OPPENHEIM & Co. v. MAHOMED HANEEF

Viscount CAVE.

restored, the respondents to pay the costs in both Courts in India and the costs of this Appeal.

Solicitors for appellants: *Morris, Veasey & Co.*

APPELLATE CIVIL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Coutts Trotter and Mr. Justice Kumaraswami Sastri.

1921, December 21.

TIRUPATIRAJU AND TWO OTHERS (DEFENDANTS TWO TO FOUR), APPELLANTS,

v.

VENKAYYA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Hindu Law—Mortgage by widow—Suit on mortgage and compromise by widow selling mortgaged properties to mortgagee—Suit by reversioners—Onus of proving validity of compromise on alienee.

Where a Hindu widow who had mortgaged her husband's estate for a debt contracted by her was sued by the mortgagee and compromised the suit by purporting to make over the property to the mortgagee absolutely,

Held, that the burden of proving that the compromise was valid and binding on the reversioners was on the mortgagee purchaser. *Kumarasami Odayar* v. *Subramania Iyer*, (1916) 31 M.L.J., 87 and *Kadakkarai Nadan* v. *Nadakkannu Nadan*, (1921) M.W.N., 342 and *Srinivasa Aiyar* v. *Thiruvengada Maistry*, (1919) 10 L.W., 594, explained. The distinction between cases where the suit or claim against the widow arises out of a contract or transaction entered into by her husband with strangers, and those where it is in respect of a contract or transaction entered into by herself, pointed out.

SECOND APPEAL against the decree of N. BALARAMA LAO, Subordinate Judge of Cocanada, in Appeal Suit No. 26

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* Second Appeal No. 115 of 1921.

of 1920, presented against the decree of V. PURNAYYA, Additional District Munsif of Cocanada, in Original Suit No. 102 of 1919.

This was a suit by the daughter of a deceased Hindu to redeem a usufructuary mortgage made by him. The defendants (mortgagees) pleaded that the deceased's widow borrowed Rs. 200 from the defendants and hypothecated to them the same property and that when sued on the hypothecation she compromised the suit by making over the property to the defendants absolutely. The Court of first instance upheld the defendant's pleas and dismissed the suit. But on appeal by the defendants, the Subordinate Judge held that the burden of proving that the compromise and the sale were valid and binding on the reversioners was on the defendants; and that, as they had failed to discharge the burden, he allowed redemption, reversed the decree of the first Court and remanded the suit for disposal after trying other undecided issues, e.g., whether any improvements were effected by the defendants. Thereupon the defendants preferred this Second Appeal to the High Court, which was heard by KRISHNAN and ODGERS, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH:

The facts necessary for this Reference are briefly these: One Davuluri Swami, who was the original owner of the plaint properties, mortgaged them usufructuarily to the first defendant in 1887 for Rs. 171-8-0 and died soon after. On his death, his estate passed into the hands of his widow Sathemma. In 1891 she executed a deed of simple mortgage for Rs. 200 in favour of the same person, the first defendant, as a second mortgage on the same properties with some addition. In 1901 she was sued by the first defendant for recovery

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of the money due on the second mortgage by sale of the mortgaged properties, presumably subject to the first mortgage. This suit, Original Suit No. 564 of 1901, was compromised by the widow with the first defendant and it was arranged thereby that the first defendant was to take the properties as sold to him outright in settlement of his claim. The widow thereafter went away to Rangoon and has not been heard of since for many years. The present suit is by the Swami's daughter, the first plaintiff, and an assignee of a half share of her properties, the second plaintiff, and they sue on the footing that the widow is dead and the reversion has fallen in to the first plaintiff, to redeem the usufructuary mortgage granted by the Swami, ignoring the compromise decree and the second mortgage executed by the widow. The defendants set up the compromise in answer to the suit and an issue was framed whether it was binding on the first plaintiff.

On that issue the Subordinate Judge held that the burden of proof was on the defendants, the alienees, to prove that the mortgage debt and the compromise were binding on the reversioner, and, finding that they had not established it on the evidence, he set aside the compromise and the sale under it and allowed redemption to the plaintiffs. The learned vakil for the appellants contends that this view of the burden of proof is opposed to *Kumarasami Odayar* v. *Subramania Iyer*(1), and *Kadakkarai Nadan* v. *Nadakannu Nadan*(2). But on the other side *Srinivasa Aiyar* v. *Thiruvengada Maistry*(3) is cited in support of it. The two sets of rulings seem to be directly contradictory on this point, the one expressly dissenting from the view taken in the other. In these circumstances we think it right that the question should

(1) (1916) 31 M.L.J., 87. (2) (1921) M.W.N., 342.
(3) (1919) 10 L.W., 594.

be authoritatively settled by a Full Bench. As all the authorities bearing on the question are cited and discussed in the above rulings it is not necessary to refer to them in detail again.

We therefore refer to the Full Bench the following questions :—

(1) Which of the two views taken in the above rulings as to the burden of proof is the correct one? and

(2) On whom was the burden of proof in the present case?

ON THIS REFERENCE

A. Krishnaswami Ayyar for appellants.—A widow represents the estate and has power to compromise a litigation *bona fide*. After the compromise decree, necessity for alienation need not be proved and the onus is on those attacking it to prove fraud, collusion, coercion, etc.: see *Kadakkarai Nadan* v. *Nadakkammu Nadan*(1), *Kumarasami Odayar* v. *Subramania Iyer*(2).

[Court.—The questions are (1) in what capacity the widow alienated and (2) in what capacity she compromised the litigation?]

Where a widow alienates, the presumption is that she alienates in her representative capacity, especially where the purpose is such as to bind the inheritance: *Jugul Kishore* v. *Jotendro Mohun Tagore*(3). As to the validity of a compromise decree, see *The Great North West Central Railway* v. *Charlebois*(4), *Risal Singh* v. *Balwant Singh*(5), *Hari Nath Chatterjee* v. *Mothurmohun Goswami*(6), *Subbammal* v. *Avudalyammal*(7), *Bai Kanku* v. *Bai Jadav*(8) and *Reyella Jogayya* v. *Nimmshakavi Venkataratnamma*(9).

(1) (1921) M.W.N., 342.
(2) (1916) 31 M.L.J., 87.
(3) (1884) I.L.R., 10 Calc., 985 (P.C.), 991.
(4) [1899] A.C., 114.
(5) (1918) I.L.R., 40 All., 593 (P.C.).
(6) (1894) I.L.R., 21 Calc., 8 (P.C.).
(7) (1907) I.L.R., 30 Mad., 3.
(8) (1919) I.L.R., 43 Bom., 869.
(9) (1910) I.L.R., 33 Mad., 492.

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P. Somasundaram for respondent.—There is no conflict between the cases quoted in the Order of Reference. A supervening decree does not improve the position. It is no better than a contract. Here, the contract, the litigation and her compromise, were all in her personal capacity and not in her representative capacity; in such cases the reversioners are not bound: see Mayne's Hindu Law, page 896, paragraph 641. In most of the cases quoted by the appellant, the debt was incurred by the husband: *Baijun Doobey* v. *Brij Bhookun Lall Awusti*(1), *Bhogaraju Venkatrama Jogiraju* v. *Addepalli Seshayya*(2), *Kambinayani Timmaji* v. *Kambinayani Subbaraju*(3), *Khunni Lal* v. *Gobind Krishna Narain*(4), *Kanhaiya Lal* v. *Kishori Lal*(5). A consent decree is no better than a contract: *Wentworth* v. *Bullen*(6), *The Great North West Central Railway* v. *Charlebois*(7).

A. Krishnaswami Ayyar in reply.—*Bhogaraju Venkatrama Jogiraju* v. *Addeppalli Seshayya*(2) is wrong in some portions. It is not necessary that the suit should be pursued to the end in order that the litigation might bind the estate.

[COUTTS TROTTER, J., referred to *Mohendra Nath* v. *Shamsunnessa*(8). The Chief Justice referred to *Rajlakshmi Dasee* v. *Katyayani Dasee*(9).

A. Krishnaswami Ayyar also referred to *Musammat Hiran Bibi* v. *Musammat Sohan Bibi*(10), and *Rajendranath Mitra* v. *Nibaran Chandra*(11).]

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(1) (1876) I.L.R., 1 Calc., 133 (P.C.).
(2) (1912) I.L.R., 35 Mad., 560, 565.
(3) (1910) I.L.R., 33 Mad., 473.
(4) (1911) I.L.R., 33 All., 356 (P.C.), 367.
(5) (1916) I.L.R., 38 All., 679.
(6) (1829) 9 B. & C., 840.
(7) [1899] A.C., 114.
(8) (1915) 21 C.L.J., 157, 163.
(9) (1911) I.L.R., 38 Calc., 669, 673.
(10) (1915) 23 C.L.J., 82, 89.
(11) (1921) 25 C.W.N., 859.

SCHWABE, C.J.—By the Hindu Law, a widow in possession of property inherited from her husband has a life interest with power to alienate for necessaries. The reversioners are protected by the rule that if she does alienate, the onus is on the alienee to show that the alienation was, in fact, for necessaries. In this case, the widow Sathemma inherited from her husband Davuluri Swami certain properties, then the subject of a mortgage to the first defendant by the husband. She executed a second mortgage for Rs. 200, which, it is recited in the deed, was advanced for payment of the debts of the husband to the first defendant and for maintenance of the widow. The widow having died, the plaintiffs, the reversioners, wish to redeem the first mortgage. The first defendant's answer to this claim is that a suit was brought in 1901 by the first defendant against the widow to recover the money due on the second mortgage and that the suit was compromised by the widow agreeing that the first defendant should take the property absolutely, as if sold to him, in settlement of his claim.

It is admitted that apart from the compromise decree the onus would be on the defendant to show that the second mortgage was, in fact, for necessaries. It is also admitted that, if the widow had sold the property to the first defendant at the date of the compromise, the onus would have been on him to show that the sale was for necessary purposes. But it is contended that the widow in her representative capacity as manager of the property, had power to compromise the suit, and that it must be taken that she compromised the suit in that capacity, and that, in the absence of evidence adduced by the reversioners to the contrary, she must be taken to have acted properly in so doing.

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The result would be somewhat startling for it follows that the whole protection, which the law gives to reversioners in respect of dealings by the widow and which the reversioners had before the compromise, can be taken away by a further act of the very person against whom it is the policy of the Hindu Law to protect, which act in itself amounts to a further alienation.

It is said that there are authorities on this point and it is by reason of their supposed conflict that this case is referred to the Full Bench. I can myself find no such conflict in the cases which are quoted in the Order of Reference. There are two cases, *Kumarasami Odayar* v. *Subramania Iyer*(1), and *Kadakkarai Nadan* v. *Nadakkamu Nadan*(2), which decided that a compromise by a widow of a suit relating to the property inherited from her husband is binding on the reversioners. In both these cases she was sued in her representative capacity as representing the estate, and it may well be that she in that representative capacity can bind the estate by a compromise. I am not giving any decision upon that point, which we can deal with when it arises. At present, I see no reason to dissent from the view expressed in either of those two cases. But in the present case she was not, in fact, sued in her representative capacity. She was sued as a mortgagor on the second mortgage that is, to enforce a contract made by her, and she compromised that suit by purporting to make over the property to the mortgagee absolutely. This, in my judgment, she cannot do except subject to the rule stated above for the protection of the reversioners. If she could, it would be open to her to adopt simple means for avoiding the rule which is made for the protection of the reversioners. All that she would have to do would be

(1) (1916) 31 M.L.J., 87. (2) (1921) M.W.N., 342.

first to mortgage and then, if the plaintiff sued on the mortgage, to compromise by alienation. Thus the whole protection which the Hindu Law has given to reversioners under similar circumstances would be taken away because she went through the formality of compromising an action instead of taking the more simple course of selling the property in her capacity as widow. That this is not permitted is clear from *Srinivasa Aiyar* v. *Thiruvengada Maistry*(1), and, if that case is rightly decided the question in this case must be answered by saying that the onus is on the mortgagee. I confess that, for my part, after listening with care to the arguments which have been addressed to us on either side, I entirely agree with what is said in that judgment. I also entirely agree with the remarks of MOOKERJEE, J., in *Rajlakshmi Dasee* v. *Katyayani Dasee*(2), and those of MAHMOOD, J., in *Santkumar* v. *Deo Saran*(3). They seem to me entirely right in principle. It may be that some of the remarks made in these judgments go a little further than was necessary for the decision of those cases. I want to guard myself from being taken to express the view that in no case can a widow compromise a suit and thereby bind the reversioners. I am quite clear that there are cases in which she can do so. But what I do hold is that in an action against the widow on a contract made by the widow, a compromise by which she makes over the estate stands on no different footing from a conveyance by her of the property. In the two cases quoted in the Order of Reference I find that at any rate the original contract was not made by the widow, and I find that it is quite clear that the widow had been sued in her representative capacity and, therefore, I think that those cases should not be regarded as conflicting with *Srinivasa Aiyar* v.

(1) (1919) 10 L.W., 594. (2) (1911) I.L.R., 38 Calc., 639.
(3) (1886) I.L.R., 8 All., 365.

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Thiruvengada Maistry(1), and the cases there quoted. If they do conflict, I prefer the decision in the latter case. It follows from what I have said that the answer to question (2), is that, in the present case, the burden of proof is upon the defendant.

The other question "which of the two views taken in the above rulings as to the burden of proof is the correct one" is a question which, speaking for myself, I decline to answer. The use of the words "two views taken in the above rulings" is certainly open to comment. The ruling in the cases referred to so far from taking two views are, I think, consistent with each other, and, for that reason, it seems to me to be a question to which no answer is required. I should like to take this opportunity of pointing out that, in my judgment, the Order of Reference to a Full Bench should not ask hypothetical questions or ask the Full Bench, so to speak, to give a dissertation on general principles of law but to do what is quite enough for any Judge to do, to answer the question which directly arises in the case before the Court.

COUTTS TROTTER, J.

COUTTS TROTTER, J.—I am of the same opinion, and have little to add. With great respect to the learned Judges who referred the case, I do not think there is any necessary conflict between the decided cases. I quite assent to the principle that where a widow represents the estate it would be unreasonable to deny her the same discretion to avoid useless litigation as would be vested undeniably in a male manager. But I think that that must be subject to this qualification—which exists in the present case—that where the obligation sought to be enforced against the estate is one of her own creation,

(1) (1919) 10 L.W., 594.

she stands in exactly the same position with regard to the justification of the compromise as she does with regard to that of her original contract, and is clothed with no higher authority and no less degree of responsibility by the accident that she has superadded to her character of a widow in possession that of a litigant. To hold otherwise, it seems to me, would be nothing less than an abrogation of common sense. I think, that the rule that a widow as representing the estate can effectually settle claims arising out of the acts of others, is a salutary one—*ut sit finis litium*. But to give her the same power in relation to her own acts would be to make her, as it were, a judge in her own cause: she is not solely concerned with her duty to the estate, as may be supposed in the former case, but is obviously liable to a bias in favour of attempting to validate her own act. Such a conclusion would obviously deprive the reversioners of the very protection which the Hindu Law endeavours to give them; and would unquestionably lead to endless collusive compromises, as the present one may well have been. I do not think that such a conclusion has even the superficial merit claimed for it, that on its face it is a logical deduction from the fact that she has a discretion as to settling claims which do not arise out of her own acts.

In the view I have taken of this case, I agree with my Lord that it is not necessary for us to answer the first question propounded, as I think the answer to the second resolves the supposed conflict between the authorities.

KUMARASWAMI SASTRI, J.—On the facts of this case I am of opinion that the onus lies on the alienees to prove that the compromise decree is binding on the reversioners. In considering the question as to whether a compromise arrived at by the widow is binding on the reversioners, the main consideration is whether the suit or claim against

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the widow is a suit or claim arising out of a contract or transaction entered into by her husband with strangers who claim against the estate or whether the suit is upon a contract or transaction which is entered into by the widow herself. In the former case there can be little doubt that she represents the estate and a *bona fide* compromise by her would bind the reversioners. In the latter case there is always the question as to whether she acted in her individual capacity or whether she acted as representing the estate. This question has to be solved, in cases where the suit proceeds to trial, by the evidence adduced in the case and the findings on the issues. A mere allegation by the plaintiff that the widow acted for the estate, or a mere assertion by her that she so acted, would not by itself show that she acted in her representative capacity or that the decree is binding on the reversioners. It has been held in numerous cases that where her husband's property is sold in execution of a decree against her and the question as to the quantum of interest conveyed under the decree passed against her is raised, it has to be determined by the nature of the claim, the evidence adduced, and the findings in the case. As pointed out by their Lordships of the Privy Council in *Jugul Kishore* v. *Jotendro Mohun Tagore*(1), if the suit is simply on a personal claim against the widow, then a sale in execution will merely pass the widow's qualified interest and the reversionary interest will not be bound by it. If, on the other hand, the suit is against the widow in respect of the estate, or on a cause of action which is not a mere personal cause of action against the widow, the whole estate will pass. I may also refer to *Kirambala Debi* v. *Kali Charan Singha*(2), *Trilochan* v. *Bakkeswar*(3) and *Veerabadra Aiyar* v.

(1) (1884) I.L.R., 10 Calc., 985 (P.C.). (2) (1916) 32 I.C., 587.
(3) (1912) 15 C.L.J., 423.

Marudaga Nachiar(1). Where there are findings of fact as to the claim, it is easy to determine with reference to the proceedings how she acted and how far the decree will bind the reversioners; but in cases where there are no findings and where we have to rest merely on the allegation of the plaintiff or of the widow, it seems to me difficult to hold that because an allegation is made by one side or the other, the reversioners ought to be bound by the consent decree passed in the suit by the alienee against the widow. In cases where a person wants to bind the estate on a personal contract or transaction by the widow, he invariably alleges that what she did was for the benefit of the estate and is binding on the reversioners, and in cases where the widow deals with the estate and borrows monies for her personal use, allegations are made of necessity to show the binding nature of the debt on the reversioners. It seems to me that in cases of compromise where the suit is on a contract by the widow, or in cases where the cause of action is personal to her, she cannot, by simply consenting to a decree, make that which can only bind her life interest, if the matter rested merely on a contract or conveyance, bar the reversioners. If there was no decree, the onus would clearly be on the alienee to show necessity, and the recitals in the document would not by themselves prove necessity. In *Brij Lal* v. *Inda Kunwar*(2), their Lordships of the Privy Council observed, at page 193:

"The onus of supporting a sale from a Hindu widow is undoubtedly on the purchaser. In the present case the appellant has adduced no evidence to prove such legal necessity as would bind the husband's estate. He has relied simply on the recitals in the schedule attached to the sale deed. Recitals in mortgages, or deeds of sale, with regard to the existence of necessity for the

(1) (1911) I.L.R., 34 Mad., 188. (2) (1914) I.L.R., 36 All., 187.

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alienation have never been treated as evidence by themselves of the fact. And it has been repeatedly pointed out by this Board that to substantiate the allegation there must be some evidence *aliunde*."

It is clear that a widow cannot do what is beyond her legal powers by simply going to Court and filing a compromise petition or consenting to a decree. I need only refer to *The Great North West Central Railway Co.* v. *Charlebois*(1). It is also clear that the widow's action in alienating her husband's estate for her private debt or for a purpose which under Hindu Law would not amount to necessity is beyond her powers, and she cannot take advantage of her representative capacity to validate a purely personal transaction. The interposition of a decree by consent would not, in my opinion, make any difference as to the onus of proof in such cases. Where the pleadings show that both the plaintiff and the widow asserted that the alienation was for purposes binding on the reversioners, there can be no substantial dispute as to the legality of the act of the widow as binding on the reversioners so as to make the legality of her act a point substantially in issue and a fair subject of compromise. As pointed out by their Lordships of the Privy Council in *Kunni Lal* v. *Gobind Krishna Narain*(2), the true test to apply to a transaction which is challenged by reversioners as an alienation not binding on them is whether the alienee derives title from the holder of the limited interest or life tenant. If the claim is based on an alienation by the widow or on a contract by her, the onus must be on the alienee to show that circumstances existed which entitled her to transfer her limited estate. I agree with the view taken in *Bhogaraju Venkatrama Jogiraju* v. *Addepalli Seshayya*(3) and *Srinivasa Aiyar* v. *Thiruvengada Maistry*(4), that a decree

(1) [1899] A.C., 114.
(2) (1911) I.L.R., 33 All., 350.
(3) (1912) I.L.R., 35 Mad., 560.
(4) (1919) 10 L.W., 594.

passed against the holder of a woman's estate on compromise between her and her creditor would be binding on the reversioners only in cases where the contract of compromise itself entered into by her would bind them. *Kumarasami Odayar* v. *Subramania Iyer*(1) and *Kadakkarai Nadan* v. *Nadakkannu Nadan*(2), referred to by the learned Referring Judges, were not cases of a contract entered into by a widow alienating property and a compromise by her. *Kumarasami Odayar* v. *Subramania Iyer*(1) was a case where the last male holder purchased two items of property in a Court-sale. They were claimed by the fourth defendant by virtue of a private sale to him. A suit filed by the fourth defendant was dismissed in the first Court and in the District Court. A compromise was entered into by the widow when the case was in the High Court. *Kadakkarai Nadan* v. *Nadakkannu Nadan*(2) was a suit by a daughter to question an alienation made by her mother and the suit was compromised. There are no doubt observations in these cases which suggest that the compromise would be binding irrespective of whether the suit was simply on a personal claim against the widow in respect of the estate or on a cause of action which is not a mere personal cause of action against the widow; and if the learned Judges intended to decide that the compromise was binding in all cases, I would respectfully dissent from them.

My answer to the reference is that the burden of proof lies on the alienees in the present case.

N.R.

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(1) (1916) 31 M.L.J., 87. (2) (1921) M.W.N., 342.