APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Aston.

1905. *February 6.*

MAHADEVAPPA BIN DUNDAPPA (ORIGINAL PLAINTIFF), APPELLANT, *v.* BASAGAWDA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS *.

Hindu Law—Widow—Alienation—Costs of litigation—Arrangement between co-widows—Adopted son—Right of the adopted son to set aside the alienation.

A Hindu died leaving him surviving two widows, C and B. The two widows after a time found that they could not agree. C (the senior widow) passed a document to B (the junior widow) on the 17th July 1879, whereby C gave B possession of certain lands, houses, etc., for her maintenance. Under this arrangement B was to carry on the *vahivat* of the same according to her pleasure as long as she might live, and the son, who might be adopted by C, would at B's death be entitled to "whatever moveable and immoveable property there is." In 1883 and again in 1885 B sold portions of this property to meet certain expenses necessarily incurred by her in litigation. C adopted the plaintiff in 1894, and she died in 1895. B died in 1902. Sometime before her death the plaintiff filed a suit against the defendants, purchasers from B, to recover possession of the property alienated by B.

Held, that, under the agreement of 1879, B had authority from C to do any act necessary for the due and proper management of the property, and one of those acts was to pay the costs of the litigation, and that, therefore, B had implied authority from C to alienate the property to meet these costs.

Held, further, that, under the circumstances of the case, the burden of proof lay upon the plaintiff to show that C did not consent to the sale.

SECOND APPEAL from the decision of M. P. Khareghat, District Judge of Dharwar, confirming the decree passed by V. G. Kaduskar, Joint Subordinate Judge at Dharwar.

Suit to obtain possession of property, moveable and immoveable.

One Dundappa, a Hindu, died leaving behind him two widows, Chanbasawa and Basawa. At his death the two widows were living together, and they continued to do so for some time after his death. Later on quarrels arose between them, in consequence of which Chanbasawa, the senior widow, passed to Basawa, the younger widow, on the 17th July 1879 a document which ran as follows :—

"To Chiranjiva Basawa kom Dundshetti Angdi, inhabitant of Kalwad, at present residing in Nagarhalli.

* Second Appeal 117 of 1904.

I, Chanbasawa kom Dundshetti Angdi, inhabitant of Kalwad, taluka Navalgund, give in writing an agreement-paper as follows :—

As you and I together cannot pull on well, for the purpose of your maintenance, the lands and houses detailed below situated in the village of mauze Nagarhalli, taluka Navalgund, district Dharwar. [The sentence is left unfinished in the original.] [Here follows a description of the property.]

I have given this day into your possession the lands, houses and backyards mentioned above. You are to carry on the vahivat of the same according to your pleasure as long as you live. I have no objection to it. Subsequently, after your death, I and the person whom I will make my son are entitled to whatever moveable and immoveable property that there is. No objection should be made in future to the khata, etc., being entered in my name. The agreement paper is duly given in writing as above."

In 1883, and again in 1885, Basawa executed a sale of a portion of the property, which was handed over to her by Chanbasawa to pay off Court expenses and reward of the pleader in connection with certain litigation in defending her title to the property. The defendants were purchasers from Basawa.

The plaintiff was adopted in 1894 by Chanbasawa, who died in 1895.

Basawa died in 1902. Some time prior to her death, the plaintiff, as the adopted son of Dundappa, filed this suit against the defendants to recover possession of the property, which had been alienated by Basawa.

The Subordinate Judge found it proved that the sale transaction in favour of the defendants was proved to have been passed for consideration and was *bond fide* and that the plaintiff was bound by the sale. He, therefore, rejected the plaintiff's claim.

On appeal the District Judge confirmed this decree. His judgment was as follows :—

"I hold that the sale is not invalid by reason of want of consent on the part of Chanbasawa. . . . There is practically no evidence that Chanbasawa consented to the sale and so I hold it as a matter of fact that she did not. No doubt if the co-widow Chanbasawa had sought to set aside the alienation after Basawa's death without there having been any arrangement between the widows under the rulings at 11 M. I. A. 487, I. L. R. 1 Mad. 290 and I. L. R. 16 Mad. 1, she would have been entitled to a decree even though legal necessity was proved. But in the present case there are several circumstances which distinguish it from those. In this case there is a registered deed of separation between the widows, made in 1879, previous to the sale to defendant 1, under which Basawa is to enjoy the property during her life time without interference from

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Chanbasawa. Further, Chanbasawa died before Basawa without raising any objection to alienation. Besides, the person now objecting is an adopted son, who does not claim either through Chanbasawa or Basawa, but directly from their husband. The case at I. L. R. 22 Mad. 522 shows that the Privy Council rulings quoted above do not bar an agreement between co-widows whereby one parts wholly with her own rights with respect to specified property in favour of the other. I think this is a similar case although there is no express provision to alienate. Under the deed in this case Chanbasawa could not have interfered with any disposal of the property by Basawa during the latter's life-time. Basawa was, in fact, put in the same position as a sole widow with respect to the property assigned to her. This is neither repugnant to Hindu Law or equity.

"Supposing in this case there had been no adoption and the claimant was a reversioner, would he have been allowed to dispute the alienation for legal necessity? I should think not. After Chanbasawa's death Basawa would have been the sole widow, who could not have disputed the alienation made by herself. It would have been valid during her life-time, and so it would have been after her death if for legal necessity. I do not see why the adopted son should be in a better position than a reversioner. Legally the effect of the adoption is the same as if Chanbasawa and Basawa had died together at the moment of adoption.

"The right to dispute the alienation was a personal one to Chanbasawa. It was at the most voidable at her option. She did not exercise that option, and the plaintiff who does not claim through her cannot exercise that right. I see no reason for perpetuating an injustice by extending a purely technical rule of law in favour of one person to another."

The plaintiff preferred a second appeal, contending, *inter alia*, that the sales were invalid in their inception by reason of the want of consent of Chanbasawa, and that the reasons given by the lower Court for holding that such consent was not necessary were bad in law.

S. V. Bhandarkar, for the appellant.

Shamrao Vithal, for the respondents.

RUSSELL, J.:—The plaintiff in this case sued to obtain possession of the plaint property, alleging that it belonged to one Dundappa, that his widow Chanbasawa adopted him, and that, as such, he is the owner of the property. The defendant claims the same as purchaser from Basawa, the co-widow of Dundappa.

The defendants' case is that they bought the property in question under two sale-deeds, Exhibits 53 and 97, of 1883 and

of 1885 respectively, from Basawa, and that she executed the same for necessary purposes, *viz.*, to pay off certain Court expenses and reward of the pleader.

It appears that Chanbasawa died in 1895, having adopted the plaintiff in 1894, and Basawa died in 1902, after this suit was filed.

The first question raised was that the said two sale-deeds had not been proved, but on this question of fact both the lower Courts have found in favour of these deeds. The deeds have been put in evidence without objection and we see no reason for saying that they have not been duly proved.

The next question raised was that the sale by Basawa was not for necessary purposes. On this point both the lower Courts have found as a fact that the sale was for necessary purposes.

We accept that finding.

Then it was contended that as partition between widows does not enlarge their power of disposal (*Bhugwandeen Doobey* v. *Myna Baee* [1]) the consent of Chanbasawa to the sale by Basawa was necessary to validate it, and the finding of the lower Appellate Court that Chanbasawa did not consent is conclusive.

It has however been held proved that on the 17th July 1879 Chanbasawa made an agreement with Basawa which, as translated, runs as follows :—

"I Chanbasawa kom Dundshetti, Angdi inhabitant of Kalwad, taluka Nawalgund, give in writing an agreement paper as follows :—

As you and I together cannot pull on well, for the purpose of your maintenance, the lands and houses detailed below, situated in the village of mauze Nagarhalli, taluka Nawalgund, district Dharwar."

(Here follows a description of the property.)

"I have given this day into your possession the lands, houses and backyards mentioned above. You are to carry on the vahivat of the same according to your pleasure as long you live. I have no objection to it. Subsequently, after your death, I and the person whom I will make my son are entitled to whatever moveable and immoveable property there is. No objection should be made in future to the khata, etc., being entered in my name."

Now the position of a co-widow is thus set forth in Mayne's Hindu Law, 6th Edn., p. 732 (his Lordship read the whole page).

(1) (1867) 11 Moo. I. A. 487, p. 515.

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From this it would appear that there was nothing to prevent Chanbasawa from handing over to Basawa the management of the property comprised in that agreement. If this be so, Basawa had authority from her co-widow to do any act necessary for the due and proper management of the property. One of these acts, it has been found, was to pay the costs of the litigation, that being so, it was contended for respondents that she was authorized by Chanbasawa—impliedly at all events—to do what she did.

The case must be looked at as a whole, and so looking at it, it appears to us that there is evidence that the sale by Basawa was impliedly authorized by Chanbasawa.

The District Judge has arrived at the conclusion that Chanbasawa did not consent to the sale. He says in his judgment:—"There is practically no evidence that Chanbasawa consented to the sale and so I hold as a matter of fact that she did not." But it was clearly an error in law to place upon the defendant the burden of proof that Chanbasawa consented to the sale. In the circumstances of the present case, the burden lay upon the plaintiff to show that Chanbasawa did not consent to the sale. That burden was not discharged, and there being no suggestion that evidence on the point was excluded, or that plaintiff was in a position to prove this affirmatively, it would be futile to remand the case for a fresh finding on this point.

We, therefore, confirm the decree of the lower Appellate Court and dismiss this appeal with costs on appellant.

Decree confirmed.

R. R.