

KORU NAYAN
v.
RAMAPPA. day that the present suit was brought, in which he has accepted this very amount in full discharge of the mortgage.

It is next argued that the tender was conditional. No doubt section 83 is silent as to a receipt. But defendant not only waived the objection to this demand, but, acceding to it, produced a draft receipt for approval. Nor do we think that the request for return of the title-deeds was a condition vitiating the tender, as the section requires that the title-deeds should be deposited before the mortgagee takes out the money.

As to the case in *Nanu v. Manchu*(1) the mortgagor in that case appears to have insisted on the return of documents other than those which the mortgagee was bound to deposit under section 83.

We therefore set aside the decree of the Lower Appellate Court and restore that of the District Munsif.

Respondent must pay appellant's costs in this Court and in the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

BHAGIRATHI (PLAINTIFF), APPELLANT,

v.

ANANTHA CHARIA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu law—Maintenance—Suit to recover arrears of maintenance due under a personal decree, and to establish a charge for future maintenance on the family property.

A Hindu widow obtained a personal decree against her father-in-law for maintenance. Her late husband's five brothers were made parties to the suit, but no personal decree was made against them, nor did the widow ask that her maintenance be made a charge on the family property. On the death of her father-in-law, the family property devolved on his sons and grandsons, who sold certain of the property. There were arrears of maintenance due, and the widow instituted the present suit, in which she asked for a decree establishing her right to receive maintenance for her life and for the arrears of maintenance on the responsibility of the property:

Held (1) that the maintenance not having been declared a charge upon the portion of the property which had been alienated, this property was free of any charge for her maintenance;

(1) I.L.R., 14 Mad., 49.

* Second Appeal No. 304 of 1893.

(2) that the arrears of maintenance constituted a personal debt of the plaintiff's deceased father-in-law, and that his sons and grandsons (the defendants) incurred his liability on his decease and were bound to discharge the same out of the family property ;

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(3) that the right to maintenance being enforceable against the defendants, the right to have it made a charge on the family property was enforceable along with it.

SECOND APPEAL against the decree of W. C. Holmes, District Judge of South Canara, in appeal suit No. 131 of 1892, reversing the decree of U. Babu Row, District Munsif of Udipi, in original suit No. 335 of 1891.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the High Court.

The District Munsif decreed in favour of the plaintiff, but the District Judge reversed the decree. The plaintiff preferred this appeal.

Narayana Rau for appellant.

Ramachandra Rau Saheb for respondents.

MUTTUSAMI AYYAR, J.—Appellant is a Hindu widow and defendants 1 to 16 are her husband's brothers and nephews. In original suit No. 137 of 1870 the former obtained a personal decree against Vadiraja Charia, her father-in-law, for maintenance at the rate of Rs. 30 per annum. To that suit her husband's five brothers were also made parties, but there was no personal decree against them. Nor did appellant then ask that her maintenance be made a charge on ancestral or family property. Vadiraja Charia died since and defendants 1 to 16 repudiated their liability to pay maintenance under the decree passed against him. On the death of Vadiraja Charia, the family property devolved on respondents, and at the date of the suit there were arrears of maintenance under the former decree to the extent of Rs. 90. The first 16 defendants sold items of property 3 and 4 to the 17th defendant, and appellant's case is that the alienation can only be upheld subject to her claim for maintenance. The plaintiff prayed for a decree establishing her right to receive maintenance for her life at the rate of Rs. 30 per annum as per decree in original suit No. 137 of 1870, and Rs. 90 for arrears of maintenance on the responsibility and by the sale of the properties 1 to 4 mentioned in schedule A attached to the plaint, and such other relief as the Court might deem fit to grant in the circumstances of this case. The District Judge considered that

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appellant was bound to have asked in the former suit that her maintenance be made a charge on the family property, and held that the present suit was barred by section 43 of the Code of Civil Procedure. The District Judge further held that appellant's claim against the 17th defendant must fail, and in support of his opinion he relied upon the decisions in *Saminatha v. Rangathammal*(1) and *Rangamma v. Voballayya*(2). I do not think that the decision of the Judge can be supported except so far as it relates to the 17th defendant.

Appellant's maintenance has not been declared a charge on the property alienated, and the District Judge was right in upholding the alienation against her claim. I am also of opinion that neither of the cases relied on by the Judge is in point. In *Saminatha v. Rangathammal*(1) both suits were brought against the same person, and it was held that no second suit should be brought to recover arrears of maintenance which might have been recovered in execution of the decree passed in the prior suit. The point decided in *Rangamma v. Vohalayya*(2) was that a personal decree for maintenance and a declaration that it is a charge on family property are two remedies referable to the same cause of action, viz., the right to receive maintenance, and that two separate suits cannot be brought in respect of the two remedies against the same defendant.

In the present case appellant rests her claim to arrears on the ground that they constitute a personal debt of Vadiraja Charia and his sons and grandsons. Defendants 1 to 16 are bound to discharge it under Hindu law from the family property which has devolved on them by right of survivorship. Their liability to pay their father's and grandfather's debt arose only on the death of Vadiraja Charia.

As regards plaintiff's claim to future maintenance, it is tenable against defendants 1 to 16, the ancestral property surviving to them and passing into their management only on the death of Vadiraja Charia. The right to maintenance being enforceable against them, the right to have it made a charge on family property is also enforceable along with it.

Though several grounds of claim are united in this suit, each ground of claim is good as against all respondents. It is urged on respondent's behalf that the suit is framed as if it was a suit

(1) I.L.R., 12 Mad., 285.

(2) I.L.R., 11 Mad., 127.

to execute the decree already passed in original suit No. 137 of 1870; but the clause in the plaint which contains the prayer is open to the construction that it prays for relief similar to those in the former decree. I would, therefore, set aside the decree of the Judge and remand the case for disposal on the merits. The costs incurred in this Court will abide and follow the result and be provided for in the revised decree.

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APPELLATE CIVIL.

Before *Mr. Justice Muttusami Ayyar* and *Mr. Justice Best*.

ACHUTAN NAYAR (DEFENDANT No. 4), APPELLANT,

1893.
November 8.

v.

KESHAVAN (PLAINTIFF), RESPONDENT.*

Mortgage—Right of a jenni, who is a judgment-creditor, to sell the kanom right before the expiry of twelve years.

A jenni, who has obtained a decree for arrears of rent, may sell the kanom before the expiry of twelve years: such a sale does not put an end to the kanom, but only transfers the kanomdar's interest to the purchaser at the execution sale.

SECOND APPEAL against the decree of A. Venkataramana Pai, Subordinate Judge of South Malabar, in appeal suit No. 374 of 1892, modifying the decree of J. F. Pereira, District Munsif of Angadipuram, in original suit No. 45 of 1892.

This was a suit to recover the sum of Rs. 63-14-2, being principal and interest on account of arrears of porapad for the years 1065, 1066 and a portion of 1067, alleged to be due by the defendants on a kanom kychit executed by the first defendant to plaintiff's elder brother, the late Neelakandan Musad, on the 7th Edavom 1048 (19th May 1883).

The plaintiff sued to recover the aforesaid arrears from first defendant personally, from the properties of first to third defendants' tarwad, and by the sale of the kanom and value of improvements on the properties demised.

Defendants 1 to 3 and 5 were *ex parte*.

The fourth defendant answered that the demise sued upon was

* Second Appeal No. 417 of 1893.