

(1962) 09 GAU CK 0001**Gauhati High Court****Case No:** Appeal No. 138 of 1960

Mantapada Choudhury

APPELLANT

Vs

Purnaprabha pathak and Others

RESPONDENT

Date of Decision: Sept. 25, 1962**Hon'ble Judges:** G. Mehrotra, C.J**Bench:** Single Bench**Advocate:** S.M. Lahiri, M.C. Pathak and N.M. Lahiri, for the Appellant; S.C. Das, for the Respondent**Final Decision:** Allowed**Judgement**

G. Mehrotra, C.J.

This is Defendant's second appeal arising out of a suit for khas possession over 3 K. 5 lessas of land under dag No. 697 of 20 years New Settlement of Gauhati Town together with the constructions situated thereon and for compensation of Rs. 2,025/-. The Plaintiffs claimed to be the owners of the land and houses described in the schedule by virtue of a deed of gift executed by Musst. Thaneswari Kalitani Defendant No. 2 on the 20th December, 1950 in favour of the Plaintiffs. The land in dispute had dag Nos. 754 and 317 of area 2 kathas 4 lessas and dag Mo. 395/430 of area 16 lessas and at the resettlement; the patta and dag have been renumbered as patta No. 634 and dag No. 697 and the area is shown as 3 kathas 5 lessas. The owner of the said land and the houses was Defendant No. 2 mother of Plaintiff No. 1 Purnaprabha Pathak and mother-in-law of Plaintiff No. 2 Krishna Kanta Pathak. As She had no other heirs, she gifted away the suit land and the houses to the Plaintiffs.

Before the execution of the deed of gift the land had been leased out to the Defendant under a Kabuliyat dated the 16th September 1941 for ten years. There was a clause of renewal in the deed. After the expiry of ten years the tenant had to remove the structures at his own cost and the payment of rent was to be in two instalments in October and April each year. The Defendant committed default in

payment of rent and after iTng notice of ejectment to the Defendant on "the 25th February 1953 the present suit has been brought, Plaintiffs have claimed compensation from 16th September 1951 to 16th April 1953 at fl"c rate of Rs. 75/- per month. The houses are also needed for extensive repairs as they are neglected by the Defendant. The Defendant contested the suit on various questions of law and fact. The trial court decreed the suit for ejectment and Rs. no/- as compensation. On appeal the decree of the Court below has been affirmed.

2. Three points mainly have been urged in. this appeal. Firstly it is contended that the Defendant No. 2 being a limited owner, could not transfer the property by gift to the Plaintiffs. The document cannot be regarded as surrender by the limited owner in favour of the next reversioner, rirstly it was not a surrender of the entire interest of the limited owner and secondly it was a surrender not only in favour of the next reversioner-the daughter-but also her husband and thus there is no acceleration of succession, by the said deed. The Plaintiffs have no right during the lifetime of Defendant No. 2, the donor, to bring the present suit. Secondly it is contended that there was a renewal clause and in the absence of any intention on the part of the Defendant to give up pos session, the tenancy was automatically renewed and thus the Plaintiffs had no right to bring this suit.

3. In paragraph 3 of the plaint the Plaintiffs assert that Defendant No. 2 mother of Plaintiff "No. 1 and mother-in-law of Plaintiff No. 2 having no other heir except Plaintiff No. 1, in order to augment succession, gifted away the suit land and houses to the Plaintiffs. The Plaintiffs thus relied upon the gift deed as a deed of surrender. The surrender by a widow is not a transfer in the sense that the transferee acquires title through a widow. The reversioner is entitled to inherit the property of the last male owner after the death of the widow and the widow by surrender of her right only accelerates the succession. It constitutes her effacement and the reversioner getting the prpperty by succession earlier than if he got it otherwise after the death of the widow.

In the case of [Mummareddi Nagi Reddi and Others Vs. Pitti Durairaja Naidu and Others](#), the whole doctrine of the surrender by the widow has been laid down. The following passage is apposite:

The basis of the doctrine of surrender or relinquishment by the widow of her interest in the husband"s estate which has the effect of accelerating the inheritance in favour of the next heir of her husband, is the effacement of the widow"s estate and not the ex facie transfer by which such effacement is brought about. The result merely is that the next heir of the husband steps into the succession in the widow"s place. This effacement may be effected by any process and it is not necessary that any particular form should be employed. All that is required is that there should be a bona fide and total renunciation of the widow"s right to hold the property and the surrender should not be a mere device to divide the estate with the reversioners. It would be clear from the principle underlying the doctrine of surrender that no

surrender and consequent acceleration of estate can possibly be made in favour of anybody except the next heir of the husband. It is true that no acceptance or act of consent on the part of the reversioner is necessary in order that the estate might vest in him; vesting takes place under operation of law. But it is not possible for the widow to say that she is withdrawing herself from her husband's estate in order that it might vest in somebody other than the next heir of the husband. In favour of a stranger there can be an act of transfer but not one of renunciation. The position is not materially altered if the surrender is made in favour of the next heir with whom a stranger is associated and the widow purports to relinquish the estate in order that it might vest in both of them. So far as the next heir is concerned, there cannot be in such a case a surrender of the totality of interest which the widow had, for she actually directs that a portion of it should be held or enjoyed by somebody else other than the husband's heir

4. In the case of Natvarlal Punjabhai and Another Vs. Dadubhai Manubhai and Others, the same principle was reiterated. It was held that-

Thus, surrender is not really an act of alienation of the widow of her rights in favour of the reversioner. The reversioner does not occupy the position of a grantee or transferee and does not derive his title from her. He derives his title from the last male holder as his successor in law and the rights of succession are opened out by the act of self effacement on . the part of the widow which operates in the same manner as her physical death. It is true that a surrender may and in the majority of cases does take the form of transfer, e. g. when the widow conveys the entire estate of her husband, without consideration and not as a mere device to share the estate with the reversioner, in favour of the latter. But it is the self effacement by the widow that forms the basis of surrender and not the ex facie transfer by which such effacement is brought about.

5. In the present case admittedly the gift was in favour of the daughter and her husband. Her husband was not the next reversioner of the last male owner and as such the gift was in favour of the next reversioner as well as a stranger and it could not operate as a bona fide surrender so as to constitute the effacement of the widow and acceleration of the inheritance. That being so, the widow pro forma Defendant still remained as the holder of the widow's estate and the landlord of the contesting Defendant and unless there was a notice of ejectment given by her, the tenant Defendant could not be ejected.

6. The courts below have held that even if the gift deed was not binding it was operative during the life time of the widow and the Defendant cannot defeat the claim of the donee on the ground that the gift was not valid. It is tb.6 reversioner alone who can challenge the transfer by a widow and the lessee has no right to challenge the transfer by the widow. The Plaintiffs have riot based their case on the transfer. It is contended by the Appellant that under the Hindu law the widow is entitled to transfer by way of gift a portion of her property. She can also transfer the

property for legal necessity which may be binding on the reversioner but a transfer without consideration, neither for legal necessity nor of a small portion of the property, is void ab initio and no title can pass to the transferee under the said transfer.

The case of the Plaintiffs is not that under the gift deed the widow's estate was transferred to the Plaintiffs. I have already referred to paragraph. 3 of the plaint. The suit is expressly based on the ground that the gift deed constituted surrender only of file widow's estate in favour of the Plaintiffs. Reliance is placed on the gift deed. The courts below have not considered the question whether the gift deed required registration or not and further the question of legal necessity or the validity of the gift otherwise under the Hindu law should have been considered. If the effacement is not complete and valid, the Plaintiffs could not be the owners of the property by inheritance and thus the suit will only be brought for ejectment after due notice by the pro forma Defendant. In that view of the matter the suit must fail and it is not necessary to go into the other question whether the option of renewal was not exercised by the Defendant.

7. There is a finding by the courts below that at no stage the Defendant expressed his desire to exercise the option of renewal. If that is so, the question of the suit being premature does not arise. In the result therefore, this appeal is allowed and the suit is dismissed. But as the point was not taken before the courts below and the gift was only attacked on the ground of undue influence, the parties will bear their own costs throughout.