

1883
 EMPRESS
 v.
 MHASNYA
 RAMA.

specified amount. Such is the phraseology of contemporaneous enactments, e.g., Act XXVII of 1837, sections 10 and 11, and Act XXXI of 1838, section 29. Moreover, we should expect that a penalty imposed for the omission to take out a certificate and pay the proper fee thereon, would amount to a specified multiple of such fee, as in the case of the omission to pay stamp duties; and if the phrase "subject to" be rightly construed in this manner in this one place, the same interpretation must be put upon the same words, wherever they appear in the section. Upon the whole, therefore, we are of opinion, as at present advised, that the view taken by the District Magistrate is correct, and we, accordingly, direct notice to issue to Mhasnya bin Rama to show cause why the fine imposed by the Subordinate Magistrate should not be enhanced to ten rupees.

The notice having been served, the case was heard by *Kemball* and *Pinhey*, JJ., on the 8th of March, 1883, when the Government Pleader appeared for the Crown and no one for the accused.

KEMBALL, J.—We agree in the judgment passed on the 19th of January last, and enhance the fine to ten rupees.

APPELLATE CIVIL.

Before Mr. Justice Kemball and Mr. Justice Pinhey.

1883
 April 11.

DALSUKHRAM MAHASUKHRAM AND OTHERS (ORIGINAL DEFENDANTS),
 APPELLANTS, v. LALLUBHAI MOTICHAND (ORIGINAL PLAINTIFF),
 RESPONDENT.*

Hindu law—Widow—Maintenance—Family house—Residence—Purchaser from the heir with knowledge—Widow's right of residence a charge on the property.

Where a purchaser purchases a house, the property of a Hindu family, from the heir, with full knowledge that the widow is residing and being maintained in it, such purchaser cannot ask for the summary eviction of the widow from the house, even though there may be other property in the hands of the heir out of which her maintenance could be derived; but the purchaser takes the house subject to the right of the widow to continue to reside therein.

Lakshman Ramchandra Joshi v. Satyabhamabai (1) distinguished.

THIS was a second appeal from the decision of S. H. Phillpotts, Judge of the district of Ahmedabad, reversing the decree of Rav

* Second Appeal, No. 191 of 1882.

(1) I. L. R., 2 Bom., 494.

Saheb Lallubhai P. Parakh, Subordinate Judge of Ahmedabad.

The plaintiff originally brought this suit against the first defendant, Dalsukhram Mahasukhram, to recover possession of two houses situated in the city of Ahmedabad. He alleged that he purchased these houses from the defendant under a registered deed of sale, dated 13th of November, 1873, for Rs. 900, and let them to him at an annual rental of Rs. 46 under an agreement of 3rd September, 1877. The defendant Dalsukhram admitted the execution of the deed of sale, but contended that it had been obtained fraudulently and without consideration, in settlement of certain time-bargain transactions between the plaintiff and Dalsukhram's brother, and that one of the houses was the self-acquired property of his late father, and by him devised to his mother Jadav, his sister Parvati, and his sister's sons Chotolal and Nanka, in whose joint possession it now was. The defendant also admitted the execution of the agreement for rent, but contended that that also was a nominal transaction, and that he had never actually paid any rent. All these persons were, accordingly, joined as co-defendants with Dalsukhram, and they contended that Dalsukhram had no right to sell the houses, that the transactions between him and the plaintiff were not *bonâ fide*, and that one of the houses had been bequeathed to them by Dalsukhram's father, whose self-acquired property it was.

The Subordinate Judge found that the sale to the plaintiff by Dalsukhram was not a *bonâ-fide* transaction, and that the will set up by the defendants was proved and valid, and he, therefore, rejected the plaintiff's claim. The District Judge came to a different conclusion. He pronounced both against the execution as well as the validity of the will; but found that Dalsukhram's father was not himself the acquire of the house alleged to have been devised, but was part owner of it with Dalsukhram. The District Judge further held that the defendants failed to prove that the sale of the houses effected by Dalsukhram was fraudulent or invalid, though the consideration seemed insufficient. He, therefore, reversed the decree of the Subordinate Judge; but being of opinion that, "by Hindu law and the custom of the country, a widow is entitled to residence in the house of her husband during her life-time,

1888

DALSUKH-
RAM MAHA-
SUKHRAM
v.
LALLUBHAI
MOTICHAND.

1885

DALSUKH-
RAM MAHA-
SUKHRAM
v.
LALLUBHAI
MOTICHAND.

notwithstanding the sale of it by her son, so the possession of the plaintiff of that house must be postponed till her death". The District Judge, accordingly, awarded the plaintiff's claim; but allowed Jadav, the widowed mother of the defendant Dalsukhram, to continue to live during her life-time in the house which she occupied.

The defendants appealed to the High Court.

Pandurang Balibhadra for the appellants.—When Dalsukhram sold the houses he was not in possession of them, and the sale was, therefore, invalid. [KEMBALL, J.—This point was not taken in the Court below.]

Shantaram Narayan for the respondent.—We object to that part of the District Judge's decree which reserves to the widowed mother of the first defendant Dalsukhram the right of living in one of the houses during her life-time. This reservation was made by the Judge of his own motion. Admitting the right of a Hindu widow to be maintained, we say that that right does not include the right of residence. It is not pretended that the widow's right in this case has been made a precise and positive charge on the estate by any decree in her favour. The widow's right not having become a right *in re* attaching to the estate, the heir conveyed a title to the purchaser free from her claim: *Lakshmun Ramchandra Joshi v. Satyabhamabai* (1) and the cases there cited.

Pandurang Balibhadra, contra.—The District Judge had power to make a suitable provision for the widow. The High Court has sometimes made a similar provision in second appeal: *Jamnabai v. Raychand* (2). The authorities cited by the respondent show that a suitable provision, including residence, must be made for the widow, who cannot be summarily ousted. Her claim has been recognized as attaching to the estate.

The judgment of the Court was delivered by

KEMBALL, J.—The only objection taken in argument by the appellants against the decision of the District Judge is, that the sale of the house in the occupation of Bai Jadav was void by reason

(1) I. L. R., 2 Bom., 494.

(2) I. L. R., 7 Bom., 225.

of Dalsukhram not having been in possession at the time of its sale to plaintiff; but it is clear that neither Dalsukhram nor the other defendants ever relied, or intended to rely, on this objection; and if they failed to ask the Judge to consider the question of possession as affecting the validity of the sale, they cannot now require that the case be returned for the Judge to record his finding upon it. The respondent, however, has taken exception to the order of the Judge that Bai Jadav was to be allowed to live in the house she occupied during her life-time; and several cases have been cited to us on either side, all of which were considered and discussed in *Lakshman Ramchandra Joshi v. Satayabhambai* (1). That was a suit for maintenance brought by a Hindu widow against her husband's brother (against whom she had previously obtained a decree), who was the sole surviving member of her husband's family, and against certain *bonâ-fide* purchasers for value from the husband's brother of certain immoveable ancestral property of the family. It was contended there, as here, that the widow's maintenance was not such a charge on the estate as to give her any kind of proprietary interest in it, it was also contended that her right, although its value was dependent on the amount of her deceased husband's share in the property, was a merely personal one against her husband's brother; and that notice of what was not really a charge, in the sense of an interest, in the property could not convert the merely personal obligation into a real right by way of incumbrance on the property, accompanying it into whosoever hands it might pass. And it was held by West, J., after a very able and exhaustive discussion of numerous authorities, that it was open to the sole surviving proprietary member to sell the estate which had vested in him; that he could not, however, by so doing affect the right of the widow if it had become a right *in re* adhering to the estate, though the widow's right, until made a precise and actual charge on the property, could not prevent the said proprietary member dealing with it at his discretion; that such member who, with a view to defraud the widow, parted with the estate could not by so doing get rid of his liability, and that the vendee, who shared in the proposed fraud, could not be allowed to profit by it; though, if he bought knowing

1883

DALSUKH-
RAM MAHA-
SUKHRAM
v.
LALLUBHAI
MOTICHAND.

(1) I. L. R., 2 Bom., 494.

1883

DALSUKH-
RAM MAHA-
SUKHRAM
v.
LALLUBHAI
MOTICHAND.

of the widow's existence and of her claim, but in the *bonâ-fide* belief that no wrong would be wrought upon her by the sale, he would acquire a title free from the claim. But here, independently of the circumstance of the absence of evidence of proper reasons for the alienation, and of the insufficiency of the consideration noted by the Judge, there is this notable difference in the present case, that the widow is a defendant in possession, and the plaintiff purchased admittedly with full knowledge of such possession. The precept in the passage from Katyayana in I Colebrooke's Digest, page 423, Bk. II, chap. IV, sec. II, text XIX, appears to place the requisites for the maintenance of the family on the same footing as the family dwelling; and although the rule laid down in *Baboo Gobuk Chunder Bose v. Ranee Ohilla Dayee* (1) and other Bengal cases—that “where a purchaser purchases property from the heir, with notice that a Hindu widow is entitled to be maintained out of it, the property in the lands of the purchaser continues to be charged with that maintenance”—may be, and is, subject to certain conditions, we think, having regard to the circumstances of this case and to the case of *Mangala Debi v. Dinanath Bose* (2), decided by Sir B. Peacock, C. J., and fully concurred in by Mitter, J.—where it was held, partly on the authority of *Prankoonwur v. Deokoonwur* (3), a Bombay case, that a son could not evict his widowed mother, or authorize a purchaser to do so, without providing some other suitable dwelling for her—and also to the case of *Srimati Bhagabati Dasi v. Kanailal Mitter* (4), we should not be justified in interfering with the order of the District Judge. Bai Jadav's claim may be said to have been recognized as chargeable on the estate, in the hands of her son Dalsukh, by the apparent allotment to her of the house under consideration for residence; and we know of no authority which would warrant her being summarily evicted, as sought by the plaintiff, even though there may be other property in the hands of Dalsukh out of which her maintenance can be derived. We confirm the decree of the Court below, with costs.

(1) 25 Calc. W. R., 100.

(3) 1 Borr., 404.

(2) 4 Beng. L. R.; O. C. J., 72.

(4) 8 Beng. L. R., 225.