APPELLATE CIVIL.

Before Macpherson and Dhavle, JJ.

1933.

November, 29.

BIPAT MAHTON

v.

KULPAT MAHTON.*

Hindu Law—widow, alienation by, without legal necessity—valid as against strangers to reversion—land attached under section 146, *Code of Criminal Procedure*, 1898 (*Act V of* 1898)*—suit for declaration of title by alienee—suit based on "absolute title" and not "prior possession"— defendants strangers to reversion—plaintiff found to have no title—limited declaration, whether can be granted—action of ejectment—plaintiff, whether can succeed on prior possession.*

A Hindu widow is the owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death, and her alienation is not absolutely void but is only *prima facie* voidable at the election of those who would be entitled to the property by survivorship, inheritance or escheat.

An alienation by a Hindu widow even without legal necessity is valid as against strangers to the reversion, and such questions as those of legal necessity and the adequacy and the passing of the consideration can only be raised by a limited class of parties, and not by such strangers.

Bijoy Gopal Mukerji v. *Krishna Mahishi Debi*(1), followed.

Collector of Masulipatam v. *Cavaly Vencata Narrainapah*(2) and *Bhagwat Dayal Singh* v. *Debi Dayal Sahu*(3), explained.

The plaintiff in an action of ejectment is entitled to succeed on the strength of his prior possession only.

* Appeal from Appellate Decree no. 1476 of 1930, from a decision of Babu Ram Chandra Chaudhuri, Additional District Judge of Bhagalpur, dated the 19th September, 1930, reversing a decision of Babu Raj Narayan, Subordinate Judge of Bhagalpur, dated the 28th February, 1927.

(1) (1907) I. L. R. 34 Cal. 329, P. C.
(2) (1861) 8 Moo. I. A. 529, 553.
(3) (1908) I. L. R. 35 Cal. 420, P. C.

Shyama Charan Ray v. *Surya Kanta Acharya*(1), *Sahodra Kuer* v. *Gobardhan Tewari*(2), *Chaturbhuj Singh* v. *Sarada Charan Guha*(3), *Manik Borai* v. *Bani Charan Mandal*(4) and *Naba Kishore Tilakdas* v. *Paro Bewa*(5), referred to.

B, an alienee from a Hindu widow brought a suit for a declaration of his title in respect of certain lands (which had been attached by an order of the Magistrate under section 146, Code of Criminal Procedure) on the basis of his purchase from the widow. The suit was brought on the footing of "an absolute title" and not on "prior possession", the allegations in the plaint being that the widow had sold the property to the plaintiff "for satisfaction of the dues of her husband and legal debts" and that there was actual payment of the consideration. The suit was resisted by the defendants who had no interest in the reversion. The lower appellate court dismissed the suit holding that the plaintiff had no title as the purchase from the widow was without consideration or legal necessity.

Held, that although the purchase of the plaintiff may be deemed to be valid against the defendants who were strangers to the reversion, he was not entitled to the declaration sought for, inasmuch as he had failed to establish his title which was the basis of the suit, and that having regard to the frame of the suit he could not succeed on the strength of prior possession.

Per MACPHERSON, J.—The plaintiff must also have failed if he had come on previous possession (or practically, on appeal against the order under section 146), for (*at least* at the date when the suit was brought) he would have had to show that he was entitled to possession against the whole world.

Appeal by the plaintiff.

The facts of the case material to this report are stated in the judgment of Dhavle, J.

K. P. Jayaswal and *B. C. Sinha*, for the appellant.

(1) (1910) 15 Cal. W. N. 163.
(2) (1917) 2 Pat. L. J. 280.
(3) (1932) I. L. R. 11 Pat. 701.
(4) (1910) 13 Cal. L. J. 649.
(5) (1922) I. L. R. 50 Cal. 23.

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S. N. Sahay and *D. L. Nandkeolyar*, for the respondents.

DHAVLE, J.—This is an appeal by the plaintiff in a suit concerning 37 bighas of land once held by Tulsi Bhagat in mauza Sarouni Kalan. On the death of Tulsi in Baisakh, 1326, his widow Musammat Chando came into possession of the land; and she sold it to the plaintiff by a registered kabala executed in the following October. In 1924 there was a dispute regarding the possession of the land, which led to proceedings under section 145 of the Code of Criminal Procedure before the Magistrate. There were three parties in these proceedings: (*1*) Bipat, the plaintiff, in the present suit who relied on the sale-deed from Musammat Chando; (*2*) Kankal Mahton, defendant no. 1, who claimed as an adopted son of Tulsi; and (*3*) Jageshwar Mahton, defendant no. 2, who claimed 5 bighas out of the disputed land under a deed of sale from Tulsi. The Magistrate was unable, on the evidence produced before him, to satisfy himself as to which of the parties was then in possession of the land, and therefore attached it under section 146 of the Code of Criminal Procedure. This was in June, 1924, and the present suit was brought in the following April by Bipat, basing his claim on the sale-deed from Musammat Chando and asking for a declaration of his title on the footing that Chando had sold the land to him "for satisfaction of the dues of her husband and legal debts". Kankal, defendant no. 1, though impleaded as a major, appeared to be a minor, and a written statement was put in on his behalf by his father, Kulpat Mahton, alleging that the suit was collusive and fraudulent, that the widow had no right to sell the property and that Kankal would be greatly prejudiced if the case was allowed to go on without deciding in the first place "with whom the title to these lands goes and continues". A reference was made in Kankal's written statement to a written statement that had been previously filed by Kulpat Mahton, alleging that he was Tulsi's father's brother's son and

joint with him, that Musammat Chando, who had been married by Tulsi "in chumawan form" after the death of his first wife, had been turned out of the house by Tulsi and had then married Jageshwar (before Tulsi's death), and that the sale-deed obtained by Bipat from Chando was

"a nominal, baseless, illegal and wrongful deed of sale..... without any consideration and without any right and possession."

The trial court added Kulpat as a defendant, overruling the objection of the plaintiff who had himself travelled beyond the parties to the proceedings under section 145 of the Code of Criminal Procedure by impleading Jageshwar's brother Kohdil as defendant no. 3. As to Jageshwar and Kohdil, the plaintiff's case was that they were merely farzidars of Tulsi; and this was upheld by the trial court and need not be further considered. As regards plaintiff's own title, the learned Subordinate Judge came to the conclusion that Kulpat was not a cousin of Tulsi, that even if he were a cousin, he was not joint with Tulsi at the time of the death of the latter, that Chando was married to Jagdeo not in the life-time of Tulsi but after his death, and that her kabala was

"not a collusive document and was executed for consideration."

He also considered that Kulpat had no *locus standi* to question the validity of the sale by Chando to the plaintiff and, therefore, upheld the sale without going into the question whether it was supported by legal necessity. The suit was decreed, and Kulpat and Kankal appealed.

The learned Additional District Judge who heard the appeal found that the evidence adduced by the plaintiff to prove the execution of the kabala by Musammat Chando was quite satisfactory. He was, however, of opinion that on the pleadings in the case it was incumbent on the plaintiff,

"who wants to enforce a certain conveyance made in his favour by a Hindu widow,"

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to state and prove that the sale by the widow was justified by legal necessity. His conclusion was as follows:—

"* * * though the kebala was executed by Musammat, plaintiff failed to prove either the passing of the full consideration money thereof or the existence of the legal necessity for the same, so that in view of the principles of law laid down by the Privy Council in the cases quoted above the plaintiff failed to discharge the burden which lay on him to prove his title under the conveyance from the widow who has only limited interest in the properties of her husband. The kebala therefore is not valid in the eye of the Law so as to make the title of the plaintiff complete in respect of the property conveyed to him under it. The widow having remarried, her life interest too has come to an end. Consequently the kebala cannot be validated till she lives."

In this view the learned Judge held that the plaintiff was

"not entitled to the declaration prayed for by him."

The appeal was, therefore, allowed and the suit dismissed.

It has been urged on behalf of the plaintiff, who has now appealed to this Court, that even on the findings of fact of the lower appellate court that legal necessity for the sale and the passing of full consideration has not been established, Musammat Chando's sale-deed in favour of the plaintiff was not *ipso facto* void, but was only voidable at the instance of Tulsi's reversioners and that the plaintiff was, therefore, entitled to a decree. Referring to the observation of their Lordships of the Judicial Committee in the *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*(1) that the restrictions on a Hindu widow's power of alienation are "inseparable from her estate", the learned Judge apparently considered "that even if there be no reversioners, she cannot alienate the corpus of the property except for a legal necessity". He has also cited *Bhagwat Dayal Singh* v. *Debi Dayal Sahu*(2) for the proposition that "an alienee who

(1) (1861) 8 Moo. I. A. 529, 553.
(2) (1908) I. L. R. 35 Cal. 420, P. C.

claims title under a conveyance from a Hindu widow must prove genuineness of his conveyance, also that the woman understood the full import and nature of the transaction she was entering into, and that it was justified by legal necessity, (as to) the existence of which the alienee must satisfy himself by reasonable enquiry". In neither of these cases, referred to by the learned Judge, however, was it decided that an alienation of a husband's property by a Hindu widow, if unsupported by legal necessity, is void, or that its validity can be impugned by any party other than those who would be entitled to the property by survivorship, inheritance or escheat. In the case of *Collector of Masulipatam*(1) what was decided was that the Crown, taking by escheat the property left by a Hindu husband, was entitled to challenge his widow's alienation of it as unsupported by legal necessity. In the case of *Bhagwat Dayal Singh*(2) it was by a reversioner and his assignees that the claim of the alienee from the widow was resisted, and the observations of the Judicial Committee in that case regarding what must be proved by the alienee have no application to cases between such alienees and third parties. As their Lordships had pointed out in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (3), a Hindu widow is the owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death, and her alienation is not absolutely void but is only *prima facie* voidable at the election of the reversionary heir. There can be no question that an alienation by a Hindu widow even without legal necessity is valid as against strangers to the reversion, and that such questions as those of legal necessity and the adequacy and the passing of the consideration can only be raised by a limited class of parties, and not by such strangers. It is doubtless on this account that the

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(1) (1861) 8 Moo. I. A. 529.
(2) (1908) I. L. R. 35 Cal. 420, P. C.
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learned Judge below finally found that the kabala was not "valid in the eye of the law so as to make the title of the plaintiff complete". The question is whether on the title found, the plaintiff was not entitled to a modified declaration. The Magistrate's order of attachment under section 146 of the Code of Criminal Procedure remains in force

"until a competent court has determined the rights of the parties thereto, or the person entitled to possession thereof."

The plaintiff, however, did not frame his suit in such a way as merely to get rid of the bar to possession caused by the Magistrate's order, doubtless because Kankal had claimed the land as Tulsi's adopted son. Had he been dispossessed by Jagdeo and Kankal, and had there been no order passed by the Magistrate under section 146, he would have had to sue in ejectment; and according to the leading Calcutta case of *Nisa Chand Gaita* v. *Kanchiram Bagani*(1) such a suit would not have succeeded, as not brought within six months of the dispossession, unless he proved a subsisting title as distinguished from mere prior possession, while on the findings of the lower appellate court, his title came to an end on Chando's remarriage, an event which according to a former deposition of Jagdeo (apparently accepted by the lower courts) took place in Magh, 1327, i.e., a couple of months or so after her sale to the plaintiff. But that question does not arise in a case like the present as was pointed out in *Shyama Charan Ray* v. *Surya Kanta Acharya*(2) to which our attention was drawn on behalf of the appellant. In this decision *Nisa Chand Gaita* v. *Kanchiram Bagani*(1) was distinguished and doubted, nor has this last case been accepted as good law in this court—*see Sahodra Kuer* v. *Gobardhan Tewari*(3) and other cases referred to in *Chaturbhuj Singh* v. *Sarada Charan Guha*(4) in which the plaintiff in an

(1) (1899) I. L. R. 26 Cal. 579.
(2) (1910) 15 Cal. W. N. 163.
(3) (1917) 2 Pat. L. J. 280.
(4) (1932) I. L. R. 11 Pat. 701, 707.

action of ejectment was held entitled to succeed on the strength of his prior possession only. *Shyama Charan Ray's*(1) case was not quite accepted in *Manik Borai* v. *Bani Charan Mandal*(2), cited for the respondents, and was recently distinguished in *Naba Kishore Tilakdas* v. *Paro Bewa*(3) as really turning not on mere prior possession but also on title, but it was apparently accepted as good law in *Sahodra Kuer's*(4) case. This does not, however, entitle the appellant to succeed in his present suit, brought as it was on the definite footing of "an absolute title" (*see* paragraph 12 of the plaint) for the reason already indicated: he alleged not only legal necessity in paragraphs 3 and 4 of the plaint but also actual payment of the consideration in paragraph 5, and one of the declarations sought in the relief portion of the plaint was that Musammat Chando had sold the property to the plaintiff "for satisfaction of the dues of her husband and legal debts". No alternative claim was made based upon possession. The material issues framed were—

3. Is the kabala of the plaintiff a collusive document and for consideration and is the sale under the kabala a valid sale?

* * * * * * *

5. Has the plaintiff got any right to the land in suit and is the plaintiff entitled to a declaration prayed for?

These issues were discussed together by the trial court, and one does not in that discussion find a word about possession or any right based on it. Stress has been laid on behalf of the appellant on the order portion of the judgment of the learned Subordinate Judge in which

"it is declared that he has title to the disputed land and he was in possession of it since his purchase till the date of attachment;"

and it has been urged that this implies a finding of possession which has not been set aside by the lower

(1) (1910) 15 Cal. W. N. 163.
(2) (1910) 13 Cal. L. J. 649.
(3) (1922) I. L. R. 50 Cal. 23.
(4) (1917) 2 Pat. L. J. 280.

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appellate court. No claim, however, appears to have been advanced before the lower appellate court on the basis of plaintiff's prior possession, and it is difficult to see why that court should be expected to set aside an implied finding on which no claim was advanced before it. Even if the contrary were to be held, it does not seem that the present is a proper case in which to allow the appellant to change his ground from an absolute title to a title which only lasted two or three months, though his possession may well have continued for four or five years, and treat as surplusage " the satisfaction of the dues of her husband and legal debts " which the plaintiff had so deliberately made a part of his case. A declaration is essentially a discretionary relief. The lower appellate court as the final court of fact has found one suspicious circumstance after another against the plaintiff, beginning with the fact that the thumb impression of Musammat Chando was not taken either on the sale-deed, which is the basis of the plaintiff's title, (such as it was), or on the mortgage bond which the plaintiff had taken from her four months previously and within a couple of months of Tulsi's death. The sale-deed was (in the words of the learned District Judge) obtained from the widow

" in hot haste without caring to make any enquiry in respect of the debts, the creditors or the legal necessities thereof, and also without enquiring whether there was no sufficient income of the properties in the hands of the Musammat to satisfy those debts. Nor the Musammat was given any opportunity to have any independent advice in the matter. She, I am constrained to observe, could not fully understand the significance and effect of the transaction she was entering into..... What did the Musammat get by the transaction? Nothing practically."

Though the plaintiff set out to show that he had actually paid the widow's creditors, the finding of fact is that he has entirely failed on the point. Shortly after the sale to the plaintiff, Chando left the family and married Jagdeo; and

" it is an admitted fact on both sides that Tulsi left a daughter, Musammat Razia, who gave evidence in the case for the plaintiff (*Sic.* A mistake for ' the defence ')."

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On these findings of fact the plaintiff's kabala could not have stood against the widow nor against the admitted heir, if impleaded. It is pretty obvious on these findings that the plaintiff has played a fraud upon Razia, Tulsi's daughter by his former wife and aged only 16, if not also on his vendor, an illiterate woman who left the family shortly after the sale. In these circumstances the lower appellate court was, in my opinion, entirely justified in holding the plaintiff to the precise claim put forward in the plaint and coming to the conclusion that he

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" is not entitled to the declaration prayed for by him."

The appeal fails and must be dismissed.

Long after the arguments in this appeal, and while this judgment was being typed, Musammat Razia applied to be added as a party respondent. The application was made far too late to be entertained, and there is still time for her to establish her rights in the ordinary way.

MACPHERSON, J.—I agree that the suit and this appeal must fail. The plaintiff-appellant made a case of title and failed to establish it. Further, speaking for myself, he must also have failed if he had come on previous possession (or practically, on appeal against the order under section 146), for (*at least* at the date when the suit was brought) he would have had to show that he was entitled to possession against the whole world.

Appeal dismissed.