

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Melvill.

1883
February 12.

DHONDO RÁMCHANDRA, DECEASED, BY HIS SONS AND HEIRS, BÁL-KRISHNA AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, v. BÁL-KRISHNA GOVIND NAGVEKAR AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Hindu law—Widow's estate—Sale by a Hindu widow—Power of widow to alienate—Suit by purchaser of equity of redemption—Costs of a redemption suit—Compensation to mortgagee—Omission of finding by District Judge—Practice.

The restrictions on a Hindu widow's power of alienation are inseparable from her estate. Their existence does not depend on that of heirs capable of taking on her death.

The plaintiffs sued as purchasers of the equity of redemption from S., a Hindu widow, to redeem a mortgage effected by her husband P. The mortgage deed recited that a portion of the mortgaged land was held by B., not as owner, but as mortgagee from a third party. S. was alive when the suit was instituted, but she died after the settlement of issues. The plaintiff then filed a supplementary claim to succeed as B.'s next heir. The defendants (the sons of the mortgagee) contended that the plaintiff could not redeem, because the sale by S. was invalid. They also claimed compensation for loss of the rents and profits of a portion of the mortgaged property redeemed from B. by the original owner. The Subordinate Judge allowed the plaintiff's claim. In appeal, the District Judge confirmed his decree, being of opinion that the sale was valid as against the defendants, because there were no collateral heirs. On appeal to the High Court,

Held, following the decision of the Privy Council in *The Collector of Masulipatam v. Cavalry Venkata Narrainapak*(1), that the plaintiffs, who were bound to make out their title, could not succeed on the strength of an alienation by a Hindu widow, unless they proved that the alienation was made for purposes which the Hindu law recognized as necessary.

Held, also, that the defendants were not entitled to any compensation on account of the redemption of a portion of the mortgaged property by the original owner, because they were aware that the mortgage to B. was liable to be redeemed, and they (defendants) took such a precarious security at their own risk.

In a redemption suit the defendant (mortgagee) is ordinarily entitled to his costs, unless he has refused a tender of the amount due to him, or has so misconducted himself in the course of the suit as to induce the Court to subject him to a penalty.

THIS was a second appeal from the decision of C. B. Izon, Judge of the District Court of Ratnágiri, affirming the decree of

*Second Appeal, No. 114 of 1882.

(1) 8 Moore's Ind. App., 529; S. C., 2 Cal. W. R. (P. C.) 59, 61

Gopál Gánesh Soman, Second Class Subordinate Judge of Málvan.

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NAOYEKAR.

One Bábli mortgaged certain property to Dhondo Rámchandra. After Bábli's death his widow Sundrábái sold the property to the plaintiffs. The mortgagee Dhondo died, leaving three sons him surviving. Subsequently, the plaintiffs brought this suit against Sundrábái and the three sons of Dhondo to redeem the mortgage effected by Bábli, Sundrábái died while the suit was pending. The other defendants contended (*inter alia*) that the sale by Sundrábái was invalid according to Hindu law; that the plaintiffs, therefore, had no right to redeem; that they (defendants) were entitled to compensation on account of the redemption of a portion of the mortgaged property fraudulently allowed by Bábli.

The Subordinate Judge allowed the plaintiffs to redeem on payment of Rs. 502 to the defendants. In appeal, the District Judge upheld the decision of the first Court, being of opinion that the sale was valid as against the defendants, because Bábli had left no collateral heirs.

The defendants appealed to the High Court.

G. N. Nádkarni for the appellants.—The plaintiffs claim under Sundrábái, but she is dead. They have, therefore, no right to sue for redemption, as she had only a life interest in the property. A Hindu widow is not competent to alienate any immovable property—*The Collector of Masulipatam v. Cavalí Venkata Narrainapah* ⁽¹⁾. The District Judge has wrongly interpreted the passage in West and Bühler, page 123. He has not found that Sundrábái sold the property for any necessary or valid purposes. If Bábli has no collateral heirs, the property ought to go to Government as the last heir. The defendants are entitled to compensation for the loss of six fields which Bábli, after the date of the mortgage to the defendants, fraudulently allowed the original owners to redeem on receipt of the amount due by them. The plaintiffs have not proved that they have tendered the money due to the defendants. The Judge, therefore, ought not to have allowed them their costs.

Shamráv Vithal, with him *V. G. Bhandárkar*, for the respondents.

(1) 8 Moore's Ind. Apps., 529; S. C., 2 Calc. W. R. P. C., 59, 61.

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MELVILL, J.—We think that this case must be remanded for reconsideration by the District Judge.

The plaintiffs sued, as purchasers of the equity of redemption from Sundrábái, a Hindu widow, to redeem a mortgage effected by Sundrábái's husband, Bábli. When the suit was instituted, Sundrábái was alive : but she died after the settlement of issues, and the plaintiff then filed a supplementary claim to succeed as Bábli's next of kin (exhibit 125). This claim it was not necessary for the District Judge to consider, because he was of opinion that the plaintiff was entitled, as Sundrábái's alienee, to redeem the mortgage. If, upon the remand of the case, the District Judge should arrive at a different conclusion upon the latter point, it will then be necessary for him to decide whether the plaintiff can succeed as next heir to Bábli.

The ground of the District Judge's decision is thus briefly stated by him :—“It appears that the alienation is only invalid as against the collateral heirs (see West and Bühler, page 123). In this case there are apparently no such heirs, and the sale will, I think, be valid against mortgagees.”

We do not understand the passage, to which the District Judge refers, in the sense in which he has interpreted it, and the decision of the Judicial Committee in *The Collector of Masulipatam v. Cavalv Venkata Narrainapah*⁽¹⁾ states the law upon this point very clearly. At page 553 of the Report the Privy Council say : “Their Lordships are of opinion that the restrictions on a Hindu widow's power of alienation are inseparable from her estate, and that their existence does not depend on that of heirs capable of taking on her death.” It follows that the plaintiff, who is bound to make out his title, cannot succeed on the strength of an alienation by a Hindu widow, unless he proves that the alienation was made for purposes which the Hindu law recognizes as necessary.

The defendants have contended that they are entitled to compensation for the loss of six fields, part of their original security, which were taken out of their possession by the original owners, who redeemed them from the defendant's mortgagee.

(1) 8 Moore's Ind. App., 529.

Bábli. Upon this point the defendant's pleader before us relied on the decision of this Court in an unreported case—Special Appeal 22 of 1875. We find, however, that in that case a fraud had been practised by the mortgagor on the mortgagee, the former having sold the property in dispute to a third party previously to the mortgage; and it was properly held that the mortgagee, who had been ousted in consequence of this fraud, was entitled to be compensated for the loss of the rents and profits which he ought to have received in lieu of interest. In the present case there was no such deception. The defendants' mortgage deed informed them that a portion of the land assigned to them as security was held by Bábli, not as owner, but as mortgagee, and they were, therefore, well aware that the mortgage to Bábli was liable to be redeemed; and they must be held to have taken such a precarious security at their own risk.

The defendants also contend that they are entitled to certain benefit secured by a document, exhibit No. 75. The Subordinate Judge held this document to be a forgery: but, in appeal, the defendants contested this finding; and they are entitled to a decision on the point by the District Court.

The defendants complain of the District Judge's order as to costs; but on this point we do not feel able at present to express any opinion. No doubt the defendant in a redemption suit is ordinarily entitled to his costs, unless he has refused a tender of the amount due to him, or has so misconducted himself in the course of the suit as to induce the Court to subject him to a penalty. We must leave the District Judge to come to a fresh decision on this point after consideration of all the facts of the case.

We reverse the decree of the District Court, and remand the case for a new decree with reference to the foregoing observations. The parties should be allowed to give fresh evidence, if necessary. The costs of this second appeal will follow the final result.

Decree reversed and case remanded.

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