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under Acts XX of 1866 and VIII of 1871, and would have been null and void without registration. The registration of the mortgage-deed was optional under Act XIX of 1843. The question of priority, therefore, does not arise in this case, as ruled in *Khandu Dulabdas v. Tarachand Amarchand* (1). The plaintiff charged the sale (No. 17) to be fraudulent and collusive. The lower Courts have not determined that question. They have not decided, also, whether the plaintiff's mortgage was not valid without possession in the district of Kanara. It is necessary that these questions should be determined.

The following is the judgment of the Court:—

JUDGMENT.

WESTROPP, C. J.—The District Judge has found (and his finding must be accepted as conclusive on that point) that the document on which the plaintiff founds his claim (Ex. 46), dated 13th June, 1864, was executed *bona fide*, and that it did not need registration as against the (Exs. 17 and 18) respectively, dated 22nd October, 1868, and 7th February, 1874, as shown by *Khandu Dulabdas v. Tarachand Amarchand* (1). The learned District Judge has, however, omitted to notice the fact that neither Annappa nor the plaintiff ever had possession under the mortgage (Ex. 46), or to consider and determine whether, in Kanara, a mortgage without possession can be upheld against a subsequent purchase with possession. The plaintiff has in his plaint alleged that the purchase by Parambhat from Narsama on the 22nd October 1868, (Ex. 17) was fraudulent and collusive. The learned District Judge has not determined whether or not that allegation is true. If he, on retrial, should hold that averment to be untrue, it will become incumbent upon him to consider and determine whether, in Kanara, a mortgage without possession can be sustained as against a subsequent purchase from the mortgagor with possession. So far as we know, Gujarat is the only province in this Presidency in which a mortgage without possession is sustainable against a subsequent *bona fide* purchase with possession. In order that the foregoing questions, which have [462] been left undecided by the District Judge, may be resolved by him, we reverse his decree, and remand this cause to him for retrial, and direct that he may be at liberty to take such further lawful evidence in the cause as he may deem necessary for such retrial. The costs of the appeals must follow the final result of the cause.

Case remanded.

4 B. 462.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief-Justice, and Mr. Justice F. D. Melvill.

GURUNATH NILKANTH (*Original Defendant*), Appellant v.
KRISHNAJI GOVIND (*Original Plaintiff*), Respondent.*

[16th February, 1880.]

Hindu law—Hindu widow, power of, to alienate her husband's immoveable property.

A purchaser of immoveable property from a Hindu widow, in order to show that the property is absolutely conveyed to him, ought to aver and prove that

* Second Appeal No. 393 of 1879.

she sold it under such special circumstances as justify a Hindu widow in alienating the immoveable property of her husband without the consent of his heirs. Even if her husband were separate in estate from his father and brothers at the time of his death, and died without male issue, his widow would have no power to make an absolute alienation of his estate in the absence of such special circumstances. She can only dispose of her widow's estate in his immoveable property, which estate determines either upon her death or re-marriage, and the purchaser is not entitled to retain the property after the occurrence of either of these events.

The plaintiff sued to recover possession of certain immoveable property sold to him by the first defendant, a Hindu widow. The second defendant answered that his father and the first defendant's husband were undivided brothers, and that, as a childless widow, she had no right to sell the property. Both the lower Courts upheld the sale as absolute, on the ground that she was competent to make it as widow of a separate Hindu. The District Judge heard the appeal *ex parte* under s. 551 of the Civil Procedure Code.

The High Court, on second appeal, held that the decrees of the lower Courts were unsustainable, as they did not contain the limitation pointed out above, and remanded the case for the trial of the issue, whether there were any such special circumstances as would justify the absolute sale by the first defendant to the plaintiff.

The High Court were also of opinion that the District Judge ought not to have disposed of the appeal *ex parte* under s. 551 of Act X of 1877.

THIS was a second appeal from the decision of W. Sandwith, Judge of the District Court of Dharwar, in appeal No. 59 of 1879, [463] affirming the decree of G. G. Phatak, Subordinate Judge (First Class), at the same place.

The plaintiff, Krishnaji, brought this suit against Janava, widow of Raghapa, and claimed to recover possession of certain immoveable property sold to him by her for Rs. 200, under a deed of sale, dated the 17th July 1878.

Janava did not appear. The suit was defended by Gurunath, who was made a defendant at his own request, under s. 28 of Act X of 1877. He answered that his father Nilkanth and Janava's husband, Raghapa, were undivided brothers; that she as a childless widow had no right to sell the property in dispute; that he was the male representative of the undivided family, and was in possession of the property.

The Subordinate Judge held that Raghapa and Nilkanth were divided brothers; that a partition had taken place between them in the year 1854-55; that the lands had been entered in their names in the Government books separately according to their shares; that, on the death of Raghapa, his lands were transferred to Janava's name as his heir; that Janava and the defendant Gurunath lived separately in different houses since the partition, and managed their affairs separately. He decided that the property belonged to Janava, who had a power to sell it absolutely. He, accordingly, allowed the plaintiff's claim.

The District Judge confirmed the decree of the first Court, holding that Janava, as the childless widow of a man who died finally separated, had a right to dispose of the share of her husband. He heard the appeal *ex parte*, under s. 551 of Act X of 1877, without sending notice of the appeal to the first Court, and without serving notice on the respondent or his pleader.

Gurunath thereupon preferred a second appeal to the High Court.

Macpherson (with him Shamrao Vithal), for the appellant.—Janava was not competent to alienate the property in dispute without the consent of the appellant. The respondent did not show that the sale by Janava was

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for a purpose allowed by the Hindu law. The lower Courts were, therefore, wrong in declaring the sale absolutely valid.

[464] *Shantaram Narayan*, for the respondent.—Janava had a power to make an absolute sale of the property for purposes sanctioned by law. But the lower Courts did not go into that question at all. The case, therefore, should be remanded for the determination of that point.

JUDGMENT.

WESTROPP, C. J.—The plaintiff, in order to show that the property, the subject of this suit, was conveyed to him absolutely, ought to have averred and proved that the widow Janava, sold it under such special circumstances as justify a Hindu widow in alienating the immovable property of her deceased husband without the consent of his heirs. Even if her husband were, at the time of his decease, separate in estate from his father and brothers, and died without leaving male issue, his widow would not, in the absence of such special circumstances, have any power to make an absolute alienation of his estate. The *dictum* of the District Judge in the present case, that, "as the sonless widow of a man who died finally separated, Janava had a right to dispose of the share of her husband," is quite too broad. In the absence of such special circumstances as we have mentioned, she could only dispose of her widow's estate in his immovable property, and that estate would determine either upon her death or upon her second marriage, so that the purchaser would not, in such a state of facts, be entitled to retain the property sold after the occurrence of either of these events. The decrees of the Subordinate Judge and of the District Judge contain no such limitation, and are, on the evidence in the case as it now stands, unsustainable. However, as both of these Judges, as well as the pleaders on both sides, appear to have ignored the Hindu law as to the circumstances which would warrant an absolute sale by a Hindu widow, and we, having regard to the consequences of explanation 2 of s. 13 of Act X of 1877, think that it is fair that there should be an inquiry as to whether any such circumstances existed in this case. We must, therefore, direct that the District Judge should try the following issue, *viz.* :—

Whether there were any such special circumstances as would justify the absolute sale on the 17th July, 1878, by Janava to the plaintiff?

[466] What would be such a justification, may be seen on reference to *Strange's Hindu Law*, Vol. I, p. 244; *West and Buhler* (2nd ed.), pp. 123-125; *Mayne's Hindu Law*, paras. 536-549. The District Court should report its finding to this Court within two calendar months after receipt of this order. The parties, respectively, should be at liberty to give such fresh evidence as may be lawfully admissible and necessary for the determination of the said issue. We reserve all further directions and the question of costs.

We wish to add that this does not appear to us to have been such a case as ought to have been disposed of *ex parte* by the District Judge under s. 551 of the Civil Procedure Code (Act X of 1877).

Case remanded.