APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Chaubal.

GANAP, ADOPTED SON OF SANNA SUBU HEGDE (ORIGINAL PLAINTIFF), APPELLANT, *v.* SUBBI KOM SANNA SUBU HEGDE (ORIGINAL DEFENDANTS), RESPONDENTS.* 1908. *July* 24.

Hindu law—Widow—Permanent alienation by widow of her husband's property—Alienation on the ground of necessity—Meaning of necessity—Alienation for preserving the estate—Alienation for improving the estate.

Under Hindu law, a permanent alienation of immoveable property by a widow can only be justified on the ground of necessity. The "necessity" involves some notion of pressure from without and not merely a desire to better or to develop the estate, for this last implies vast powers of management which in practice would not easily be distinguishable from an authorization to embark upon speculative ventures.

A Hindu widow can alienate immoveable property inherited by her from her husband in order to preserve the estate; but she is not entitled to alienate it merely in order to improve it.

SECOND appeal from the decision of C. C. Boyd, District Judge of Kánara, reversing the decree passed by E. F. Rego, Subordinate Judge at Honávar.

Suit to recover possession of certain lands.

The lands in dispute belonged originally to one Sanna Subbu. He died without issue leaving him surviving his widow, Subi (defendant No. 1). He had authorized his wife Subi to adopt a son to him by virtue of which Subi adopted the plaintiff on the 12th December 1891.

In 1889 Subi sold some of the lands belonging to her husband and also granted a permanent lease (*mulgeni*) of a portion of other lands to defendants Nos. 2 and 3.

The plaintiff sued to recover possession of these lands. His claim was decreed by the Subordinate Judge.

On appeal this decree was reversed by the District Judge who dismissed the plaintiff's suit. He remarked as follows:—

"The widow had the power to grant a permanent lease as it was necessary in order to prevent the land from being wasted and to bring large parts of it

*Second Appeal No. 499 of 1907.

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under cultivation. There is good evidence of this: and the lease itself (executed before any dispute) recites necessity, saying the land was rocky and much was lying fallow. This recital is of great importance. It was made before plaintiff's adoption and by a woman of experience (by that time); and the fact (shown by evidence) that defendants did improve the land shows that it was right to lease it to them. The above view of the law is justified by the decision at I. L. R. 25 Cal. 1; I. L. R. 30 Cal. 190: P. J. 1889, 136; P. J. 1896, 197."

The plaintiff appealed to the High Court.

S. S. Patkar for the appellants:—The lower Court has relied upon four cases, cited in its judgment, for the view that a permanent lease of property inherited from her husband by a Hindu widow is valid. If the cases are closely examined they do not bear out the proposition: see also *Sham Sunder Lal* v. *Achhan Kunwar* (1).

Nilkantha Atmaram for respondent No. 3:—It has been found as a fact that it was necessary to grant the permanent lease in order to prevent the land from being wasted and to bring large parts of it "under cultivation." The present case is much stronger than the case of *Dayamani Debi* v. *Srinibash Kundu* (2).

G. S. Mulgaonkar for respondent No. 4.

BATCHELOR, J.:—In this appeal the question is whether the plaintiff is bound by the permanent lease granted by the widow in January 1889. This question the learned District Judge has answered in the affirmative on the ground that the lease was necessary in order to prevent the land from being wasted and to bring large parts of it under cultivation. Several cases are cited by the learned Judge in support of his opinion, and the question we have to answer is whether that opinion is really in accordance with law.

Now there can be no doubt of the general principle that a permanent alienation of immoveable property by a Hindu widow can only be justified on the ground of necessity. What necessity has hitherto been supposed to include, may be seen on reference to Golap Chandra Sarkar's work (2nd Edn.) at p. 312 where the instances given of necessity are religious purposes, payment of the

(1) (1893) L. R. 25 I. A. 183 at p. 192. (2) (1906) 33 Cal. 842.

husband's debts, performance of his funeral rites, maintenance of the widow, certain marriages, costs of certain litigation and preservation of the estate.

It is, we think, settled that the widow can alienate in order to preserve the estate, but we do not think that she is entitled to alienate merely in order to improve it. In support of this view we may refer to *Hurry Mohun Rai* v. *Gonesh Chunder Doss* (1), where Mr. Justice Mitter says "Suppose a Hindu widow engages a builder to make sundry improvements in the family dwelling-house while there is no necessity for such improvement, and dies after the work is finished. It seems to me that it would be unjust to hold that the next heir is liable to pay for the work done out of the estate, though it is to a certain extent benefited thereby. It follows therefore that in order to bind the next heir it is not sufficient to show that the contract has conferred a benefit upon the estate; but it must be further established that the contract is of such a nature that a prudent owner in managing his estate would find such a contract necessary for the due preservatio n of the estate." Thus the necessity required involves some notion of pressure from without and not merely a desire to better or to develop the estate, for this last implies vast powers of management which in practice would not easily be distinguishable from an authorisation to embark upon speculative ventures. The only case which Mr. Nilkanth has been able to show to us as decided in his favour is *Dayamani Debi* v. *Srinibash Kundu* (2) where it was held that a Hindu widow, as regards the management of the estate, has not less power than the manager of an infant's estate, and the reversioners are not entitled to set aside a permanent lease granted by her, which is found to be for the benefit of the estate and by which they are found to have been benefited. But we notice that the learned Chief Justice in the course of his judgment observes that "each case must depend upon its own circumstances" and we take it therefore that this particular decision was intended to be based upon the special circumstances then before the Court. This inference derives support from what was said by the Judicial Committee in *Sham*

(1) (1834) 10 Cal. 823 at p. 829.

(2) (1906) 33 Cal. 842.

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Sunder Lal v. *Achhan Kunwar* [1] where Lord Davey says "the authorities quoted by Mr. Cowell have no application to the case. They were cases of a family business being carried on by the manager of an undivided family estate. In that case the manager of a family business has a certain power of pledging assets for the requirements of the business. But the position of a Hindu widow or daughter is not by any means the same as that of the head of an undivided family, and even in the latter case the validity of a mortgage by the manager of a family business without the concurrence of the other members of the family, or when some of those members are minors, depends on proof that the mortgage was necessarily entered into in order to pay the debts of the business. This is clear from the cases cited, including that of *Doulat Ram* v. *Mehr Chand*[2]. To use the language of Pontifex, J., in a judgment quoted in that case, the touchstone of the authority is necessity." And now reverting to Maclean, C. J.'s remark that each case must depend upon its own circumstances, we have here a circumstance which, if it be necessary, can be safely used to distinguish this case from that of *Dayamani Debi*, for, here we are satisfied upon a general view of the whole transaction entered into by the widow, that she was not acting fairly towards the expectant heir, to apply the test which was adopted in *Chimnaji Govind Godbole* v. *Dinkar Dhondev Godbole*[3].

Upon these grounds therefore, we must reverse the decree under appeal. Mr. Nilkanth has contended that an issue should be sent down to determine the cost of the improvements which were made by the defendants 3 and 4 and for which the plaintiff should be held liable, but we do not think that it is necessary to send down an issue upon this point, for in the interlocutory judgment of the learned Subordinate Judge we have precise findings that the cost of the improvements effected was Rs. 250 and that the plaintiff should be held liable to refund this amount to defendants 3 and 4.

The decree will therefore award possession to the plaintiff on condition that he refund this sum of Rs. 250 to the defendants 3

(1) (1898) L. R. 25 I. A. 183 at p. 192. (2) (1887) L. R. 14 I. A. 187.
(3) (1886) 11 Bom. 320.

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and 4. This condition will only attach to those lands which are included in the Mulgeni lease. In regard to the lands not so included the plaintiff will be entitled to unconditional possession and mesne profits from the year 1902-03 till delivery of possession or until the expiration of three years from the date of this decree whichever event first occurs.

Costs on the respondents throughout.

Decree reversed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Russell.

1907.
December 20.

BANI MUNCHARAM AND ANOTHER, PLAINTIFFS, *v.* REGINA STANGER, DEFENDANT.*

Suit for Ejectment—Contract Act (IX of 1872), section 23—Immoral transaction.

If a plaintiff cannot make out his case except through an immoral transaction to which he was a party he must fail.

Fivaz v. *Nicholls* (1), followed.

THE facts of this case appear sufficiently from the judgment.

Inverarity with him *Raikes* and *Jinnah* for plaintiff.

This is in the nature of a hire and purchase agreement. The property in the goods is not parted with. Suppose there is a transfer of property and suppose the agreement is illegal, section 84 of the Transfer of Property Act applies. The transferor is not *in pari delicto* with the transferee. The property in the furniture has not passed: *Ex parte Crawcour* (2); Benjamin on Sale (5th Edn.), p. 327. We admit our plaint is inartistically drawn but the claim is not based on the lease. There is no prayer for payment of rent. Possession is asked for in general terms. The

* Suit No. 737 of 1907.

(1) (1846) 2 C. B. 501.

(2) (1878) 9 Ch. D. 419.