The last two mortgages out of the five in favour of defendant No. 1's father were effected during the pendency of the plaintiff's suit of 1899 and of the execution proceedings in that suit. It is clear that the plaintiff was actively prosecuting the suit and the execution proceedings from the date of the suit to the date of the Court-sale. Under section 52 of the Transfer of Property Act, Mariam, who was a party to the suit, could not transfer the property by way of mortgage so as to affect the rights of the plaintiff to bring the property to sale free from such burden. These mortgages clearly affected the plaintiff's right under the decree, which he could resist as a purchaser at the Court-sale in execution of that decree. The decisions in *Shivjiram* v. *Waman*[1] and *Rachappa* v. *Mangesh*[2], though not under section 52 of the Transfer of Property Act, clearly support this view.

Decree reversed.

J. G. R.

[1] (1897) 22 Bom. 939. [2] (1898) P. J. p. 386.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Hayward.

RAMA BIN SANTU RANDIVE (ORIGINAL DEFENDANT), APPELLANT *v.* DAJI BIN NARU RANDIVE AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1918 *July* 31.

Hindu law—Widow—Reversioners—Whether award or compromise decree against widow binds reversioners.

The principle that a decree fairly obtained against a Hindu widow binds the reversioners does not apply to a compromise or an award decree, not shown to have been fairly obtained against the Hindu widow as representing the estate.

Jeram v. *Veerbai*[1], followed.

*Second Appeal No. 209 of 1917.

[1] (1903) 5 Bom. L. R. 885.

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SECOND appeal from the decision of V. V. Kalyanpurkar, First Class Subordinate Judge, A. P., at Satara, confirming the decree passed by V. R. Gutikar, Subordinate Judge at Karad.

Suit to recover possession of property.

One Joti owned the property in dispute. He had a separated brother named Santu. Santu had four sons, one of whom was Rama (defendant). The other three had each one of them one son, plaintiffs Nos. 1 to 3.

In about 1892, Joti died leaving him surviving a widow Tai and a daughter Tanu.

The defendant set up a claim under a will alleged to have been made in his favour by Joti, and took the property into his possession. In 1908, Tai filed a suit to recover possession of the property from the defendant and in the alternative to recover maintenance from him. The parties referred their disputes to arbitration. The arbitrators decided that Tai should live with the defendant; but that if she chose to live separately from him she was entitled to maintenance at the rate of Rs. 36 a year. At the request of the parties, the Court passed a decree in terms of the award.

Tai died in December 1911, Tanu having predeceased her.

In 1912, the son of Tanu sold the property in dispute for Rs. 500 to plaintiffs Nos. 1 to 3.

The plaintiffs filed the present suit to recover possession of the property from the defendant.

The defendant contended *inter alia* that the award decree operated as *res judicata*.

The lower Courts overruled the contention and decreed the suit.

The defendant appealed to the High Court.

D. R. Patwardhan, for the appellant.—The rule in the *Shivagunga's case*[1] that a decree fairly obtained against a widow binds the reversioners applies here: see also *Mussumat Bhagbutti Daee* v. *Chowdry Bholanath Thakoor*[2]; *Jugol Kishore* v. *Maharajah Jotindro Mohun Tagore*[3]; *Hurrinath Chatterji* v. *Mohunt Mothoor Mohun Goswami*.[4] A consent decree is as good as a contested decree. The case of *Jeram* v. *Veerbai*[5] was decided by a single Judge and is not binding. See also *Ghelabhai* v. *Bai Javer*[6].

I. K. Vakil, for the respondents.—The rule in *Shivagunga's case*[1] does not apply to a consent decree. In the absence of proof that the decree was fairly obtained, the Court cannot presume it. The burden lies on the defendant to show that the decree was fairly obtained. See *Jeram* v. *Veerbai*[5]; *Mahadei* v. *Baldeo*[7]; *Gur Nanak Prasad* v. *Jai Narain Lal*[8]; *Subbi* v. *Ramkrishnabhatta*[9]; *Rajlakshmi Dasee* v. *Katyayani Dasee*[10]; *Kailash Chandra Bose* v. *Girija Sundari Debi*[11]; *Bhogaraju Venkatrama Jogiraju* v. *Addepalli Seshayya*[12]; and *Khunni Lal* v. *Gobind Krishna Narain*[13].

HAYWARD, J.:—The only question pressed in argument before us in this second appeal is whether the plaintiff's claim for the land in suit is barred by an award decree between his predecessor-in-interest, a widow, and the defendant claiming by a will from the last male owner. It has been contended on behalf of

(1) (1863) 9 Moo. I. A. 539 at p. 604.
(2) (1875) L. R. 2 I. A. 256 at p. 261.
(3) (1884) L. R. 11 I. A. 66 at p. 73.
(4) (1893) L. R. 20 I. A. 183 at p. 191
(5) (1903) 5 Bom. L. R. 885.
(6) (1912) 37 Bom. 172.
(7) (1907) 30 All. 75.
(8) (1912) 34 All. 385.
(9) (1917) 19 Bom. L. R. 919.
(10) (1910) 38 Cal. 639 at pp. 673, 674.
(11) (1912) 39 Cal. 925.
(12) (1911) 35 Mad. 560.
(13) (1911) 33 All. 356.

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the defendant that the claim is so barred relying upon the principle laid down by the Privy Council in the case of *Katama Natchier* v. *The Rajah of Shivagunga*[1] in which their Lordships ruled at page 604 that a decree fairly obtained against the widow would bind reversioners. That principle was followed by their Lordships of the Privy Council in the subsequent cases of *Mussumat Bhagbutti Dace* v. *Chowdry Bholanath Thakoor*[2] and *Jugol Kishore* v. *Maharajah Jotindro Mohun Tagore*[3] and was extended to a daughter holding a limited estate in the case of *Hurrinath Chatterji* v. *Mohunt Mothoor Mahun Goswami*[4].

The contention was not accepted by the First Class Subordinate Judge relying upon the case of *Jeram* v. *Veerbai*[5] in which Batty J. declined to apply the principle either to a compromise or an award decree. This limitation of the principle was subsequently adopted by the Allahabad High Court in the cases of *Gobind Krishna Narain* v. *Khunni Lal*[6] and *Mahadei* v. *Baldeo*[7]. In a later case (*Gur Nanak Prasad* v. *Jai Narain Lal*[8]) it was however held that a decree fairly obtained against the widow, even though the widow did not contest the suit, would bind the reversioners. This limitation of the principle suggested by Batty J. was again rigidly laid down by a Bench of the Calcutta High Court in the case of *Rajlakshmi Dasee* v. *Katyayani Dasee*[9]. On the other hand the Judges of the Madras High Court appear to have contemplated the possibility of a compromise decree against the widow binding the reversioners though they did not act on that contemplation in the case of *Bhogaraju Venkatrama Jogiraju* v. *Addepalli Seshayya*[10]. The

(1) (1863) 9 Moo. I. A. 539.
(2) (1875) L. R. 2 I. A. 256 at p. 261.
(3) (1885) L. R. 11 I. A. 73.
(4) (1893) L. R. 20 I. A. 183.
(5) (1903) 5 Bom. L. R. 885.
(6) (1907) 29 All. 487 at p. 492.
(7) (1907) 30 All. 75.
(8) (1912) 34 All. 385.
(9) (1910) 38 Cal. 639 at pp. 673, 674.
(10) (1911) 35 Mad. 560 at pp. 564, 565.

only other decision examined before us which has any bearing on this point was that of *Ghelabhai Bhikhabhai* v. *Bai Javer*[1] in which a decree fairly obtained against a widow was held to be binding on reversioners although the widow had withdrawn her appeal. It seems to me that this limitation of the principle appearing in these decisions has been founded upon the necessity of determining in each case whether the decree could properly be said to have been fairly obtained against the widow as representing the whole estate including the rights of the reversioners, and upon the necessity of proceeding with special caution where the decree was a compromise or award decree on the grounds similar to those upon which it has been held that legal necessity must definitely be proved in the case of purchases from Hindu widows and that transactions must definitely be shown to have been explained and fully understood in the case of *pardah* women as observed by Jenkins C. J. in *Sumsuddin* v. *Abdul Husein*[2]. It is not necessary for the purposes of this case to go beyond this and consider whether this limitation has not been too rigidly laid down by the learned Judges of the Calcutta High Court in *Rajlakshmi Dasee* v. *Katyayani Dasee*[3] contrary to the general principle enunciated by the Privy Council.

Now it is necessary to look at the award decree to determine whether it could properly be said to have been fairly obtained against the widow as representing the whole estate including the rights of the reversioners. It there appears that the plaintiff's predecessor-in-interest, the widow Tai, was seeking to assert her claim to full ownership of the land in suit against the defendant who was setting up title by a will

(1) (1912) 37 Bom. 172. (2) (1906) 31 Bom. 165 at p. 167.
(3) (1910) 38 Cal. 639.

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alleged to have been obtained from her deceased husband Joti. The result of the arbitration was that the widow Tai's claim was dismissed, but ample provision was made for her maintenance during her life by actual residence with the defendant or, in case she found that inconvenient, by enjoyment of a separate dwelling house and a cash maintenance allowance of Rs. 36 a year. It was in the latter case decided that after her death even that dwelling house should become the absolute property of the defendant. That award was by consent of the parties and in their actual presence made a decree of the Court. It seems to me that the defendant, who produced and relied upon this award decree, had not merely to produce it but, in accordance with the principles already discussed, to prove further that it was fairly obtained against the widow as representing not only her own interests but those of the reversioners as prescribed by the Privy Council. The defendant, however, failed to prove any such thing. On the contrary the award decree is open to the obvious criticism that the widow obtained practically all that she would be likely to need during her life-time and would not appear to have paid particular attention to the interests of the reversioners. But there is, moreover, nothing in the award decree to indicate that the matter in dispute between the parties was actually contested before the arbitrator. There was in fact no such guarantee that due regard was had to the rights of the reversioners as there would have been, had the case been actively contested in regular proceedings in the Civil Court. It would not, in my opinion, be right in such circumstances to accept this award decree as a decree fairly obtained against the widow as representing the whole estate and so binding on the reversioners. It was, therefore, in my opinion correctly disregarded by the First Class Subordinate

Judge, as not falling within the general principle enunciated by the Privy Council.

It follows that the award decree bound the widow only and not the reversioners and that as the claim here is not under the widow but by right of purchase from the last reversioner, there can be no question of *res judicata* under the provisions of section 11 of the Civil Procedure Code.

The decision of the First Class Subordinate Judge ought, in my opinion, for these reasons to be confirmed and the appeal to be dismissed with costs.

HEATON, J.:—I agree. But as the case is one of importance, I will state my conclusions in my own words. The case is of importance because we have to determine whether the principle applied in *Shivagunga's case* [1] applies to the facts of this case. The principle is the prevention of a multiplicity of suits on the same cause of action. It applies at least in this particular: there is no doubt that in the litigation which took place between the widow of the last male holder and the present defendant, who was also the defendant in the earlier suit, the widow did represent the estate and not merely herself or her own interest. For she sought to recover the property as the estate of her deceased husband, that is to say, she was fighting or professing to fight the battle not only of herself but of her daughter and her daughter's son, who, next to the widow herself, were those most nearly interested. Therefore it is that we have to see whether the principle applied in *Shivagunga's case* [1] applies in other particulars also.

The reason for applying the principle is stated in these words which appear at pages 603 and 604 of *Shivaganga's case* [1]: "It seems, however, to be

[1] (1863) 9 Moo. I. A. 539.

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necessary in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1817, if it had become final in *Anga Mootoo Natchiar's* life-time, would have bound those claiming the *Zemindary* in succession to her. And their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the *Zillah* Court by any person claiming in succession to *Anga Mootoo Natchiar*." Now it appears from what is stated at page 595 in the same report that the decree of 1817 was arrived at in a suit in which a large body of evidence had in fact been given by each side and it was therefore quite clear that, unless something to the contrary was made out, it was a really contested suit: a suit which had really been fought out. Those being the facts their Lordships said "in their opinion the decree must be binding not only on the widow but on the reversioners." Now here we have a case in which it is not shown that the suit between the widow and the present defendant was a really contested suit. I will mention six circumstances which clearly appear from the judgments and which as facts are not now contested by either side. The first circumstance is that the plaintiff in the suit was a Hindu widow. The second is that the defendant was, next to the widow's own grandson the nearest reversioner, was a member of her husband's family and amongst the agnates of that family was actually the nearest of all to her deceased husband. The third is that the defendant based his claim to the property on a will of which he never obtained probate and which has never so far as appears been produced in a Court of Justice.

The fourth circumstance is that an arbitrator was appointed by the parties and an award was made. The fifth is that there was an unopposed decree made by the Court according to the award; and the sixth and last circumstance I mention is that by this decree the widow had her residence and maintenance assured. Where you have circumstances such as these, it seems to me that you have at once the clearest indication of a probability that the decree was not a contested matter but was arrived at by either collusion or consent. When the interests of an agnate come into conflict with those of a Hindu widow we know very well from experience that the interests of the widow are likely to find very slender protection.

Those being the facts then it seems to me that although the Judge in appeal did not base his decision on them, his decision was perfectly correct.

In conclusion I should merely like to add that I entirely agree with what my learned brother has said that in each case where the principle applied in *Shivagunga's case*[1] comes to be considered, we must deal with the circumstances of the particular case; and also that when a person produces a judgment and claims, on the principle applied in *Shivagunga's case*[1], that the judgment amounts to a bar against the reversioners, he has not done enough. It still remains for him to establish, where one of the parties was a Hindu widow, that the judgment has been fairly obtained either after a contest or, if by consent, in such circumstances that the consent decree ought to be regarded as a decree fairly and properly obtained.

I agree that this appeal should be dismissed with costs

Appeal dismissed.

R. R.

[1] (1863) 9 Moo. I. A. 539