

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránúde.

1893.
December 19.

ANTA'JI (ORIGINAL DEFENDANT), APPELLANT, v. DA'TTA'JI (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Widow—Alienation by widow—Purchaser from one of several divided co-sharers—Suit for joint possession—Partition suit—Registration—Evidence—Notice of attornment admissible without registration.

The property in dispute (consisting of 12 *thikáns* or plots of land) was originally held by A and B as tenants-in-common, and they divided the income according to their respective shares. After A's death his widow adopted Chitko on condition that she was to remain in absolute possession and enjoyment for her life, and that Chitko was to succeed to the estate after her death. The widow mortgaged 9 out of the 12 *thikáns*, sold one, and granted a perpetual lease of another to the defendant. All these alienations to the defendant were made without any legal necessity. The defendant also purchased B's share in the *thikáns* in dispute. The plaintiff purchased Chitko's rights, and on the widow's death sued to set aside her alienations and to obtain joint possession with the defendant of all the *thikáns*. The defendant pleaded (*inter alia*) that the widow's alienations were valid and binding on the plaintiff, and that the plaintiff's remedy was a partition suit.

Held, that A's widow, not having higher powers than those of an ordinary Hindu widow who succeeds as heir to her sonless husband, could only make valid alienations for purposes warranted by the law. As no legal necessity was shown in respect of the alienations in question, which were made long after disputes had commenced between her and her adopted son, they were not binding on him or on his alienee the plaintiff.

Held, also, that plaintiff was entitled to be put into joint possession with the defendant. Both were outside strangers who had purchased the several shares of the separated owners of the *thikáns* in dispute. A partition suit was not, therefore, necessary.

Where on the redemption of a mortgage the mortgagee executed a document which purported to be a notice of attornment to the tenants in occupation of the mortgaged property, containing a recital that the property had been redeemed,

Held that the document, though unregistered, was admissible in evidence for its own proper purpose of proving the attornment, though not for the purpose of proving that the mortgage charge was satisfied.

SECOND appeal from the decision of Ráo Bahádur Káshináth B. Maráthe, First Class Subordinate Judge, A. P., at Ratnágiri, in appeal No. 86 of 1892.

The property in dispute consisted of 12 *thikáns* originally held by one Chitko Raghunáth and his co-sharer as tenants-in-common.

*[Second Appeal, No. 329 of 1893.]

They used to divide the income of the *thikáns* according to their respective shares.

On Chitko's death his share of the property in dispute devolved on his daughter-in-law Jánkibái, the widow of his predeceased son.

On 26th April, 1863 Jánkibái adopted a son, also called Chitko, under an agreement which provided that she was to remain in exclusive possession and management of the property during her lifetime, and that the adopted son was to succeed to the estate after her death.

In 1870 Chitko came of age. Thereupon he sued Jánkibái for possession of his adoptive father's property, alleging that the agreement of the 26th April, 1863, was invalid, and was not binding on him.

This case came up on appeal to the High Court, which ultimately decided that the agreement in question was valid, and that Chitko was not entitled to the possession of the property during Jánkibái's lifetime⁽¹⁾.

After this decision Jánkibái mortgaged 9 out of the 12 *thikáns*, sold one, and granted a permanent lease of another *thikán* to the defendant. She also released a *thikán* from the charge of a mortgage-debt due to him. All these alienations were made to the defendant shortly before Jánkibái's death. At the same time defendant purchased the interest of Chitko's co-sharer in the property in dispute.

Jánkibái died in 1886.

In 1890 plaintiff sued as purchaser of the right of Chitko (the adopted son) to set aside the alienations of Jánkibái, and to obtain joint possession with the defendant of all the *thikáns* alienated by her.

The defendant pleaded (*inter alia*) that the alienations in question were valid and binding on the plaintiff, and that he was in possession of the whole property not only as Jánkibái's alienee, but also as a purchaser of the rights of Chitko's co-sharer, and that the plaintiff's proper remedy was a partition suit.

(1) 11 Bom. H. C. Rep., 199.

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The Subordinate Judge held that Jánkibái's alienations not being supported by any legal necessity were not binding after her death, either on her adopted son or on his alienee (the present plaintiff), and that the plaintiff was entitled to be put into joint possession with the defendant. He, therefore, awarded the plaintiff's claim.

This decision was confirmed on appeal.

The defendant thereupon preferred a second appeal to the High Court.

Ghanashám Nilkanth for appellant (defendant):—The property in dispute was held jointly by Jánkibái and her co-sharers. At Jánkibái's death defendant was in possession partly as Jánkibái's alienee and partly in his own right. He had purchased the interest of Jánki's co-sharer. On the other hand, plaintiff claims as purchaser of Chitko's rights. He is not entitled to be put into joint possession with the defendant. His proper remedy is a partition suit—*Babáji v. Vásudev*⁽¹⁾; *Kallápa v. Venkatesh*⁽²⁾; *Vishnu v. Venkatráv*⁽³⁾. I next contend that Jánki's alienations were valid. The lease granted to the defendant was within the scope of her authority. It was a lawful use of the powers conferred on her by the adoption deed. But assuming that the lease is invalid, defendant is entitled to be reimbursed the cost of improvements.

Vásudev Gopál Bhandárkar for respondent:—This is a suit between two purchasers from different members of a family already divided. Each member was in separate possession of his own share. In such a case the plaintiff need not bring a partition suit. The cases cited refer to the claims of a person who has purchased the rights of a member of an undivided family. Those cases, therefore, do not apply. A partition suit is not necessary between tenants-in-common—*Khán Mahomed v. Krishnaráv*⁽⁴⁾; *Sakharám v. Govind*⁽⁵⁾. As to the alienations of Jánkibái, they were clearly in excess of her authority. The adoption deed does not confer on her any proprietary rights over the estate. It merely

(1) I. L. R., 1 Bom., 95.

(2) I. L. R., 2 Bom., 676.

(3) P. J. for 1889, p. 248.

(4) P. J. for 1885, p. 102.

(5) *Ibid.*, p. 194.

confers on her the powers of a sonless Hindu widow succeeding to the separate or self-acquired property of her deceased husband. She had no authority to mortgage, sell, or otherwise alienate the property except for strict necessity. The *onus* of proving such necessity lies on the alienee. The defendant has not discharged this *onus*. It is found as a fact that the alienations were made by the widow without any necessity whatever. That being so, they cannot bind the plaintiff. Refers to *Mussamat Bhagbutti v. Chowdry Bholanath*⁽¹⁾; *Koonjbehari Dhur v. Premchand Dutt*⁽²⁾; *Hirábái v. Lakshmibái*⁽³⁾; *Lalla Byjnáth v. Bissen*⁽⁴⁾; *Roy Mukhun Lall v. Stewart*⁽⁵⁾; *Naráyan v. Yamunábái*⁽⁶⁾. The lease being invalid, the defendant is not entitled to compensation for improvements—*Herman v. Jeuchner*⁽⁷⁾. Exhibit 81 is not admissible in evidence for want of registration. It was put in to prove the extinction of the mortgage—*Fáki v. Khotu*⁽⁸⁾.

JARDINE, J.:—In this case the appellant's pleader rested his contentions chiefly on four grounds. He contended (1) that the suit was improperly framed and that plaintiff's remedy was a partition suit; (2) that Jánkibái was competent to make the alienations, and her acts bound the plaintiff; (3) that even if the other alienations were set aside, the permanent lease of plot No. 3 granted by Jánki to defendant should hold good, and if set aside, defendant was at least entitled to compensation for improvements made by him; (4) that the redemption of plot No. 8 by defendant from Jánki bound the plaintiff, who could not ask the defendant to repay the mortgage-debt charged on it, and already satisfied, twice over. We feel satisfied that none of these contentions are at all tenable.

Plaintiff was purchaser of the rights of one Chitko, the adopted son of Jánki. Under the adoption deed, Jánki reserved to herself full powers of management for her life. Jánki died in 1886, and before her death she mortgaged nine out of the twelve plots now in dispute with defendant, sold in part one of them

(1) 24 Cal. W. R., 168.

(6) 18 Cal. W. R., 121.

(2) I. L. R., 5 Cal., 684.

(7) P. J. for 1889, p. 136.

(3) I. L. R., 11 Bom., 573.

(8) 15 Q. B. D., 561.

(4) 19 Calc. W. R., 80.

(5) I. L. R., 4 Bom., 590.

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(No. 12) to him; gave a permanent lease of plot No. 3, and released plot No. 8 from the charge of a mortgage debt due to her.

The lands in dispute were held in joint ownership by Jánki's husband and a co-sharer, whose rights defendant purchased. After Jánki's death, plaintiff, as purchaser of Chitko's rights, brought this suit to cancel Jánki's alienations in defendant's favour and to obtain joint possession with defendant of the lands to the extent of Chitko's share therein. Defendant admitted (Exhibit 65) that he had purchased the interest of a co-sharer of Jánki's husband. He further admitted that he paid to Jánki the rent due for her share of the jointly owned lands. Under these circumstances, we do not think that defendant could legally require plaintiff to bring a partition suit in respect of these lands, when plaintiff only sought to be placed in the same position as Jánki occupied before. The authorities (*Vishnu v. Venkatráv*⁽¹⁾, *Bábáji v. Vásudev*⁽²⁾, *Kállápa v. Venkatesh*⁽³⁾) cited by the appellant's pleader all relate to claims brought by the purchasers of the rights of a member or members of an undivided family. This was not the case here. Both plaintiff and defendant were outside strangers, and had purchased the several shares of separated owners of jointly owned lands. The rulings reported in *Abáji Vithal Prabhu v. Govind Apáji Waradkar*⁽⁴⁾, *Khán Mahomed v. Krishnaráv*⁽⁵⁾, and *Sakhárám v. Govind*⁽⁶⁾ appear to us to govern in the present case the rights of such purchasers.

As regards the nature and extent of Jánki's powers over the property managed by her during her lifetime under the terms of the adoption deed (Exhibit 146), they have formed the subject of previous litigation, and were adjudicated upon in Second Appeal No. 547 of 1888 and also in the case of *Chitko v. Jánaki*⁽⁷⁾. Jánkibái's powers could not fairly be placed on a higher level than those of a Hindu widow, who succeeds as heir to her sonless husband. The adoption deed itself gives her only unrestricted enjoyment during her lifetime. It confers

(1) P. J. for 1889, p. 248.

(4) P. J., 1885, p. 68.

(2) I. L. R., 1 Bom., 95.

(5) *Ibid.*, p. 102.(3) *Ibid.*, 2 Bom., 676.(6) *Ibid.*, p. 194.

(7) 11 Bom. H. C. Rep., 199.

on her no proprietary rights. As such Hindu widow, Jánki could only make valid alienations for certain purposes. No such legal necessity has been shown in respect of the mortgages and sales effected by her in 1883 and 1885 a short time before her death. Chitko would not have been bound by these alienations, and plaintiff stands in Chitko's place. The mortgage bonds (Exhibits 72, 76) and the sale-deed (Exhibit 77) were not passed to pay all her husband's debts. She had, according to the defendant's own evidence, a net income of Rs. 300 a year, and her alienations, therefore, made long after disputes commenced between her and Chitko, must be set aside as having no legal validity after her death—*Koonjbehári Dhur v. Premchand Dutt*⁽¹⁾, *Hirábái v. Lakshimbái*⁽²⁾, *Annéji Dattatraya v. Chandrabái*⁽³⁾, *Lálla Byjnáth v. Bissen*⁽⁴⁾, and *Roy Mukhun Láll v. Stewart*⁽⁵⁾.

The permanent lease (Exhibit 79) of plot No. 3, passed also in 1885, cannot be placed on any other footing than Jánki's mortgages and sales. It has been held that a manager of temple property cannot grant a valid permanent lease—*Naráyan v. Yamunábái*⁽⁶⁾—and Jánki's lease could have no legal force after her death. The lease was not merely voidable but void as against Chitko and his assigns.

As regards the alleged expenditure on improvements, the Court of first instance characterized the Commissioner's report (Exhibit 21) as an extraordinary document of no value. The appellant did not choose to take objection to this finding, and he cannot now be permitted in second appeal to urge this equitable claim for compensation.

As regards plot No. 8, it certainly stands on a different footing from the other lands. It did not belong to Chitko, and it was only mortgaged with him by the owner, whose equity of redemption was bought by defendant. Defendant subsequently took back the mortgage bond from Jánki in September, 1885 (Exhibits 80, 81). The endorsement of satisfaction made on the back of this bond (Exhibit 80, which is for more than Rs. 100) is clearly inadmissible in evidence, as it was not registered. Exhi-

(1) I. L. R., 5 Calc., 634.

(2) *Ibid.*, 11 Bom., 573.

(3) *Ibid.*, 17 Bom., 503.

(4) 19 Cal. W. R., 80.

(5) 18 *Ibid.*, 121.

(6) P. J., 1889, p. 135.

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bit 81 was held to be inadmissible by the lower Court of appeal on the same ground. This document is, however, not a release or *sodchitti*, but is a notice of attornment to the cultivating tenants of the lands redeemed. As such under the authority of *Faki v. Khotu*⁽¹⁾, *Sangappa v. Basappa*⁽²⁾, *Shidlingapa v. Chenbasapa*⁽³⁾, *Annappa v. Ganpati and Vishnu*⁽⁴⁾, *Jagappa v. Latchappa*⁽⁵⁾, *Gireedhur Doss Mohunt v. Nitto Gopal Doss*⁽⁶⁾, and *Bharmava v. Ningava*⁽⁷⁾, it would be admissible in evidence for its own proper purpose of proving attornment, though not for the purpose of proving that the mortgage charge was satisfied—*Basawa v. Kalkapa*⁽⁸⁾, *Varada v. Krishnasami*⁽⁹⁾, *Gopi v. Markande*⁽¹⁰⁾, *Jagappa v. Latchappa*⁽⁵⁾, and *Deb Narain Mundul v. Baharee Lal Ghose*⁽¹¹⁾. The Court of first instance, however, held that Exhibit 81 was not proved to be a genuine and *bona fide* document. The appellant took no objection to this finding in the lower Court of appeal, and it is doubtful if it is open to him to raise this question in second appeal. Exhibit 81 being thus not proved to be genuine, the question of its admissibility or otherwise is really one of minor importance. We accordingly overrule the objections urged by the appellant in support of his case and confirm the decree of the First Class Subordinate Judge, A. P., with costs.

Decree confirmed.

(1) I. L. R., 4 Bom., 590.

(2) 7 Bom. H. C. Rep., 1 (A. C. J.)

(3) I. L. R., 4 Bom., 235.

(4) *Ibid.*, 5 Bom., 181.(5) *Ibid.*, 5 Mad., 119.

(6) 19 Cal. W. R., 291.

(7) P. J., 1889, p. 197.

(8) I. L. R., 2^d Bom., 489.(9) *Ibid.*, 6 Mad., 117.(10) *Ibid.*, 3 Bom., 30.

(11) 18 Cal. W. R., 329.