

Gotiram Nana Nevade Vs Kesarbai Kevalchand

Court: Bombay High Court

Date of Decision: Aug. 1, 1929

Citation: AIR 1930 Bom 47 : (1929) 31 BOMLR 1276

Hon'ble Judges: Madgavkar, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Madgavkar, J.

The question is, whether the property purchased by defendants Nos. 2 and 3 appellants from defendant No. 1 is subject to

the right of residence in favour of the plaintiff-respondent, the widowed mother of defendant No. 1. The trial Court held that it was not. The lower

appellate Court held that it was. Defendants Nos. 2 and 3 appeal.

2. The plaintiff's claim in the first instance was based on an agreement to sell the property to her passed by her son and bearing a date anterior to

the conveyance in favour of the appellants. That document has been held by both the lower Courts, and in my opinion justly, to be spurious and to

be in fact the result of a conspiracy between the mother and the son to defeat the right of the appellants purchasers. Both the lower Courts have

also found that they were transferees in good faith with notice of the right of residence of the widow but in theory only, because as a matter of fact

for five years prior to the suit she had of her own accord left the family house, the subject-matter of the present litigation, and had been residing in

another house in the vicinity in that village.

3. It has also been found that the greater portion of the consideration of the purchase was expended in paying off the mortgage of one Hemchand

passed by defendant No. 1 and not challenged by the plaintiff-respondent as in any way immoral. It to these facts that the law as to the right of

residence as against the purchasers has to be applied.

4. It is argued for the appellants that their purchase was not only in good faith but that the mala fides was on the part of the respondent. Not only

did she enter into a spurious deed deliberately to defeat the respondent's transfer, but having as she admits knowledge a month before, of the

purchase transaction, she abstained from taking any steps to warn the appellants and gave them no notice of the right of residence on which she

intended to rely, much less, of the agreement to sale to her on which the suit was in the main based. This agreement moreover purports to be made

in order to pay off the mortgagee Hemchand and the appellants rely upon a recital in the visarpavti held to be spurious to show that the respondent

admitted the binding character of Hemchand's mortgage. For the respondent it was contended that the widow's right of residence remains

unaffected by her residence elsewhere and is effective even against the purchaser in good faith.

5. In regard to the class of cases at either extreme the law is clear. Where the sale is to pay off the ancestral debt binding on the joint family and is

made to a purchaser in good faith, the widow's right of residence is extinguished : Yamnabai Vs. Nanabhai Sadanand, . On the other hand, where

the debt is not incurred in good faith, her right remains : Kisandas v. Rangubai (1906) 9 Bom. L.R. 382. The intermediate class of cases occasions

difficulty. Speaking broadly, the element of good faith is the deciding factor, and perhaps to a certain extent, the element of possession. The

transferee with notice of the widow's right is not entitled to evict her if she is in possession: Dalsukhram Mahasukhram v. Lallubhai Motichand

I.L.R.(1883) 7 Bom. 282 ; Bai Bevkore v. Sanmukhram I.L.R(1888). 13 Bom. 101. The general character of that right and the usual

consequences, legal and equitable, flowing from it have been exhaustively dealt with by Westropp C.J. in Lakshman Ramchandra Joshi v.

Satyabhamabai I.L.R(1887)2 Bom. 494 which is rather in favour of the purchasers.

6. In the present case the good faith is all on the side of the purchasers and the bad faith on the side of the respondent widow She had deliberately

been living away from the house for five years. An ordinary intending purchaser might well be excused therefore if he thought that she had foregone

her right in respect of the house in suit. She knew of the mortgage of Hemchand. She knew of the intended sale to the appellants. She was herself

ready and willing to purchase the house in order to pay off the mortgage, as shown by her own visarpavti, and yet she deliberately abstained from

sending any notice to the appellants warning them not to purchase the house and that it was subject to her right of residence. In fact the present

claim is hardly distinguishable from a conspiracy between the mother and the son, after having received the consideration from the appellants, to

come in the way of the purchasers. The law, in my opinion, does not compel the appellants to submit to the charge of residence in a case such as

the present.

7. I allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the trial Court with costs throughout on the

plaintiff respondent.