FULL BENCH REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice McDonell, Mr. Justice Prinsep and Mr. Justice Wilson.

1883 *February* 28.

JANOKI NATH MUKHOPADHYA (PLAINTIFF) *v.* MOTHURANATH MUKHOPADHYA AND OTHERS (DEFENDANTS).*

Hindu law—Bengal School of Hindu law—Widow's estate—Joint widows—Partition—Alienation—Purchaser from Hindu widow.

Where a Hindu governed by the Bengal School of Hindu law dies intestate leaving two widows his only heirs him surviving, either of those widows may sell her interest in her deceased husband's property, and the purchaser thereof is entitled to enforce a partition as against the other widow.

The partition if decreed should be effected in such a way as would not be detrimental to the future interests of the reversioners.

THE facts of the case are thus stated in the judgment of the Court of first instance: "The plaintiff alleges that he has purchased the half share of a piece of land and a house standing thereupon, belonging to one Rajnarain Mukerji, an inhabitant of Santipur, who died intestate in August 1872, leaving two widows, Prosunnomoyi and Brojo Sunduri, as his only heirs-at-law. Plaintiff's purchase was made from Brojo Sunduri, the younger widow, who sold her interest ostensibly for the purpose of providing her maintenance. The purchase deed is dated the 10th of August 1878. This suit has been brought by the plaintiff for the enforcement of partition of the disputed premises against the senior widow as well as against four kinsmen of the deceased (his cousin's sons) who have been in possession thereof since the death of Rajnarain. The senior widow has not appeared in this case. The suit is defended only by the defendant No. 4, one of the four kinsmen mentioned above." The Munsiff dismissed the suit on the ground that the plaintiff's vendor had no power to convey her interest to the plaintiff, and that neither she nor the plaintiff as her representative was entitled to enforce partition of the joint estate as against the other widow. This decision was upheld on

* Full Bench Reference made by Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Mitter, in Appeal under s. 15 of the Letters Patent in Appeal from Appellate Decree No. 522 of 1882.

appeal to the District Judge, and again upheld on second appeal to a single Judge of the High Court.

The arguments on which these decisions were based were to the effect that by Mitakshara law widows take a single estate, and that there can be no alienation by one without the consent of the other—*Bhugwandeen Dobey* v. *Myna Baee*, (1); *Gajapathi Nilamani* v. *Gajapathi Rashamani*, (2), unless on the ground of legal necessity; and that the same principle was applicable to the Bengal School of Hindu law—*Amrito Lal Bose* v. *Rajonee Kant Mitter*, (3); *Maniram Kolita* v. *Keri Kolitani*, (4). The plaintiff appealed to a Division Bench of the High Court (GARTH, C.J., and MITTER, J.) who referred the question to a Full Bench with the following opinion:—

This is a suit for possession after partition of two plots of land and the building upon them. One of those plots exclusively belonged to one Rajnarain Mukerji, who held a half share in the other, the defendants Nos. 2, 3, 4 and 5 being entitled to the other half. Rajnarain died leaving him surviving two widows, Prosunnomoyi Dabi and Brojo Sunduri Dabi. The plaintiff's case is that he has purchased Brojo Sundnri's interest in the property in dispute under a conveyance executed by her.

The Courts below dismissed the suit upon two grounds:—

First, that the interest of Brojo Sunduri in her husband's property was not alienable; and, *secondly*, that neither Brojo Sunduri nor the plaintiff can legally enforce a partition of her husband's estate, so as to separate her share from that of the other widow.

The learned Judge in this Court has confirmed the decision of the lower Courts upon both these grounds. It has been argued before us that the learned Judge in this Court is not right in holding that the questions raised in the case are concluded by decisions of the Privy Council. We think that there is considerable force in this contention, and as those questions are of general importance, we think it desirable to obtain an authoritative ruling

(1) 11 Moore's I.A., 487.
(2) I. L. R., 1 Mad., 290; L. R. 4 I. A., 212.
(3) L. R., 2 I. A., 113; 15 B. L. R., 10.
(4) I. L. R., 5 Calc., 776.

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of a Full Bench upon them. We, therefore, refer the following questions for the decision of a Full Bench:—

First.—Whether under the Hindu law in force in Bengal, Brojo Sunduri's alienation of her interest in her husband's estate is valid?

Second.—Whether the plaintiff or Brojo Sunduri is entitled to a partition of the property in suit?

Baboo *Gurudas Banerji* for the appellant.

Baboo *Srinath Das* for the respondents.

The judgment of the Full Bench was delivered by—

MITTER, J.—We are of opinion that both these questions should be answered in the affirmative.

It is now settled law that the interest of a Hindu widow may be alienated by her, and that the alienation would be valid for her life. In cases of necessity, such as are mentioned in paras. 61 and 62, s. 1, chap. XI of the Dyabhaga, she may effect even an absolute alienation to enure after her death. If there were no provisions to the contrary, the right of alienation of the interest of one of two or more widows jointly inheriting their husband's estate would logically flow from these two propositions. So far as the doctrines of the Hindu law prevalent in the Lower Provinces of Bengal are concerned, there does not, in our opinion, exist any such contrary provision.

One of the cardinal points of difference between the Mitakshara and the Dyabhaga is, that according to the latter the right of alienation being a necessary incident of ownership, one of two or more joint owners can alienate his interest in the joint property without the consent of the co-parceners.

The author of the Mitakshara relying upon certain texts of Vyasa, in para. 30, chap. 1, s. 1, lays down the rule of law that, "among unseparated kinsmen the consent of all is indispensably requisite, because no one is fully empowered to make an alienation since the estate is in common."

"But the texts of Vyasa," says Jimuta Vahana, "exhibiting a prohibition, are intended to show a moral offence: since the family is dis-

Dyabhaga, p. 36.

tressed by a sale, gift or other transfer, which argues a disposition in the person to make an ill use of his power as owner. They are not to invalidate the sale or other transfer.

"So likewise other texts (as this 'though immovables or bipeds have been acquired by a man himself, a gift or sale of them *should* not *be made* by him, unless conveniug all the sons') must be interpreted in the same manner. For here the words 'should' 'be made' must necessarily be understood.

"Therefore since it is denied that a gift or sale should be made, the precept is infringed by making one; but the gift or transfer is not null: for a fact cannot be altered by a hundred texts." (Dyabhaga, chap. II, paras. 27 to 30.)

It is clear therefore that according to the Dyabhaga, the right of alienation is in no way affected by the joint inheritance of two or more widows in their husband's estate.

As regards the second question, the right of enforcing partition is also clearly laid down in the *shastras*. The passage from the Mitakshara which bears upon this point is not fully translated as has been pointed out in page 451, Madras High Court Reports, Vol. III. It is to the following effect: "There (in that order) the first to inherit is the wife *patni*. *Patni* is she who is (so) made by marriage, and this from the Smriti or rule of Grammar 'Patyur-no yagna Sumyogai.' (The particle *ni* is added to *pati* to signify one who partakes in the holy sacrifice) singular number, because the class is denoted. Hence, if there be several, whether of the same or different castes they divide and take the property according to their shares."

In page 132 of the Viramitrodya, the same rule of law is thus laid down: "First of all the *patni* or the lawfully-wedded wife takes the estate. The term *patni* itself signifies a woman espoused in the prescribed form of marriage, agreeably to the aphorism of Panini. 'The term *pati* (husband) is changed into *patni* (meaning the correlative) implying relation through a sacrifice.' The singular number (in the term *patni* in Yagisvara's text 1) implies the class, hence if a person leaves more wives than one, then all of them, first those of the same class (with the husband), and after them those of a different class, shall take the husband's property dividing the same amongst themselves."

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In the Dyabhaga, there is no special provision of this nature in the chapter on the widow's succession; but the right of partition is provided for in all cases of joint inheritance by the following passages: "First, the term partition of heritage (Dyabhaga) is expounded, and on that subject Nareda says: "Where a division of the paternal estate is instituted by sons, that becomes a topic of litigation called by the wise Partition of Heritage. What came from the father is 'paternal,' and this signifies property arising from the father's demise. The expressions 'paternal' and 'by sons' both indicate any relation, for the term 'Partition of Heritage' is used for any division of the goods of any relation by any relatives." Chap. I. paras. 2 and 3.

"Since any one parcener is proprietor of his own wealth, partition at the choice even of a single person is thence deducible; and concurrence of heirs, suggested as one case of partition, is recited explanatorily in the text the brethren being assembled, &c." Chap. I. para. 35.

Upon these passages it is quite clear that in the case of a joint succession of two or more widows to their husband's estate, the partition may be enforced at the instance of any one of them.

So far then as the original treatises go, they clearly recognize the right of alienation by one of two or more widows jointly succeeding to their husband's estate, and of enforcing partition of the joint heritage.

But it has been urged that these questions have been decided by the Judicial Committee of the Privy Council in a contrary way.

The first of the cases cited before us is *Bhugwandeen Dobey* v. *Myna Baee* (1). The facts of that case are these: One Rae Dina Nath died, and his estate was inherited by his two widows, Myna Baee and Dula Baee. The latter died leaving her share of the heritage, which had been separated under an order made by a Judge in a summary suit pursuant to Act XIX of 1841, to her father and brother under a will executed by her before her death. The Judicial Committee of the Privy Council held (1) that under the Mitakshara law which governed the case, the will was invalid against the surviving widow who

(1) 11 Moore's I. A., 487.

was entitled to succeed to the property in suit by right of survivorship; (2) that there was no severance of the joint tenancy of the two widows; and (3) that there could not be a partition between them, *so as to affect the right of survivorship of either.* Their Lordships closed their judgment with the observation, that the case might have been decided upon the single ground that in a joint estate the alienation of the interest of one co-parcener without the consent of the rest is invalid.

It will appear from this analysis of the decision, that it does not bear upon the questions before us. It was not decided there that there could be no partition between the widows binding between them during their lifetime; but what was held was, that any such partition would not affect the right of survivorship of either. This is all that was decided in that case upon the question of partition, and the decision in *Gajapathi Nelamani* v. *Gajapathi Rashamani* (1) following the first-mentioned case only reaffirmed that proposition. As regards the observations upon the question of the right of alienation, they are entirely based upon the Mitakshara law; but it has been already shown that upon this point the law, as laid down in the Mitakshara, is different from that of the Dyabhaga.

The last case cited is *Amrito Lal Bose* v. *Rajonee Kant Mitter* (2). This is a Bengal case, and all that it decides is, that between widows jointly succeeding to their husband's estate, as well as between daughters jointly inheriting their father's property, there is right of survivorship.

We are, therefore, of opinion that the contention that those decisions have laid down the law contrary to our opinion expressed above is not correct.

On the other hand, in *Srimati Paddamani Dasi* v. *Srimati Jaggadamba Dasi* (3) (which was a case of succession of two daughters), it was held that either of them was entitled to enforce partition, although such partition might not be binding on the reversioners.

(1) I. L. R., 1 Mad. 290: L. R., 4 I. A., 212.
(2) L. R., 2 I. A., 113: 15 B. L. R., 10.
(3) 6 B. L. R., 134.

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There remains to notice the case cited before us of *Kathaperumal* v. *Venkabai* (1); but with deference to the learned Judges who decided it, it seems to us that their decision was based upon a misapprehension of the Privy Council cases referred to above. The learned Judges were of opinion that according to those decisions there could not be *any* kind of partition between two widows jointly inheriting their husband's property. We have already shown that the judgments of the Privy Council do not go to that length.

We are, therefore, of opinion that the decisions of the lower Courts are erroneous. We accordingly reverse them, and remand the case to the Munsiff to decide the remaining issues. We think it right to observe here that if a partition be ultimately decreed, it should be effected in such a way as would not be detrimental to the future interests of the reversioners.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

1883 *February* 6.

PARBUTTY DASSI (PLAINTIFF) *v.* PURNO CHUNDER SINGH AND OTHERS (DEFENDANTS).*

Evidence Act (I of 1872,) s. 35.—Admission—Statement in Decree—Practice of Mofussil Courts.

In a suit for possession of a fishery, the plaintiff sought to put in evidence an admission alleged to have been made in the year 1818 by the defendant's predecessor in title in a written statement in a former suit. The only evidence of the admission was that contained in the decree in the former suit, the ordinary part of which was prefaced with a short statement of the pleadings in the suit. Under the old practice of Mofussil Courts, it was the duty of the Court to enter in the decree an abstract of the pleadings in each case.

Held, that the statement in the decree was evidence of the admission under s. 35 of the Evidence Act (Act I of 1872.)

Lekraj Kuar v. *Mahpal Singh*, (2), referred to.

* Appeal from Appellate Decree No. 105 of 1882, against the decree of Baboo Promotho Nath Mookerjee, Additional Subordinate Judge of East Burdwan, dated the 29th October 1881, reversing the decree of Baboo Janoki Nath Mookerji, Munsiff of Cutwa, dated the 30th June 1880.

(1) I. L. R., 2 Mad., 194.
(2) I. L. R., 5 Calc., 744.