to pay government duty. This would protect the alienation on the principles already stated. It is true that the concluding words of the judgment as to the sons being bound by the consent of the fathers "through whom they claim" could be read as indeed they have been read as indicating that consent operated *proprio vigore*. But two remarks fall to be made. First the idea of an eventual reversioner claiming through any one who went before him is opposed both to principle and authority. It is opposed to principle because, as already stated, there is no vested right till the death. It is opposed to authority (*Bahadur Singh Mohar Singh*, I.R. 291A, at p. 1). Secondly, there is no hint in the judgment that their Lordships proposed to lay down a new doctrine which would render quite immaterial most of the cases quoted. It seems therefore much safer to conclude that the judgment was only meant to settle the point at issue. viz., the comparative merits of the Allahabad and the Calcutta rules, leaving the operation of consent to stand on the perfectly logical grounds of the authorities quoted, than to hold that a new and illogical extension of the law was introduced, and to find consolation in the fact as stated by Sadasiva Aiyar, J., that Lord Halsbury once said that law was not a logical science.

The result of the consideration of the decided cases may be summarised thus: (1) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a *bona fide* surrender, not a device to divide the estate with the reversioner. (2) When the alienation of the whole or part of the estate is to be supported on the ground of necessity. then if such necessity is not proved *aliunde* and the alienee does not prove enquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel the transaction will be held to afford a presumptive proof which if not rebutted by contrary proof will validate the transaction as a right and proper one. These

propositions are substantially the same as those laid down by Jenkins, C.J., and Mookerjee, J., in the case of Debi Prosad. It follows that their Lordships cannot agree with a good deal of what was said in the case of *Rangappa Naik*, I.L.R. 31, Mad. 366.

It now becomes necessary to fix what was the character of the deed executed by Marakammal in favour of Ramasimi Gounden. All the Judges in the Courts below concurred in holding that it was not a total conveyance of Marakammal's property, and that was scarcely contested by learned counsel before this Board. This prevents it receiving effect as a surrender. Counsel however strenuously argued that it was a deed for consideration and not a deed of gift. As to this all the Judges have decided that it was a deed of gift except Kumaraswami Sastri, J., who says that in his view it is unnecessary to decide, but that if he had to do so he would hold it a deed for consideration. Their Lordships see no ground for disagreeing with the result arrived at by the large majority of the learned Judges below. It calls itself a deed of gift, and it is apparent from the opinion of the Chief Justice that this point was abandoned at the trial and is not mentioned in the reasons for appeal to the Appeal Court.

Being a deed of gift it cannot possibly be held to be evidence of alienation for value for purposes of necessity. It follows therefore, that the deed taken by itself cannot stand.

So far the result at which their Lordships have arrived is in consonance with the views of all the learned Judges in the Courts below except Sadasiva Aiyar, J. But the Court of Appeal differing from the District Judge and from Miller, J., have held that the appellant cannot be allowed to challenge the deed on the ground of estoppel or ratification in respect of his conduct in taking the mortgage as above set forth. Their Lordships are unable to agree in this view. They think, with Miller, J., that there is here no room for the doctrine of estoppel. Of estoppel by record or by deed obviously there is none. The definition of estoppel in the Indian Evidence Act—a definition which covers both estoppel by deed and *in pais*—is Sec. 115. "When a person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act on such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representatives to deny the truth of that thing." How can it be said that the plaintiff, by any act of his, led the respondents to think that something was true and then to act on that belief? The learned Judges of the Appeal Court rest their opinion on the case of *Bajranji Singh*. Their Lordships have already examined that case, and stated what in their view is the true import of the judgment. But apart from that, if *Bajranji Singh's* case had been decided on the ground of estoppel, it affords no parallel to the present case. In that case all the reversioners in being had consented to the alienations. They were bound by their own consent and the *post nati* were held to claim through those that

were bound. Here the plaintiff never consented to the deed, nor is his claim traced through Ramasimi even in the matter of descent.

No doubt there is another view which is not estoppel, but is expressed by one learned Judge as ratification. It is scarcely that, though it might be hyper-criticism to object to the use of the word. What it is based on is this. An alienation by a widow is not a void contract, it is only voidable. (*Bijoy Gopal Mukirji* v. *Krishna Mahishi Debi*, 34, Cal. 329.) Now in all cases of voidable contracts there is a general equitable doctrine common to all systems, that he who has the right to complain must do so when the right of action is properly open to him and he knows the facts. If, therefore, a reversioner, after he became *in titulo* to reduce the estate to possession and knew of the alienation, did something which showed that he treated the alienation as good he would lose his right of complaint. This may be spoken of, though scarcely accurately, as ratification. In some cases it has been expressed as an election to hold the deed good. (*Raja Modhu Sudan Singh* v. *Rooke Singh*, L.R. 24, I.A. 164.)

But it is well settled that though he who may be termed a presumptive reversionary heir has a title to challenge an alienation at its inception, he need not do so, but is entitled to wait till the death of the widow has affirmed his character, a character which up to that date might be defeated by birth or by adoption. The present plaintiff raised these proceedings immediately after his title was confirmed.

Of course something might be done even before that time which amounted to an actual election to hold the deed good. In that view what was done here? The learned Appeal Judges dismiss as inadequate the fact of the purchase of the two small pieces of ground. But they attach great weight to the taking of the mortgage. Here they have made a slip as to the facts. The mortgage did not consist, as they think, of only the share of the Mitta which had come through the deed of gift. It consisted also of two-fourteenths of the Mitta which had come to the mortgagors in right of their own succession. The value of this share was more than the sum secured by it. Now at the time of the mortgage the plaintiff did not know whether he would ever be such a reversioner in fact as would give him a practical interest to quarrel with the deed of gift. Why should he not take all that the mortgagors could give or propose to give? To hold that by by so doing he barred himself from asserting his own title to part of what was mortgaged seems to their Lordships a quite unwarrantable proposition.

Their Lordships will therefore humbly advise His Majesty to allow the appeal, and to restore the decree of the District Judge; the appellant to have his costs in the Courts below and before this Board.

In the Privy Council.

RANGASAMI GOUNDEN

v.

NACHIAPPA GOUNDEN.

[*Delivered by* LORD DUNEDIN.]

Printed by Harrison & Sons, St. Martin's Lane, W.C.

1918.