

1893
DHUNPUT
SINGH
v.
PARESH
NATH
SINGH.

and carrying on the manufacture of lard on the hill. The suit of the plaintiffs as against the Rajah defendant having failed, they must pay his costs in this and in the Lower Court. But they will be entitled to their costs as against Mr. Boddam in both the Courts.

Decree varied.

J. V. W.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

1893
July 10.

UDAI CHUNDER CHUCKERBUTTY AND ANOTHER (PLAINTIFFS) v. ASHUTOSH DAS MOZUMDAR (DEFENDANT).*

Hindu law—Widow—Alienation by Hindu widow—Legal necessity—Pilgrimage never carried out—Debt barred by limitation.

The payment by a Hindu widow of her husband's debts, though barred by limitation, is a pious duty for the performance of which a Hindu widow may alienate her property.

Chimnaji Gobind Godbole v. Dinkar Dhonev Godbole (1) and *Tarini Prasad Chatterjee v. Bhola Nath Mookerjee* (2) followed.

In the case of an alienation by a Hindu widow of her husband's property on the ground of legal necessity, the alienee is sufficiently protected if he

* Appeal from Appellate Decree No. 1540 of 1891, against the decree of Babu Nobin Chunder Gangooly, Subordinate Judge of Tippera, dated the 7th of July 1891, reversing the decree of Babu Huro Mohun Bose, Munsif of Kushba, dated the 31st of July 1890.

(1) I. L. R., 11 Bom., 320.

(2) Appeal from Appellate Decree No. 45 of 1890, decided by TOTTENHAM and GHOSE, JJ., on 28th August 1891.

The judgment of the Court was as follows :—

This was a suit brought by the reversioners to the estate of one Mahanand Chatterjee in respect of certain property alienated by Rohini Debi, who was the widow of Mahanand; Rohini Debi having died in the month of Aghran 1288 (November 1881), that is, 39 years subsequent to the death of her husband, who deceased in the year 1249 (1842).

The defence was that the alienation was made for legal necessity and to enable the widow to perform a pilgrimage to Gaya and also for her own maintenance. There was a further contention that the plaintiffs were estopped from bringing this suit by certain conduct of the plaintiff Tarini Prasad Chatterjee, who sues for himself with his minor brothers. The lower Courts have concurrently dismissed the plaintiffs' suit. The Court below found that the alienation was effected by the widow in order to

satisfies himself by *bonâ fide* enquiries of the existence of such necessity, although he may be in fact mistaken. He has not to see to the application of the money.

THE facts of this case were as follows :—

The defendant at the end of 1294 (1887) purchased 10 kanis of rent-free land at a sale held in execution of decree for arrears of rent at an enhanced rate passed against the former tenant. As the defendant did not pay any rent, the plaintiffs brought a suit, on the 25th July 1888, for arrears of rent, the amount claimed being Rs. 57-13-3, and for khas possession. The defendant pleaded that he was not liable for the rent as the plaintiffs' purchase was from

1893

UDAI
CHUNDER
CHUCKER-
BUTTY

v.
ASHUTOSH
DAS
MOZUMDAR.

obtain funds for the purpose of paying off her late husband's debts, and for her own pilgrimage to Gaya. In appeal it has been contended that the Court below was wrong in treating the husband's debts as forming any legal necessity for the alienation, inasmuch as the debts were barred by limitation. The alienation in question was only a mortgage, which was effected in the year 1279 (1872), and upon that mortgage the mortgagee obtained a decree and got the property sold. We think, however, the District Judge was right in holding that the husband's debts were sufficient to authorize the widow to raise the money in question by mortgaging property. Although the debts were barred by limitation there was, by Hindu law, a moral obligation upon the widow to satisfy the debts, if she was in possession of the assets of her husband. The authorities upon this question are : *Bhala Nahana v. Parbhu Hari* (1), *Chimnaji Gobind Godbole v. Dinkar Dhondev Godbole* (2), *Bhau Babaji v. Gopala Mahipati* (3), and *Kondappa v. Subba* (4). These cases directly support the ruling of the Judge of the Court below. On the other hand, his attention and our attention has been called to the cases of *Ram Churn Pooree v. Nunhoo Mundul* (5) and *Melgirappa v. Shivappa* (6). We think, however, that these cases are not in point, and that we are right in following the authorities cited on the other side. The case of *Melgirappa v. Shivappa* was considered later in the case of *Bhau Babaji v. Gopala Mahipati* (3).

As to the pilgrimage to Gaya, that was no doubt also a pious duty on the part of the widow, and justified her incurring some debts to be a charge upon her husband's estate. It is not necessary, therefore, to consider the question of estoppel, as to which we may say we are not entirely in agreement with the Court below. But upon the other grounds stated, we think the decree of the lower Appellate Court was right in law, and this appeal must be dismissed with costs.

(1) I. L. R., 2 Bom., 87.

(4) I. L. R., 13 Mad., 189.

(2) I. L. R., 11 Bom., 320.

(5) 14 W. R., 147.

(3) I. L. R., 11 Bom., 325.

(6) 6 Bom., A. C., 270.

1893

UDAI
CHUNDER
CHUCKER-
BUTY
v.
ASHUTOSH
DAS
MOZUMDAR.

one Umatarā, a Hindu widow with only a life interest, and that he had himself purchased the taluk from the reversioners.

The Munsif held, without going into evidence, that, as the defendant had purchased the holding in execution of a decree for its arrears, he had himself created the relationship of landlord and tenant, and gave the plaintiffs a decree with costs. On appeal, the Subordinate Judge reversed the Munsif's finding, and remanded the case for re-trial, on the ground that in a suit for rent, where the plaintiff's right to the rent is disputed, it is incumbent upon the Court to determine that question before a decree can be passed in the plaintiff's favour. On the re-trial the Munsif gave the plaintiffs a decree on the ground that their title was a good one, as they had purchased from a Hindu widow who sold the property in order to liquidate her husband's debts and for purposes of a pilgrimage to Gaya which, however, she never carried out. On appeal, the Subordinate Judge reversed the finding of the Munsif on the grounds that there was no legal necessity, as the widow did not go to Gaya on pilgrimage; that the debt of her husband, which she paid, was a debt barred by limitation; and that she did not need maintenance as her brother was maintaining her.

From this decision the plaintiff appealed to the High Court.

Babu *Gobinda Chunder Das* for the appellants.

Babu *Durga Mohun Das* for the respondent.

Babu *Gobinda Chunder Das* :—The sale by the widow was made for valid reasons, which amounted to legal necessity, and if so, the plaintiffs' title is a good one. The alienation to the plaintiffs was made for three reasons—1st, to perform her husband's *shrad* ceremonies and to go on pilgrimage to Gaya; 2nd, in order to pay her husband's debts; and 3rd, in order to maintain herself. The lower Appellate Court accepts the fact of the existence of the debts and that they were satisfied, but holds that as they were barred by limitation, there was no necessity to liquidate them. Limitation does not affect the sacredness of the obligation to liquidate the debts; besides, it has been held in *Chimnaji Gobind Godbole v. Dinkar Dhondev Godbole* (1) and *Tarini Prasad Chatterjee v. Bhola Nath Mookerjee* (2) that the payment of the husband's debts, though

(1) I. L. R., 11 Bom., 320.

(2) See note (2), *ante* p. 190.

barred by limitation, is a pious duty for the performance of which a Hindu widow may alienate her husband's property. That alone is sufficient to make the sale to the plaintiffs a good one. The fact that the plaintiff did not go to Gaya does not affect the question of legal necessity, her intention was to go and the sale was made for that purpose, but she liquidated her husband's debts first. Then there was the further ground that she alienated the property for her maintenance which she was legally entitled to do. For these reasons it should be held that the sale conferred a good title on the plaintiffs.

1893
 UDAI
 CHUNDER
 CHUCKER-
 BUTTY
 v.
 ASHUTOSH
 DAS
 MOZUMBAR.

Babu *Durga Mohun Das* for the respondent:—The main ground which was supposed to form the necessity for the widow selling the property, was that she wished to go to Gaya to perform the *shrad* ceremonies of her husband. It is admitted that she never went. Therefore that necessity never existed. If the purchase money was given to her for that purpose, it should have been used in that way. The second alleged necessity, namely, to liquidate her husband's debts, is also not tenable. In the first place, the debts in question were barred by limitation, and there was no necessity to pay them as they could never be demanded, and the person to whom the money was due was her own brother. That necessity therefore was not a valid one. Her last ground for selling was also a false one, as she was being maintained by the very brother to whom she paid the amount to liquidate her husband's debts. No legal necessity ever existed, and the sale was a fraud on the reversioners.

The judgment of the Court (MAOPHERSON and BANERJEE, JJ.) was as follows:—

The plaintiffs as purchasers of a rent-free tenure from one Umatarā, the widow of Bholanath Chuckerbutty, to whom the tenure originally belonged, brought this suit for arrears of rent due in respect of a jote situated within the rent-free tenure. The defendant, who had purchased the jote in execution of a decree for arrears of rent against the former jotedar, and who had subsequently purchased the rent-free holding from the reversionary heirs of Umatarā after her death, resisted the plaintiffs' claim, on this ground, amongst others, that the plaintiffs did not

1893
 UDAI
 CHUNDER
 CHUCKER-
 BUTTY
 v.
 ASHUTOSH
 DAS
 MOZUMDAR.

acquire any title by their purchase from Umatarā which could be binding against the reversioners, and that, upon Umatarā's death, they had ceased to have any interest in the rent-free holding.

The first Court decided the question thus raised and the other questions arising in the case, in favour of the plaintiffs and gave them a decree.

On appeal, the lower Appellate Court has held that the plaintiffs did not acquire, by their purchase from Umatarā, any interest in the rent-free holding which could be binding on the reversioners, as there was no real necessity for any alienation by her; and therefore, without going into the other questions arising in the case, it has dismissed the suit.

In second appeal it is contended for the plaintiffs, that the lower Appellate Court was wrong in law in holding that the sale by Umatarā was without necessity; and we think this contention is sound. The learned Subordinate Judge observes with reference to the two purposes for which the sale was made, *viz.*, the performance of Umatarā's husband's *shrad* at Gaya, and the payment of his debts, that as Umatarā did not go to Gaya, and as the debts were barred by limitation, the alleged necessity for the alienation did not exist.

With regard to the first matter, the learned Subordinate Judge observes, "when the widow did not go to Gaya, she had no necessity for the sale. In such a case, I think the purchaser ought to see that the widow really goes to Gaya, and does not cheat the reversioner by false pretext."

We do not think that this view of the law is correct. In cases like this, if the purchaser believes in good faith that the widow, when making the alienation, professed to do so for the purpose of raising money, for going to Gaya and performing her husband's *shrad*, he is not bound to see to the application of the purchase money.

Then as to the second point, we think that the learned Subordinate Judge is equally in error. It has been held by the Bombay High Court, in the case of *Chinnaji Gobind Godbole v. Dinkar Dhondev Godbole* (1), that the payment of the husband's debts,

(1) I. L. R., 11 Bom., 320.

though barred by limitation, is a pious duty, for the performance of which a Hindu widow may alienate her husband's property, and the same view was taken of the law by this Court in an unreported case, being appeal from the Appellate Decree No. 45 of 1890 (1), and that we think is the correct view of the law. As the Court of appeal below accepts the first Court's finding as to the existence of the debt, and as to its satisfaction out of the purchase money, we think, upon the facts found in this case, we must hold that the alienation by Umatara to the plaintiffs, conveyed to them an absolute title. That being so, the decree of the lower Appellate Court must be set aside, and the case remanded to that Court for the trial of the other questions arising in it.

The appellants will have their costs of this appeal. The other costs will abide the result.

Appeal allowed and case remanded.

C. S.

Before Mr. Justice Ghose and Mr. Justice Gordon.

HARA COOMAR SIRCAR (PETITIONER) v. DOORGAMONI
DASI (OBJECTOR).*

1893
Sept. 4.

Probate—Application for, and grant of, probate—Probate and Administration Act (V of 1881)—Discretion of Court as to refusal to grant probate—Executor.

Where on application for probate by a person appointed executor by the will, the genuineness of the will is not disputed, and the applicant is a person not legally incapable, the Court acting under the Probate and Administration Act (V of 1881) has no discretion to refuse probate on the ground that in its opinion the applicant is not a fit and proper person to be appointed executor.

The facts of this case are set out in the judgment of the Lower Court, which was as follows:—

“This is an application for probate of the will of one Dhan Krishna Sircar by one Hara Coomar Sircar. The opposite party is one Doorgamoni, widow and executrix of the said testator. The admitted facts are that

* Appeal from Original Decree, No. 204 of 1892, against the decree of A. E. Staley, Esq., District Judge of Backergunge, dated the 8th of July 1892.

(1) See note (2), *ante p.* 190.

1893
UDAI
CHUNDER
CHUCKER-
BUTTY
v.
ASHUTOSH
DAS
MOZUMDAR.