

## APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice  
Nánábhái Haridás.*

DIWA'LI, (ORIGINAL DEFENDANT), APPELLANT, v. APA'JI GANESH,  
(ORIGINAL PLAINTIFF), RESPONDENT.\*

1886,  
February 16.

*Decree—Execution—Civil Procedure Code (Act XIV of 1882), Sec. 266, Cl. (1)—  
Land assigned for maintenance of widow with proviso against alienation—Such  
land exempt from attachment.*

By a deed of assignment the usufruct of certain land was given to a Hindu widow for her maintenance, the deed expressly stipulating that the same was not to be in any way alienated. A judgment-creditor of the widow caused the land to be attached in execution of a money decree. The widow contended that the land was protected from attachment under section 266 of the Civil Procedure Code (Act XIV of 1882). Both the lower Courts disallowed the widow's contention. On appeal to the High Court,

*Held*, reversing the orders of the lower Courts, that, having regard to the proviso against alienation contained in the deed of assignment, the usufructuary interest in the land assigned to the widow was one over which she had no power of disposal, and, consequently, could not be attached and sold in execution of a money decree against her.

THIS was a second appeal from the decision of H. J. Parsons, District Judge of Thána.

Under an agreement between the appellant, who was a widow, and her adopted son the usufruct of certain land was assigned by deed to her for her maintenance. The deed expressly stipulated that the appellant was "not to mortgage, make a gift of, sell or assign the land in any way to any person."

Subsequently the respondent (plaintiff) obtained a money decree against the appellant and in execution attached the said land. The defendant contended that the land, having been assigned to her for maintenance, was exempted from attachment under section 266 of the Civil Procedure Code (XIV of 1882). The Subordinate Judge of Dáhánu overruled the defendant's objection, and ordered that the defendant's life-interest in the land should be sold. The defendant appealed to the District Judge of Thána, who confirmed the order of the Court of first instance.

\* Second Appeal. No. 430 of 1884.

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The defendant preferred a second appeal to the High Court.

*Yashwant Vāsudev Athlye* for the appellant:—The land is protected from attachment under clause (1) of section 266 of the Civil Procedure Code (Act XIV of 1882), the land being set apart for maintenance. Besides this, the express proviso in the deed of assignment precludes the widow from alienating it, she being given therein a mere usufruct.

*Māhādev Ohimnāji Apte* for the respondent:—The profits of land assigned to a widow for maintenance is not the same as a right to future maintenance within the meaning of clause (1) of section 266 of the Civil Procedure Code (Act XIV of 1882.) That the nature of an expectancy or right to future maintenance is not attachable has been determined in the case of *Syud Tuffazal v. Raghunāth Prasād*<sup>(1)</sup> followed in *Rāmābāi v. Ganesh*<sup>(2)</sup>. If under the proviso against alienation contained in the deed of assignment she could not alienate the land, she had absolute power over the profits, and, as such, they should be held liable to attachment and sale—arrears of maintenance having been held attachable. A widow can alienate her life-interest—*Amjad Ali v. Monirām Kalita*<sup>(3)</sup>. A distinction between right to future maintenance and what has become a definite sum thereof, is drawn in the case of *Musst. Duloon Koonwur v. Sungum Singh*<sup>(4)</sup>.

SARGENT, C. J. :—A suit was brought by the appellant against her adopted son, a minor, and the administrators of his estate to enforce her claim to maintenance out of the estate of her deceased husband, Vanmāli Vithaldās. This suit was compromised by the following agreement between the parties:—

“I, the opponent, beg to represent as follows:—It is agreed to assign to the applicant, for her maintenance, the income of a field land sufficient to give her an amount of about Rs. 33, thirty-three, every year. The land is situated at mauje Virathal Budruk, and is continued in the applicant's name in the Government records. The land is as follows:—(Here follows the description of the land). The applicant should take into her possession the above-mentioned land and enjoy the same for her

(1) 7 Beng. L. R., 187.

(3) I. L. R., 12 Calc., 52.

(2) Printed Judgments for 1876, p. 386.

(4) 7 Calc. W. R. Civ. Rul., 311.

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maintenance. And she should also pay the Government assessment for the land. The applicant is not to mortgage, make a gift of, sell, or assign the said land in any way to any person. Should the applicant bring about an opportunity of her ownership over the land being terminated, owing to the non-payment of the Government assessment of the said land, the opponent is to take the land into his possession. And, then, the applicant shall have no claim for maintenance. The applicant is not to live in the house, but to hire at her own expense, or obtain in any other way, a house and to live in the same. The land which stands in the name of the applicant is to be transferred to the name of the minor. From *Mugh Shudh* 1st, *Samvat* 1939, to the end of *Ashwin* in the same year (from 8th February, 1883, to the end of October, 1883,) Rs. 2-12-0 per month should be paid to the applicant for her maintenance. And we are to give the land into the applicant's possession in the month of *Kartik* in *Samvat* 1940, (November, 1883). And from that time she is to enjoy the land. Thus it is agreed. The said land is let, this year, to Dámodar Ganesh, of Arnala, on a rent of 58, fifty-eight, maunds of paddy. We will recover the rent and pay it over to the applicant in the month of *Kartik* in *Samvat* 1940 (November 1883); and at that time we will deliver over the field to the applicant. Thus it is agreed. An order may be made accordingly."

The respondent, who has obtained a money decree against the appellant, now seeks, in execution of his decree, to sell the interest which the appellant acquired by the above agreement in the field in question. His right to do so, which is disputed by the appellant, must depend upon whether the appellant acquired an interest in the land under the above agreement, which, by section 266 of the Code of Civil Procedure (Act XIV of 1882), is made liable to attachment and execution.

Now, by the terms of that agreement, the usufruct of the field was assigned to the appellant for her maintenance. At the same time it was provided that she should be put into possession in the following month of *Kartik* in *Samvat* 1940 (corresponding with November, 1883), and it was clearly within the contemplation

of the parties that she should henceforth take the rent for her maintenance, which it was supposed would give her Rs. 33 a year after paying the assessment. It was argued for the appellant that the interest in the field, which she thus acquired, having been assigned to her for her maintenance, was untransferable.

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We agree with the Subordinate Judge in thinking that it would be difficult to distinguish in this respect between an interest in land assigned to a widow for her maintenance and the estate which the widow acquires by inheritance, and which has long been held to be transferable. However, in the view we take of the proviso contained in the agreement against alienation, it becomes unnecessary to determine the question, which, having regard to the remarks in West and Bühler Hindu Law, p. 254, cannot be considered to be altogether free from doubt.

The assignment of the usufruct in the present case contains a proviso that the appellant "should not mortgage, make a gift of, sell, or assign the said land in any way to any person;" and we think that the very general terms in which it is couched, coupled with the special object for which the appellant was to be put in possession of the field, show an intention to prevent the appellant's doing any act by which any stranger might acquire a right of any description over the land, and it is plain that by a transfer of her own interest the transferee would acquire the right to enter on the land. The usufructuary interest intended to be assigned to the appellant was, therefore, one over which she had no power of disposal, and, consequently, could not be attached and sold in execution of a money decree.

We must, therefore, reverse the orders of the Lower Courts, and order that the appellant's interest in the field be not sold. Appellant to have her costs throughout.

*Order reversed.*