

[534] same must have been the intention in the case contemplated by sub-cl. (b). The holder of the village in the concluding para. of s. 216 must, we think, be read as meaning the holder of the assessment or any part thereof of an alienated village.

We agree, therefore, with the conclusion arrived at by the lower appeal Court that the plaintiff is entitled to the sum claimed, but subject to the quit-rent and *judi* which, the Joint Subordinate Judge held, should be deducted, and against which no cross-objections were taken by the defendant before the lower appeal Court. The decree of the lower Court must, therefore, be confirmed subject to the above amendment. Appellant must pay respondents their costs of this appeal.

Decree confirmed subject to amendment.

18 B. 534.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

VENKAJI SHRIDHAR, DECEASED, BY HIS SONS BALVANT AND OTHERS (*Original Defendants*), Appellants v. VISHNU BABAJI BERI AND ANOTHER (*Original Plaintiffs*), Respondents.*

[7th September, 1893.]

Hindu law—Widow—Right of widow to sell property inherited from her husband—Reversioner—Suit by reversioner to set aside sale by widow—Burden of proof—Evidence.

B. having during his life-time mortgaged certain property the income of which was sufficient only to pay interest on a portion of the mortgage-debt, his widow after his death sold it before the mortgage-debt fell due. The reversioners sued to set aside the sale.

Held, that although there might have been no absolute necessity for the widow to sell the property to provide herself with maintenance, still as there was no other family property, the property in question must necessarily have been sold at the expiration of the time fixed by the mortgage, and the sale by the widow ought to be supported.

A widow like a manager of the family must be allowed a reasonable latitude in the exercise of her powers, provided she acts fairly to her expectant heirs.

[R., 36 B. 88 = 13 Bom. L.R. 860 = 12 Ind. Cas. 271; 8 C.L.J. 458 (464) = 13 C.W.N. 201 = 4 Ind. Cas. 513.]

THIS was a second appeal from the decision of S. Tagore, District Judge of Sholapur-Bijapur.

Suit by reversioners to set aside the sale of a house by a widow.

[535] The house in question had been the property of one Baba Balaji, who died childless, and his widow Lakshmibai took possession. The property had been mortgaged by Baba before his death, and in 1859, while the mortgage term had still two years to run, Lakshmibai sold the property to the defendant.

The plaintiffs sued as reversioners to set aside the sale, contending that it was without necessity, and, therefore, illegal. The defendant pleaded that the sale was valid, Lakshmibai having sold the house in order to pay her husband's debts.

The Subordinate Judge dismissed the suit, holding that it lay on the plaintiffs to show that the sale was improper and illegal, and that they had failed to do so.

* Second Appeal No. 247 of 1892.

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On appeal, the District Judge reversed the decree, holding that the burden of proof lay on the defendant, and that it was for him to show that the property was sold under such circumstances as to justify a Hindu widow in alienating the immoveable property of her husband without the consent of his heirs. The District Judge remanded the case for decision on the merits. The following is an extract from the Judge's judgment:—

"It might be inferred from the documents produced in this case (Exs. 78, 79, 80), that the sale was made by Lakshmbai to pay her husband's debts and to procure maintenance for herself. Both these objects are such as would justify a sale by a Hindu widow; but a mere recital in a widow's deed of sale of the object is not enough to prove it: West and Buhler, Vol. I, Introduction, p. 102. It appears that the shop was mortgaged by Baba Balaji to one Devidas for Rs. 150 in 1854. Three years after Baba borrowed from Devidas a further sum of Rs. 50 on the mortgage of the same property. This mortgage was made for five years, but before the expiry of the period stipulated, the shop was sold by Lakshmbai to the defendants. It has not been shown that there was any necessity to sell the shop to pay off the mortgage-debt before the time fixed in the mortgage instrument.

"It is urged by the respondents' pleader that such necessity arose out of the necessity on the part of the widow of procuring her own maintenance; but I am not satisfied that the widow was [536] in such straitened circumstances as to be compelled to sell the property for the small sum of Rs. 81 on account of her maintenance. There is a preponderance of evidence to show that she was in easy circumstances. Defendants' own witness, No. 60, a relation of Lakshmbai, says that she occasionally lived with the witness, and the latter declares that he was ready to support the widow in case she chose to reside with him permanently. Upon the whole, I find that the defendants have failed to make out a case of necessity for the absolute alienation by the widow of her husband's estate."

On remand the Subordinate Judge allowed the plaintiff's claim.

On appeal by defendants the Judge confirmed the decree.

Defendants preferred a second appeal.

Ghanasham N. Nakkarni, for the appellants (defendants):—He relied upon *Chimnaji Govind Godbole v. Dinkar Dhondeo Godbole* (1).

Mahadeo Chimnaji Apte, for the respondents.

JUDGMENT.

SARGENT, C. J.—In this case the District Judge has found that the property had been mortgaged by the widow's husband in his life-time; but he has held there was no necessity for the widow's selling the mortgaged property two years before the mortgage-debt fell due, as the state of her circumstances did not imperatively require it to be done in order to provide herself with maintenance. But we think that a widow, like a manager of the family, must be allowed a reasonable latitude in the exercise of her powers, provided, as Mr. Justice West says in *Chimnaji Govind Godbole v. Dinkar Dhondeo Godbole* (1), "she acts fairly to her expectant heirs." Here then, although there may have been no absolute necessity to sell to provide herself with maintenance, still, as there was no other family property, and the property in question must necessarily have been sold at the expiration of the time fixed by the mortgage, we think that the sale is one which

ought to be supported. The entire income of the property had been appropriated to the interest of part of the mortgage-debt, and 12 per cent. was running on the remaining [537] Rs. 50, which would necessarily have to be added to the principal when the entire mortgage-debt was paid off. The reversioners could, under the above circumstances, be in no way prejudiced by the widow's anticipating the date at which the mortgage-debt fell due.

We must, therefore, reverse the decree of the Court below and dismiss the plaint with costs on the plaintiffs throughout.

Decree reversed.

18 B. 537.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

NATHU VALAD PANDU (*Original Plaintiff*), *Appellant v.* BUDHU VALAD BEIKA (*Original Defendant*), *Respondent.**

[7th September, 1893.]

Civil Procedure Code (Act XIV of 1882), s. 13 (1), expl. II, and s. 43—Suit for specific performance of a contract of sale and to execute a sale-deed—Sale-[538] deed subsequently executed by the Court under s. 262 (2) of the Civil Procedure Code—Suit on sale-deed to recover possession.

The plaintiff claiming specific performance of a contract of sale sued the defendant to compel him to execute a deed of sale, alleging that he had paid the

* Second Appeal No. 256 of 1892.

(1) Sections 13 and 43 of the Civil Procedure Code (Act XIV of 1882);—

13. *Res judicata.*—No Court shall try any suit or issue in which the matter directly and substantially in issue

has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and

has been heard and finally decided by such Court.

Explanation I.—The matter above referred to must in the former suit have been alleged by one party, and either denied or admitted, expressly or impliedly, by the other.

Explanation II.—Any matter which might and ought to have been made ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

43. *Suit to include whole claim.*—Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Relinquishment of part of claim.—If a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Omission to sue for one of several remedies.—A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but, if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

For the purpose of this section an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action.

Illustration.

A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the year 1891 and 1892 is due and unpaid. A sues B only for the rent due for 1892. A shall not afterwards sue B for the rent for 1891.

(2) 262. *Form and effect of execution of conveyance by Court.*—The execution of a conveyance, or the endorsement of a negotiable instrument, by the Court under the last