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(i.e., the first three defendants), that leave was not obtained to bring this one suit for the immoveable and moveable property together, was not made in the Court below—those defendants being then and there apparently content to have the suit decided on its merits. Such an objection being of a dilatory character, and quite besides the merits, ought, we think, to have been taken in the Court of first instance, and not after the parties have incurred the cost and expended the time [562] necessary for a hearing on the merits. If not taken in the Court of first instance, and the defendants have gone to a full hearing on the merits, we think that it must be regarded as waived. It is, therefore, unnecessary for us now to decide whether, in a case like this, viz., a single contract for sale of moveable and immoveable property together, s. 44 of Act X of 1877 renders leave to bring such a suit as this a preliminary step requisite for its institution.

We vary the decree of the Subordinate Judge by holding that, neither as regards the moveable nor the immoveable property, is this suit barred by the law of limitation; and by directing that the plaintiffs (Hariba being admittedly in the same interest as Dhondiba) be put into possession of the moveable property as well as the immoveable property respectively mentioned in the plaint. And if it appear to the Subordinate Judge on inquiry that the said moveable property has, since the date of the contract for sale by Mrs. Dickenson to the plaintiff Dhondiba, become deteriorated or to any extent been lost, so that it cannot now be delivered to the plaintiffs in the same condition and to the same extent as it existed at that date, let the Subordinate Judge ascertain and fix the amount in money, which would be a fair compensation to the plaintiffs for such deterioration and loss. And it is hereby directed that all of the defendants shall forthwith pay to the plaintiffs the amount so fixed by the Subordinate Judge. Mrs. Dickenson (otherwise Bayley) must bear her own costs of this suit and appeal. The other defendants must pay to the plaintiffs their costs of this suit and of the appeal.

5 B. 563 = 6 Ind. Jur. 38.

[563] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., and Mr. Justice Melvill.

VARJIVAN RANGJI AND OTHERS (*Plaintiffs*), *Appellants v. GHELJI GOKALDAS AND OTHERS (Defendants), Respondents.**

GHELJI GOKALDAS AND OTHERS (*Defendants*), *Appellants v. VARJIVAN RANGJI AND OTHERS (Plaintiffs), Respondents.**

[27th January, 1881.]

Hindu law—Widow—Daughter—Alienation—Consent of heirs—Legal necessity.

An alienation, by a Hindu widow, of immoveable property inherited from her husband is invalid in the absence of legal necessity, but the invalidity can be removed by the consent of all the heirs of the widow's husband who are likely to be interested in disputing the transaction: *Raj Lukhee Dabee v. Gokool Chunder Chowdhry* (1) followed.

Sale made conjointly by a Hindu widow and her daughter, who subsequently predeceased her mother, of immoveable property inherited by the widow from her husband, in the absence of legal necessity ordered to be set aside; and the grandsons

* Cross Appeals Nos. 175 and 180 of 1880.

(1) 13 M.I.A. 209.

of the second cousins of the widow's husband held entitled to recover the property on recouping the vendees the expenses incurred on improvements.

[F., 10 C. 225; R., 30 A. 1 (P.C.)=5 A.L.J.; 1=9 Bom.L.R. 1948=6 C.L.J. 766=12 C.W.N. 74=35 I.A. 1=17 M.L.J. 605=3 M.L.T. 1=11 O.C. 78 (87); 25 B. 129; 35 C. 1086=8 C.L.J. 120=12 C.W.N. 914; 17 C.L.J. 499 (519)=17 C.W.N. 707; 2 C.P.L.R. 221 (223)]

THESE were cross second appeals from the decision of S. H. Phillpotts, Judge of Ahmedabad, amending the decree of R. S. Desai, Subordinate Judge (Second Class) at Nadiad.

JUDGMENT.

The facts of the case are thus stated at the outset of the judgment of the High Court delivered by

SARGENT, J.—The plaintiffs in the suit are the grandsons of the second cousins of one Narotam Shevakram, who died leaving a widow, Bai Achrat, and a daughter, Bai Vakhat. Bai Achrat died on the 17th June, 1865, having survived her daughter. The object of the suit is to recover possession from the defendants of one house and six fields, survey Nos. 219, 233, 237, 331, 761, and 762.

The first defendant contended by his written statement—

1. That the suit was barred by the Statute of Limitations.

2. That the fields were sold to him by the widow, Bai Achrat, and her daughter for a necessary purpose on *Poush Sud* 12 of *Samvat*, 1916, and that he thus became the lawful owner of them.

[564] 3. That the house was sold to him by the widow, Bai Achrat, for a necessary purpose on *Poush Sud* 1st, *Samvat*, 1921.

4. That the plaintiffs, though aware of the fact of the sales to him, took no objection to the same.

5. That he had spent Rs. 624-11-3½ on the property.

Defendant No. 2 by his written statement states—

1. That he purchased the house from the first defendant on 13th *Poush Sud*, 1923, and has spent Rs. 1,400 on improving it.

2. That plaintiffs had full knowledge of his purchase and of the improvements, and never objected.

3. That the suit could not be maintained under s. 8 of Act VIII of 1859.

The defendants 3, 4, 5, 6, 7, 8 and 9 by their joint written statements state—

1. That defendants 3 and 4 purchased the fields Nos. 233 and 237 from defendant No. 1.

2. That defendants 5, 6, and 9, and defendants 7 and 8 purchased fields 761 and 762 from first defendants in equal shares.

Lastly, defendant No. 10 says that field 331 has been in his possession for a very long time, and that neither the widow nor daughter had any right to it. The Subordinate Judge decreed possession of all the fields to plaintiffs on the payment, as regards field 331, of Rs. 51 to defendant No. 10 due on a mortgage created by Narotam, and also ordered that they should be paid Rs. 381 by defendants 1 and 2 for the house. Against this decree three several appeals—Nos. 167, 175, 176, of 1878—were preferred by the defendant No. 10, the plaintiffs and defendants Nos. 1 and 2 respectively. In appeal 167 the District Judge found that it was not proved that Narotam, through whom the plaintiffs claim, mortgaged field No. 331 to defendant 10, and he disallowed their right to redeem.

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In appeals 175 and 176 the District Judge found—
 1. That the claim was barred as regards fields 761, 762, 331, but not as regards the house and the other fields.

[565] 2. That the house and fields were not sold for a necessary purpose to the first defendant.

3. That the plaintiffs are the grandsons of the second cousins of Narotam Shevakram and decreed possession is to be given up to the plaintiffs of fields 219, 233, 237; but that plaintiffs should recover Rs. 381 from first or second defendant instead of the house. From this decree in appeals Nos. 175 and 176 the plaintiffs and defendants 1 and 3 now appeal.

[The judgment then proceeds as follows to dispose of the point of limitation raised by the plaintiffs :—]

At the hearing the plaintiffs claimed the right to appeal against the decision of the Court below in appeal 167. Two objections, however, are fatal to this claim. In the first place, they have not filed an appeal against that decision; but, in any case, the finding of the Court below, respecting the mortgage, was on a question of fact, and, therefore, not appealable; and there being no mortgage, the right to recover field No. 331 was clearly barred by the long possession defendant No. 10 had enjoyed of the field. Passing to the other fields in question it is not in dispute that they together with field No. 331, already disposed of, were sold to the first defendant by the widow, and conveyed to him by an instrument bearing date 12th Poush Sud, 1912, to which both the widow and her daughter were conveying parties. The present suit is brought by the plaintiffs, as the persons entitled by inheritance to the possession of the lands on the death of the widow, to recover the fields. And their right of action, as such, clearly, therefore, falls under No. 142 of the Limitation Act of 1871, which is admittedly the Act to be applied. The Court below was, therefore, in our opinion, wrong in holding that any part of the plaintiffs' claim was barred.

But the main point argued before the High Court, and upon which the judgment proceeded, was whether the conveyance by the widow, Achrat, and her daughter were valid by the Hindu law. Upon this point the Subordinate Judge made the following observations :—

"I now come to the second ground of the plaintiff's objection to the deed of sale, namely, that the fact of Bai Vakhat being a [566] party to that deed does not alter the character of the transaction, and that it does not do away with the obligation on the defendant No. 1 to prove that Bai Achrat was under a legal necessity to sell the property, and that the sale was a *bona fide* one.

In *Ram Shevuck Roy v. Sheo Govind Sahu* (1) it was held by the Calcutta High Court that a Hindu widow takes with her husband's estate the power of alienation; and conveyance made by her gives a good title, liable only to the superior claim of such of her husband's heirs as may be alive at the time of her death; and, in a case where certain landed property in the possession of a Hindu widow was sold on the alleged ground of necessity, and the execution of the deed of purchase was attested by the then next heirs, it was held by the said High Court that the assent implied in such attestation was not conclusive in law as to the necessity for the sale, though the fact of persons most interested in contesting such a sale being called in to execute the deed is

(1) 8 W.R. 519.

the strongest possible proof of good faith on the part of the purchaser (*Madhub Chunder Hajrah v. Gobind Chunder Banerji* (1)); and in the case of *Kali Mohun Deb Roy v. Dhananjoy Shah* it was ruled that the consent of the then reversioner to a sale by a Hindu widow, though not binding evidence on the present heir, is strong presumption of the existence of necessity at the time of sale, to be rebutted only by proof of fraud and collusion or of the absence of necessity (2). In *Jwalanath v. Kulu* (3) the Agra High Court held that where a daughter was colluding with the widow in making transfer of divided property, the plaintiffs, the next reversioners after the daughter, were competent to maintain the suit to have the transfer declared null and void; and in the case of *Rajlukhee Dabee v. Gokool Chundra Chowdhry* (4) the Judicial Committee of the Privy Council ruled that a recital in a deed of sale, by a Hindu widow, of her deceased husband's property, setting forth that the alienation was necessary for the purpose of paying his debts, is not of itself evidence of such necessity; nor does the attestation of a relative import his concurrence. Such a transaction may become [567] valid by the consent of the husband's kindred; but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there ought to be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one, and justified by Hindu law. From the above rulings it may well, I think, be laid down that a sale by a Hindu widow, though assented to by the reversioner, who predeceased the widow, may, for want of proof of legal necessity for the same, be set aside at the instance of the heir of her husband who succeeds her on her death, and that the fact of the then reversioner assenting to the sale can only be considered as a piece of evidence to prove the necessity, but liable to be rebutted by stronger evidence on the other side.

"It is argued by Mr. Desai bhai, on behalf of the defendant No 1, that Bai Vakhat, the then reversioner, having been joined by Achrat in the conveyance, it becomes absolute, and cannot be questioned by the person who succeeds the widow on her death; and in support of his argument he relies upon the rulings of the Calcutta High Court in *Gour Hurri Dutt v. Radha Gobind Shah* (5) and in *Mohunt Kishen Geer v. Busgeet Roy* (6).

"In *Gour Hurri Dutt v. Radha Gobind Shah* it was ruled, by a Division Bench of the Calcutta High Court, that a reversionary interest may be sold in execution of a decree; but a Full Bench of the same High Court has ruled, in *Ramchandra Tantra Das v. Dharmo Narayan Chuckerbutty* (7), that the interest of an heir expectant on the death of a widow in possession is such a mere contingency that it cannot be regarded as property, and, therefore, is not liable to attachment and sale under s. 205 of Act VIII of 1859. There being thus a Full Bench ruling of the same High Court, the decision of a Division Bench of that High Court cannot be followed.

"In *Mohunt Kishen Geer v. Busgeet Roy* it was held, by a Division Bench of the Calcutta High Court, that a Hindu widow in possession and the apparent next taker, by joining in [568] one conveyance, can make a complete title; but the facts, as reported, do not seem to me similar to

(1) 9 W. R. 350.

(2) 6 W. R. 51.

(3) 3 Agra R. 55.

(4) 12 W.R.P.C. 47.

(5) 12 W. R. 54.

(6) 14 W.R. 379.

(7) 7 B.L.R. 341.

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those of this case. In the case referred to, the suit was brought by a person claiming through the reversioner, who was a party to the conveyance; it was, therefore, unjust and inequitable to hold that a representative of the reversioner was at liberty to contest the validity of the purchase by a stranger who took all possible precaution in purchasing the property. Again, the ruling of the same High Court in *Kali Mohan Deb Roy v. Dhananjoy Shah* (1) does not seem to have been overruled in deciding the case of *Mohunt Kishen Geer v. Busgeet Boy*. It must, therefore, I think, be distinguished from the present case.

"It is urged, on behalf of the plaintiffs, that, even if it be supposed that the consent, by the then reversioner, to a sale, by a Hindu widow, of moveable property makes the sale absolute, Bai Vakhat was not capable of giving such a consent, and he relies upon the ruling of the High Court of Bombay in *Vijjarangam v. Lakshuman* (2), wherein it has been held that as to *stridhan* acquired by inheritance (so far as it consists of immovable property) a woman's power of alienation must be limited. I think this argument is good. If a woman, who has inherited the immoveable property of her father, cannot alienate at her mere caprice, there are equally strong, if not stronger, reasons for holding that she cannot, at her mere caprice, give an absolute consent to the sale, by her mother, of immoveable property of her husband.

"Under the above considerations I hold that the fact of Bai Vakhat being a party to the deed of sale does not alter the nature of the transaction, and that the said deed of sale cannot be held valid without proof of necessity."

In appeal to the District Judge he held, as has been stated in the part of the High Court's judgment given above, that the plaintiff's claim was barred as to three of the six fields, and that neither the house nor any of the fields was sold under legal necessity; and he decreed that the plaintiffs should recover possession of fields Nos. 219, 233, and 237, but not of the others, and [569] that, as regards the house, he should recover from the first and second defendants Rs. 381.

Nanabhai Haridas (Government Pleader), for the original plaintiffs. —The main question involved in these appeals is whether the widow Achrat made valid alienations. The fields were conveyed by her and her daughter, Vakhat; the house was conveyed by her alone. I submit that this fact of the daughter joining with her mother makes no difference, for she possessed only what, in the English law, would be called a contingent remainder which by her death before her mother never became vested in her. In the case of *Mohunt Kissen Geer v. Busgeet Roy* (3) it was, no doubt, held that a Hindu widow in possession and the next apparent taker, by joining in one conveyance, could make a complete title, but that was a case in which the claimant claimed through the reversioners. Here the plaintiffs claim adversely to the nearest reversioners. On the point of the consent of heirs which, under certain circumstances, validates a sale by a widow, I would draw attention to the remarks at p. 563 of Mayne's Hindu Law, and the authorities cited there. They show that *all* the heirs seemingly interested must join in giving the consent. The position of a woman is, under the Hindu law, one of dependence; and the consent of a daughter, albeit she is the next reversioner and heir, is insufficient to validate her mother's alienation. As the Subordinate Judge has held, it can be, at

(1) 6 W.R. 51.

(2) 8 B.H.C. R. O.C.J. 244.

(3) 14 W.R. 379.

best, but strong evidence to prove that legal necessity existed for the alienation, and it is liable to be rebutted by stronger evidence to the contrary. The succession of females, according to the Hindu law, is not regular succession. The theory of spiritual benefit to the manes of the ancestor, upon which the succession of males is based, has no application to the case of female succession: *Gunga Pershad Kur v. Shumbhoonath Burmun* (1).

The following authorities were also referred to:—

West and Buhler, 120; 2 MacNaghten's Hindu Law, 309; Cunningham's Digest of Hindu Law, 128; 2 Norton's Leading Cases, 626.

[570] *Gokaldas Kahandas*, for defendant No. 1, Ghelji, and his vendee defendant No. 3, Bhagvandas.—I submit that the conveyance, by the widow and her daughter, as well as that by the former alone, is valid: *Collychund Dutt v. John Moore* (2). In that case, where the reversioners had joined the widow, the alienation by her was held to be valid, and the heirs of the reversioner were also held to be bound by her act. *Pratap Chunder Roy v. Shreemutty Joy* (3) was a case of relinquishment by a widow in possession in favour of reversioners; and it was further held there that a relinquishment in favour of second reversioners was also valid if made with the consent of the first reversioners. In the case of *Gour Hurri Dutt v. Radha Gobind Shah* (4) the Court went so far as to hold that a reversionary interest could be sold in execution of a decree. Even so late as 1878 the Calcutta Court held in *Raj Bullubh Sen v. Oomesh Chunder Roor* (5) that a grant by a Hindu widow made with the consent of the next reversioner was valid, and created a title which could not be impeached, on the death of the widow, by the person who, but for such grant, would be entitled as heir of her husband. That affirmed the ruling in *Sham Soonduree v. Shurut Chunder Dutt* (6). I, therefore, submit that the sales, both of the house and fields, were good, and the original as well as the subsequent vendee acquired good title.

Shantaram Narayan, for the vendee of the house, relied on the authorities cited by Mr. Gokaldas.

Pandurang Balibhadra, for the original defendant No. 10.

The judgment of the High Court then proceeded to deal with the above point.

JUDGMENT CONTINUED.

SARGENT, J.—Passing to the merits of the case, as the Court below has found that the sale of the fields was not for a necessary purpose, the validity of the first defendant's title under the conveyance of 12th *Poush Sud*, 1912, and that of the eight defendants claiming through him, depends upon the question whether the widow and daughter of Narotam Shevakram could convey an [571] indefeasible title as against the persons who (the daughter having died before her mother) became entitled to the property as the next heirs of Narotam on the death of the widow. As Bai Vakhat's interest in the fields at the time of the sale was contingent on her surviving her mother, which she failed to do, her joining in the conveyance could (if at all) only operate to give validity to it as importing the concurrence of the then nearest apparent heir of Narotam to the alienation in question.

Now, it may be taken as well established that the consent of heirs will render valid an alienation by a widow under circumstances which

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(1) 22 W. R. 993.
(4) 12 W. R. 54.

(2) 1 Fulton's Rep. 73.
(5) 5 C. 44.

(3) 1 W. R. 98.
(6) 8 W. R. 500.

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would otherwise not justify it. It was so held by the Privy Council as far back as the case of *Cossinath Bysak v. Hurroosondree Dossee*(1); but the question, who are the heirs whose consent will thus render the alienation indefeasible, has led to much conflict of decision. The principle, however, upon which that question is to be answered has, we apprehend, been laid down by the Privy Council in the case of *Raj. Lukhee Dabea v. Gokool Chunder Chowdhry*(2). Their Lordships say: "They do not mean to impugn the authorities, &c., which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such cases must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindu law." In the present case the plaintiffs, although distant heirs, were the heirs presumptive of Narotam at the time of the sale, entitled to succeed in the event of Vakhat dying before her mother without issue, and, as such, clearly interested in disputing the sale. Nor can the mere concurrence of Bai Vakhat, albeit the nearest in succession (having regard to the state of dependence in which all women are supposed by Hindu law to have their being), be regarded as affording the slightest presumption that the alienation was a justifiable one. On both these grounds, we think, the plaintiffs are entitled to succeed. With respect to the house, the plaintiffs are clearly entitled to it on [572] recouping the second defendant what has been actually expended by him in rebuilding it. The decree must, therefore, be varied by directing that the plaintiffs be put into possession of all the fields, except No. 331, and also of the house on payment, by plaintiffs to second defendant, of the moneys actually expended by him in rebuilding it, the same to be determined in execution of the decree, and by directing that the first and other defendants (excepting the tenth defendant, Abheram Nathuram) do pay plaintiffs their costs throughout. Plaintiffs to pay to defendant No. 10 the costs of the second appeal.

Decree accordingly.

5 B. 572=6 Ind. Jur. 96.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Nanabhai Haridas.

JAMNADAS. (*Defendant*), *Applicant v. BAI SHIVKOR (Plaintiff)*,
*Opponent.** [10th March, 1881.]

Damages on account of rent—Suit for use and occupation—Trespass—Ejectment—Mesne profits—Court of Small Causes—Jurisdiction.

The plaintiff, alleging that the defendant, without her permission, removed a lock placed by her on her house and took possession of it, sued in a Court of Small Causes for "damages on account of rent" of which she was thus deprived. The Court, regarding the suit as one for use and occupation, made a decree in favour of the plaintiff.

Held--that the suit was not rightly regarded as one for use and occupation, for the claim was not based on any contract, express or implied: it should have been regarded as an action of trespass, brought to try a question of title.—an action in which the Court of Small Causes had no jurisdiction. The plaintiff's

* Extraordinary Civil Application, No. 136 of 1880.

(1) 2 Mor. Dig. 198 Ed. 1849.

(2) 13 M.I.A. 209 (228).