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NADIRSHAW v. MANEKBAI

Wassoodew J.

That discretion has not been shown to have been unwisely exercised.

Therefore I agree with the order proposed.

Decree varied.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Rangnekar and Mr. Justice Sen.

1937 *September* 29

MOHANLAL KHUBCHAND, HEIR OF THE DECEASED CHHAGANLAL LAXMICHAND AND OTHERS, (HEIR OF ORIGINAL DEFENDANT NO. 1 AND DEFENDANTS NOS. 3 TO 10), APPELLANTS *v.* JAGJIVAN ANANDRAM (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Widow—Alienation without justifying cause—Reversioner's suit to recover from alienee possession and mesne profits—Sale not ab initio *void—Possession of alienee wrongful when reversioner elects to treat sale as nullity—Mesne profits prior to suit cannot be awarded.*

It is beyond dispute that wrongful possession of a defendant is the foundation for a claim to mesne profits.

A Hindu widow is not a tenant for life, but she is the owner of the property inherited by her from her husband, subject to certain restrictions on alienation and subject to its devolving upon the next heir of her husband upon her death. The whole estate is for the time vested in her and she represents it completely.

Moniram Kolita v. *Kerry Kolitany*,[1] *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[2] and *Janaki Ammal* v. *Narayanasami Aiyer*,[3] referred to.

It is difficult to accept the contention that a sale by a Hindu widow is *ab initio* void or a nullity.

It is open to a reversioner to elect to treat it as a nullity, and this he can do by instituting a suit to recover possession of the property. It is from that time that the sale becomes wrongful, and the possession of an alienee wrongful. Accordingly the possession of an alienee from a Hindu widow is not wrongful at any time *anterior* to the exercise of the election, even if the alienation is found to be made without a justifying cause.

Raja Modhu Sudan Singh v. *Rooke*,[4] relied on.

*First Appeal No. 229 of 1934.

[1] (1879) L. R. 7 I. A. 115, at p. 154, s.c. 5 Cal. 776.
[2] (1907) L. R. 34 I. A. 87, s. c. 34 Cal. 329.
[3] (1916) L. R. 43 I. A. 207, s. c. 39 Mad. 634.
[4] (1897) L. R. 24 I. A. 164, s. c. 25 Cal. 1.

Consequently, where a suit is brought by the next reversioner to set aside an alienation made by a Hindu widow without any legal necessity, and he succeeds, he is not entitled to mesne profits for any period prior to the institution of the suit.

Sahebgouda Somappa v. *Parawa*,[1] followed.

Mallappa v. *Anant*,[2] discussed.

FIRST APPEAL from the decision of C. D. Pandya, First Class Subordinate Judge, Broach, in suit No. 309 of 1931.

Suit to recover possession of property with past and future mesne profits.

One Narsi died in 1905 leaving him surviving his widow Bai Mahakor. At his death he left considerable property and no debts. On January 11, 1926, the widow died.

During her life-time the widow had made certain alienations and they fell into two groups.

On May 7, 1917, she executed in favour of Chhaganlal (defendant No. 1) a sale deed of which the consideration was Rs. 256. On the same day she executed another sale deed in favour of one Narottam, the predecessor-in-title of defendants Nos. 8 to 10, of which the consideration was Rs. 270. The second group of alienations comprised three sale deeds bearing the same date, viz., September 11, 1919. The first was in favour of Dahya Gopal (defendant No. 3), the second in favour of Ratanji Morar (defendant No. 4), and the third in favour of one Shambhu, the predecessor-in-title of defendants Nos. 5 to 7. In each case the consideration was Rs. 1,261.

On September 24, 1931, Jagjivan (respondent), a reversionary heir, sued to recover possession of the suit property with mesne profits for three years next before suit and future mesne profits allowable under O. XX, r. 12 (*c*) of the Civil Procedure Code, 1908.

[1] (1934) F. A. No. 73 of 1932, decided by Beaumont C.J. and Sen J., on August 31, 1934 (unrep.).

[2] (1936) 38 Bom. L.R. 941.

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The learned Subordinate Judge held that there was no legal necessity in respect of each of the alienations and that the alienees did not make proper and *bona fide* inquiry as to the existence of legal necessity. He, therefore, made in favour of the plaintiff a decree for possession, awarding him mesne profits for three years next before suit and future mesne profits.

Defendants Nos. 1 and 3 to 10 appealed.

R. G. Naik, for the appellants.

A. G. Desai, for heir of appellant No. 1 and appellant No. 6.

G. N. Thakor, with *B. G. Thakor*, for respondent No. 1.

RANGNEKAR J. [His Lordship after setting out the facts discussed the evidence and continued :—]

This brings us to the question about the mesne profits. The learned trial Judge held that the plaintiffs were entitled to mesne profits and he ordered the defendants to pay to the plaintiffs mesne profits at the rate of Rs. 8 per acre in proportion to the lands in their possession for three years before suit and future mesne profits at the same rate from the date of the suit until delivery of possession to the plaintiffs. The appellants complain of the first part of this order.

Mr. Desai relies, first, upon an unreported decision of a Divisional Bench of this Court consisting of the learned Chief Justice and my brother Sen in *Sahebgouda Somappa* v. *Parawa*.[1] In that case, the Court, following *Subba Goundan* v. *Krishnamachari*,[2] and *Ramasami Aiyar* v. *Venkatarama Ayyar*,[3] held that a reversioner who succeeded in getting a sale made by a Hindu widow set aside on the ground that there was no legal necessity for it was not

[1] (1934) F. A. No. 73 of 1932 decided by Beaumont C.J. and Sen J., on August 31, 1934 (unrep.).
[2] (1921) 45 Mad. 449.
[3] (1923) 46 Mad. 815.

entitled to get mesne profits for any period prior to the institution of his suit. This decision, of course, is binding on us, even if we thought it to be wrong. But it appears that the principles laid down in that case were again considered in *Mallappa* v. *Anant*[1] by the learned Chief Justice and Mr. Justice Divatia. It was a case where a minor sued to set aside an unauthorized sale of his property by his guardian. After referring to his earlier unreported decision and pointing out that another Bench of this Court had taken a different view in *Appanna Kenchappa Banati* v. *Vithal Ramachandra Petkar*[2] the learned Chief Justice held that an order for mesne profits for any period prior to the suit was not justified on principles of equity, and then proceeded to consider whether it would be right in law. His Lordship observed as follows (p. 944) :—

"In my opinion the true view is that where the plaintiff sues to set aside the original transaction, whether it be a sale by a Hindu widow, or manager of a joint family, or guardian of a minor, and he makes the original parties to the transaction, or their representatives, parties, he is entitled to an order restoring the parties to their original position. In such a case the Court is in a position to make such order as is just and equitable, and to provide that the plaintiff recovers the land with mesne profits from the date from which he was dispossessed, and the defendant-purchaser gets back his purchase money with interest, and in a proper case other moneys to which he may be entitled. That is the form of order made when a sale is set aside as induced by fraud, see Seton on Decree, 7th Edition, Vol. III, page 2250. But if the attitude which the plaintiff adopts is that he merely desires to recover possession of the land, and that the payment of purchase money to a party who was not entitled to receive it, is no concern of his, then he is entitled, in my opinion, merely to an order for recovery of possession with mesne profits from the date of suit. He cannot in such a case treat the purchaser, who was in, under a voidable conveyance, as a mere trespasser . . . as against him."

It is said by the learned counsel on behalf of the respondents that this decision is not correct. As to the earlier decision of the learned Chief Justice and Mr. Justice Sen, the learned counsel says that the decision

[1] (1936) 38 Bom. L. R. 941.

[2] (1936) F. A. No. 20 of 1930, decided by Broomfield and Tyabji, JJ., on February 10, 1936 (unrep.).

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of their Lordships of the Privy Council in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[1] was either not brought to their Lordships' attention or that its effect was not considered, and that, therefore, the decision in *Sahebgouda Somappa* v. *Parawa*[2] is not binding on this Court. He further says that the cases in the Madras High Court relied upon by the Court in *Sahebgouda Somappa* v. *Parawa*[2] were not cases of a reversioner seeking to set aside a sale by a Hindu widow without legal necessity. This, undoubtedly, is correct. It is argued by him that it is not necessary for a reversioner to sue a purchaser from a Hindu widow to set aside the sale or alienation made without any legal necessity, and that he can straightaway bring a suit for possession under Art. 141. He asserts that if there is no legal necessity the transaction is a nullity and not a voidable transaction; and for this purpose he relies on the observations of their Lordships of the Privy Council in *Bijoy Gopal's* case[1].

In these circumstances it has become necessary for us to consider the question *de novo*. What, then, is the position? It is beyond dispute that wrongful possession of the defendant is the foundation for a claim to mesne profits. That is implicit in the definition of mesne profits contained in s. 2 (*12*) of the Civil Procedure Code. The question, then, is, when does the possession of an alienee from a Hindu widow, when there was no legal necessity justifying the alienation, become wrongful? Is his possession wrongful *ab initio*, i.e., from the date of alienation, or is it from the time that the alienation is challenged? If the possession is wrongful from the very commencement, then, of course, there can be no answer to the claim for mesne profits made by a reversioner who is seeking to set aside the sale. But if not, then there is no principle of equity or of

[1] (1907) L. R. 34 I. A. 87, s. c. 34 Cal. 329.

[2] (1934) F. A. No. 73 of 1932, decided by Beaumont C.J. and Sen J., on August 31, 1934 (unrep.).

law which would justify an award of mesne profits from a period anterior to the moment when the sale is challenged. Now, the answer to this inquiry must depend upon the powers of a Hindu widow, the nature of her estate and the rights of her husband's reversioners.

Mr. Thakor says that a Hindu widow is a life-tenant and any alienation by her is void and not merely voidable. I am unable to accept the contention. It is well established by authorities, which cannot now be disputed, that a Hindu widow is not a tenant-for-life, but is the owner of the property inherited by her from the husband, subject to certain restrictions on alienation and subject to its devolving upon the next heir of her husband upon her death. The whole estate is for the time vested in her and she represents it completely. [See *Moniram Kolita* v. *Kerry Kolitany.*[1]] *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi,*[2] on which the learned counsel relies, also lays down the same principles. In *Janaki Ammal* v. *Narayanasami Aiyer*[3] their Lordships of the Privy Council observed (p. 209): "Her (widow's) right is of the nature of a right of property: her position is that of an owner: " and they stated that so long as she is alive, no one has any vested interest in the succession. Apart from legal necessity, a Hindu widow can alienate immoveable property with the consent of the next reversioner, or for certain religious or charitable purposes. Under the Mayukha she can dispose of moveable property by act *inter vivos*. An alienation of immoveable property by her without any legal necessity is valid and passes her life interest to the alienee. These principles are too well settled to require any authority to be cited. If, then, this is the nature of a widow's estate, can it be said that an alienation made by her without necessity is a void transaction as Mr. Thakor argues? It is well settled that this is not the

[1] (1879) L.R. 7 I. A. 115 at p. 154, s. c. 5 Cal. 776.
[2] (1907) L. R. 34 I. A. 87, s. c. 34 Cal. 329.
[3] (1916) L.R. 43 I. A. 207, s. c. 39 Mad. 634.

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case. "Such an alienation will be valid during the widow's lifetime. If not made for a lawful purpose, such as will bind the heirs, it has no effect against them when their title accrues; they may then sue for possession, and the statute will run from that date." (Mayne, p. 961). But even then the alienation is not void but voidable; the reversioner may affirm or ratify it. This is the principle which is laid down in *Bijoy Gopal's* case.[1] [See also *Raja Modhu Sudhan Singh* v. *Rooke*,[2] *Rangasami Gounden* v. *Nachiappa Gounden*.[3]] I do not think that there is anything in the observations of their Lordships of the Privy Council in *Bijoy Gopal's* case[1] which in any way militates against the view which we are taking.

Apart from the fact, as pointed out by the learned Chief Justice in *Malappa* v. *Anant*,[4] that the only point which was argued before their Lordships of the Privy Council in *Bijoy Gopal's* case[1] was one of limitation, I think the observations to which the learned counsel referred support the view which we are taking. Their Lordships first observed that it was open to the reversioner to affirm the sale or alienation made by the Hindu widow without any legal necessity, expressly or impliedly. They then referred to the prior decision of the Privy Council in *Raja Modhu Sudhan Singh* v. *Rooke*[2] and observed as follows (p. 91):—

"In the case before this Board cited by the learned Judge the question was whether the acceptance of rent payable under the *putni* and other circumstances afforded evidence of an election by the *raja* to confirm the *putni* and treat it as valid. If it was *ipso facto* void it could not of course be confirmed, and the acceptance of rent would be evidence only of the creation of a new tenancy. A Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his

[1] (1907) L. R. 34 I. A. 87, s. c. 34 Cal. 329.
[2] (1897) L. R. 24 I. A. 164, s. c. 25 Cal. 1.
[3] (1918) L. R. 46 I. A. 72, s. c. 42 Mad. 523.
[4] (1936) 38 Bom. L. R. 941.

pleasure treat it as a nullity without the intervention of any Court, and he shews his election to do the latter by commencing an action to recover possession of the property."

Reading the whole passage in the light of the other decisions of the Privy Council, which are referred to above, it is difficult, in my opinion, to accept the contention that a sale by a Hindu widow is *ab initio* void or a nullity. All that their Lordships observed is that it is open to a reversioner to elect to treat it as a nullity, and this he does by instituting a suit to recover possession of the property. It is from that time the sale becomes wrongful, and the possession of the alienee wrongful. What is capable of being affirmed can never be void [*Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi.*[1]] It is clear that if the sale is not disputed by the reversioner, it would confer on the alienee a valid title against third parties. A voidable transaction is perfectly valid until it is avoided by the party entitled to do so, or until he elects to avoid it. In this view, it is difficult to accept the contention that the possession of an alienee from a Hindu widow is wrongful at any time *anterior* to the exercise of the election, even if the alienation is found to be made without a justifying cause.

We, therefore, agree with the view taken by the Court in *Sahebgouda Somappa* v. *Parawa*[2] that in a suit brought by the next reversioner to set aside an alienation made by a Hindu widow without any legal necessity, if he succeeds, he is not entitled to mesne profits for any period prior to the institution of the suit. This view as regards sales by a Hindu widow is re-affirmed in *Malappa* v. *Anant,*[3] but, we think, with great respect, too broadly to be accepted. In the passage from the decision in *Malappa* v. *Anant,*[3] the learned Chief Justice stated that in his opinion, in such a suit " the plaintiff is entitled to an order restoring the parties to their original position". This, we venture to think,

[1] (1907) 34 I. A. 87, s. c. 34 Cal. 329.
[2] (1934) F. A. No. 73 of 1932 decided by Beaumont C. J. and Sen J., on August 31, 1934 (unrep.).
[3] (1936) 38 Bom. L. R. 941.

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is not a correct view to take of such suits in all cases. As pointed out by Mayne (p. 964), in general where a conflict arises between the reversioner and the alienee of the widow, the question is simply whether the alienation was for a lawful and necessary purpose or not. If it was, it binds him; if it was not, it does not bind him. In either view no equity can arise between them. In some cases, however, the reversioner is at liberty to set aside the transaction but only on special terms. For instance, if the widow sold a larger portion of the estate than was necessary to raise the amount which the law authorized her to raise, the sale cannot be absolutely void as against the reversioners, but they could only set it aside by paying the amount which the widow was authorized to raise with interest from her death, the defendant accounting for rents and profits from the same period. Where the sale is justified as to part of the consideration and not justified as to another part, the reversioner may obtain a decree that he is entitled after the death of the widow to recover the whole property sold on payment of such portion of the consideration as represents the money borrowed for a legal necessity. It is in such cases only that equitable considerations can come in.

For these reasons, the order made by the learned Judge in this respect seems to us to be wrong and that order will have to be struck off from the decree made by the learned Judge.

The decree then will have to be varied by striking off the words "for the three years next before suit".

The decree then will run that the defendants shall give up possession as set out in the plaint: that defendants Nos. 1 and 2 shall pay Rs. 66, defendants Nos. 8, 9 and 10 shall pay Rs. 72, defendant No. 3 shall pay Rs. 96, defendant No. 4 shall pay Rs. 96, and defendants Nos. 5, 6, 7 and 11 shall pay Rs. 96 as mesne profits from the date of the suit until possession is restored to the plaintiff at the rate of Rs. 8 per

annum per acre of lands respectively in the possession of these defendants.

The order of costs made by the lower Court will stand and the parties will pay and receive proportionate costs of this appeal.

Decree varied.

Y. V. D.

ORIGINAL CIVIL.

INSOLVENCY JURISDICTION.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Rangnekar.

GANESHNARAIN ONKARMAL (ORIGINAL PETITIONING CREDITORS), APPELLANTS v. RAJA PARTAPGIRJI NARSINGIRJI (ORIGINAL DEBTOR), RESPONDENT.*

1937 *October* 5

Presidency-towns Insolvency Act (III of 1909), ss. 2 (b), 9 (e), 11—Debtor—Foreign subject—Attachment of property for twenty-one days or more of foreign subject whether makes him subject to insolvency law of British India—Debtor to be subject of British India, or to personally commit act of insolvency to be liable under the insolvency law of British India.

A foreign subject whose moveable property remained in attachment for more than twenty-one days in execution of a money decree against him, cannot be treated as a "debtor" to whom the provisions of the Presidency-towns Insolvency Act, 1909, applies, if he does not reside within the jurisdiction of the Bombay High Court during the period when his goods were so attached even though he carries on business through his agent or agents in Bombay within a year of the presentation of a petition to adjudicate him an insolvent.

In order that the provisions of the insolvency laws of British India should apply to a debtor, he must be either a subject of British India, or must have committed or suffered within British India an act of insolvency.

Ex parte Blain, In re Sawers[1] and *Cooke* v. *Charles A. Vogeler Company*,[2] followed.

APPLICATION by a creditor to adjudicate the respondent, who was a foreign subject, insolvent.

*O. C. J. Appeal No. 45 of 1937, Insolvency No. 177 of 1937.

[1] (1879) 12 Ch. D. 522. [2] [1901] A. C. 102.