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For these reasons we adhere to the decisions of this Court in *Lakshman* v. *Radhabai*[1] and *Moro* v. *Balaji*[2] not only on the ground of *stare decisis*, but also as being sound Hindu law. Reversing the decree of the lower appellate Court we remand the appeal for disposal according to law on the merits. Costs shall abide the result.

Decree reversed.

R. R.

(1) (1887) 11 Bom. 609. (2) (1894) 19 Bom. 809.

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Chandavarkar.

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October 6.

KAVERIAMMA AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* LINGAPPA BIN RAMA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), section 50—Mortgage with possession—Lease to mortgagor—Death of the mortgagee and his surviving undivided brother—Sister entitled as heir—Possession and management by mortgagee's widow—Payment of the rent by the tenant in good faith to mortgagee's widow—Suit by sister for recovery of rent—Assignment by lessor not necessary.

On the 14th December 1895 Lingappa mortgaged with possession certain property to Subraya who on the same day let out the property to Lingappa for twelve years. Subsequently Subraya having died his interest as mortgagee survived to his undivided brother Ramkrishna. Ramkrishna died in the year 1901 and thereafter possession and management of the property was taken by Subraya's widow Gowri. She got her name placed on the khata as owner of the property and recovered rent from the tenant for the years 1902 and 1903. The person entitled to the property was Kaveriamma as the sister and heir of Subraya and Ramkrishna and she brought a suit against the tenant for the recovery of rent of the said years on the ground that Gowri had no authority to receive rent and give discharge for the same.

Held, that the defendant was not chargeable with rent sued for. Section 50 of the Transfer of Property Act (IV of 1882) was applicable inasmuch as the defendant in making the payment to Gowri acted in good faith and had no notice of the plaintiff's interest in the property. The language of the section is general and no assignment by the lessor during the tenancy was necessary.

* Second Appeal No. 576 of 1906.

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SECOND appeal against the decision of C. C. Boyd, District Judge of Kánara, confirming the decree of E. F. Rego, Subordinate Judge of Honávar.

The plaintiffs alleged as follows :—Plaintiff 1's father Parameshwar Bhat died possessed of landed estate the khata of which stood in his name in the revenue records. He died leaving him surviving two sons, Subraya and Ramkrishna, and a daughter, plaintiff 1. Ramkrishna was a minor and he lived in union with Subraya. On Parameshwar Bhat's death the khata of the lands was transferred to Subraya's name. Subsequently Subraya died leaving a widow Gowri. On Subraya's death the khata was transferred to the name of Ramkrishna. Thereafter Ramkrishna also died unmarried and issueless. Plaintiff 1 was thus entitled to the property as heir, she being the sister of Ramkrishna. While Subraya was alive the three defendants and their two brothers executed to him a mortgage-deed of the lands in dispute for Rs. 800. The mortgage was with possession and was dated the 14th December 1895 and on the same day defendant 1 took up the lands on a Chalgeni lease for twelve years and passed a kabulayat to Subraya. The plaintiffs, therefore, brought the present suit against the tenant, defendant 1 and his two brothers, defendants 2 and 3, who were all in possession of the mortgaged property to recover arrears of rent for the years 1902 and 1903. Plaintiff 2 was joined as a party because he had purchased from plaintiff 1 a moiety of her interest in the estate.

Defendant 1 answered *inter alia* that the suit was untenable, that he had no privity of contract or privity of estate with the plaintiffs who were not the lawful owners of the lands, that the lands belonged to his family and were mortgaged with possession to Subraya from whom the defendant alone took them on a lease and paid rent to Subraya and after his death to his widow Gowri, that he had no sort of *vinculum juris* with the plaintiffs, that Ramkrishna had no interest and he was not Ramkrishna's tenant, that defendants 2 and 3 lived separate and they had nothing to do with the leaseholds, that he had paid the rent in suit to Gowri and had taken receipts from her, that he was not aware of the purchase by plaintiff 2 from plaintiff 1, that the purchase was invalid and that the suit was collusive and vexatious.

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Defendant 2 was absent.

Defendant 3 stated that the mortgage-debt which they had contracted was the family money of Subraya and Ramkrishna but the bond was passed to Subraya alone, that Subraya and Ramkrishna lived in union, that he was willing to pay the mortgage-debt to a rightful heir declared by the Court and that he was not liable to pay the rent in suit as the lease was taken by defendant 1 alone.

The Subordinate Judge found that the Chalgeni lease alleged by the plaintiffs was proved, that their title to recover the arrears of rent was not proved, that the payment alleged by defendant 1 was proved, that the payment was binding upon the plaintiffs, that Subraya and Ramkrishna lived in union but the sum advanced for the mortgage-debt was the self-acquisition of Subraya and that the plaintiff was not entitled to recover the arrears of rent claimed. The suit was, therefore, dismissed.

On appeal by the plaintiff the District Judge raised the following issues :—

(1) Was plaintiff's evidence wrongly excluded ?

(2) Was the mortgage amount the self-acquired property of Subraya or the joint family property of Subraya and Ramkrishna ?

(3) Can plaintiffs recover the rent sought ?

(4) Do the payments of rent by defendants to Gowri bind plaintiffs ?

The findings on the said issues were :—

(1) No.

(2) Self-acquired property of Subraya.

(3) No.

(4) No finding necessary.

The District Judge, therefore, confirmed the Subordinate Judge's decree.

The plaintiffs preferred a second appeal.

N. A. Shiveshvarkar for the appellants (plaintiffs).

S. S. Patkar for the respondents (defendants).

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The second appeal was heard by Chandavarkar and Heaton, JJ., who, on the 19th July 1907, delivered the following interlocutory judgments :—

CHANDAVARKAR, J. :—There are two points urged before us in support of this second appeal. First it is contended that the evidence of the appellants was wrongly excluded by the Subordinate Judge. The exclusion complained of was under the following circumstances. It appears that the Subordinate Judge and also the parties to the suit were under the impression that the onus lay in the first instance upon the defendants. Accordingly the plaintiff's pleader put in an application on 8th September 1904 praying that the plaintiff's witnesses might be summoned after the defendants' witnesses had been examined. Now, the order passed by the Subordinate Judge which is in Kánarese is clearly to the effect that as prayed by the plaintiffs their application should be brought before him at the conclusion of the defendants' evidence for the purpose of ordering summonses to issue to the plaintiff's witnesses. That meant that the prayer was granted. We think that it was a wrong order to pass. Such an order is calculated to create unnecessary delay in the disposal of cases. However that be, here the plaintiffs were led by the Subordinate Judge's order to believe that their witnesses would be summoned after the defendants' witnesses had been examined: and therefore they were entitled to the summonses when the event contemplated occurred. But the Subordinate Judge declined to issue summonses *then*, because one of the plaintiffs had not come into Court and gone into the witness box though summoned by the defendants. What happened was the defendants wanted to examine one of the plaintiffs; the plaintiff would not come forward and for some reason or other stayed away. But that might be a reason for drawing a presumption against her case on the merits. It is not sufficient to deprive the plaintiffs of the right they had secured under the Subordinate Judge's order. The learned District Judge has treated the refusal by the Subordinate Judge to issue summonses as a matter of discretion. But the previous order of the Subordinate Judge left him no discretion at all. We think therefore that the first point must be decided in favour of the plaintiffs.

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Secondly, the point urged in support of this appeal is that the District Judge has decided the case under the erroneous impression that there is no evidence that Subrao and his brother had any joint property: the appellants' pleader Mr. Nilkanth has read out to us the deposition of defendant No. 1 in which he says that the two brothers not only lived jointly but he (defendant No. 1) has seen their field and their house. This could only mean that there was a house which Subrao held jointly with his brother. There is also evidence to that effect in the depositions, Exhibits 34 and 35. We also notice that in Exhibit 5 defendant No. 3 says "we borrowed family money of Subrao and Ramchandra" which clearly means that Subrao and Ramchandra had some nucleus of joint property from which the money came. If all this evidence is believed, then Subrao and Ramchandra must be regarded as having been the members of an undivided Hindu family and in that case, Subrao having pre-deceased Ramchandra, on Ramchandra's death the first plaintiff as his sister and therefore *gotraja sapinda* would be entitled to the property.

The appeal must go back to the District Judge who will remit the case to the Subordinate Judge.

The Subordinate Judge should resume the suit from the point where the defendants' evidence having closed, the plaintiffs had to begin their case. The defendants' witnesses should be summoned and examined. The Subordinate Judge will then remit the record to the District Judge who will after hearing the parties record his findings on the issues already raised and submit them to this Court.

The findings upon the issues must be returned within four months.

HEATON, J.:—I concur in the order proposed. The case was disposed of by the Subordinate Judge after refusing to grant an adjournment. I am exceedingly reluctant to interfere with the discretion which Chapter III of the Civil Procedure Code confers upon Judges in granting or refusing adjournments. The law gives to them the power and it is not for us in any way to limit it, but in this particular case the Subordinate Judge gave what

from the record appears to have been practically an undertaking that the plaintiffs' witnesses should be summoned after the defendants' witnesses had been examined. It seems to me that in so doing he made a grievous mistake; but having done so, he had of himself limited the discretion which the law gave him as to adjournments and when the time came and the plaintiff requested an adjournment to enable him, in fulfilment of the Subordinate Judge's own undertaking, to obtain the attendance of the witnesses; I consider the Subordinate Judge was bound to grant it.

The first issue raised by the District Court being disposed of by the High Court, the Judge after the remand found upon the remaining issues as follows:—

(2) The mortgage amount was the joint family property of Subraya and Ramkrishna.

(3) The plaintiffs can recover the rent sought from defendant 1.

(4) The payments of rent by defendant 1 to Gowri did not bind the plaintiffs.

After the said findings were certified to the High Court, they were objected to by the respondents (defendants).

The appeal was heard by Scott, C. J., and Chandavarkar, J.

S. S. Patkar for the respondents (defendants):— We object to the findings arrived at by the Judge. He has found in the plaintiffs' favour on the question of title having come to the conclusion that the mortgage-debt advanced to the defendants was the joint family property of Subraya and Ramkrishna and they having died, plaintiff 1, their sister, was entitled to the property as heir. But in this case Subraya's widow Gowri, to whose name the khata of the lands was transferred in the revenue records is not a party and a suit for the declaration of right is now pending between her and the plaintiff. We have already paid rent of the years in suit to Gowri and taken receipts from her. We should not be compelled to pay it twice over. The property was mortgaged with possession to Subraya for a period of twelve years on the 14th December 1905 and defendant 1 took possession of the property under a lease for the same period. Subsequently Subraya and Ramkrishna died and

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Gowri took up the management of the property and the lands were transferred to her khata. She, as the widow of Subraya, was the apparent owner and the lands also being transferred to her name, we, in good faith, paid the rents to her and took from her receipts for the same. We had no knowledge that plaintiff 1 was the heir. As tenants we were estopped from denying the title of our landlord Subraya and his widow Gowri.

We further rely on section 50 of the Transfer of Property Act. The ruling in *Jamsedji Sorabji* v. *Lakshmiram Rajaram*[1] supports our contention. It lays down that a person taking a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive rent or to sue in ejectment.

N. A. Shiveshvarkar for the appellents (plaintiffs):—On the bases of the fresh evidence recorded after the remand the Judge came to the correct conclusion that our title was proved and that the defendants were liable to pay us the rent claimed. From the beginning the case has been fought out on the question of title. At first it was found that we had not proved our title and consequently the suit was dismissed. Now that the finding on the question of title has been returned in our favour, it is not open to the defendant, at this late stage, to set up *bonâ fides* on his part which he did not set up before.

Section 50 of the Transfer of Property Act does not apply. It cannot be made applicable as observed by the Judge "without unduly straining the meaning of the words used". The illustration to the section indicates the class of cases contemplated by the section.

Defendant 1 held the lands as the tenant of Subraya and any payment made to him in good faith would exonerate the defendant from liability to the rightful heir. But directly Subraya died, the defendant could not claim the protection of the section. It was his duty to inquire and to ascertain what persons were entitled to the rent.

Patkar, in reply.

SCOTT, C. J.:—This suit was brought by the plaintiffs to recover rent from the first defendant on the ground that he

(1) (1888) 13 Bom. 323.

was the lessee of certain property to which the first plaintiff had become entitled as heir of her deceased brothers.

The property had come into the possession of the first plaintiff's family by a deed of mortgage, dated the 14th of December 1895, which was executed with possession in favour of Subraya although the mortgage money was advanced by Subraya on behalf of himself and his younger brother. On the same date, the 14th of December 1895, Subraya in his own name granted a lease of the property for 12 years to the first defendant. Subraya after some years died, his interest as mortgagee surviving to his younger brother Ramkrishna. Ramkrishna thereafter died and the person who became entitled as his heir was the first plaintiff. The first plaintiff, however, did not live with her brothers and upon the death of Ramkrishna the property was taken possession of and managed by Subraya's widow Gowri, who, after Ramkrishna's death in the year 1901, got her name placed on the *khata* as the owner of the property. While she was thus the apparent owner of the property she demanded rent from the first defendant and he paid her rent for the year 1902 and the year 1903. It is for these years that the plaintiffs now seek to recover rent from the first defendant on the ground that Gowri had no authority to receive rent and give a discharge for the same.

At the time that the first defendant paid these rents to Gowri the tenancy was still continuing and he was, therefore, estopped as against Subraya, the nominal lessor, and Subraya's heir Gowri from disputing their right as landlords. He could not have defended a suit for rent brought against him by Gowri.

It is also apparent from the findings of the District Judge that the defendant in making the payment to Gowri was acting in good faith. He had no notice of the plaintiffs' interest in the property. We think that it is a case calling for the application of section 50 of the Transfer of Property Act which runs as follows:—

> No person shall be chargeable with any rents or profits of any immoveable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

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It has been contended on behalf of the plaintiffs that section 50 has no application to a case in which there has not been an assignment by the lessor during the tenancy.

The section, however, is not in terms limited to such cases, and, we think, its language is general enough to cover the case before us. We must therefore hold that the first defendant is not chargeable with the rents sued for, and we therefore confirm the decree of the lower Court and dismiss the suit.

The defendant in the course of the suit raised contentions as to the right of the plaintiff as heir of her brother Ramkrishna and it became necessary to investigate closely the rights of Subraya and Ramkrishna with reference to the property in question. In those contentions the defendant has failed. For these reasons we think that the proper order as to costs will be that each party do bear her or his own costs throughout.

Decree confirmed.

G. B. R.

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Batchelor.

1908. *October 7.*

BAI MANI AND ANOTHER (ORIGINAL PLAINTIFFS—PETITIONERS), APPELLANTS, *v.* KHIMCHAND GOKALDAS (ORIGINAL DEFENDANT 1—OPPONENT), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), sections 503, 505 and 588—Recommendation by Subordinate Judge of a person to be appointed receiver—Refusal by District Judge—Appeal.

A Subordinate Judge recommended to the District Judge that a certain person be appointed receiver and in case of the recommendation not being accepted, the Nazir of his Court should be appointed. The District Judge refused to authorize the Subordinate Judge to appoint either of the persons so recommended.

Against the order of the District Judge an appeal was preferred to the High Court.

* Miscellaneous Appeal No. 16 of 1908.