

APPELLATE CIVIL.

1903
April 27.

Before Mr. Justice Banerji and Mr. Justice Aikman.

RAM KUNWAR (PLAINTIFF) v. RAM DAI (DEFENDANT)

Hindu law—Hindu widow—Right to maintenance—Sale of property in respect of which the widow's right to maintenance might be enforceable—Act No. IV of 1882 (Transfer of Property Act), section 39.

The maintenance of a Hindu widow is not a charge upon the estate of her deceased husband until it is fixed and charged upon the estate by a decree or by agreement; and the widow's right is liable to be defeated by a transfer of the husband's property to a *bona fide* purchaser for value even with knowledge of the widow's claim for maintenance, unless the transfer has, further, been made with the intention of defeating the widow's claim. *Sham Lal v. Banna* (1) and *Lakshman Ramchandra Joshi v. Satyabhamabai* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. D. N. Banerji and Pandit Sundar Lal, for the appellant.
Pandit Moti Lal, for the respondent.

BANERJI and AIKMAN, JJ.—The appellant, who is the widow of one Thakur Gir Prasad Singh, brought the suit out of which this appeal has arisen to recover arrears of maintenance from her husband's sons and from the estate left by her deceased husband, a part of which is in the possession of the respondent, who was the third defendant in the court of first instance, under a usufructuary mortgage executed by one of the sons on the 19th April, 1894. Previously to the institution of the suit the plaintiff had sued the sons for her maintenance, and obtained decrees, the earliest of which was passed in 1887. The present suit was opposed by the respondent, who claimed to be a transferee for consideration, without notice of the plaintiff's right. The court of first instance decreed the claim against her, but the lower appellate court set aside that portion of the decree which affected the respondent. The plaintiff has preferred this appeal, and the question we have to determine is, whether the property in the hands of the respondent is liable for the amount claimed by the plaintiff.

* Second Appeal No. 774 of 1897 from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 3rd June 1897, modifying a decree of Babu Bipin Behari Mukerji, Officiating Subordinate Judge of Aligarh, dated the 3rd March 1896.

(1) (1882) I. L. R., 4 All., 296.

(2) (1877) I. L. R., 2 Bom., 494.

Both the courts below have found that the respondent is a mortgagee for consideration, but had notice of the plaintiff's right. The first court also held that the transfer under which she is in possession was made with the intention of defrauding the plaintiff, and depriving her of her right, and applied the provisions of section 39 of the Transfer of Property Act. The lower appellate court, however, was of a contrary opinion, and found that the mortgage was not made with the intention of defeating the plaintiff's right to maintenance. It held that the claim could not be enforced against that portion of the property which is in the respondent's hands, although she had notice of the appellant's rights.

It is conceded that the maintenance of a Hindu widow is not a charge upon the estate of her deceased husband, until it is fixed and charged upon the estate by a decree or by agreement. This was held by a Full Bench of this Court in the case of *Sham Lal v. Banna* (1). It is further conceded that there was no agreement by which any particular property was charged with the maintenance of the plaintiff. It is, however, contended that the decree obtained by the plaintiff on 22nd August 1887, created a charge upon the property left by the deceased husband of the plaintiff. If this is so, the respondent took the property, of which she is the mortgagee, subject to that charge, and cannot claim exemption from liability. We have examined the decree of 22nd August 1887, and have satisfied ourselves that the only charge declared by that decree was a charge for the amount of maintenance which had already accrued due and was decreed to the plaintiff. No charge for future maintenance was created by the decree. Such being the case, the learned counsel for the appellant next relies upon section 39 of Act No. IV of 1882, and in particular on the concluding words of that section. That section, so far as it relates to maintenance, provides that "where a third person has a right to receive maintenance from the profits of immovable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has notice of such intention, or if the transfer is gratuitous, but not against a transferee for consideration and without notice of

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the right, nor against such property in his hands." The object of the section, so far as it relates to maintenance, is to declare in what cases a right of maintenance may be enforced against transferees of the property from which the maintenance is recoverable. In our opinion an essential condition for the enforcement of the right under the section against a transferee is that the transfer has been made with the intention of defeating the right. Where a transfer has been made with such intention and the transferee has notice of it, he cannot defeat the right, although he may be a transferee for consideration. Again, if the transfer is gratuitous, the transferee can in no case defeat the right. Where, however, the transfer is for consideration, and the transferee has no notice of the right, it cannot be enforced against him, even if the transfer was made with the intention of defeating the right. As we read the section, a condition precedent to the enforcement of the right against the transferee in all cases is that the transferor has acted in fraud of the person entitled to the right. The words "and such property is transferred with the intention of defeating such right" govern all that follows those words. Given a right to receive maintenance from the profits of immovable property and given a transfer made with the object of defeating that right, the only transferee who can defeat the right is a transferee for value and without notice of the right. But where the transfer has not been made with such object, the right cannot be enforced against the transferee, although he had notice of the right. As observed in the commentaries on the Transfer of Property Act by Messrs. Shephard and Browne, something more than mere notice of the right has to be proved against a transferee. It must also be established that the transfer was made in bad faith, that is, with the intention of defeating the right. The reason for such a rule is not far to seek. A Hindu widow's right to receive maintenance has been held to be a right of an indefinite character, which, unless made a charge upon property by agreement or by a decree of court, is only enforceable like any other liability in respect of which no charge exists. See the Full Bench decision in *Sham Lal v. Banna* (1). A right of such a nature should not equitably be enforced against a transferee for value unless the transfer was

(1) (1882) I. L. R., 4 All., 296., at p. 299.

made in fraud of the right of maintenance. In *Lakshman Ramchandra Joshi v. Satyabhamabai* (1) it was held that the mere circumstance that a purchaser for value had notice of the claim for maintenance is not conclusive of the widow's rights against the property in his hands. Mr. Justice West further held that "what was honestly purchased is free from her claim for ever: what was purchased in furtherance of a fraud upon her, or with knowledge of a right which would thus be prejudiced, is liable to her claim from the first." As pointed out by Mr. Mayne in his work on Hindu Law, paragraph 421, page 518, 5th Edition, section 39 of the Transfer of Property Act, substantially gives effect to the views expressed in the case cited above.

For these reasons we are of opinion that the view taken by the learned Judge of the lower appellate court is right and that this appeal must fail. We dismiss it with costs.

Appeal dismissed.

Before Mr. Justice Banerji and Mr. Justice Aikman.
 ASHIQ HUSAIN (OBJECTOR) v. MUHAMMAD JAN AND OTHERS
 (APPLICANTS)*

*Act No. XIX of 1873 (N.-W. P. Land Revenue Act), sections 107 et seqq—
 Partition—Revenue Courts not competent to partition buildings.*

In a partition under the North-Western Provinces Land Revenue Act, 1879, neither buildings nor the materials thereof can be partitioned; what is partitioned is the land in the mahal. Where such land is covered with buildings, the Court making the partition has to follow the provisions of section 124 of the Act; but it can decide no question of right to the buildings, nor can it partition them.

THIS appeal arose out of an application made by the respondents for partition of certain resumed muafi and shamilat lands in the village of Muhammadpur, together with the buildings thereon, consisting of various shops and houses. Objections were filed by the appellant Ashiq Husain, including one, to the effect that the Revenue Court was not competent to partition the shops and houses. These objections were disallowed summarily by an Assistant Collector, but on appeal the District Judge made an

* Second Appeal No. 829 of 1897 from a decree of C. Rustomjee, Esq., District Judge of Moradabad, dated the 5th August 1897, confirming the order of Kuar Bahadur, Assistant Collector of Moradabad, dated the 18th June 1895.

(1) (1877) L. L. R., 2 Bom., 494.

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