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if sanctioned. There is no other part of the definition of "unlawful" which could possibly cover this case. A similar result was arrived at by Sir Charles Sargent in the case of *The Bank of Bengal* v. *Vyabhoy Gangji*.[1]

For these reasons I hold that the only effect on the mortgage is that the principal mortgage-debt must be taken to be Rs. 2,500 *minus* 443-13-9 = Rs. 2,056-2-3 and interest allowed on that sum only. The lower appellate Court has wrongly decided the matter on a preliminary point.

For these reasons I agree with the order proposed by the learned Acting Chief Justice.

Decree reversed and case sent back.

G. B. R.

(1) (1891) 16 Bom. 618.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1907. *July* 30.

HARI NARAYAN JOG (ORIGINAL PLAINTIFF), APPELLANT, *v.* VITAI KOM NARU PASALE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Mitakshara—Mayukha—Succession—Co-widows' interest in the property of their deceased husband—Right of assigning her share—Partition—Alienation of her share—Valid during her life-time—Survivorship.

It is the right of each of the co-widows to enjoy her deceased husband's property by partition *inter se*, both under the Mitakshara and the Mayukha. She can, therefore, assign her share to anyone she chooses; and if she has already obtained her share by partition, she can alienate that share. But in either case the assignment or alienation cannot take effect or have validity beyond her life-time. It is good as long as she lives: and, on her death, her interest in the property ceases and the share goes to the surviving co-widow or co-widows as the case may be.

SECOND appeal from the decision of C. French, Assistant Judge of Satara, confirming the decree passed by S. N. Sathaye, Subordinate Judge at Vita.

* Second Appeal No. 43 of 1905.

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Suit to recover possession of certain land.

One Naru Pasla died in 1896. He had two wives: Vitai (defendant No. 2) and Kashi (defendant No. 1). He had by the former, one daughter who was married. By the latter he had two daughters, one of whom was married and the other was not married.

At Naru's death, his two widows succeeded to his property.

On the 3rd July 1901 Vitai (defendant No. 2) sold her interest in Naru's property to the plaintiff, and placed him in joint possession.

On the 21st January 1905, the plaintiff brought this suit for partition and possession of a moiety of the property.

The Subordinate Judge held that the plaintiff was not entitled to any relief, as the sale to him by Vitai was not for necessity or for a valid purpose. He remarked as follows:—

"It is urged for the defence that plaintiff ought to have shown the legal necessity for the transaction which is apparently shown to be contracted to affect her interest and the interest of him after her. A Hindu widow is indeed a co-parcener but is unlike other co-parceners, *e.g.*, brothers after their father's death. There are legal limitations upon the estate that a widow takes which do not find place in the case of other co-parceners. It is, I think, on the ground of these limitations that a person dealing with her has to show the circumstances under which he entered into the dealings he seeks to enforce. The case of two or more widows is still more complicated as their position is peculiar. They are joint tenants with right of survivorship and no alienation by one widow can have any validity against the rights of the others without their consent or on established necessity arising under circumstances which rendered it impossible to seek for consent. (*Vide* Mayne's Hindu Law, 5th Edition, para. 510). The Bengal law under Dayabhaga must be distinguished from the Mitakshara law prevailing in this presidency, and in the case noted at the end of the paragraph referred to above this distinction is clearly stated (I. L. R. 9 Cal. pp. 580, 585, Full Bench Ruling in *Jnanokinath Mukhopadhya* v. *Mathuranath Mukhopadhya*). The principle of law enunciated in the leading case of *Bhugwandeen Doobey* v. *Myna Baee* (11 M. I. A. 487) is relied upon in the Full Bench ruling as the distinguishing feature between the two schools of law. The case in I. L. R. 11 Mad. 304 is to the same effect (*vide* p. 306), It is further to be noted that at a partition in a Hindu family the marriages of unmarried daughters in the undivided family are a factor for consideration in the allotment of shares (*vide* Mayne's Hindu Law, para. 441, 5th Edition)."

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On appeal the Assistant Judge confirmed the decree. His grounds were as follows :—

It is admitted that defendant 1 did not give her consent. But that consent was clearly necessary. Mayne's Hindu Law, section 554, 6th Edition says: On the principle of joint tenancy with survivorship, no alienation by one widow, even though she is manager at the time, can have any validity against the rights of the others without their consent, or an established necessity arising under circumstances which rendered it impossible to seek for consent. It is true that the paragraph goes on as follows :—

It has however been held that a widow can alienate her *life interest* as against her co-widows.

But in the first place I am not sure that this is the settled law in the Bombay Presidency, the decision quoted by Mayne being a Calcutta one and, secondly, it appears, the necessity for the alienation must first be proved before the widow can alienate even her life-interest. For Mayne again in section 637 says: The purposes which authorise a Hindu widow to mortgage or sell her property are summed up by the Judicial Committee in the words already quoted (section 625). And section 625 runs (about the middle) :—"It is admitted, on all hands, if there be collateral heirs of the husband, the widow cannot of her own will alienate the property except for special purposes." Further on, the special purposes are said to be religious or charitable purposes, and it is observed that to support an alienation for worldly purposes, necessity must be shown. It should be noted that the Judicial Committee says "if there be collateral heirs." In the present case defendant 2 admits (exhibit 20) that she has a daughter, and defendant 1 has two daughters living. And there is also the co-widow. *A fortiori*, therefore, the above remarks apply to the present case. No necessity has been proved.

The plaintiff appealed to the High Court.

K. H. Kelkar for the appellant.

D. A. Khare for the respondents.

CHANDAVARKAR, J.:—Both the lower Courts have held that where a Hindu in this Presidency dies, leaving him surviving two or more widows as heirs, none of them has the right to alienate her life-interest in the property without some necessity justifying the alienation or without the consent of her co-widow or co-widows, as the case may be. And in support of that view they rely upon certain passages in Mr. Mayne's Hindu Law and Usage, Sixth Edition, section 554, p. 733. The passage runs as follows :—

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"On the principle of joint tenancy with survivorship, no alienation by one widow, even though she is the manager at the time, can have any validity against the rights of the others without their consent, or an established necessity arising under circumstances which rendered it impossible to seek for consent."

This means that such an alienation cannot bind the interest or right of the other widow or widows—it does not mean that it cannot bind the interest of the widow alienating. Mr. Mayne, in support of the proposition above quoted, cites the ruling of the Privy Council in *Sri Gajapati Radhamani Guru* v. *Maharani Sri Pusapati Alakarajeswari* [1], where their Lordships do not lay down the law so broadly as the lower Courts in their respective judgments in the present case seem to think. What their Lordships observe is that a mortgage by one co-widow cannot be "binding upon the joint estate which had descended from their deceased husband *so as to affect the interest of the surviving widow.**"

Mr. Mayne goes on to say :—

"It has, however, been held that a widow can alienate her life-interest as against her co-widows, just as she can against the reversioners, . . . without prejudice to their rights of survivorship;" and in support of that he cites *Janoki Nath* v. *Mothuranath*. [2]

But both the Lower Courts in the present case reject the authority of that decision on the ground that it is the law under the Dayabhaga in Bengal and has no application to this Presidency. That view, however, gives the go-by to the rights which, under the Mitakshara and the Vyavahara Mayukha, the two paramount authorities in this Presidency, accrue to the widows of a deceased Hindu succeeding as joint heirs to his property. The right of each of such widows to enjoy the property by partition *inter se* is admitted in distinct terms, both in the Mitakshara and the Mayukha. The passage bearing on the point in the former which, as pointed out by Stokes in his Hindu Law Books (page 52), is omitted by Colebrooke in his translation of the Mitakshara (page 428, *placita* 5 and 6 of Stokes' Hindu

(1) (1892) L. R. 19 I. A. 184. (2) (1883) 9 Cal. 580.

* These words are not in italics in the original judgment from which the passage is quoted. [Ed.]

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Law Books), is translated in a foot-note given at page 53 by Stokes in his Hindu Law as follows:—

"The singular number 'wife' signifies the kind; hence, if there are several wives belonging to the same or different castes, (they) divide the property according to the shares prescribed to them, and take it."

To the same effect is the Vyavahara Mayukha:—

"This establishes our argument [the wife, if faithful, &c., para. 2nd] that a lawfully married wife, restrained [in her conduct] takes the wealth. But if there be more than one, they will divide it, and take shares." [Stokes' Hindu Law Books, page 86, *placitum* 9.]

And following that, Arnould and Couch, JJ., have held in *Ramia* v. *Bhagi* (1) that "where a Hindu dies intestate leaving no issue and several widows, the widows succeed equally and are entitled to equal shares in his estate." No doubt that was a case on the Original Side of this Court, but the learned Judges in support of their decision rely on a decision of the then Chief Justice of the Court in *In the Goods of Chapa Juddoo* based on the answers obtained by him from the Shastrees of the Sadar Adalat at Poona to the effect that, "if there be more than one widow, each of them is entitled to an equal share of the property." And in *Mussammat Sundar* v. *Mussammat Parbati* (2), their Lordships of the Judicial Committee of the Privy Council dealing with the right of each of two Hindu widows, holding an estate jointly, to claim partition from the other, observe: "It is impossible to hold that a joint estate is not also partible."

The right of each of such widows to partition being established, it is a necessary corollary from that that she can assign it to any one she chooses. So also, if she has herself obtained her share by partition, she can alienate that share. In either case, the assignment or alienation cannot take effect or have validity beyond her own life-time. On her death her interest in the property ceases and the share goes to the surviving co-widow or co-widows, as the case may be. [Macnaghten's Hindu Law, Vol. I, pp. 20, 21, 3rd Edn.]. But it is good so long as she lives.

(1) (1862) 1 Bom. H. C. R. 66. (2) (1889) L. R. 16 I. A. 186 at p. 194.

This conclusion of Hindu Law is in accordance with the decision of the Madras High Court in *Ariyaputri* v. *Alamelu*[1], where it was held that, though more widows than one inheriting their husband's property "take together as a class" and "partition is permitted between them, not as in the case of male co-parceners for the purpose of converting a joint estate into two or more separate estates to be held in severalty, but for the limited purpose of securing to each widow a distributive enjoyment of the benefit of joint property," yet that "is not inconsistent with her right of separate beneficial enjoyment during her life being bound by her own voluntary act or by a Court sale in execution of a decree against her."

The Subordinate Judge, who decided the suit in this second appeal before us, relies upon that decision as supporting the view that Hindu co-widows being joint tenants with right of survivorship, "no alienation by one widow can have any validity against the right of the others without their consent or an established necessity arising under circumstances which rendered it impossible to seek for consent." That undoubtedly is the law, but that is not the present case. The plaintiff who claims partition under an assignment from defendant No. 2 of the right to a share by partition from her co-widow, defendant No. 1, is not seeking to affect in any way the rights of defendant No. 1. If his assignor has a right to a share during her life-time, he is entitled to claim it by partition and to hold it during her life-time. There is no question in that of the assignment or alienation affecting the rights of the other widow.

To such a partition in the present case it is objected by the lower Courts, on the analogy of a partition among the co-parceners in an undivided Hindu family, that both the widows here have unmarried daughters, and that, if the alienation of her interest by defendant No. 2 in favour of the plaintiff is held valid, it must prejudice those daughters in respect of their marriages, the expenses of which are a charge on the estate inherited from their husband by both the widows. But the fact that there are unmarried daughters in a joint Hindu family,

(1) (1888) 11 Mad 304 at p. 306.

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whose marriage expenses have to be provided for out of its property, has never been held to deprive any of its co-parceners of the right of alienating his own share or of demanding a partition, though that may be a reason for upholding the alienation or allowing the partition subject to those expenses. In the present case it will be for the Court, if necessary, to decide upon the evidence and circumstances of the case, after taking into consideration the pleas of the respective parties, whether the partition claimed by the plaintiff should be allowed subject to any conditions warranted by Hindu Law.

As the lower appellate Court has dismissed the suit practically upon a preliminary ground, *viz.*, that the suit for partition cannot lie, we must reverse the decree and remand the appeal for disposal according to law. Costs to abide the result.

Decree reversed. Case remanded.

R. R.

PRIVY COUNCIL.*

[On appeal from the High Court of Judicature at Bombay.]

1907.
February 6, 7, 8.
July 22.

CHABILDAS LALLUBHAI (PLAINTIFF) *v.* DAYAL MOWJI AND OTHERS (DEFENDANTS).

Vendor and Purchaser—Auction sale under power of sale in a mortgage—Condition of sale depreciatory of mortgagor's title—Solicitor of mortgagee acting for purchaser in preparation of deed of conveyance—Constructive notice—Conduct of mortgagees at sale inducing bidders to leave—Knowledge of purchaser of such circumstances—Notice—Proviso in mortgage to protect purchaser—Transfer of Property Act (IV of 1882), sec. 69.

At an auction sale under a power of sale in a mortgage on conditions one of which both the lower Courts found to be a depreciatory condition wholly unwarranted by the state of the mortgagor's title, the mortgaged property was knocked down to the appellant who the same day signed a written contract to purchase. In a suit by the purchaser against the mortgagor for possession of the property, to which suit the mortgagees were made parties, *Held* that the purchaser was not affected with constructive notice of the true state of the title

* *Present*: LORD MACNAGHTEN, LORD DAVEY, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.