

1880

PARMA'YA
v.
SONDE SHRI-
NIVA SA'PA'

been left undecided by the District Judge, may be resolved by him, we reverse his decree, and remand this cause to him for retrial, and direct that he may be at liberty to take such further lawful evidence in the cause as he may deem necessary for such retrial. The costs of the appeals must follow the final result of the cause.

Case remanded.

APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

February 16. GURUNATH NILKANTH (ORIGINAL DEFENDANT), APPELLANT, v. KRISHNA'JI GOVIND (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law--Hindu widow, power of, to alienate her husband's immoveable property.

A purchaser of immoveable property from a Hindu widow, in order to show that the property is absolutely conveyed to him, ought to aver and prove that she sold it under such special circumstances as justify a Hindu widow in alienating the immoveable property of her husband without the consent of his heirs. Even if her husband were separate in estate from his father and brothers at the time of his death, and died without male issue, his widow would have no power to make an absolute alienation of his estate in the absence of such special circumstances. She can only dispose of her widow's estate in his immoveable property, which estate determines either upon her death or re-marriage, and the purchaser is not entitled to retain the property after the occurrence of either of these events.

The plaintiff sued to recover possession of certain immoveable property sold to him by the first defendant, a Hindu widow. The second defendant answered that his father and the first defendant's husband were undivided brothers, and that, as a childless widow, she had no right to sell the property. Both the lower Courts upheld the sale as absolute, on the ground that she was competent to make it as widow of a separate Hindu. The District Judge heard the appeal *ex parte* under section 551 of the Civil Procedure Code.

The High Court, on second appeal, held that the decrees of the lower Courts were unsustainable, as they did not contain the limitation pointed out above, and remanded the case for the trial of the issue, whether there were any such special circumstances as would justify the absolute sale by the first defendant to the plaintiff.

The High Court were also of opinion that the District Judge ought not to have disposed of the appeal *ex parte* under section 551 of Act X of 1877.

THIS was a second appeal from the decision of W. Sandwith, Judge of the District Court of Dhárwár, in Appeal No. 59 of 1879,

* Second Appeal, No. 398 of 1879.

affirming the decree of G. G. Phatak, Subordinate Judge (First Class) at the same place.

The plaintiff, Krishnáji, brought this suit against Jánavá, widow of Rághápá, and claimed to recover possession of certain immovable property sold to him by her for Rs. 200, under a deed of sale dated the 17th July, 1878.

Jánavá did not appear. The suit was defended by Gurunáth, who was made a defendant, at his own request, under section 28 of Act X of 1877. He answered that his father Nilkanth and Jánavá's husband, Rághápá, were undivided brothers; that she, as a childless widow, had no right to sell the property in dispute; that he was the male representative of the undivided family, and was in possession of the property.

The Subordinate Judge held that Rághápá and Nilkanth were divided brothers; that a partition had taken place between them in the year 1854-55; that the lands had been entered in their names in the Government books separately according to their shares; that, on the death of Rághápá, his lands were transferred to Jánavá's name as his heir; that Jánavá and the defendant Gurunáth lived separately in different houses since the partition, and managed their affairs separately. He decided that the property belonged to Jánavá, who had a power to sell it absolutely. He, accordingly, allowed the plaintiff's claim.

The District Judge confirmed the decree of the first Court, holding that Jánavá, as the childless widow of a man who died finally separated, had a right to dispose of the share of her husband. He heard the appeal *ex parte*, under section 551 of Act X of 1877, without sending notice of the appeal to the first Court, and without serving notice on the respondent or his pleader.

Gurunáth thereupon preferred a second appeal to the High Court.

Macpherson (with him Shámráo Vithal) for the appellant.— Jánavá was not competent to alienate the property in dispute without the consent of the appellant. The respondent did not show that the sale by Jánavá was for a purpose allowed by the Hindu law. The lower Courts were, therefore, wrong in declaring the sale absolutely valid.

1880

GURUNA'TH
NILKANTH
v.
KRISHNA'JI
GOVIND

Shántáráim Náráyan for the respondent.—Jánavá had a power to make an absolute sale of the property for purposes sanctioned by law. But the lower Courts did not go into that question at all. The case, therefore, should be remanded for the determination of that point.

WESTROPP, C. J.—The plaintiff, in order to show that the property, the subject of this suit, was conveyed to him absolutely, ought to have averred and proved that the widow, Jánavá, sold it under such special circumstances as justify a Hindu widow in alienating the immoveable property of her deceased husband without the consent of his heirs. Even if her husband were, at the time of his decease, separate in estate from his father and brothers, and died without leaving issue male, his widow would not, in the absence of such special circumstances, have any power to make an absolute alienation of his estate. The *dictum* of the District Judge in the present case, that, “as the sonless widow of a man who died finally separated, Jánavá had a right to dispose of the share of her husband,” is quite too broad. In the absence of such special circumstances as we have mentioned, she could only dispose of her husband's estate in his immoveable property, and that estate would determine either upon her death or upon her second marriage, so that the purchaser would not, in such a state of facts, be entitled to retain the property sold after the occurrence of either of these events. The decrees of the Subordinate Judge and of the District Judge contain no such limitation, and are, on the evidence in the case as it now stands, unsustainable. However, as both of these Judges, as well as the pleaders on both sides, appear to have ignored the Hindu law as to the circumstances which would warrant an absolute sale by a Hindu widow, and we, having regard to the consequences of explanation 2 of section 13 of Act X of 1877, think that it is fair that there should be an inquiry as to whether any such circumstances existed in this case. We must, therefore, direct that the District Judge should try the following issue, viz. :—

Whether there were any such special circumstances as would justify the absolute sale on the 17th July, 1878, by Jánavá to the plaintiff?

What would be such a justification, may be seen on reference to Strange's Hindu Law, Vol. I, p. 244; West and Bühler (2nd ed.), pp. 123-125; Mayne's Hindu Law, paras. 536-549. The District Court should report its finding to this Court within two calendar months after receipt of this order. The parties, respectively, should be at liberty to give such fresh evidence as may be lawfully admissible and necessary for the determination of the said issue. We reserve all further directions and the question of costs.

We wish to add that this does not appear to us to have been such a case as ought to have been disposed of *ex parte* by the District Judge under section 551 of the Civil Procedure Code (Act X of 1877).

Case remanded.

APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice M. Melvill.

NA'GO MAHA'DEO APTE VAKIL (ORIGINAL DEFENDANT), APPELLANT, *v.*
 NA'RA'YAN RA'MCHANDRA PATWARDHAN (ORIGINAL PLAINTIFF), RES-
 PONDENT,*

March 24.

Misrepresentation—Suit against an attesting witness to a security bond for appearance of an insolvent judgment-debtor.

The plaintiff held a money decree against M., who was arrested in execution of it. On being brought to the Court, however, M. applied for his discharge as an insolvent under section 273 of the Civil Procedure Code (Act VIII of 1859). He was released on the security of G., who executed a bond for the appearance of M. at the inquiry into his insolvency. The defendant attested the bond, and wrote in the attestation that G. was a solvent person. In consequence of the non-appearance of M., the plaintiff sought to execute his decree against the surety G., who on his arrest also applied for his discharge on the ground of his insolvency, and was discharged after inquiry. The plaintiff thereupon sued the defendant for the amount of his decree and cost of execution, on the ground of his representation in the attestation that G. was solvent. The Subordinate Judge rejected, but the District Judge, in appeal, allowed the plaintiff's claim.

Held by the High Court, on second appeal, that the plaintiff had no cause of action against the defendant, whether the suit was considered as brought upon a covenant or misrepresentation, as the defendant was neither a co-obligor in the

* Second Appeal, No. 405 of 1879.