1869

Bagubai widow of Visaji Dinkar Desai v. Kazi Sayad Nizmuddin and Kazi Sayad Amruddin.

The judgment of the Full Court was, on the 22nd of September 1869, delivered by

COUCH, C. J. :—We concur in openion with the Calcutta and Madras High Courts on the point which has been argued before us. This question has been raised from time to time in this Court ; and whenever raised before me I have considered it to be liable to be re-opened for a formal decision. Under Sec. 372 a special appeal lies from all decisions in regular appeal. The words "regular appeal" have in no part of the Act been construed to mean an appeal from a decree. As stated in the judgment of the Chief Justice of the Calcutta High Court, regular appeal a means nothing more than a general ordinary appeal, an appeal lying on every ground of error, whether of fact or law. This seems to be the way in which the phrase has been used in the old Regulations. Unless the words have any special meaning attached to them, we ought not to put upon them a limited interpretation. We have held, under Sec. 376, that decree means an order, and none of the prohibitory sections seem to bear out the limited construction. Certainly, even if there were a slight ambiguity in the expression, there are very many reasons of convenience and expediency why we should adopt the liberal construction. We allow the special appeal.

Special appeal allowed.

Oct. 6.

Special Appeal No. 326 of 1869.

Kashinath Sitaram Oze ... ... *Appellant.*
Dadki, Woman, *et al* ... ...*Respondents.*

Hindu widow—Sale—Onus probandi.

A party claiming immoveable property by virtue of an alienation by a Hindu widow during her son's minority is bound, whether he be a plaintiff or a *defendant*, to prove that he made reasonable inquiry, and that he in good faith believed that such circumstances existed as would justify the widow in alienating her son's estate.

This was a Special Appeal from the decision of Arthur Bosanquet, Judge of the District of Thana, in Appeal Suit No. 520 of 1868, confirming on remand the decree of the Munsif of Panwel, in Original Suit No. 345 of 1866.

1869

Kashinath Sitaram Oze v. Dadki *et al.*

The plaintiff sued the defendants to recover possession of certain fields, which he alleged he had bought from the widow Dadki (defendant No. 1), and had let to her and the other defendants, but who would neither pay rent nor give up possession.

The Munsif threw out the claim, on the ground that the plaintiff had failed to prove that the sale by Dadki was for some common family necessity.

The Judge, on appeal, raised an issue whether it was proved that the widow, Dadki, sold the property for a necessary purpose, and recorded the following finding:—

"The land cultivated by Dadki appears, from the evidence, to have yielded enough produce for the support of herself and her children, but only barely enough, with rigid economy. Of the purchase-money specified in the deed of purchase, only Rs. 13 were taken by Dadki in cash. She admits having spent that sum on the subsistence of herself and her children. The remainder of the purchase was on account of old debts; and those debts are not proved to have been incurred for necessary purpose. I quite admit that if the burden of proof in this case lay on Dadki, the case would be given against her; for she has not proved that the old debts were incurred for unnecessary purposes; but then she could not be expected to prove a negative."

Upon these grounds the Judge made a decree in favour of the defendants.

On the 24th of September 1869 the Special Appeal was argued before GIBBS and MELVILL, JJ.

Shantarám Narayan and *Bhairavanath Mangesh* appeared for the appellant.

Dhirajlal Mathuradas appeared for the respondents.

The Court took time to consider, and on the 6th of October 1869 the judgment of the Court was delivered by

MELVILL, J.:—The special appellant contends that this suit was brought by him as landlord against his tenant, Dadki, and that the Courts below should have found whether the letting was proved; and, if so, should have

awarded him possession of the land, leaving Dadki's sons, if so advised, to sue to set aside the sale. This would certainly have been the proper course ; but as Dadki's sons, Mahadu and Padja, have been made parties, and therefore all who are interested are before the Court, it is admitted that we ought to avoid the multiplication of suits, and determine the validity of the sale by Dadki to the plaintiff instead of leaving that question to form the subject of a separate action.

Mr. Shantaram has urged upon us that the fact of the letting ought to be determined, because if that be proved the plaintiff must be regarded as being in possession of the land, and Mahadu and Padja must be treated as if they were plaintiffs in ejectment, and bound, as such, to establish their title. In other words, the argument is, that it would not be for the plaintiff in this case to prove the validity of the sale, but for Mahadu and Padja to prove that the land was not sold by their mother for necessary expenses. We do not think that this argument is sound. In *Hunoompersad Panday* v. *Mussumat Babooee Munraj Koonweree* (*a*), which was a suit to oust a mortgagee in possession, on the ground that the mortgage by the plaintiff's mother was invalid, it was held by the Judicial Committee of the Privy Council that, "where the mortgagee, with whom the transaction took place, is setting up a charge in his favour, made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan" Having regard to the decision in that case and to the decisions of this Court in the cases *Trimbak Anant* v. *Gopalshet bin Mahadshet* (*b*), and *Gane Bhive Parab, et al* v. *Kane Bhive et al* (*c*), we think that a party claiming immoveable property by virtue of an alienation by a Hindu widow during her son's minority, is bound,

(*a*) 6 Moo. Ind. App. 393.

(*b*) 1 Bom. H. C. Rep. 27. (*c*) 4 Bom. H. C. Rep. A. C. J. 169.

1869

Kshinath Sitaram Oze v. Dadki et al.

whether he be a plaintiff or defendant, to prove that he made reasonable inquiry, and that he in good faith believed that such circumstances existed as would justify the widow in alienating her son's estate.

The question then which the Courts below should have determined, and which they must now be called upon to determine, is, whether the plaintiff has proved that he purchased the property in dispute *bona fide*, and believing, after making reasonable inquiries, that the sale was necessary for the support or other unavoidable expenses of the family.

The value of the property purchased will form an important element in deciding this question. Dadki alleges that it is worth Rs. 500, and that she only intended to mortgage it, and not to sell it for Rs. 125. The Judge has found that she has failed to prove any agreement for re-conveyance; but she would certainly not have been justified, and the plaintiff must have known that she was not justified, in selling the family estate, if she could have raised enough for the family necessities by simply mortgaging it; as Westropp, J., says in *Dagdu bin Daud* v. *Shekh Saheb valad Badruddin* (*d*), "in ascertaining whether the sale is for the benefit of the infant full adequacy of price is a most important question."

The decree of the Lower Court is reversed, and the case remanded for a new decree with reference to this judgment.

Decree reversed and case remanded.

(*d*) 2 Bom. H. C. Rep. 348, 360.