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MUTTEERAM KOWAR v. GOPAUL SAHOO.

Sreemutty Russomoyee Dossee (1). A Hindu widow is bound to pay the debts of her husband; hence the alienation was justifiable.

(1) *Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.*

The 26th August 1868.

CHOWDRY JUNMEJOY MULLICK (ONE OF THE DEFENDANTS) *v.* SREEMUTTY RUSSOMOYEE DOSSEE (PLAINTIFF).*

Hindu Law—Alienation—Sradh—Limitation.

Baboo *Aushootosh Chatterjee* for the appellant.

Baboos *Kissen Sucka Mookerjee, Sreenath Doss, Kally Mohun Doss,* and *Doorga Mohun Doss* for the respondents.

THE judgment of the Court was delivered by

MITTER, J.—This was a suit instituted by the plaintiff, now respondent before us, to recover possession of certain moveable and immoveable properties described in the plaint. The case set up by the plaintiff was that the properties sued for by her were held and owned by her father, the late Gudadhur Roy; that, on the demise of her father without male issue, his whole estate, real and personal, devolved upon her mother Sreemutty Deyee as his next heir and successor; that, on the death of her mother, which took place on the 19th Bhadra 1273 (16th September 1866) the plaintiff, as the only heir and representative of her father, wanted to take possession of the estate, but that she was opposed by the defendants in the cause under color of various titles alleged to have been created in their favor by the said Sreemutty Deyee. The cause of action was stated to have arisen on the 14th May 1866, the date when their opposition was alleged to have been offered. The principal Sudder Ameen of Midnapore, Baboo Nobinkissen Palit, has given a decree to the plaintiff in respect of a portion of her claim, and the present appeal has been accordingly preferred to us by the defendant Chowdry Junmejoy Mullick.

The properties involved in this appeal may be conveniently arranged under the following heads:—

1*st*.—8 annas of Joonbuldia.

2*nd*.—1 anna 5 gundas of Mehal Chuck Shampallora.

3*rd*.—204 bigas of lakhiraj land referred to in paragraph 6 of the written statement filed by the appellant.

4*th*.—222 bigas of lakhiraj land referred to in the 7th paragraph of the written statement filed by the appellant.

With reference to the first item of property it is contended that the decision of the Principal Sudder Ameen is erroneous on the question of limitation as well as on that of title. We are of opinion that the contention is sound. The principal Sudder Ameen has overruled the plea of limitation on the ground that the action has been brought within twelve years from the date of the death of the plaintiff's mother; and on the question of title he has held that the evidence produced by the plaintiff has satisfactorily shown that her father was in possession. It is contended that the appellant does not claim the property in question upon a title created in his favor by the mother of the plaintiff, and the plaintiff

* Regular Appeal, No. 323 of 1867, from a decree of the Principal Sudder Ameen of Midnapore, dated the 3rd August 1867.

For religious and charitable purposes, a Hindu widow can alienate —The *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1). The sale cannot, at any rate, be set aside without

is therefore bound to prove either that her father or her mother, who represented his estate, was in possession at some time within twelve years prior to the institution of the suit. On turning to the evidence produced by her, we find that it is altogether insufficient to prove either title or possession. This evidence consists of the depositions of a few witnesses, and of nothing more. The evidence of these witnesses does not go one single step beyond a vague and general statement to the effect that the plaintiff's father was the owner of the property in question, and that he was in possession thereof. No information is given as to the nature of this ownership, nor as to the time when possession was held under it by the father of the plaintiff; and in the absence of such information, we can hardly deem ourselves justified in relying upon such evidence even if it were free from other imputations, which is by no means the case. It is perfectly true that the opinion of the Court examining the witnesses about the value of their testimony is, as a general rule, entitled to every consideration, but where that Court does not appear to have taken the slightest pains in dealing with the evidence, this rule can hardly be said to apply. It is much to be regretted that the lower Court has failed in this case to bestow the slightest care upon the examination of the witnesses produced by the parties, but we cannot upon that ground act upon evidence so vague and unsatisfactory as that which has been referred to above. At any rate it is clear that, even if we were to accept this evidence as it goes, there is nothing to show that the plaintiff's father, or that her mother, was in possession of this property at any time within twelve years prior to the date of the suit. On the other hand, the appellant has satisfactorily shown that the disputed property has been held by him for a very long period of time as part and parcel of Mehal Kenky, which was purchased bp him at a sale for arrears of revenue. We are therefore of opinion that this portion of the plaintiff's claim ought to be dismissed on the ground of limitation, as well as on that of her failure to prove her title.

With reference to the second item of property, it is to be observed that the appellant claims 1 anna out of the 1 anna 5 gundas comprised therein, under a conveyance executed in his favor by the mother of the plaintiff on the 12th Chaitra 1264 (26th March 1858); the remaining 5 gundas being claimed by him under another conveyance executed in his favor by some of the co-sharers of the plaintiff's father. The Principal Sudder Ameen has set aside the purchase made from the mother of the plaintiff, on the ground that the appellant has failed to establish any justification for the alienation, and the remaining 5 gundas share has been also taken away from him upon the ground that his vendors had no right to transfer it to him. With reference to the purchase made from the mother of the plaintiff, the apellant contends that she, the plaintiff, was a consenting party to the alienation, and further that, independently of such consent, there was a valid necessity to support it. The Principal Sudder Ameen appears to have

(1) 8 Moore's I A., 500.

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payment of the amount which the widow was justified to raise—*Phoolchund Lall* v. *Rughoobuns Suhaye*.

said nothing on the first point, and we are, therefore, obliged to decide it for the first time in appeal, although it was urged by the appellant from the very beginning. We think, however, that the appellant has disproved his own plea. It is true, indeed, that the evidence produced by the appellant goes to show that the plaintiff was a consenting party to the alienation she now complains of, but that very evidence, or at least the major part of it, conclusively shows that the plaintiff was minor at the time. We think, therefore, that this plea must be rejected. The second objection, however, is sound. The appellant has shown, by good and satisfactory evidence, that the plaintiff's mother had occasion to defray the expenses of the *sradh* of her husband's mother, and that it was for the purpose of raising funds on account thereof that the sale in question was made. Some of the co-sharers of the plaintiff's father, who are also members of the same family with him, have been examined to prove this fact, and we do not see the slightest reason for discrediting their testimony. The principal Sudder Ameen says that Shoonder Narain Roy, the eldest brother of the plaintiff's father, being then alive, the mother of the plaintiff had nothing to do with the *sradh*, but the Principal Sudder Ameen entirely forgets the position which a Hindu widow occupies with reference to the estate of her deceased husband. This position is clearly laid down in the Dayabhaga, p. 182. "For women, the heritage of their husbands is pronounced applicable to use. Let not women, on any account, make waste of their husband's wealth." The word "waste" is expressly defined to mean "expenditure not useful to the owner of the property." It is clear, therefore, that the mother of the plaintiff had full right to alienate any portion of the estate in her possession, if the benefit of her husband's soul required such a sacrifice, even though the act by which that benefit was to be secured was to be actually performed by a male member of the family. It is a mistake to suppose that she holds the estate in trust for the benefit of the next heir of her husband, and such an heir has no right to contest the validity of an alienation that has been made for the spiritual welfare of the deceased owner himself. Now the performance of the *sradh* of his mother was a matter of the utmost importance to the *manes* of the plaintiff's father, and whoever might have performed it, the plaintiff's mother was fully justified in raising funds for such performance. It is a settled doctrine of the Hindu law that a deceased Hindu participates in the funeral cakes that are offered by any of his surviving relatives to a common ancestor to whom he himself was bound to offer them when living. If the plaintiff's father had been living, he would have been bound to perform the *sradh* of his mother, and he is, therefore, competent after his death, to share in the oblations offered to her by any of his male relatives. The mother of the plaintiff, therefore, was bound in duty to raise funds for the *sradh*, whoever might have performed it; and by raising funds for this purpose, she was using, and not wasting, the property within the meaning of the definition above pointed

(1) 9 W. R., 108.

Baboo *Kaliprosonno Dutt* for the respondent contended that, as both the lower Courts had found that there was no legal necessity, the plaintiff was entitled to have the sale set aside. There is no finding by the Judge that the widow ever went to Gya or incurred any expense for such pilgrimage. Besides, the lower Appellate Court has found as a fact that there was no necessity for contracting any debt for this purpose, as the estate in the hands of the widow was sufficient for such purposes. Upon the findings of the lower Court, the purchaser is not entitled to retain possession of the property.

Baboo *Tarruck Nath Dutt* in reply.

The judgment of the Court was delivered by

PHEAR, J.—After giving consideration to this case, we are of opinion that the 900 rupees, the debt incurred for Gya pilgrimage, and the 800 rupees, the debt incurred for the *sradh*, by the widow, were expenses to liquidate which it was within the power of the widow to alienate her husband's property. They are of the nature of expenditure for the purpose of procuring spiritual benefit for the husband, and it has been laid down by the Privy Council, and the doctrine has been constantly followed by this Court, that the widow's power of alienation for spiritual purposes is larger than the power of alienation to which necessity gives rise. It has been long settled that she is not, in any proper sense, trustee for the heirs: she has the whole inheritance in her with a limited power of alienation—a power of alienation which can only be exercised, perhaps I may say, in two classes of contingencies,—one class comprising cases of necessity, and the other class, cases of raising money for spiritual purposes.

out. The Principal Sudder Ameen also says that the appellant has given no evidence to prove that the *sradh* was actually performed, but evidence on this point is altogether unnecessary. All that the appellant was bound to show was that he had made reasonable enquiries about the existence of the alleged necessity, and that it was a necessity sanctioned by the Hindu law. The appellant has given ample evidence to prove this part of his case, and there is literally no evidence produced by the plaintiff to rebut it.

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In this view it appears to us that the alienation was a good alienation, although it may be that the Rs. 1,700, which is the total of the two items to which I have referred, may have been an inadequate consideration for the sale: I suppose, indeed, we must take it to have been an inadequate consideration, because the actual purchase-money was Rs 4,000.

Under these circumstances the alienation is not void, but, as was expressed by the late Chief Justice, in the case of *Phoolchund Lall* v. *Rughoobuns Suhaye* (1), is voidable by the heir upon his offering to pay the real consideration (in this case it would be Rs. 1,700), together with reasonable interest thereon, and upon the further condition, of course, that the defendant should account for the rents and profits during the interval over which he had been in possession, both the interest and the account of rents and profits to run from the date of the widow's death. We think, therefore, that the decrees of both Courts below, which have been passed in favor of the plaintiff without any qualification whatever, are wrong decrees, and must be reversed.

The plaintiff has not in this suit expressed his readiness to repay the defendant any portion of the purchase-money, but has sought to recover the property unconditionally.

Under the circumstances we think that the right order will be to dismiss the plaintiff's present suit, leaving him to any future remedy if he has any right to it.

The defendant, appellant, must have his costs in all the Courts.

Appeal allowed.

(1) 9 W. R., 108.