
(1963) 02 PAT CK 0012
In the Patna High Court
Case No : A.F.O.D. No. 484 of 1958

Nathuni Missir

APPELLANT

Vs

Mosammat Ratna Kuer and Others

RESPONDENT

Date of Decision : 21-02-1963

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 7
Hindu Succession Act, 1956 — Section 14, 8
Limitation Act, 1908 — Article 141, 144
Specific Relief Act, 1877 — Section 42

Citation : AIR 1963 Patna 337

Hon'ble Judges : Tarkeshwar Nath, J; H. Mahapatra, J

Bench : Division Bench

Advocate : K.B.N. Singh, Janaradan Singh, Yadunath Sharan Singh and Upendra Prasad Varma, for the Appellant; Lal Narain Sinha and L.M. Sharma, for the Respondent

Final Decision : Allowed

Judgement

Tarkeshwar Nath, J.—This appeal was preferred by Pandit Suraj Missir and Pandit Nathuni Missir (Plaintiffs 1 and 2), but, during the pendency of this appeal, Pandit Suraj Missir died and now his sole heir Pandit Nathuni Missir is the only appellant in this appeal. They instituted a suit for a declaration that the deed of surrender dated 12-12-1946 executed by Mosammat Ratna Kuer (defendant 1) in favour of Mosmt. Deorani Kuer and Ramji Pandey (defendants 2 and 3) was illegal, invalid, inoperative and not binding upon them. According to the genealogical table, which was a part of the plaint, Ganesh Missir had three sons, viz., Bagar Missir, Harbans Missir and Gokhul Missir. Bagar Missir died issueless in a state of jointness with his two brothers. Harbans Missir had two sons Tilak Missir and Dwarika Missir. Tilak Missir naa one son Ramdeni Missir, who died issueless. Dwarika Missir had three sons, viz., Sheodeni Missir, Raghu Missir and Ramchij Missir alias Ram Charitar Missir. Gokhul Missir naa two sons, Rambhaju Missir, and Raghunandan Missir. Ram-bhaju Missir had two sons, Suruj Missir

(Plaintiff 1) and Sheonandan Missir. Sheonandan Missir left one son Hirdeya-nand Missir, who died issueless. Raghunandan Missir left two sons, Nathuni Missir (Plaintiff 2) and Ram Kripal Missir.

Sheodeni Missir died long ago leaving behind no issue before survey operations while he was joint with Raghu, Missir and Ramchij Missir. Ramchij Missir died in 1922 leaving a widow Mosmt. Shirajo Kuer (defendant 4) and two daughters, viz., Deorani Kuer (defendant 2) and Shureshra Kuer. After the death of Ramchij Missir, Raghu Missir came in possession of all the properties belonging to that family and he died issueless in 1926 leaving behind his widow Ratna Kuer (defendant 1). The said widow came in possession of the properties as a limited owner. Plaintiffs case further was that Ratna Kuer went out of her house in 1941 for Ganges bath, but she did not come back. She could not be traced out and there was a rumour that she was drowned in the river. After her disappearance, plaintiff came in possession of the properties as legal heirs of Raghu Missir and Ratna Kuer, but they put Shirajo Kuer (defendant 4) in possession of the properties in lieu of maintenance which she was entitled to get from the estate of Raghu Missir. Defendant 4 executed a deed of usufructuary mortgage for Rs. 1,400/- on 21-7-1942 in the name of Tribhuwan Sharma and when the plaintiffs learned of that transaction they took back possession of the properties. Plaintiffs instituted a title suit No. 153 of 1944 in the Court of the Munsif, third Court, at Arrah, against defendant 4 and Tribhuwan Sharma for possession of the mortgaged land. The suit was transferred to the first Court of the Munsif and he dismissed the suit on 22-1-1948 holding that Ramchij Missir died later than Raghu Missir. Title Appeal No. 128 of 1948 against that decree was dismissed on 15-12-1948 and a Second Appeal No. 265 of 1949 also arising out of the said suit was unsuccessful on 7-1-1953, subject to the modification that the question as to whether Raghu Missir had died earlier than Ramchij Missir was left open for future adjudication.

Ratna Kuer (defendant 1) having conspired with defendant 4 executed a deed of surrender on 12-12-1946 in favour of defendants 2 and 3 during the pendency of the said suit, but the plaintiffs learnt of it later. Ratna Kuer described defendant 2 as her daughter and defendant 3 as her daughter's son in that deed, but in fact it was not so. Raghu Missir was married only once and Ratna Kuer was his widow.

Defendant 2 was the daughter of Ramchij Missir and she was married in village Bagipakhar with Nityanand Unoubey and she had no issue. Ramji Pandey (defendant 3) was the son of Jagarnath Pandey of village Pandeypur. Defendant 4 had another daughter Sureshra Kuer and she was married to Rampujan Pandey, brother of Jagarnath Pandey. Plaintiffs alleged that Raghu Missir being the last male-holder, the widow and the daughters of Ram Charilar Missir had no title to the properties in question and the deed of surrender by Ratna Kuer in favour of defendants 2 and 3 was illegal, invalid and inoperative. Defendants 2 and 3 never came in possession of the properties mentioned in the said deed and, on the other hand, the plaintiffs as heirs of Raghu Missir came in possession

of all the properties of Raghu Missir after the disappearance of Ratna Kuer. They further averred that they had acquired title to those properties on account of their adverse possession. On these allegations, they filed the plaint first on 4-8-1954 in the Court of Munsif, but it was returned to be presented before a competent Court and then it was filed in the trial Court on 6-3-1956.

2. Defendant 1 supported the case of the plaintiffs alleging that they were the legal heirs of Raghu Missir who was the last male-holder. Her case was that she left the house long ago and then the plaintiffs took possession of the properties. Defendant 2 was the daughter of Kamchij Missir and Shirajo Kuer. Defendants 2 and 3 were not the heirs of Raghu Missir and she did not execute any deed of surrender in their favour. Rampujan Pandey, son-in-law of defendant 4, asked her to execute a general power of attorney in his favour in order to enable him to look after the property and giving her that impression, he got a deed executed by her which later on transpired to be a deed of surrender in place of a power of attorney. It appears that while the suit was pending, she filed a petition of compromise as well admitting the case of the plaintiffs, but defendants 2 to 4 objected to the recording of the compromise on the ground that it was fraudulent and the petition of compromise was forged.

3. Defendant 4 filed a separate written statement and her case was that the genealogy, set up by the plaintiffs was incorrect, inasmuch as Gokhul Missir and Bagar Missir were not the sons of Ganesh Missir. According to her, Gokhul Missir was the son of Nidhi Missir and that being so, the plaintiffs had neither any concern with the family of Harbans Missir, nor could they be the heirs of Raghu Missir. She alleged that Ramchij Missir was the last male-holder and, as such, he came in possession of all the joint family properties. After his death, she came in possession of these properties as a "Hindu widow". Defendant 2 was not her daughter and, on the other hand, she was the daughter of Raghu Missir by his first wife Mosmt. Sumaro Kuer. Defendant 2 was married to Jagarnath Pandey of Pandeypur and defendant 3 was her son. Defendant 1 did not go out of her house on the pretext of taking bath in the Ganges, but she had left the village and was residing in the town of Arrah. Defendant 1 ceased to have any concern with those properties and defendant 4 was in possession of those properties in her own rights and not in lieu of maintenance as alleged by the plaintiffs. She executed the usufructuary mortgage bond for legal necessities and Title Suit No. 153 of 1944 was rightly dismissed throughout. She alleged that she was not in collusion with defendant 1 and, on the other hand, defendant 2 had prevailed upon defendant 1 to execute a deed in her favour and that of her son (defendant 3) in order to deprive her (defendant 4) of the properties. She claimed title on account of adverse possession as well in respect of all the properties and took the plea that the suit for a mere declaration was not maintainable. She filed an additional written statement denying the plaintiffs' possession even for a single day.

4. There was another written statement by defendants 2 and 3 and, according to

them as well, Nidhi Missir was the father of Gokhul Missir and that being so, the plaintiffs had no concern with the family of Harbans Missir and were not the agnates of Raghu Missir. Their case was that Raghu Missir was married twice and the name of his first wife was Sumaro Kuer, who gave birth to a daughter (defendant 2) and the latter has a son (defendant 3). After the death of Raghu Missir, who was the last male-holder, defendant 1 came in possession of the properties and she validly executed the deed of surrender dated 12-12-1946. They came in possession of the properties from the date of the surrender. Defendant 2 had a daughter Sureshra Kuer, who was married to Rampujan Pandey of Pandeypur. The name of the husband of defendant 2 was Jagarnath Pandey of village Pandeypur and not Nityanand Choubey of village Baghipakar. Defendant 4 had no right to the properties as against the claim of defendant 1, but she (defendant 4) having looked after the properties her name was entered in the various papers. They also filed an additional written statement denying the plaintiffs' possession.

5. The Additional Subordinate Judge held that Ramchij Missir died before Raghu Missir, the plaintiffs were the agnates of Ramchij Missir and Raghu Missir, but defendants 2 and 3 were the daughter and daughter's son respectively of Raghu Missir and, as such, the plaintiffs' suit was not maintainable. He further found that the plaintiffs had not acquired any title by adverse possession and, on the other hand, defendant 4 had acquired title on account of adverse possession. The suit, according to him, was barred by the provisions of Section 42 of the Specific Relief Act and u/s 14 of the Hindu Succession Act, 1956. He refused to record the compromise arrived at between the plaintiffs and defendant 1 and held that the deed of surrender was validly executed by defendant 1. On these findings, he dismissed the suit with costs, and, being aggrieved by this decree, the plaintiffs preferred this appeal.

6. Learned Counsel for the appellant contended, at the outset, that the finding of the trial Court with regard to the parentage of defendant 2 was vitiated and not supported by the evidence on record. He submitted that defendant 2 was the daughter of Ramchij Missir and thus the plaintiffs were the nearest reversioners of Raghu Missir and they had a right to seek the declaration asked for in the present suit. The first question for consideration, therefore, is as to whether defendant 2 is the daughter of Raghu Missir or Ramchij Missir. Parties to the suit have relied only on the oral evidence for the determination of this issue and any extract from any birth register indicating the parentage of defendant 2 has not been filed by either party. (Then after discussing evidence on the points (paras 6 to 7) His Lordship proceeded:) On a review of the evidence, I am in agreement with the view taken by the trial Judge that Deorani Kuer (defendant 2) is the Daughter of Raghu Missir from his first wife Sumrao Kuer. The evidence further indicates that Ramji Pandey (Defendant 3) is the son of defendant 2.

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8. Learned counsel for the appellant urged that even if the case of the contesting

defendants that defendants 2 and 3 were the daughter and daughter's son respectively of Raghu Missir was correct, the suit of the plaintiffs for a declaration about the invalidity of the deed of surrender was maintainable, inasmuch as the nearest reversioners or Raghu Missir had, by their own conduct, precluded themselves from instituting a suit for challenging the validity of the deed of surrender. He contended that even accepting the finding of the learned Subordinate Judge in this respect, the plaintiffs, although remote reversioners, had a cause of action for the present suit and they were entitled to the relief sought for. He urged that the view taken by the trial Judge based on the decision in the case of Ram Ayodhya Missir and Others Vs. Raghunath Missir and Others, with regard to the effect of Sections 14 and 15 of the Hindu Succession Act, 1956, was not correct in view of the Full Bench decision of this Court in the case of Harak Singh Vs. Kailash Singh and Another, . In the suit, which came before the Full Bench, the plaintiffs had asked for a declaration that the deed of gift dated 30-3-1949, executed by defendant No. 2, Musammam Deosunder Kuer, widow of Rambarat Singh, in favour of defendant No. 1, Kailash Singh, was not valid beyond the lifetime of the widow and was not binding upon the plaintiffs (of that suit), who were the next reversioners. The plaintiffs there had claimed to be the next reversioners to the estate of Rambarat Singh and alleged that defendant No. 1, in whose favour the gift was made, was the sister's son of Deosunder Kuer.

That suit was contested by defendant 1 on the ground that the plaintiffs were not the next reversioners and that he himself was the next reversioner being the sister's son of Rambarat Singh. The Subordinate Judge had dismissed that suit on the ground that defendant 1 was the sister's son of Rambarat Singh and the plaintiffs were not the next reversioners to the estate of Rambarat Singh. When that case came before the Division Bench, it was contended on behalf of the plaintiffs that in cases where the next reversioner was unwilling or suffered from some disability to institute a suit, the reversioner who came next was entitled to bring a suit for possession. That contention, was accepted and it was held that defendant 1, though the next reversioner, could not bring a suit for setting aside the alienation in his own favour and, as such, the reversioners who came next were entitled to institute that suit. The question, which came before the Full Bench for consideration, was:

"Whether the right of an heir of the last male holder to repudiate an absolute alienation of property by way of sale or gift made by a female Hindu without legal necessity before the coming into force of the Hindu Succession Act of 1956 (Act XXX of 1956) and his claim of possession thereof from the transferee on the death of the female Hindu or on the extinction of the woman's estate otherwise, has been adversely affected and taken away by Section 14 of Act XXX of 1956?"

Their Lordships held that the view of law expressed in the decision of the Division Bench in the case of Ram Ayodhya Missir and Others Vs. Raghunath Missir and Others, was not correct and the right of the plaintiff to repudiate the alienation of

the property by way of absolute gift made by defendant 2 unsupported by legal necessity was not adversely affected by Section 14 of Act XXX of 1956, and the claim for possession of the plaintiff from the transferee after the death of defendant 2, or on the extinction of the widow's estate otherwise, would not also be affected or taken away by Section 14 of the said Act. It is open to a reversioner to wait till the death of a Hindu widow to challenge her acts, for instance, any adoption or any alienation made by her, and it is equally open to him to pursue his remedies against her acts even during her lifetime. During the lifetime of a Hindu widow, the reversionary right is a mere possibility or spes successionis. It is difficult to predicate as to who would be the nearest reversioner at the time of her death. The general rule no doubt is that such suits must be brought by the presumptive reversioner, that is, the person who would succeed if the widow were to die at that moment, but there are certain exceptions to this general rule. Such a suit can be instituted by a distant reversioner if the nearest reversioners are in collusion with the widow, or have precluded themselves from suing. If the nearest reversioner refuses to institute a suit without sufficient grounds, or he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumptive reversioner is entitled to sue.

This was the view taken in the case of *Rani Anund Kunwar v. Court of Wards*, 8 Ind App 14. It was further observed, in that case, that in such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claimed to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner was entitled to sue, and would probably require the nearer reversioner to be made a party to the suit. The principles laid down in this decision have been followed subsequently in various cases and I would refer to the case of *Ambika Prasad Vs. Chandramani Kuer*, . In that case, the plaintiffs had claimed as reversioners to the estate of one Sital Prasad that certain sale deeds executed by Mostt. Chandramani Kuer (defendant 1), daughter of Sital Prasad, were not binding on them. Defendants had alleged, in that suit, that Chandramani Kuer and her husband had adopted one Basdeo as a son to them. The Subordinate Judge had held that Basdeo was the next reversionary heir of Sital Prasad. A question arose as to whether the plaintiffs had a right to maintain that suit in view of that finding. It was urged on behalf of the respondent in the appeal before the High Court that the plaintiffs had wholly ignored Basdeo as the adopted son of Chandramani Kuer and her husband; and that being so, it would not be right to investigate the plaintiffs' case on the footing that Basdeo was in collusion with the widow or had precluded himself from interfering, in that case, Basdeo himself was a party to certain transactions entered into by the limited owner.

On reading of the plaint of that suit, it was pointed out that it was true that the plaintiffs had not admitted in their plaint that Basdeo was the adopted son of Chandramani Kuer and her husband, but Basdeo was cited as a defendant and the facts stated in the plaint made it quite clear that Basdeo (defendant 6) was

in collusion with Chandramani Kuer (defendant 1) and her husband and thus, he (Basdeo) had precluded himself from interfering (to adopt the words of the Judicial Committee in Rani Anund Kunwar's case, 8 Ind App 14). It further appeared, in that case, that Basdeo had, by a subsequent document, ratified the transactions entered into by the limited owner, in these circumstances, their Lordships held that Basdeo had precluded himself from suing and that being the position, the plaintiffs were clearly entitled to maintain that suit. The other decision of this Court on this point is in the case of Sheodutta Kedia and Another Vs. Akali Bhumijani and Others, . Learned counsel for the appellant referred to the case of Tulsi Ahir and Others Vs. Mt. Sonia and Another, . The plaintiffs' case there was that Mangra, father of defendant 1, died in 1938 in a state of jointness with them and, after the death of Mangra, his share devolved on them by survivorship. Mostt. Sonia (defendant 1), who was the daughter of Mangra, did not inherit her father's share and a sale deed (exhibit A) dated 2-2-1954, executed by her, in favour of defendant 2 was not binding on those plaintiffs, as it was fraudulent, without consideration and legal necessity.

Defence, in that action, was that the land in suit was exclusive property of the father of defendant 1 and, on his death, his widow came in possession of that property and later on his daughter succeeded to her father's property as his sole heir. The sale deed executed by her (defendant 1) in favour of defendant 2, was valid and for consideration. The trial Court held that the sale deed was for consideration, but not for legal necessity and Mangra was separate and the genealogy given by the plaintiffs was not correct. On these findings, it dismissed the plaintiffs' suit. On appeal, the lower appellate Court found that Mangra was a member of the plaintiffs' family, but, at the time of his death, he was separate from the plaintiffs. It affirmed the trial Court's finding that the sale deed was without legal necessity, but it dismissed the suit because the form of the suit was defective and, by the time the appeal came to be decided by it, Hindu Succession Act, 1956, had come into force conferring u/s 14 of it an absolute right upon a Hindu widow.

The plaintiffs thus preferred an appeal before the High Court. It was contended on behalf of the appellants that, in view of the finding of the lower appellate Court, that the sale deed in question was not for legal necessity, the plaintiffs were entitled to the relief sought for in the suit, inasmuch as even if Mangra was separate at the time of his death in 1938, the plaintiffs were his immediate next reversioners. Respondents contested the appeal, on the ground, that the plaintiffs did not claim the lands in suit as next reversioners of Mangra, but they claimed it by survivorship and, therefore, in absence of any alternative relief, as reversioners they were not entitled to a decree. Reliance was placed on the decision in the case of Srinivas Ram Kumar Vs. Mahabir Prasad and Others, . It was held that, although the plaintiffs did not set up a case, in so many words, that, in the event of Mangra having been found to have died in a state of separation from the plaintiffs they would be entitled, as reversioners, to seek for the same relief, yet this inference was irresistible on the finding of the lower

appellate Court itself, namely that Mangra having died in a state of separation the plaintiffs alone would be the next male reversioners.

In view of these decisions, learned counsel for the appellant submitted that, although the plaintiffs had not stated, in so many words, in their plaint "that defendants" 2 and 3 were the daughter and daughter's son of Raghu Missir and the next reversioners to the estate of Raghu Missir, yet they were entitled to get the declaration sought for, inasmuch as defendants 2 and 3, on the facts and circumstances of the present case, had precluded themselves or were under a disability from suing.

9. These propositions of law are well settled, but Mr. Lalnarain Sinha for defendant 4 submitted that the plaintiffs in the present case were not entitled to urge the reversioners to the estate of Raghu Missir. His contention was that the plaintiffs did not sue in a representative capacity on behalf of all the reversioners, and, in fact, the suit was for vindication of a private and personal right. He placed before us certain paragraphs of the plaint and laid great stress on the statements in paragraphs 5 and 9 of the plaint. Plaintiffs' case in paragraph 5 was that, after the disappearance of Mostt. Ratna Kuer, the plaintiffs as legal heirs of Raghu Missir and Ratna Kuer entered into possession of the entire properties. But advisedly they put into possession Sheorajo Kuer, widow of Ramchij Missir in lieu of maintenance. They stated in paragraph 9 that Ratna Kuer had no right to surrender the estate in favour of defendants 2 and 3 and the deed of surrender was quite illegal, invalid and inoperative against the plaintiffs. Another statement was that "defendant Nos. 2 and 3 neither were nor are in possession and occupation of any property mentioned in the said deed of surrender, rather the plaintiffs, as heirs of Raghu Missir after the disappearance of Musammat Ratna Kuer, have been in possession and occupation of the entire properties of Raghu Missir."

They further stated that, besides other title, the plaintiffs had acquired one more title by virtue of adverse possession. In view of these averments, learned counsel urged that the plaintiffs were claiming their title and possession and also adverse possession which was not consistent with the case of reversioners. In other words, while defendant 1 was still alive, reversioners could not come in possession of the property and the plaintiffs having laid their claim on that footing, the suit by them was not as reversioners but as persons having an independent title to the properties in suit. A decision given in a suit instituted by a reversioner that an alienation is invalid enures for the benefit of all the reversioners and the right of a reversioner to institute a suit is based on the principle that there is a common apprehended injury to the interest of all the reversioners. Learned counsel's main objection was that the present suit was not by a reversioner at all and the plaintiffs could succeed or fail on their individual rights claimed in the plaint. I am constrained to say that the plaint has to be read as a whole. In paragraph 1 of the plaint, the plaintiffs stated that the relationship existing between them and Raghu Missir would be apparent from the

genealogical table which formed part of the plaint. In paragraph 2, they gave the details of the genealogical table and, in paragraph 3, they stated that Raghu died issueless in 1926 leaving behind his widow Ratna Kuer (defendant 1), who entered into possession and occupation of the properties as a Hindu widow. In paragraph 4, they stated about the disappearance of defendant 1 in 1941 and, in paragraph 5, their case was that, after her disappearance they as "legal heirs" of Raghu Missir and Ratna Kuer came in possession of the entire property.

I have underlined the words "legal heirs" (here into " ") and the words in Hindi are "bahaisiat waris jaez wo qanooni". In paragraph 9 also, they averred that Raghu died leaving behind him the plaintiffs as his legal heirs and their case was that, after the disappearance of Ratna Kuer they came in possession as heirs of Raghu Missir. If they had not given the genealogical table and disclosed their relationship with Raghu Missir, the matter might have stood on a different footing, but they have, at more than, one place, claimed that they were the legal heirs of Raghu Missir and, in that capacity, they asserted to have come in possession, after the disappearance of defendant 1. It is true that they set up an alternative case on the basis of their adverse possession, but that has been found to be incorrect by the Court below and that finding has not been assailed in this appeal by learned counsel for the appellant. That alternative case, however, will not mean that the suit by them was not as reversioners or Raghu Missir. I thus do not find any merit in the objection raised by Mr. Lal Narain Sinha to the frame of the suit and I am of the opinion that the suit was by the plaintiffs as reversioners of Raghu Missir.

10. Another question which arises in this appeal is, as to whether the plaintiffs being the remote reversioners they were entitled to institute the present suit for a declaration with regard to the invalidity of the deed of surrender. Where the nearest reversioner is the female and is entitled to a limited interest only, the reversioner next to her is competent to sue. It was observed in the case of *Ramyad Pande v. Rambihara Pande* 4 Pat U 734 : (AIR 1920 Pat 514) that there was a consensus of opinion in the different High Courts that a reversioner who was not the immediate reversioner but who was the immediate male reversioner was entitled to sue for a declaration declaring the invalidity of transfers made by the widow notwithstanding that there might be other female lives between him and the estate. In that appeal, the only lives between the plaintiff and the estate of the last male holder were the lives of the widow and her two daughters and each of those ladies took only a life estate. In those circumstances, it was held that the suit of the plaintiff, who was not the immediate reversioner but the immediate male reversioner, was maintainable. This decision of the Division Bench was also referred to in the case of *Tulsi Ahir and Others Vs. Mt. Sonia and Another*. Besides this, in the present case, the deed of surrender was in favour of defendants 2 and 3 (daughter and daughter's son of Raghu Missir) and, as such, those defendants could not institute a suit for declaring the invalidity of that deed which was in their own favour. They suffered a disability in the institution of the suit and a case of this kind is covered by the principles laid

down in the leading case of 8 Ind App 14. I am thus of the view that the plaintiffs' suit for the declaration sought for is maintainable.

11. The next question for consideration is, as to whether the deed of surrender in favour of defendants 2 and 3 was valid. Learned counsel for the appellant submitted that this deed was invalid for the simple reason that it was in favour of defendant 3 as well, who was not the nearest reversioner of Raghu Missir. It is settled that a Hindu widow can renounce the estate in favour of the nearest reversioner and by a surrender she brings her own civil death and there is a complete effacement of her title, but the surrender, in order to be valid, has to be in favour of the nearest reversioner. In the present case, it was in favour of defendant 3 also. The question is whether the deed was valid? Learned counsel referred to the decision in the case of Musammat Phool Kuer Vs. Musammat Pem Kuer and Another, . It appears from the facts of that case that one Mostt. Mohan Kuer had relinquished her estate in favour of Shah Jwala Prasad and Shah Madho Lal in equal moieties. Madho Lal admittedly was not the next reversioner entitled to succeed to the estate. A question arose, as to whether the surrender, in that case, was valid.

Their Lordships observed as follows:

"The principle underlying the doctrine of surrender is that it cannot possibly be made in favour of anybody except the next heir of the husband, vesting of the estate in the next reversioner takes place under operation of law and it is not possible for the widow to say that she is withdrawing herself from the husband's estate in order that it may vest in somebody other than the next heir of the husband. Madho Lal admittedly was not the next reversioner entitled to succeed to the estate. Thus the surrender of the totality of the interest of the widow was not made in favour, of the next heir. That being so, it cannot operate as a valid surrender."

In other words, in case the surrender is in favour of the next heir and a remote reversioner, the result is that it is not valid and the relinquishment has not the effect of extinguishing the title of the widow in the estate. This decision is on all fours and the situation, in the present suit, is exactly the same. Defendant 3 not being the nearest reversioner, defendant 1 could not execute the deed in his favour as well and, for this reason, it must be held that the deed of surrender (exhibit C) is invalid, illegal and not binding on the reversioners.

12. Mr. Lalnarain Sinha submitted that the trial Judge had found the possession of defendant 4 to be adverse -and the evidence in support of that finding, was overwhelming. He referred to the evidence of plaintiff "I (P. W. 10) himself and pointed out that the case made out by him that he was in possession of the disputed land from the time defendant 1 had disappeared (namely 15 years ago) was entirely false in view of the various statements made by that witness in his cross-examination, plaintiff 2 admitted that defendant 4 executed two usufructuary mortgage bonds in 1942, but there was another one exhibit B/5 in

1944 as well. His evidence further indicates that his name was not entered in the landlord's office and, on the other hand, defendant 4 was mutated in that office and she paid rent. Learned counsel for the appellant pointed out that the rent receipt (exhibit E/lb) indicating payment of rent on 24-6-1952 was in the name of both Ratna Kuer and Shirajo Kuer (defendants 1 and 4) and, as such, the trial Judge was not right in holding that defendant 4 was in adverse possession of the lands in question. Mr. Lalnarain Sinha referred to *Sham Koer v. Dan Koer* 29 Ind App 132 where it was held that a possession as of right by the widow and daughter-in-law of a member of an undivided Mitakshara family of a portion of the undivided estate for twelve years barred the heirs of the deceased unless they could show that the possession was permissive. In the present case, no issue was framed, as to whether defendant 4 was in adverse possession of the disputed lands. The limited owner (defendant 1, widow of Raghu Missir) is still alive and during her lifetime the question of possession is immaterial, inasmuch as the reversioners cannot claim possession so long as the widow is alive. The suit itself was for a mere declaration and not for possession. It is open to the reversioners to institute a suit for possession within 12 years on the death of defendant 1 under Article 141 of the Indian Limitation Act. The reversioner's right to recover possession would not be affected by the fact that the widow was out of possession for more than 12 years. The adverse possession of defendant 4, even if any, would be against the limited owner, that is, defendant 1 in the present case. I am thus of the view that the question of possession was not at all material, on the facts and circumstances of the present case, and it is not necessary to be gone into in the present appeal.

13. The trial Judge further took the view that the suit for mere declaration was not maintainable and it was barred u/s 42 of the Specific Relief Act. Learned counsel for defendant 4 urged, in support of this finding, that the plaintiffs having claimed an independent title to the lands in suit they ought to have prayed for recovery of possession as well, and that not having been done so, the suit was barred u/s 42 of the Specific Relief Act. In view of my finding that the suit by the Plaintiffs was as reversioners, they could not seek for recovery of possession during the lifetime of defendant 1 and, as such, the provision of Section 42 of the Specific Relief Act cannot stand in their way. So long as defendant 1 was alive, only declaration could be sought for and that has been done by the plaintiffs.

14. Mr. Lalnarain Sinha finally submitted that Sureshra Kuer, who was admittedly daughter of defendant 4, was alive and she was the legal heir of Raghu Missir, who could challenge the validity of the deed of surrender, in the event of there being no challenge by defendants 2. and 3. He urged that Sureshra Kuer was the brother's daughter of Raghu Missir and she was an heir mentioned in item No. IV of class II of the Schedule to Section 8 of the Hindu Succession Act, 1956. Thus, according to him, the plaintiffs, who were the agnates of Raghu Missir, had no right of suit. His contention was that, although Raghu Missir had died before 17th June, 1956, yet his property would devolve according to the provisions of

Chapter II of the Hindu Succession Act (Act XXX of 1956). Section a provides that the property of a male Hindu dying intestate shall devolve according to the provisions of Chapter II. There are four Clauses (a) to (d) in that section and Clause (a) provides that the property shall devolve firstly, upon the heirs, being the relatives specified in class I of the Schedule; and Clause (b) provides that the property shall devolve secondly, if there is no heir of class 1, then upon the heirs, being the relatives specified in class II of the "Schedule. The opening words of the section, viz., "the property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter" indicate that the rules contained in Chapter II will apply and regulate the succession to the property of a male Hindu dying intestate after the commencement of this Act. In those cases, the rules of succession, according to the Hindu Law before this Act governing the deceased would no longer be applicable. This provision is prospective and not retrospective.

In the present case, Raghu died, according to the plaintiffs, in 1926 and, in any event, he died admittedly before 17th June, 1956. After his death, his widow (defendant 1) is a limited owner. The question for consideration is as to who would be the heir of Raghu Missir and on whom his properties shall devolve. The provisions of Section 8 came to be considered by my learned brother Mahapatra J. in *Renuka Bala Chatterji Vs. Aswini Kumar Gupta and Others*, and it was observed that the provisions of Section 8 were not retrospective and that section would not apply to all cases of intestacy of a Hindu male without having any reference to the time of death of such a male Hindu, and the property of such a deceased male Hindu would not devolve on his heirs mentioned in the Schedule of the Hindu Succession Act, 1956. I would refer to the following observation made in that case:

"If the death of a full owner occurs after the 17th June, 1956, there is no doubt that the inheritance will be governed by the Act, and there will be no room for intervention by any limited heir. The difference in succession arises only in cases where the death occurred prior to the 17th June, 1956, and the first devolution of the estate took place at that time according to the old Hindu law. If that devolved upon a limited owner, on whose death, the property would devolve once again on the next heir of that full owner according to the old Hindu Law."

My learned brother took pains to examine the facts of the case of *Harak Singh Vs. Kailash Singh and Another*, and pointed out that the plaintiffs, in that case, had asked for a declaration that a deed of gift of the year 1949 executed by defendant 2, widow of one Rambarat Singh, in favour of defendant 1, was not valid beyond the lifetime of the widow and was not binding on the plaintiffs who were the next reversioners to the estate of Rambarat Singh. Defendant 1, in that case, was the sister's son of Rambarat and the plaintiffs were the sons of the separate brother of the father of Rambarat. Defendant 1 contested the suit, on the ground that the plaintiffs were not the next reversioners and he himself being the sister's son of the last full owner was the next reversioner. The trial Court had dismissed that suit holding that defendant 1 was the preferential

reversionary heir. On appeal by the plaintiffs, the defendants contended that, after the passing of the Hindu Succession Act, 1956, the limited estate of the Hindu widow had become absolute according to Section 14 of that Act even in the hands of the alienee and, as such, the plaintiffs were not entitled to get a declaration that the said deed of gift by the widow was not valid beyond her lifetime.

I have already referred to the question which was referred to the full Bench in that case, and it is not necessary to repeat that. My learned brother pointed out, while dealing with that Full Bench decision, that the heirs of the last male holder, who had brought that suit, (which was before the Full Bench) were the heirs according to the old Hindu Law and not according to the Hindu succession Act. It was further noticed that the death of the last full owner had occurred before 1956 and the limited owner, his widow, was still alive when the suit was instituted and the succession to the estate of the last full owner was to open on her death, that is, after 1956. It was held by their Lordships in the case before Full Bench that the right of the plaintiffs in that case to repudiate the alienation of the property by the widow for no legal necessity was not affected by the Act, and the claim for possession of the plaintiffs from the transferee, after the death of the widow or on the extinction of the widow's estate otherwise, was also not affected or taken away by Section 14.

My learned brother quoted a passage from the judgment of my Lord the Chief Justice in the case before the Full Bench and I would reproduce it at this place;

"It is also established that such an alienation by the widow can be avoided only at the instance of a co-widow, or at the instance of reversioners, or at the instance of those who are entitled to the property by escheat. Such an alienation will be legally valid as against third parties, and the transaction cannot be challenged by such third parties on the ground of legal necessity.....

In other words, the transaction by a Hindu widow which is unsupported by legal necessity is not void but is voidable at the instance of a certain class of persons, namely, those who are entitled to the property by survivorship, or in inheritance, or escheat."

It was definitely held by their Lordships in the Full Bench decision that the reversioners, according to the old law, were entitled to challenge the alienation made by the widow in that case. In other words, succession which would open on the death of a limited owner to the estate of the last full owner, who died before the 17th June, 1956, would be governed by the old law of succession, in spite of the provisions of the Hindu Succession Act XXX of 1956.

15. Mr. Lalnarain Sinha submitted that the real question in the case of Renuka Bala Chatterji Vs. Aswini Kumar Gupta and Others, was with regard to the applicability of Section 15 of the Hindu Succession Act, on the facts of that case, and not Section 8. A question arose, in that case, as to who were the heirs of Manorama Mazumdar (widow of Girish Chandra Mazumdar), who was the

absolute owner in respect of a portion of the property, and it was contended that Manorama's heirs after Urmila, who was one of her daughters, would be, according to to Section 15, Sub-clause (b), the heirs of her husband Girish Chandra. Those heirs, it was urged, would be in pursuance of the provisions of Section 8 which, in that case, meant sons of a pre-deceased daughter. In those circumstances, it became necessary to consider, as to whether the provisions of Section 8 as well, were retrospective or prospective. I am thus of the opinion that, although Sureshra Kuer is alive, yet it will be no bar to the plaintiffs claiming the relief sought for in the present suit.

16. In the result, the appeal is allowed and the Judgment and decree of the trial Court are set aside. The plaintiff's suit is decreed and the deed of surrender dated 2-12-1946, executed by defendant 1, in favour of defendants 2 and 3, is invalid and not binding on the Plaintiff. In the circumstances of the present case, parties will bear their cwn cost throughout.

Mahapatra, J.

17. I agree.