

(1965) 07 GUJ CK 0017
In the Gujarat High Court

Chhaganram Nathuram Pandya and Another APPELLANT
Vs
Naginlal Sampatram and Others RESPONDENT

Date of Decision : 02-07-1965

Acts Referred:

Hindu Succession Act, 1956 — Section 14, 14

Citation : (1966) 7 GLR 993

Hon'ble Judges : M.U. Shah, J;J.B. Mehta, J

Bench : Division Bench

Judgement

J.B. Mehta, J.—These three appeals arise from the same judgment and decree passed by the Civil Judge, Senior Division, Broach, in the plaintiffs' suit in which they had challenged certain alienations and gifts which were made by the deceased widow Bai Suraj.

2. The properties in question belonged to one Ishvar Narottam Pandya of village Dora in Amod Taluka. The said Ishvar Narottam died in about Samvat Year 1960-61 i. e. about 1905 A. D. leaving behind him his widow Bai Suraj, without any issue. Consequently, Bai Suraj got only a widow's estate in the properties in question. The plaintiffs alleged they were the reversioners and their geneological table was given which is undisputed us and which was as under:

Narbheram | ----- | | Ambaram
Narottam-Bai Jamna | ----- | | | Nathuram Ranchhod
Ishvar-Bai Suraj |Bai Jivi |----- |Ganpat | | |Garbad Chhaganaram
Motiram | (Plff.No. 1) (Plff.No. 2) Bai Amba- | Natvarlal | Tolashankar |
Motiram | (Deft. No. 3) Balkrishna (Defts. Nos. 2, 4) Bai Suraj had a brother
named Sampatram and defendant No. 7 Naginlal was the son of the said
Sampatram. The Plaintiffs' case was that as Bai Suraj had only a widow's
estate, she could not alienate the properties by way or sales on gifts to the
different defendants and their predecessors in title at different times the various
properties in six schedules. Schedules VII, VIII and IX describe in separate lots
the properties mentioned in Schedule VI. It was the case of the plaintiffs that the

sale deeds were without consideration and the sale deeds as well as the gift deeds were not bona fide transactions and the widow had no power to transfer the properties in question. It was further the case of the plaintiffs that the plaintiffs' deceased father had issued a notice in about 1909 of which copies were widely distributed warning the prospective purchaser and Bai Suraj. The plaintiffs had also filed a suit in 1951 challenging the gift deed in favour of defendant No. 7 and it was held that the gift was not binding on the plaintiffs after the death of Bai Suraj. After the death of Bai Suraj on 10th February 1958 the plaintiffs have filed the present suit on 24th March 1958 challenging the said transactions and have prayed for delivery of possession of the properties in question along with the mesne profits from the various defendants. The defendants had filed a separate written statements and even though the genealogy set out in the plaint had been challenged, there is now no dispute in that connection. The alleged transactions were supported on the ground that the purchasers were bona fide purchasers for value without notice and the notice alleged to have been circulated in 1909 was denied. It was the case of the defendants that the widow was competent to pass the sale deeds and the gift deeds and a contention was also taken under the Hindu Succession Act 1956, that after coming into force of that Act, in any case the widow's estate having been enlarged; the plaintiffs could not challenge the transactions in question. The trial Court came to the conclusion that the genealogy set out in the plaint, as aforesaid, had been proved. As for the property mentioned in Schedule I, covered by the sale deed Ex. 58 in favour of defendant No. 1, the transactions was held to be not supported by any legal necessity even if the consideration might be real As for the properties mentioned in Schedules II and IV covered by the two gift deeds, Exs. 62 and 63, and for which defendant No. 2 has been joined as an heir of Bai Amba and Bai Jivi as defendants Nos. 2 and 4, the trial Court came to the conclusion that these two gifts were not bona fide and in any case they were not of small portions of the property and were held to be incompetent. As regards the property in Schedule III covered by fix. 65 in favour of defendant No. 3, the trial Court came to the conclusion that the said gift deed was also not bona fide and in any case could be revoked by the plaintiffs and was held to be not binding on the plaintiffs. As regards the properties mentioned in Schedule V covered by the sale deed Ex. 66 in favour of predecessor of defendants 5 and 6, the trial Court found that the said sale deed was also not bona fide and was not supported by any legal necessity. Accordingly, in respect of the properties in Schedule I to V, the trial Court decreed the plaintiffs' suit for recovery of these properties with mesne profits against those defendants. The land in Schedule II in Section No. 91/2 which was in possession of the plaintiffs was ordered to be retained in their possession as absolute owners. Therefore, defendants Nos. 1, 5 and 6 have filed appeal No. 484/60 in respect of those properties mentioned in Schedule I and Schedule V; while, defendants Nos. 2, 3 and 4 have filed Appeal No. 485/60 in respect of the properties in Schedules II, III and IV. As regards properties in Schedule VI which were described separately also in Schedules VII, VIII and IX, the trial Court found that as Bai Suraj was in

possession of those properties and as she had executed the sale deed in favour of defendants Nos. 8, 9 and 10, except for Section No. 131/2, on 1st February 1958 for consideration, the said sales were binding on the reversioners. The plaintiffs' suit was, therefore, dismissed so far as defendants Nos. 7 to 10 were concerned. As for Section No. 131/2 which continued to remain in possession of the plaintiffs, they were directed to retain possession thereof as owners as the gifts in favour of defendant No. 7 had been renounced by him. The plaintiffs have, therefore, filed their appeal No. 483/60 in so far as their suit has been dismissed in respect of the properties mentioned in Schedules VII, VIII and IX and which are collectively shown in Schedule VI.

3. Taking up the plaintiffs' appeal first, the dispute is in respect of the properties mentioned in Schedule VI. By a gift deed, Exhibit 69, dated 20th May 1950, six plots bearing Section Nos.

A. G. 118/4 of 1-36 125/1 of 1-21 295/3 of 2-22 341/2 of 1-33 132/2 of 1-7 131/2 of 2-3 in all admeasuring 11 Acres and 2 Gunthas and one house had been gifted by Bai Suraj to Sampat's son (brother's son) Naginlal, who is defendant No. 7. But on that date Naginlal was aged only 4 years and the document was executed by Bai Suraj also as guardian on behalf of Naginlal. Thereafter the plaintiffs had challenged the said gift by filing Civil Suit No. 140/51 against Bai Jadav, the mother of defendant No. 7 as guardian of defendant No. 7. In that suit by the judgment dated 11th July 1952 the said gift deed was held to be not binding on the plaintiffs who were the next reversioners of the deceased Ishvar Narottam, the husband of Bai Suraj. However, as the plaintiffs were not entitled to possession during the life time of Bai Suraj, the relief of injunction prohibiting the defendants from interfering while taking possession was refused. After the said suit was decided, the plaintiffs asked for mutation of the fields in question and by the order Exhibit 104 dated 17th May 1953 six plots were removed from the name of defendant No. 7 and were mutated in the name of Bai Suraj. It is the case of defendant No. 7 in his deposition, Exhibit 99, that after he became major, he did not exercise the option to accept the gift and that the possession of the properties remained with Suraj. Thereafter Bai Suraj had on or about 28th March 1957 filed an application in the Tenancy Court for getting possession of those lands from the various tenants after giving notice to terminate tenancy as per Exhibit 107. In the said suit, as found from Exhibit 105, permission to sell those lands to defendants 8 and 9 u/s 64C of the Tenancy Act was given by the Mahalkari on 21st August 1957. In view thereof two sale deeds, one Exhibit 59 for Section No. 341/2 in favour of defendant No. 8 and the other Exhibit 67 for four Section Nos. 132/2, 111/4, 125/1 and 295/3 were executed by the defendant No. 7 as power of attorney holder of Bai Suraj. Both these deeds were executed on 1st February 1958. As for the house which also formed part of the gift deed Exhibit 69 the sale deed was passed in favour of defendant No. 10 also on the same day Bai Suraj thereafter died on 10th February 1958.

4. The learned Government Pleader for the plaintiffs argued that the gift-deed

Exhibit 69 operated as a complete gift as required u/s 123 of the Transfer of Property Act. As the gift was completed and as it was in terms recited therein that possession had been transferred to the donee, it could not be held by the lower Court that possession was with Suraj of the properties mentioned in Exhibit 69. If Bai Suraj was not possessed of all these properties at the time of her death, by reason of Section 14 of the Hindu Succession Act, her estate was not enlarged and she had no competence to pass the three sale-deeds on 1st February 1958, only nine days before her death. The learned Government Pleader also argued that as the transactions of sale had been effected by defendant No. 7 as the power-of-attorney-holder, no consideration must have been at all passed. Turning to the sale-deeds in question, it is clear that before the sub-registrar the consideration had been accepted by Bai Suraj. The lower Court was, therefore, right in holding that the three sale-deeds were for consideration. The only point which has, therefore, to be considered is whether those properties remained in possession of defendant No. 7 or were with Bai Suraj. The learned Government Pleader argued that the defendants 8 and 9 who were tenants of the land were interested in saying that Bai Suraj was in possession and defendant No. 7 was also acting in collusion and so he was coming out with the same theory. It may be noted, however, that so far as the house is concerned which has been sold to defendant No. 10, the plaintiff Chhaganlal, Exhibit 73, has in terms admitted that defendant No. 10 took its possession on the date of the sale-deed passed by Bai Suraj. He also admitted that Bai Suraj and her husband resided in that very house which was only 25 paces away from his house. He also admitted that it was not let out by her to anybody. He, however, stated that defendant No. 7 had let it out to one Chhitabhai Desai. Although he had not seen any rent note, it was his inference from the fact that Chhitabhai had been staying in the said house. The said Chhitabhai had not been examined. The said house has all throughout remained in the name of Bai Suraj in the Gram Panchayat records at Exhibits 111 to 113. It is, therefore, clear that at least as far as this house is concerned, it was in possession of Bai Suraj right upto the date of its sale to defendant No. 10 even on the plaintiffs' own saying. That would support the evidence of defendant No. 7 that he had not accepted the gift after he had attained majority. As regards the various lands, admittedly, Section No. 131/2 had remained with the plaintiffs and there is no sale-deed passed for (be said Section No. 131/2 on 1st February 1958. This Section No. 131/2 is also one of those lands which formed part of the gift-deed Exhibit 69. It is also clear from the tenancy suits which were filed by Bai Suraj herself after terminating the lease of the tenants, defendants Nos. 8 and 9, that possession must be with Bai Suraj and not with defendant No. 7. The recital in Exhibit 69 that possession had been transferred to the donee is, therefore, not consistent with these actual facts. It must also be kept in mind that defendant No. 7 being a minor, Bai Suraj who donated the said property also acted as guardian of defendant No. 7, for acceptance of the gift. It is, therefore, natural that possession might not have actually changed hands. The house was in possession of Bai Suraj while one of the fields at least was with plaintiffs. The

learned Government Pleader, therefore, could not rely on the mere recital in Exhibit 69 in the face of this evidence which had been rightly relied upon by the lower Court. The learned Government Pleader also argued that the receipts being obligatory u/s 26 of the Bombay Tenancy Act, defendants 8 and 9 who were the tenants could not be heard to say that even though they paid rent to Bai Suraj, no receipts were passed. That section applies only when the rent is paid in cash, in which cases the receipt for the amount paid is obligatory. In the present case, however, the tenants could not be disbelieved on this score, especially when their evidence was corroborated by the tenancy suits filed by Bai Suraj for obtaining possession on the basis that defendants 8 and 9 were her tenants. We, therefore, agree to the finding of the lower Court that all these properties mentioned in Exhibit 69 continued to remain in possession of Bai Suraj and they were not in possession of defendant No. 7. On the coming into force of the Hindu Succession Act, therefore, by virtue of Section 14, Bai Suraj became at absolute owner and she was entitled to execute the three sale-deeds in favour of defendants 8, 9 and 10. In these changed circumstances the previous decision as per Exhibit 68 holding that the gift-deed Exhibit 69 was not binding on the plaintiffs reversioners after the death of Bai Suraj could not help the plaintiffs, except in respect of Section No. 131/2 in possession-of the plaintiffs and which was not sold by Bai Suraj on 1st February 1958 and for which the plaintiffs have got a decree in their favour. The decree of the trial Court was, therefore, legal and proper in respect of the properties in Schedule VI and the plaintiffs could not assail the same on any of the grounds urged before us. The decree of the trial Court, therefore, as regards the properties mentioned in Schedule VI is, therefore, proper and it could not be challenged. The plaintiffs' appeal must, therefore, fail.

5. As regards the appeal filed by defendants Nos. 1, 5 and 6 it relates to properties mentioned in Schedule I and Schedule V, Bai Suraj has by Exhibit 58 dated 6th July 1909 sold one house mentioned in Schedule I to defendant No. 1 for Rs. 699. Defendant No. 1 was the next door neighbour as admitted by the plaintiff Exhibit 73. The said consideration has been split up in two items of Rs. 399 and Rs. 300. Rs. 300 have been shown to have been received for repaying the loan taken from one Patel Ishvar Zaver of village Dora for the obsequial ceremonies of the deceased Ishvar Narottam, while Rs. 399 have been shown to have been received in cash for performing the Choryasi (feeding Brahmins) after the death of her husband as per his orders and for going on a pilgrimage. The said sale deed has been attested by Bai Jamna, the mother of the deceased Ishvar Narottam and Bai Jivi, the sister of the deceased Ishvar Narottam. There is an endorsement that Bai Suraj had admitted having received the consideration of the document before the sub-registrar. Mr. Desai argued that the lower Court had erred in its entire approach and had acted on inadmissible evidence for holding that this alienation at Exhibit 58 was not supported by legal necessity although consideration might have been really passed. He first argued that the notice Exhibit 72, dated 27th June 1909 which was alleged to have been served

on Bai Suraj and the intending purchaser Madhav Punja, the predecessor of defendant No. 1, was not duly proved.

6. This notice was tendered with the plaint by list Exhibit 3 and on the list an endorsement was made on behalf of the defendants that the notice was not admitted and that its exhibition was objected. The said notice was exhibited after the evidence at Exhibit 71 of the witness Biharilal Ichhalal was recorded for the plaintiffs. It seems that thereafter nothing was brought to the notice of the Court and no arguments appear to have been advanced objecting to the exhibition of the said document. His objection, therefore, does not appear to have been pressed before the learned trial Judge. Even if it were open to Mr. Desai to raise at this stage such an objection we find no substance in Mr. Desai's contention that Exhibit 72 was wrongly exhibited. Mr. Desai argued that witness Biharilal Ichhalal, Exhibit 71, who was the son of the owner of the Gnyanoday Press in which Exhibit 72 purports to have been printed as seen from the pressline had no personal knowledge. He has stated that he could not find the original due to the lapse of so much time and he stated that the said notice was printed in their press from what was stated in the said document. He admitted that in fact their record there was nothing to show that the notice was printed in the Gnyanoday Press. Mr. Desai, therefore, argued that there was nothing to show that the original had been lost, so that secondary evidence could be led. He further argued that there was nothing to show that this copy was made from any original and so u/s 63 of the Evidence Act, such a copy could not be tendered as secondary evidence. He also argued that Section 90 also could not be invoked in respect of this old document as Section 90 applied to a document which was an original and not a copy as held in Harihar Prasad v. Deonaraian Prasad AIR 1956 Section C. 305 at page 310. The argument of Mr. Desai that the plaintiffs were tendering secondary evidence of some original notice is misconceived in the facts and circumstances of the present case. The plaintiff, Exhibit 73, has stated that his father got a notice printed before the sale deed, Exhibit 58, and that he had produced the printed copy of the said notice. He also stated that one copy of the notice was sent by registered post to the intending purchaser, Madhav Punja, the predecessor of defendant No. 1, while the other was sent by registered post to Bai Suraj. He admitted that he had not got postal receipts to show the same. The plaintiff has not been cross-examined in this connection and his evidence remains uncontradicted. It is clear from the evidence of the plaintiff that what was sent to Bai Suraj and to the intending purchaser Madhav Punja was only a printed copy and not any original. u/s 62 Explanation II of the Evidence Act where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original. The illustration to the said section also makes it clear that when a number of placards are printed at one time from one original of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

Therefore, each of these printed leaflets would be primary evidence of the contents of the other printed leaflets which had been printed at the same time. As the copies which were sent to Bai Suraj and to the intending purchaser were only printed copies of the same leaflet, the plaintiffs were really tendering primary evidence of the contents of the printed leaflet at Exhibit 72. The plaintiffs did not rely on this printed notice as evidence of any original which was sent to the press under the signature of the plaintiff's father. There is therefore, no substance in the contention of Mr. Desai that Exhibit 72 was not duly proved. From the unchallenged testimony of the plaintiff it is clear that the leaflet as per Exhibit 72 was sent to Bai Suraj and to the intending purchaser. It is true that Exhibit 72 proceeds on the basis that the sale deed had been executed, even though in fact it had been signed on 27th June 1909, while the document Exhibit 58 had been executed a few days thereafter on 6th July 1909. The plaintiff's father might have believed that the sale might have been completed. Nothing is asked in the cross-examination of the plaintiff to suggest that the said leaflet is not genuine or has been fabricated by the plaintiff. The leaflet would show that Bai Suraj and the intending purchaser had been sufficiently warned at the time when Exhibit 58 was entered into. It was in terms stated in Exhibit 72 that the widow had no right to make any alienation to Madhav Punja and that Bai Suraj had no difficulty in getting her food, clothing etc. out of the income of 40 Bighas of land and the income from Yajmanvritti. The purchase would therefore, be sufficiently cautioned.

7. Mr. Desai next argued that the alienation for any pious purpose of a reasonable portion of the entire property was always justified, irrespective of any consideration of the means available to the widow. Even if she had ample means or her income from the estate was sufficient to meet such expenses, she was entitled to make such an alienation. He laid particular emphasis on the commentary in Mulla's Hindu Law 12th Edition at page 261 where the learned author has observed:

The gift may be of movable property, or it may be of immovable property. The circumstance that the widow has sufficient income to provide for the observances without an alienation of the estate is immaterial, for the income is her property.

relying upon the decision of the Privy Council in *Sardar Singh v. Kunj Bihari Lal* AIR 1922 P.C. 261. Their Lordships of the Privy Council, in that case had to consider the validity of a charitable disposition by the widow to the extent of about 1/75th of the property made specifically for the creation of a permanent benefit to the deceased's soul by securing perpetual performance of bhog (food offerings) to the presiding deity and for maintaining priests (pandas) who were charged with the performance of that duty. The Privy Council affirmed the earlier decision in *The Collector & Masulipatam v. Venkata Narainapah* 13 M.I.A. 209 holding that the widow had a larger power of disposition for religious or charitable purposes or those which were supposed to conduce to the spiritual welfare of her husband than for purely worldly purposes, because in the later

case to support the alienation she must show necessity. Relying upon the Vyavastha Chandrika. I. P. 138, para 105, the Privy Council held as under:

The Hindu system recognises two sets of religious acts. One is in connection with the actual obsequies of the deceased, and the periodical performance of the obsequial rites prescribed in the Hindu religious law which are considered as essential for the soul of the deceased. The other relates to acts which, although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul". "With reference to the first class of acts the powers of the Hindu female who holds the property are wider than in respect of the acts which are simply pious and if performed are meritorious so far as they conduce to the spiritual benefit of the deceased. In one case, if the income of the property, or the property itself, is not sufficient to cover the expenses, she is entitled to sell the whole of it. In the other case she can alienate a small portion of the property for the pious or charitable purpose she may have in view. If the property sold or gifted bears a small proportion (which it is impossible to define more exactly) to the estate inherited and the occasion of the disposition or expenditure is reasonable and proper according to the common notions of the Hindus, it is justifiable and cannot be impeached by the reversioner.

In that case the plaintiffs contention was also based on the limitation mentioned in para 106 of The Vyavastha Chandrika Vol. I at page 138 which was as under:

If, however, the expenses for those including maintenance could possibly be defrayed with the accumulated wealth or with the income of the estate, left by the deceased, then his widow cannot sell any part of his estate for the performance of any such act, much less on account of any debt contracted by her for her own purpose.

In this connection at page 265, their Lordships of the Privy Council observed:

Had the Rani made the alienation for the purpose of defraying the expenses of the pilgrimage itself, while she possessed ample means for the performance of the journey and other acts connected therewith, here might have been some substance in the objection that she was not entitled to alienate any part of the immovable property having ample means at her disposal. But the alienation she has purported to effect was for the perpetual performance of acts recognised in the Hindu system as pious. It was a dedication of a very small fraction of the property.

This decision, therefore, lays down that even for essential or obligatory acts she is entitled to sell even the whole property, only if the income of the property or the property itself is not sufficient to cover the expenses. That restriction must apply to the second class of non-essential or merely pious acts (kamya karma) which result only in religious merits (Punya) on the performance thereof as going on pilgrimage to Benaras and the like and which are not indispensable acts or essential duties (nitvakarma), which must be performed, and could not be neglected without sinning, as the first Sradha of the father or of the husband, the

marriage of his daughter or the like. It is clear from the illustration given at page 265 in connection with the pilgrimage expenses, where Their Lordships of the Privy Council thought that there would be substance in the objection that the widow was not entitled to alienate any part of the immovable property having ample means at her disposal, that the said test which was in terms laid down in cases of essential acts applied even to pious acts. The alienation in that case, however, was upheld even though the widow had ample means only on the ground that it was a gift of a very small fraction of the property, made specially for the creation of a permanent benefit for perpetual performance of acts which were recognised as pious in the Hindu system. Thus, far from laying down the dictum relied upon by Mr. Desai from the Hindu Law by Mulla, the condition to justify the alienation even for charitable expenses for even essential acts is that the income of the property or the property itself is not sufficient to cover such expenses. The difference in the two cases only is in the fact that in the first class of cases for all essential acts she is entitled to sell even the whole of the property, while in the case of pious acts in the second category the alienation could be of a small portion of the property for the pious or charitable purposes she may have in view. The validity of the gift was upheld only on that exceptional ground that the alienation in that case sought to secure a permanent benefit by perpetual performance of pious acts. Their Lordships' observations were very guarded in this connection because in terms they have approved the view expressed by the Madras High Court in Vappuluri Tatayya v. G. Ramkrishnam 34 Mad. 288, where the learned Judges of the Madras High Court had expressed the same caution, because almost every gift according to Hindu notions was as such calculated to promote spiritual merit and the occasions for the performance of ceremonies calculated to bring spiritual reward were so innumerable that almost any expenditure, not for a sinful object, and any alienation by way of gift might be attempted to be justified as ministering to spiritual benefit. In Kamla Devi v. Bachulal Gupta AIR 1957 S.C. 435, their Lordships of the Supreme Court also approved the aforesaid decision of the Privy Council and laid down the following principles at page 433:

On an examination of the decisions referred to above, the following principles clearly emerge: (1) It is the imperative religious duty and a moral obligation of a father, mother or other guardian to give a girl in marriage to a suitable husband; it is a duty which must be fulfilled to prevent degradation and direct spiritual benefit is conferred upon the father by such a marriage. (2) A Hindu widow in possession of the estate of her deceased husband can make an alienation for religious acts which are not essential or obligatory but are still pious observances which conduce to the bliss of the deceased husband's soul. (3) In the case of essential or obligatory acts, if the income of the property or the property itself is not sufficient to cover the expenses, she is entitled to sell the whole of it, but for acts which are pious and which conduce to the bliss of the deceased husband's soul, she can alienate a reasonable portion of the property. (4) Gifts by a widow of landed property to her daughter or son-in-law on the occasion of the marriage

or any ceremonies connected with the marriage are well recognised in Hindu law. (5) If a promise is made of such a gift for or at the time of the marriage, that promise may be fulfilled afterwards and it is not essential to make a gift at the time of the marriage but it may be made afterwards in fulfilment of the promise. (6) Some decisions go to the length of holding that there is a moral or religious obligation of giving a portion of the joint family property for the benefit of the daughter and the son-in-law, and a gift made long after the marriage may be supported upon the ground that the gift when made fulfils that moral or religious obligation.

Looking to the propositions 3 and 4 it is clear that the power of alienation for religious purposes could be exercised only if the income of the property or the property itself was not sufficient to cover the expenses and the distinction between the essential and pious acts was only in that in one case a widow could alienate even the entire estate, while in the other case only a reasonable portion thereof. Thus the limitation mentioned in para 106 of Vyavstha Chandrika applies to both the cases of religious acts. The Supreme Court further laid down that the Hindu texts also recognised that gifts could be made at the time of or on the occasion of the marriage or any ceremonies connected therewith and might also be made in fulfilment of a promise made in connection with the marriage. These gifts on certain ceremonial occasions of landed properties as in the case of the gifts to the daughter or son-in-law on the occasion of the marriage or any ceremonies connected therewith and gifts made in fulfilment of any antenuptial promise to make such gifts have been recognised. The normal rule, therefore, is that the alienations even for religious purposes must satisfy the first condition that the income of the property or the property itself is not sufficient to cover the expenses. If the widow has ample means to meet those expenses, she cannot sell the property for meeting such expenses, even if the expenses were to be incurred for essential acts. In case of pious acts, however, as distinguished from essential acts, it must be further shown that the alienation is of a reasonable or small portion (which cannot be defined more exactly) of the estate inherited. It would depend upon the facts and circumstances of each case, looking to the nature of the occasion for the disposition or the expenditure, whether it was reasonable and proper according to the common notions of the Hindus. Unless, therefore, the reversioners bring the case within the recognised exception of gifts on some pious ceremonial occasions or of a charitable gift for perpetual performance of pious acts as in Sardarsing's case, the widow's alienation even of a small portion for meeting expenses for pious purposes would not be justified, if she had ample means to meet the same. Mr. Desai and Mr. Vakil both strongly relied on the decision in Boda Viraraju Vs. Vetcha Venkataratnam and Others, , where Krishnaswami Ayyanagar J., speaking for the Division Bench, upheld the validity of a gift of 8 Acres out of 32 Acres of land to deceased coparcener's widow for her maintenance and the gift of small pieces of land to Brahmins during the first year after her husband's death, even when she had ample income from the assets at the time of making gifts. The ratio of

Sardarsing's case culled out by Krishnaswamy Ayyanagar J. has been stated at page 99 as under:

But in respect of those other purposes which the Hindu law regards as religious or charitable, she possesses as might naturally be expected, a larger discretion and a wider authority. For obligatory, necessary observances essential for the salvation of her husband's soul, she could go the length of disposing of the entirety of the estate, where it is considerable, and where the requirements of the particular occasion demand it. For other but less peremptory purposes, though in themselves meritorious yet not indispensable, her authority is necessarily circumscribed. She may for such objects only dispose of a small and no more than a reasonable portion of the estate, the quantum to be measured by the custom and sentiment prevalent in the community to which she belongs. It is impossible to define her powers in this behalf with any more precision. The circumstances of the family, the extent of its property, the demands upon it of other legitimate calls and all those social customs and sentiments which make up what one may call the conscience of the community, must, it seems to us, be among the main factors to be considered.

Even at page 101 it is held that the circumstances that the widow had in her hands at the time a sufficient income from the assets, from which she ought to have met the expenses of maintaining a co-parcener's widow, was no doubt an element to be taken into account, but no serious importance could be attached to it. This decision could not help Mr. Desai as it in terms lays down that the question of sufficient income should be taken into account and it made no difference as in the facts of the case the gift to the co-parcener's widow was really intended to secure a permanent benefit not only to the widow herself but also to her daughters and in fact the property was conveyed away to the daughters in accordance with the directions of the deceased husband. The case was, therefore, one of an exception laid down in Sardar Singh's case. In the face of this settled law, it is not open to Mr. Desai to try to argue the case on the first principles that the widow being not a trustee for the reversioners is not bound to save the income and that the income being her own, she is not bound to utilise the same for meeting the expenses of the religious acts. The question before us is one of an alienation binding to the reversioner and it would be so binding only if the conditions laid down for such alienations are fulfilled and not otherwise.

8. Mr. Desai then argued that the long standing recitals would fill up gaps if any left in the proof of legal necessity. Even though the plaintiffs had challenged the gifts in favour of defendant No. 7 at Exhibit 69 in 1951 in the Civil Suit No. 140/1951, they had not challenged the other alienations in the life time of Bai Suraj and now when all the available witnesses and the parties to the documents were no longer alive, it would not be open to the plaintiffs to challenge the said recitals and the recitals by themselves would prove the legal necessity to support the document in question. He relied upon the decision of the Privy Council in *Nandq Lal v. Jagat Kishore* 18 Bom. L.R. 868. The Privy Council in that case laid

down that under ordinary circumstances and apart from statute, recitals in a deed of sale could only be evidence between the parties to the conveyance and those who claimed under them. But where a very long time had elapsed between the date of the deed and the institution of the suit challenging the sale, such recitals could not be disregarded, although on the other hand, no fixed and inflexible rule could be laid down as to the proper weight which they were entitled to receive. If the deed was challenged at the time or near the date of its execution, so that independent evidence would be available, the recitals would deserve but slight consideration, and certainly should not be accepted as proof of the facts establishing legal necessity. But as time goes by, and all the original parties to the transaction and all those who could give evidence on the relevant points have grown old or had passed away, a recital consistent with the probability and circumstances of the case, assumed greater importance and could not lightly be set aside; for it should be remembered that the actual proof of the necessity which justified the deed was not essential to establish its validity. It was only necessary that a representation should have been made to the purchaser that such necessity existed, and he should have acted honestly and made proper inquiry to satisfy himself of the truth. The recital was clear evidence of the representation and if the circumstances were such as to justify a reasonable belief that an inquiry would have confirmed its truth, then, when proof of actual inquiry had become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed. To hold otherwise would result in deciding that a title became weaker as it grew older, so that a transaction perfectly honest and legitimate when it took place, would ultimately be incapable of justification merely owing to the passage of time. Mr. Desai also relied upon the decision in *Iswar Gopal v. Pratapmal Bagaria* AIR 1951 S C. 213 216 where the Supreme Court also held that it was well settled that if all the original parties to the transaction and those who could have given evidence on the relevant points had passed away, a recital consisting of the principal circumstances of the case assumed greater importance and could not be lightly set aside, it was held that the circumstances which could be gathered from the recital together with the fact that document had remained unquestioned for more than half a century, were quite sufficient to support the conclusion that the grant of a permanent lease was made for legal necessity and was binding on the deity. In considering the effect of this decision, the caution sounded by their Lordships of the Privy Council in the aforesaid case in 18 Bom. L. R. 868 must be kept in mind. It was observed that in general terms the facts recited would establish the necessity alleged but it was well established that such recitals could not by themselves be relied upon for the purpose of proving the assertions of fact which they contained. Indeed it was obvious that if such proof were permitted the rights of reversioner could always be defeated by the insertion of carefully prepared recitals. In the present case there is no room for applying this doctrine of long standing recitals as we have come to the conclusion that the plaintiffs had served notice Exhibit 72 to the widow and the intending purchaser warning them from entering into any such transaction. The recitals must,

therefore have been carefully worded and the recitals by themselves could not be allowed to defeat the plaintiff's right. As pointed out by their Lordships of the Privy Council in *Ravneswar Prasad Singh v. Chandi Prasad Singh and Ors.* AIR 1915, P. C. 57, it was for the transferee from a widow to establish either that there was legal necessity for borrowings by her or that from sufficient enquiries made, he honestly believed that there was such necessity. Mere lapse of time did not affect such a matter, except in so far as it might give rise to a presumption of acquiescence or save the transferee from adverse inference arising from the scanty proof offered. Further, it was not sufficient to establish that in fact there were litigations and expenses must have been incurred. It must be shown what the expenses were, that they could not have been met from the income of the estate, and that they were reasonable. The circumstance that full price was paid for the conveyance though in favour of the transferee was insufficient by itself. What Mr. Desai argues is to ignore the notice Exhibit 72 and on the basis of mere existence of an occasion for some religious acts and the probability that expenses must have been incurred, he wants us to fill up all the gaps left in the proof of legal necessity to support the transaction.

9. Turning to the sale deed Exhibit 58 in question, it is true that it recites that the expenses of Choryasi for feeding Brahmins were to be incurred as per the husband's order and that Rs. 300 were taken for repayment of the loan taken from Zaver Ishver for the amount spent for obsequial Matam ceremonies and that Rs. 399 were required to meet the expenses of Choryasi and the pilgrimage. Mr. Desai also relied on the fact that the plaintiff Exhibit 73 had admitted that they had helped the widow by contributing half of the expenses of all the obsequial ceremonies which had come to about Rs. 500. From the word "helped" he wants us to infer that the widow had no sufficient income ignoring the plaintiff's unchallenged evidence which showed that the widow had ample means as she had land to the tune of 22 Acres or 40 Bighas yielding an annual income of Rs. 3, 000 which was sufficient for maintenance. The intending purchaser and Bai Suraj having been amply warned if the purchaser had made bona fide and sufficient inquiries, he would not rest content with such a bare recital but as a prudent man would have insisted on the receipt of Zaver Ishvar or on his endorsement on Exhibit 58. He would have inquired as to the amount reasonably required to meet these expenses. As for the pilgrimage to Dwarka, there is nothing to show that she had gone to Dwarka except for a bare suggestion and there is nothing also to show that she had no income to undertake such a journey. As for the Choryasi feast to Brahmins although the plaintiff had first stated that he did not know whether the Choryasi dinner was given, at the end he had stated that Choryasi was given by Bai Suraj after the death of her husband and that some Brass Golis (pots) worth Rs. 10 were given to 10 or 12 Brahmin families in that village and that the expenses of Choryasi would be about Rs. 20. There is nothing to suggest how the purchaser got reasonably satisfied as to the fact that the widow had not sufficient income to meet these expenses of as to what were the reasonable expenses especially when the

document was executed by Bai Suraj after a lapse of about four years from the death of Ishwar Narottam which according to the plaintiff's deposition was in about 1905. It is true that the document Exhibit 58 bears an endorsement that the consideration had been accepted by Bai Suraj before the Sub-Registrar and so the consideration must have been paid. But even if the full price had been paid the transaction could not be supported in absence of requisite proof for the plea of legal necessity. The trial Court had inferred that as the earlier documents of said properties as per Exhibits 56 and 57 in st. 1893 and 1895 had been for Rs. 399, the price would not have been more than that amount. This inference would not be justified in view of the fact that the purchaser was the next-door neighbour and was purchasing the said property in 1909. Similarly, the trial Court also considered that the age mentioned in document, Exhibit 58, of Bai Suraj as 28 was also a wrong recital to show that the widow was sufficiently aged and experienced. There is no reliable evidence as to the age of the widow as seen from the various documents on record and merely because it might have varied for a few years, no such inference could be based only on this score. Mr. Desai also relied on the attestation by Bai Jamna and Bai Jivi, the mother and the sister of the deceased husband who were immediate reversioners. Those attestations by themselves could not help the plaintiffs in view of Exhibit 72 as they were made with a view to "give a colour of legality to the transaction. The burden was on the purchaser to show how he was reasonably satisfied that the widow had no sufficient income to meet the expenses in question. Mr. Desai also argued that the name of the creditor Zaver Ishvar had been mentioned in the document itself, which would show the bona fide of the purchaser. The said Zaver Ishvar is no longer alive but no attempt was made by the plaintiffs to examine his heirs to show that the no evidence was traceable as regards the alleged loan from Zaver Ishvar. Defendant No. 1 has, therefore, failed to support the transaction by showing the legal necessity or that there was sufficient and bona fide inquiry for being satisfied as to the necessity of the expenses in the circumstances of the case. The decree against defendant No. 1 therefore, in favour of the plaintiffs must be confirmed and the appeal must be dismissed.

10. The next document, in this appeal, is Exhibit 66 dated 10th June 1914 which is a sale deed in favour of Mulji Manor the predecessor of defendants Nos. 5 and 6 for Rs. 1,192. As regards the consideration it has been recited that out of the said amount of Rs 1, 192, Rs. 981 had been received in cash to pay the debt of one Patel Gulab Karsaa of village Dora and had been paid to him and Rs. 211 had been received in cash for the maintenance. It was also stated that the debt in question had been incurred the previous year as the deceased husband had directed Bai Suraj to pay the expenses of the marriage of Bai Amba and therefore she had incurred that expenditure by taking that loan. The land covered by that sale deed was 3 Acres and 11 Gunthas. It may be noted that before this document Bai Suraj had executed two gift deeds. Exhibit 62 of Section No. 91/2 in Schedule II to her sister's daughter Bai Amba by way of Kanyadan and had executed Exhibit 68 another gift deed also on the same day

viz. 20th May 1914 in favour of the father-in-law who is defendant No. 3, totalling about 5 to 6 Acres of land out of the total estate of 22 Acres. It is difficult to believe that the widow who was so much in need of maintenance for herself would have made such large gifts Only a month before and spent so lavishly as alleged in the marriage of Bai Amba the sister's daughter of the deceased husband. The recitals did not appear to be bona fide. The plaintiff's case is that the notice Exhibit 72 had been affixed in the locality. It is true that no such reference was made in the plaint itself but the nature of the recitals by themselves leave no doubt that they were not bona fide. It is true that there is an imperative duty on the father, mother or other guardian to give a girl in marriage before she attains puberty and such duty has to be fulfilled to prevent degradation and direct spiritual benefit is conferred upon the father by such a marriage as held by the Supreme Court in *Kamla Devi v. Bachulal Gupta* A. I. R. 1957 SC. 435 at pages 440-443. This imperative obligation, however, extends to girls born in the family as pointed out by *Krishnaswamy Ayyangar J. Viraraju v. Venkataratnam* A. I. R. 1939 Mad. 98, (Supra). Mr. Desai and Mr. Vakil relied on the decision in *Bai Mangal v. Bai Rukhriini* I. L. R. 23 Bom. 291, where it was held that according to Hindu law, it was only the unmarried daughters who had a legal claim for maintenance out of their father's estate. The married daughters must seek their maintenance from the husband's family. If that provision failed and the widowed daughter returned to live with her father or brother, there was a moral and social obligation, but not a legally enforceable right by which her maintenance could be claimed as a charge on her father's estate in the hands of his heirs. Relying on the said two decisions it was argued that as Bai Jivi continued to reside with Suraj, there was a moral or a pious obligation on Bai Suraj not only to maintain Bai Jivi who was the widowed sister who had returned to live in her brother's family but also to perform the marriage of Bai Jivi's daughter Bai Amba especially as she was the only female child in the family. We have not been pointed out any text laying down any such pious obligation. We are also not prepared to believe the recitals in absence of any evidence whatsoever that the deceased had directed Bai Suraj to perform the marriage of Bai Amba and to pay the expenses thereof. If the marriage was performed a year before by taking the loan for that amount from Gulab Karsan, the purchaser would have normally insisted on the receipt of Gulab Karsan or an endorsement of Gulab Karsan on the document itself. It has been admitted by the plaintiff that in their community Mosala was given from the maternal side and these expenses would be obligatory expenses. There is nothing shown in the evidence as to the extent of expenses incurred in that connection. The purchaser is not shown to have made bona fide or sufficient inquiry to ascertain whether Bai Jivi had any means of her own to meet such expenses or whether Suraj had the necessary means or income to meet the expenses which could be reasonably incurred. Therefore, even if it had to be regarded as a pious act for which there is no textual foundation the purchaser has not shown how he was reasonably satisfied as to the necessity of the alleged expenses or as to the need of maintenance of Bai Suraj. There is nothing to show that Jivi had returned to this family as she

had no provision in her husband's family and that there was any obligation to maintain Jivi as is sought to be contended. Thus even as regards this transaction defendants No. 5 and 6 have failed to support the same and the lower Court was right in decreeing the plaintiff's claim as regards this property mentioned in Schedule V against defendants Nos. 5 and 6. This appeal of defendant Nos. 1 and 5 to 6 must, therefore, fail and is accordingly dismissed with costs.

11. As regards the appeal filed by defendants No. 2 to 4 the question is about three gift deeds. The gift Exhibit 62 relates to property in Schedule II bearing Section No. 91/2 in favour of Bai Jivi, the sister as guardian of Bai Amba who was the minor aged about 10 years. The recital in the gift is to the effect that the deceased husband had directed Bai Suraj to give the land mentioned therein as Kanyadan at the time of the marriage of the minor Amba and therefore, the said document was executed, on 20th May 1914. It may be noted that in the document Exhibit 66, which we have already referred to and which is executed only after a month in June 1914, there was a recital that the marriage had been performed a year back. If there was any direction of the husband as mentioned in the recitals in Exhibit 62, it is difficult to believe why no such gift was made at the time of the marriage and the same had been delayed. There is no evidence of any custom in the community and in fact defendant No. 3, the father-in-law of Amba, Exhibit 96, in terms admits that he did not know of any instance where land was given by the maternal-uncle of the niece as Kanyadan at the time of the marriage. There is also no evidence that both Kanyadan and Mosala would be given in the community and as to what is the reasonable extent of the Kanyadan and whether it is to be given in cash or in the form of property is also not shown in the evidence. Even if such gifts were considered to be pious gifts on the marriage occasion, there is no evidence as to what is reasonable and proper Kanyadan on such an occasion. It is very clear from the recital that it was merely a device adopted to gift away the property to the sister's daughter Amba. On the same day another disposition Exhibit 63 was made in favour of the father-in-law of defendant No. 3. The trial Court was, therefore, right in holding that there was nothing to show that the gift was bona fide made as per the custom of the community. It was, therefore, right in decreeing the plaintiff's claim in connection with the properties mentioned in Schedule II and covered by Exhibit 62.

12. The next document, Exhibit 63, is the gift deed dated 13th June 1921 in favour of Bai Jivi aged about 55 years who was the sister of the deceased husband. Bai Suraj has stated, her age as 30 years in the said document. The gift is of Section No. 315/5 admeasuring 1 Acre and 20 gunthas valued at about Rs. 400. The consideration for the gift has been stated to be that as Jivi was properly looking after Bai Suraj and as she had trust in her that she would in future also look after her during her life time and as the deceased "husband had directed her to give the land for expenses of clothing (Kapada-Choli), the said gift had been executed. After the said document Exhibit 64 dated 28th March 1940, the donee had gifted away the same to her son defendant No. 4. Plaintiff No. 2 Chhaganal Exhibit 73, has signed the document endorsing that Jivi had put

her thumb mark in his presence. Mr. Vakil argued that these gifts by way of maintenance to a sister in discharge of a pious obligation of such a reasonable portion out of the entire estate was justified. As per the legal position, we have already analysed, even if a gift was for a pious purpose only of a reasonable or small portion, the purchaser must show that the widow had not got sufficient income to meet those expenses. There is nothing in evidence to show that Jivi had to fall back on her brother's family. As against the plaintiff's word that Jivi had independent income of her own, no evidence whatsoever has been led to show that Jivi had no provision in her husband's family or had no income or property of her own. The decision in *Bai Mongol v. Bai Rukhmini* I. L. R. 23 Bom. 291, which has been already referred to would not, therefore, help Mr. Vakil to show that there was a pious obligation to maintain Jivi. In fact in the consideration itself it is recited that the gift was made as Jivi was looking after Suraj and not because of any duty or any desire to discharge any pious obligation. The recital about the husband's direction is clearly not a bona fide recital. If the husband had given any such direction the widow would not have taken so many years to fulfil the same. This gift was also, therefore, clearly a device to gift away the property mentioned therein to Bai Jivi, defeating the rights of the reversioners. Merely because the reversioner put his signature indicating that the thumb was put in his presence, he would not be precluded from challenging the transaction especially when the endorsement was on the subsequent deed, Exhibit 64, and not on the original deed of gift, Exhibit 63. In any case, nothing is shown as to what would be the expenses of clothing and whether Bai Jivi or Bai Amba had sufficient income to meet those expenses. The recitals being not bona fide the trial Court was right in holding that this gift could not be supported and was not binding on the reversioners and in decreeing the plaintiffs' claim. This appeal by defendants Nos. 2 and 4 in connection with properties in Schedule II and IV must, therefore, fail.

12.1 The last document which remains for consideration is the gift deed, Exhibit 65 in respect of the property in Schedule III dated 20th May 1914 admeasuring 3 Acres and 7 Gunthas in favour of defendant No. 3, who was the father-in-law of Bai Amba. As per the recitals of the said gift-deed; it had been made for the purpose of giving Choryasi dinner to the Brahmins of the village Dora on the next day after Jan-mashtami i.e. Parna Day as per the practice which had been started by her deceased husband. It was stated that it was because of the desire of her husband to continue the same every year that the said land had been gifted for the purpose of giving Choryasi dinner. It was further provided that whatever surplus remained after utilising the income for the Parna Day Choryasi dinner every year should be given in charity in Ranchhodji's temple in the village Dora. The donee was prohibited from mortgaging, selling or gifting away the said land and he was merely to manage the same for the purpose of the said charity and it was provided that if he could not manage, he was to make arrangements for another manager being appointed. This is clearly a charitable disposition in favour of defendant No. 3 for securing a permanent benefit for the deceased

husband's soul by securing perpetual performance of the ceremony of Janmashtami Parna Day Choryasi by feeding the Brahmins of the village Dora and even the surplus was to be utilised by defendant No. 3 for Ranchhodji's temple in the said village. The said disposition being of a small portion was clearly covered by the decision of the Privy Council in Sardar Singh's case (supra). It is true that the defendant No. 3 was only a manager for the said charitable trust, but in the present case we are not to decide as to what are the rights of the defendant as against the Charity Commissioner, if any. What we have to decide is whether this disposition by the widow for the pious purpose of a reasonable portion for securing a permanent benefit to the deceased's soul could be challenged by the plaintiffs reversioners. The lower Court was, therefore, clearly wrong in holding that this disposition could be revoked or could be challenged by the plaintiffs. We, therefore, allow this appeal only partially in so far as the property in Schedule III is concerned and we set aside the decree of the trial Court and dismiss the plaintiff's suit so far as defendant No. 3 is concerned in respect of his property mentioned in Schedule III.

13. In the result the plaintiffs' appeal No. 483/1960 is dismissed with costs. F. A. No. 484/1960 filed by defendants Nos. 1, 5, and 6 is also dismissed with costs. F. A. No 485/1960 filed by defendants Nos. 2 to 4 is dismissed with costs only so far as the appeal of defendants Nos. 2 and 4 is concerned in respect of the properties mentioned in Schedule II and IV, while the appeal of defendant No. 3 in respect of property in Schedule III is allowed and the plaintiffs' suit in that connection is dismissed with costs. The decree of the trial Court is modified to this extent. The plaintiffs to pay the costs of defendant No. 3 on the valuation of Rs. 1648 all throughout.