

APPELLATE CIVIL.

Before Sir C. F. Furrer, Kt., Chief Justice, and Mr. Justice Fulton.

1898.

July 28.

SHRI BEHARILALJI BHAGWATERASADJI (ORIGINAL DEFENDANT No. 5),
APPELLANT, v. BAI RAJBAL AND ANOTHER (ORIGINAL PLAINTIFF AND
DEFENDANT No. 1), RESPONDENTS.*

*Hindu law—Widow—Maintenance—Right of maintenance charged on property left
by testator—Sale of such property in fraud of widow's right of maintenance—
Right of widow as against purchaser—Transfer of Property Act (IV of 1882),
Sec. 39—Executor, power of sale of—Probate and Administration Act (V of 1881),
Sec. 90, as amended by Act VI of 1889, Sec. 14.*

A testator, by his will, gave his widow's maintenance out of the income of his immoveable estate, subject to a limited power of sale or mortgage conferred upon his executrix for a special purpose. It was found by the lower Courts that a large part of the property was sold by the executrix with the object of defeating the claim of the plaintiff, who was one of the testator's widows, and that the purchaser was aware of the fraud.

Held, that the plaintiff was entitled to recover her maintenance out of the property in the hands of the purchaser. The purchaser having been aware of the fraud, the plaintiff's right to maintenance against the property in his hands remained unaffected whether under section 39 of the Transfer of Property Act (IV of 1882) or the law previously in force and irrespective of the possibility of her claim being satisfied from other property.

Section 90 of the Probate and Administration Act (V of 1881) as amended by Act VI of 1889, section 14, gives an executor merely the ordinary powers of sale that an owner would have in so far as they are not limited by the will, and as such, those powers are subject to the usual rules of equity.

SECOND appeal from the decision of Ráo Bahádur Chandulal Mathuradas, First Class Subordinate Judge of Ahmedabad with appellate powers.

This was a suit by a widow to recover a house, arrears of maintenance, &c., bequeathed to her by her husband Motibhai Dhoribhai. The first defendant (Hetba) was the mother of the testator and the executrix of his will. Defendant No. 2 was the plaintiff's co-widow and defendants Nos. 3 and 4 were the sisters of the testator. The fifth defendant (appellant) was the purchaser of the whole or nearly the whole of the testator's property (including the house in question) from defendants Nos. 1, 2, 3 and 4.

The testator Motibhai Dhoribhai, of Nadiád, died on the 20th June, 1882, leaving him surviving his mother Hetba (defendant No. 1),

* Second Appeal, No. 43 of 1898.

1898.

SRI
BZHARILALJI
v.
BAI
RAJBAL.

two widows, *viz.*, Kasanba, and Rajbai (plaintiff), and two sisters Hira and Harkha. By his will, dated the 19th May, 1882, he appointed his mother Hetba (defendant No. 1) "to carry on the *vahivat* of his properties", and he (*inter alia*) gave a legacy of Rs. 601 to his younger widow, Rajbai (plaintiff), to be paid out of his moveable property. He also directed that, if she could not live jointly with the others, she was to be given a house No. 2 for her residence and Rs. 50 every twelve months for her expenses. He further gave his mother Hetba (defendant No. 1) authority for certain purposes to mortgage or sell the property, and after her death the management was to be given to his sister Hira. The following is the material portion of the will:—

"There are at present living my mother named Hetba, and I have two wives, of whom Kasanba is older and Rajbai is younger, and two sisters * Hira and * Harkha. * I authorize my mother Hetba to carry on the *vahivat* of my properties. * *

"My properties are to be dealt with in the following way. Out of my moveable property Rs. 500 are to be paid to the elder of my wives * and the younger should be paid Rs. 601. Both my said wives are after my decease to be obedient to my mother. * But if any one of my two wives or both of them cannot take her or their food jointly, the younger wife is to be given house No. 2 for her residence and Rs. 50 (Babasai currency) are to be paid to her every twelve months for expenses, and the elder one is to be given the western one of the two houses, No. 10, for her residence and Rs. 50 for expenses every twelve months. * *

"As to the whole of the immoveable and moveable property that may remain after excluding the properties dealt with above, my mother Hetba has the right of carrying on the *vahivat* thereof * as long as she may be alive. And she has authority to effect a mortgage or sale in order to make gifts for charitable and religious purposes for the benefit of her soul and to the mandir at Vatal. * * After my decease and the decease of my mother as to whatever of my above mentioned property may be remaining, after excluding therefrom the property which my mother may have dealt with, the *vahivat* thereof is to be carried on, and the same is to be taken possession of, by my sister Hira. * * *

"On the decease of my wives, after my and my mother's death, as to whatever property belonging to them there may be, the same also is to be enjoyed by the person (or persons) who may be enjoying my property at the time, and the person or persons who may be enjoying the property is or are to make outlays in respect of the obsequial ceremonies in any manner he likes, and the person who may be enjoying the property is to go on paying every year to the wives the maintenance allowance which I have fixed above, or keep them and maintain them together as far as possible. * * *

1893.

SHRI
BEHARILALJI
v.
BAI
RAJBAT.

On the 25th November, 1895, the plaintiff Rajbai brought this suit to recover the house bequeathed to her as above stated and Rs. 84-6-0 arrears of maintenance and the legacy of Rs. 601. She alleged that as she could not agree with her co-widow Kasanba (defendant No. 2) she had begun to live separately in 1893 and had demanded separate residence and maintenance, which were refused. She also alleged that Hetba (defendant No. 1) had fraudulently sold the house bequeathed to her (the plaintiff) to the fifth defendant (appellant) in order to defeat her (the plaintiff's) claim.

The first defendant Hetba pleaded that the plaintiff's claim to the legacy of Rs. 601 was barred by limitation, and she further stated that the whole of the testator's property had been sold to the fifth defendant.

Defendants Nos. 2, 3 and 4 pleaded to the same effect.

Defendant No. 5 answered that he had purchased only a part of the testator's property for which he had paid Rs. 8,750 and that this purchase-money together with the remainder of the testator's property still in the hands of the other defendants were sufficient to satisfy the plaintiff's claim.

The Subordinate Judge held that the plaintiff's claim to the legacy of Rs. 601 was barred by limitation, but he directed that she should be given possession of the house bequeathed to her for residence. As to the arrears of maintenance he ordered that they should be recovered from the first defendant (Hetba) alone.

On appeal by the plaintiff the Judge varied the decree by directing that the plaintiff should recover the maintenance awarded to her from the testator's property, whether in the hands of the first or the fifth defendant. He was of opinion that the property had been fraudulently sold to the fifth defendant in order to defeat the plaintiff's claim to maintenance. In his judgment, after referring to the provisions of the will, he continued :—

“These provisions clearly indicate that whoever enjoys or is in possession of the property should allow maintenance to his widows, including the plaintiff. In other words, their maintenance is made a charge on his property. Defendant No. 5 has purchased a large part of this property; and though, in the absence of any evidence on the point, it is not possible to say that he has purchased it without any consideration whatever, still it cannot be reasonably doubted that he was the religious preceptor of the deceased Motibhai, and is

that of his mother and sisters. The law on the subject is that laid down by section 39 of the Transfer of Property Act (IV of 1882). Where a third person has a right to receive maintenance from the profits of immoveable 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 (section 39). This section is consistent with the observations of Mr. Justice West in the well-known case of *Lakshman v. Satyubhamabai*⁽¹⁾. A purchaser taking from a vendor with reason to suppose that the transaction was one originating not in an honest desire to pay off debts or satisfy claims for which the estate was justly liable, and which it could not otherwise well meet, but in a desire to shuffle off a moral and legal liability would, as sharing in the proposed fraud, be prevented from gaining by it (see Mayne's Hindu Law, p. 432, 3rd Ed.). It is admitted by the defendant Beharilal that he is in possession of the whole of the property sold and that he knew of the will (No. 66). In fact, it is referred to in his document of sale (Exhibit 49), and if he knew of the will, he ought to have known that the property which he was purchasing was encumbered with the plaintiff's right of maintenance. The purchase was for the comparatively large sum of Rs. 8,750 and the defendant has paid Rs. 2,850 to Motibhai's uncle's son Dwarkadas with a view to buy off what might appear to be his reversionary claim (Exhibit 73). He had also promised to pay Rs. 50 annually to the testator's sister Harkhaba as directed by the will (Exhibit 48). Motibhai was a man of means, and he seems to have left behind him no debts strictly so called. Defendant No. 1 did not sell the property in order to satisfy any claim against the estate. Why did she require such a large amount as that of Rs. 8,750 and what did she do with it? She was under no necessity of selling the property, and she had no authority to sell it. Intention is to be gathered from the acts of the parties. Defendant No. 1 has acted most recklessly and defendant No. 5 most cleverly. If the latter had taken the property as a religious gift, he would have taken it burdened with the charges for maintenance. He wants to get rid of that liability by giving it the name of sale. Why was not plaintiff made a party to the sale when all the rest were joined as parties to it? The object was to defeat her rights as well as the rights of the other reversionary heirs. The intention was to take the property unencumbered, and thus to defeat the plaintiff's right of maintenance. It was the intention of the first four defendants to defeat the right, and the last defendant could not have been ignorant of it. The first four defendants were practising the fraud upon her claim, and the fifth defendant had notice of it. If she cannot get her maintenance from the property in the hands of defendant No. 5, I doubt that she can get the house from him. This case ought to be governed by section 39 of the Transfer of Property Act; and the case cited by the fifth respondent's pleader cannot apply. The result is that the plaintiff's claim for maintenance is a charge on her husband's property whether it be in the hands of defendant No. 1 or defendant No. 5."

Defendant No. 5 preferred a second appeal.

(1) (1878) 2 Bom., 491.

1898.

SHEE
BEHARILALJI
v.
BAI
RAJBAL.

Golubdas K. Parbh, for the appellant (defendant No. 5) :—We did not buy the whole of the property left by the testator. The plaintiff should look primarily to the other property for her maintenance. Section 39 of the Transfer of Property Act is not applicable. That Act came into force in this Presidency in 1893 while the right of the executrix to sell accrued long before. Section 90 of the Probate and Administration Act (V of 1881) empowers an executor to sell—*Lukshman v. Satyabhanobai*⁽¹⁾.

Dafary, for respondent No. 1 (plaintiff) :—The will gives the executrix a power of sale only under certain circumstances. Almost the whole of the property left by the testator has been sold to the appellant. The appellant who purchased the property knew of the fraud practised upon the plaintiff. Under these circumstances he cannot be exonerated from liability for the plaintiff's maintenance—*Mayne's Hindu Law*, Secs. 427 and 430; *Savitribai v. Luxmidai*⁽²⁾; *Kalu v. Kashibai*⁽³⁾.

K. M. Javeri, for respondent No. 2 (defendant No. 2).

FARRAN, C. J. :—We are of opinion that the testator by his will gave his widows a right to receive maintenance from the profits of his immovable estate subject to the limited power of sale or mortgage conferred upon his executrix “in order to make gifts for charitable and religious purposes for the benefit of her soul to the mandir at Valtal as mentioned above (*i. e.*, for *puudan*) and on other auspicious or inauspicious occasions” if he has not specifically (subject as aforesaid) charged his estate with the payment of such maintenance. We draw this conclusion as well from the general purport of the will as from the express declaration of the testator that he “who may be enjoying the property is to go on paying every year to the wives the maintenance allowance which I have fixed above and to maintain them together as far as possible” This declaration, though it immediately follows a direction to the person who may enjoy the property after the death of the testator's wives and mother as to the performance of their several obsequial ceremonies, appears to be a general direction as to the maintenance of his wives, and not a direction confined to the person who is to enjoy the property after the mother's death. The testator's widows are,

(1) (1878) 2 Bom., 494.

(2) (1878) 2 Bom., 573.

(3) (1883) 7 Bom., 127.

1898.

SHRI
BHARILALJI
&
BAY
RAJDAI.

we think, under the terms of the will, in a position exactly analogous to, if not more favourable than, that of a widow entitled under the general Hindu law to maintenance out of family property in the hands of one of the surviving members of such family.

It was argued by Mr. Gokuldas for the appellant that the Transfer of Property Act relied on by the First Class Subordinate Judge, A. P., was inapplicable to the present case notwithstanding that the conveyance to the fifth defendant took place after it had come into force. He contended that the right of the executor to sell the property which had accrued on the death of the testator in 1882, could not be reduced by the provisions of section 30 of the Transfer of Property Act IV of 1882 having regard to the provisions of section 2. Probably this argument is correct, but the point is not material, as it does not appear that section 30 has made any change in the law as explained in Mr. Justice West's judgment in *Lakshman v. Satyabhabamai*⁽¹⁾. That judgment had evidently been carefully considered by the Subordinate Judge, and we think that its principles were correctly applied. The Subordinate Judge found that the fifth defendant was aware of the fraud on the plaintiff that was practised by the first four defendants in order to defeat her claim to maintenance, and in these circumstances her right to maintenance remained unaffected against the property in his hands whether under section 30 of the Transfer of Property Act or the law previously in force, and irrespective of the possibility of her claim being satisfied from other property. At page 520 Mr. Justice West said: "I find a difficulty in accepting the doctrine that it depends on how the widow's claim may or can be met, whether she can have recourse to property already sold to provide her with maintenance. . . . 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." The law thus laid down was not seriously attacked, and we think we ought to follow it.

As regards section 90 of the Probate and Administration Act, 1881, as amended by Act VI of 1889, which, it was contended, gave the executor full power to dispose of the property, we think

(1) (1878) 2 Bom., 494.

1898.

SHRI
BEHARILALJI
v.
PAI
RAJESAI.

that the will in this case impliedly imposes a restriction upon the power of the executrix to dispose of the immovable property of the testator, and that the section relied on does not assist the defendant. It was not indeed until the reply that the pleader for the appellant was driven to rely upon it. The general purport of the will evidently evinces a desire upon the part of the testator to keep the property intact, and the limited power of sale already referred to is, we think, a clear indication of the testator's desire to restrict his executrix to a power of sale for the special purpose which he has specified. Besides, it is not clear that the section precludes the application of the equitable principle on which the decision in *Lakshman v. Satyabhamabai* is based and which has been embodied in section 39 of the Transfer of Property Act. It cannot seriously be argued that section 90 of the Probate Act in any way supersedes section 39 of the Transfer of Property Act, as there is nothing in the section itself to indicate any such intention. It seems to give the executor merely the ordinary powers of sale that an owner would have in so far as they are not limited by the will, and as such these powers would be subject to the usual rules of equity. We confirm the decree with costs.

Decree confirmed.

ORIGINAL CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Strachey.

1898.
April 15.

FRIMBAK GANGADHAR RANADE (ORIGINAL PLAINTIFF), APPELLANT,
v. BHAGWANDAS MULCHAND AND OTHERS (ORIGINAL DEFENDANTS),
RESPONDENTS.*

Mortgage—Power of sale—Suit to set aside sale under power of sale—Promise by mortgagee to postpone sale—Evidence of such promise admissible—Evidence Act (I of 1872), Sec. 92, proviso 4—Contract Act (IX of 1872), Sec. 63—Transfer of Property Act (IV of 1882), Sec. 69—Town of Bombay, limits of.

The plaintiff mortgaged certain property to the first defendant on 28th December, 1895. By the mortgage-deed the mortgage-debt was made repayable on 23rd December, 1896. On the 12th May, 1897, the first defendant sold it by auction under the power of sale contained in the mortgage-deed,

*Suit No. 307 of 1897. Appeal No. 968.