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As regards the application of Article 127 of the Limitation Act, I fully agree with my Lord the Chief Justice, that it cannot be applied until the plaintiff proves that the subject-matter in dispute is joint family property.

In the opinion of the lower Courts the plaintiff has failed to prove that the property in dispute was at any time the joint family property of Radha Mohun and Krishto Mohun. This finding of fact must be accepted as correct in second appeal.

Appeal allowed.

Before Mr. Justice Mitter and Mr. Justice Norris.

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July 3.

MOHADEAY KOOER (PLAINTIFF) *v.* HARUK NARAIN AND OTHERS, (DEFENDANTS).*

Partition—Hindu Widow—Revenue-paying Estate—Beng. Act VIII of 1876, *s.* 10.

A Hindu widow who has succeeded to a share in a revenue-paying estate as heir to her deceased husband is not a person having a proprietary interest in an estate for the term of her life only, within the meaning of s. 10, Beng. Act VIII of 1876. Even if she were, a Civil Court would not be debarred from decreeing partition of a revenue-paying estate at her instance if a proper case for the passing of such a decree be made out by her.

Jadomoney Dabee v. *Sarodaprosono Mookerjee* (1); *Phool Chand Lall* v. *Rughoobuns Sahoy* (2); *Katama Natchiar* v. *The Rajah of Shivagunga* (3); and *Bhagbutti Daee* v. *Chowdhry Bholanath Thakoor* (4) referred to.

Principles on which Courts should order partition at the instance of a Hindu widow stated.

IN this case the plaintiff stated that she and the defendants were joint owners of a settled revenue-paying estate, her share in right of her deceased husband being 3 annas 10 gundas; that in order to remove all likelihood of future disputes she applied to the

* Appeal from Original Decree No. 102 of 1881, aginst the decree of Baboo Mohendro Nath Bose, Subordinate Judge of Tirhoot, dated the 4th of March 1881.

(1) 1 Boulnois, 120.
(2) 9 W. R., 108.
(3) 9 Moore's I. A., 539.
(4) L. R., 2 I. A., 256.

Collector for a butwara of the estate, but that the application was, on the 4th of November 1879, rejected under the provisions of s. 10 of Beng. Act VIII of 1876. It appeared that the widow's application to the Collector was opposed by three of her co-sharers, Haruk Narain Chowdhry and his two brothers, and the widow then filed the present suit on the 9th of February 1880, praying for a reversal of the Collector's order and for partition. The Subordinate Judge dismissed the suit, and delivered the following judgment :—

"The plaintiff, a Hindu widow, seeks in this suit for butwara of her share by the Collector under the law for the partition of estates. She is met by the defendant with the objection that such a partition could not be held under s. 10 of Beng. Act VIII of 1876. I am of opinion that the above section applies. It provides that 'no person having a proprietary interest in an estate for the term of his life only, shall be deemed to be a person entitled to claim partition under this Act.' Now this is the present butwara law, and if the partition were at all to be held, it must be under the provisions of this law. It is contended that a Hindu widow's estate is not that of a proprietor for life, but she holds absolutely as heir to her husband. It may be that her estate is not of a tenant for life, as understood in England, but there cannot be the least doubt that her interest is that of a proprietor for life. If such a person as a Hindu widow or other female heiress under the Hindu law is not intended by the above section, I cannot conceive what other individual could be contemplated by the legislature. I therefore hold that a Hindu widow is a person within the scope and meaning of the aforementioned section of the law. If that is so, this Court cannot direct the Collector to make a butwara in this case, for that would be directing him to commit an illegality. I accordingly dismiss the suit and charge the plaintiff with the costs of the opposing defendants with interest. The costs of the consenting defendants will be borne by themselves."

The plaintiff appealed to the High Court on the grounds (1), that the Court below was wrong in holding that a Hindu widow is a person within the scope and meaning of s. 10 of Beng. Act VIII of 1876; (2), that the Court below ought to have held that a Hindu widow, such as the plaintiff is, fully represents the estate inherited by her from her husband, and is not tenant for life; (3), that the Court below ought to have held that the plaintiff was entitled to claim partition.

Baboo *Chunder Madhab Ghose* and Baboo *Gopal Lal Mitter* for the appellant.

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Baboo *Mohesh Chunder Chowdhry* and Baboo *Pran Nath Pundit* for the respondents.

The judgment of the Court (MITTER and NORRIS, JJ.) was delivered by

MITTER, J.—This is an appeal against the decision of the Subordinate Judge of Tirhoot dismissing the (plaintiff's) appellant's suit for the partition of a revenue-paying estate, a fractional share of which is owned and held by her by right of inheritance from her husband. The defendants, 1st party, who own and hold another share of this estate, and who if they survive the (plaintiff) appellant are presumptively entitled to the share in her possession after her death, alone opposed her claim.

It appears that before this suit was instituted the (plaintiff) appellant had made an application to the Collector of the district to partition the estate under the provisions of Beng. Act VIII of 1876, but the Collector dismissed the application on the ground that the (plaintiff) appellant being in possession of a share of the estate as a Hindu widow was precluded by the 10th section of the Act from applying for the partition thereof.

The present suit was then brought, praying for the reversal of the Collector's order and for an order directing that officer to partition the estate under the provisions of Beng. Act VIII of 1876.

The lower Court framed the following issues:—

First.—"Whether under the butwara law the plaintiff is entitled to have a partition effected of her share."

Second.—"Whether the plaintiff has suffered any inconvenience in the enjoyment thereof by reason of the property being joint."

The suit has been dismissed on the first of these issues, and no evidence was taken with reference to the second issue, although we are informed that the parties were ready with their evidence in the lower Court.

The objections taken before us in appeal are, 1st, that the lower Court is in error in holding that the provisions of s. 10, Beng. Act VIII of 1876 apply to the estate of a Hindu widow; and, 2ndly, that supposing the view taken by the lower Court of the provisions of s. 10 of the Act in question is correct, a Civil Court is not precluded from decreeing partition of a revenue-

paying estate at the instance of a Hindu widow, when a proper case for passing such a decree is made out.

We are of opinion that both these objections are valid.

Section 10 of Beng. Act VIII of 1876 is to the following effect:—"Notwithstanding anything hereinbefore contained, no person having a proprietary interest in an estate for the term of his life only shall be deemed to be a person entitled to claim partition under this Act." In order to decide whether a Hindu widow's estate comes within the purview of this section, we must determine what that estate precisely is.

In *Jadomoney Dabee* v. *Sarodaprosono Mookerjee* (1), Colvile, C.J., said: "But the estate of a Hindu widow is very different from a mere life estate. The case of *Cossinauth Bysack* v. *Hurro Soondery Dasi* (2), which has long given the law to this Court, and since it is a decision of the Privy Council, ought to have given, if it has not given, the law to the Courts of the East India Company, establishes that the estate of a widow is something higher than a life estate; that it entitles her to the possession of the property without restriction; and that she has a qualified power of disposition in it, the limits of which it is difficult, if not impossible exactly, to define further than by saying that the propriety of any particular exercise of that power must depend upon the circumstances in which it is made, and must be consistent with the general principles of Hindu law regarding such dispositions."

In another case, *viz.*, of *Phool Chand Lall* v. *Rughoobuns Sahoy* (3), Peacock, C.J., said: "The widow takes a widow's estate by inheritance from her husband. It is not an absolute estate for all purposes, and *it is not merely an estate for life.*" Then again in *Katama Natchiar* v. *The Rajah* of *Shivagunga* (4), in which one of the questions for decision was whether a decree obtained against a Hindu widow was binding upon the heirs coming in after her, the Judicial Committee of the Privy Council observed: "For assuming her (a Hindu widow) to be entitled to the zemindari at all the whole estate would for the time be vested in her absolutely for some purposes, though in

(1) 1 Boulnois, 120, at p. 129.

(2) Clarke's Rules and Orders, Ap. 91.

(3) 9 W. R., 108.

(4) 9 Moore's I. A., 539.

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some respects for a qualified interest, and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance would seem to apply to the case of a Hindu widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

It is clear from these cases (1), that the widow completely represents the estate; (2), that under certain circumstances she has the right to convey an absolute interest in it; and (3), that until her death it is impossible to ascertain who would be entitled to succeed to the estate after her. Such an estate as this cannot be merely an estate for life. The distinction between a mere life-estate and a widow's estate is explained by the Judicial Committee in *Mussamut Bhagbutti Daee* vs. *Chowdhry Bholanath Thakoor* (1). In that case one Odan Thakoor executed before his death a deed providing that after his death his property was to be enjoyed by his wife during her life time, appropriating the profits derived therefrom, and that after her death it was to devolve on his adopted son. The Judicial Committee of the Privy Council held that the widow obtained in this case an estate for life, and that the remainder was vested in the adopted son. Their Lordships observed, "if she (the widow) took the estate only of a Hindu widow, one consequence no doubt would be that she would be unable to alienate the profits, or that at all events whatever she purchased out of them would be an increment to her husband's estate, and the plaintiffs would be entitled to recover possession of all such property real and personal; but on the other hand she would have certain rights as a Hindu widow; for example she would have the right, under certain circumstances, if the estate were insufficient to defray the funeral expenses or her maintenance, to alienate it altogether. She certainly would have the power of selling her own estate; and it would further follow that Giridhari (the adopted son) would not be possessed in any sense of a vested remainder but merely a contingent one."

(1) L. R., 2 I. A., 256.

With all these decisions before the Legislature, defining what a widow's estate is, and which definition clearly shews that it is not a proprietary interest for the term of her life only, it seems to us not probable that if, by enacting s. 10 of Beng. Act VIII of 1876 they had intended to disentitle a Hindu widow from claiming partition under the aforesaid Act, they would have described her right as "a proprietary interest in an estate *for the term of her life only*."

The words "a proprietary interest in an estate for the term of one's life only" would imply an interest which, actually in the enjoyment of the owner at the time of his death, would terminate on the happening of that event, and would not pass on to his heirs, or if at that time that interest be in the hands of an alienee under an alienation made by him during his lifetime, it would cease to exist on his death. The first of these alternatives is true in the case of a Hindu widow, but not the second in all cases because, as already shewn, she has the right under certain circumstances to convey an absolute interest in the estate inherited by her.

Then again under Regulation XIX of 1814 a Hindu widow was competent to apply for partition of a revenue-paying estate. Clause 2, s. 4 of the Regulation provided that on an application by one, two, or more of the proprietors of a joint estate being made, the Collector should publish an advertisement notifying the same to all parties concerned, and specifying that he should proceed to make the division applied for in 15 days from the date of the advertisement, unless any person in possession of the estate should, before the expiration of that time, deny the right of such claimant or claimants to the share or shares so claimed by him or them. The next clause provided that in the event of any such denial not being offered to the claim for separation, the Collector should proceed to make the division applied for.

It is clear from these provisions that a Hindu widow, who represents the estate of her husband completely, was entitled under Regulation XIX of 1814 to apply for partition of a revenue-paying estate. This Regulation was repealed by Beng. Act VIII of 1876 which has now taken its place. And if it was the intention of the Legislature to take away from a Hindu widow the right of applying to the Collector for partition of a revenue-

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paying estate—a right which she undoubtedly had under the Regution of 1814—the Legislature would have done so by a more clear provision than what is contained in s. 10 of Beng. Act VIII of 1876 which, in our opinion, applies only to the case of a simple life estate where the remainder is vested in some known person. The decision of the lower Court upon this point is not in our opinion correct.

But even if s. 10 of Beng. Act VIII of 1876 were applicable to a widow's estate, still a Civil Court would not be debarred from decreeing partition of a revenue-paying estate at the instance of a Hindu widow if a proper case for the passing of such a decree be made out by her. This is clear from the provisions of s. 29 of the Act, which says: "Subject to the provisions of s. 11, a Civil Court may at any time direct the Collector to assign to any person lands representing a specified interest in any estate, &c., &c., &c., to be held by such person as a separate estate, &c., &c., &c., provided that an application for such partition and separation shall be presented by such person as required by ss. 16, 17, 18 and 19." But a decree of this nature must be executed in the manner indicated by s. 265 of the Civil Procedure Code.

Although the right of enforcing partition is generally a common incident in a joint undivided property, yet it by no means follows that a Civil Court would be bound to decree partition at the instance of a Hindu widow without a special cause or necessity being established for a partition. The estate of a Hindu widow is peculiar; although she completely represents the estate, yet the persons who take after her do not take it *through* her, but they take it as heirs of the last male owner. There is a further peculiarity, namely that until her death it cannot be known who would succeed to the estate after her death. Under these circumstances it would be the duty of a Court of Justice to see, before decreeing partition, that the interest of the presumptive heir be not affected by such decree. From the peculiar nature of a Hindu widow's estate, we are of opinion that the above restriction should be put upon her right to enforce partition—a right which is inherent in every owner of property: See *Shama Sundari Debi* v. *Jardine Skinner* (1).

(1) 3 B. L. R., Ap. 120.

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Therefore, before a decree for partition is given in a suit by a Hindu widow brought for that purpose, the Court ought to be satisfied that it is a *bonâ fide* claim arising from such necessities as render partition desirable between two joint owners, and that she would properly represent the interest of the estate including that of the person who would come in after her. It is upon the ground of her representing the next-taker after her that a decree for partition at her instance is held binding upon such next-taker. The following observations in Story's Equity Jurisprudence, Vol. I, s. 656A, lend considerable support to the views expressed above : "Doubts were formerly entertained whether in a suit in equity for a partition, brought only by or against a tenant for life of the estate, where the remainder is to persons not *in esse*, a decree could be made which would be binding upon the persons in remainder. That doubt is, however, now removed ; and the decree is held binding upon them upon the ground of a virtual representation of them by the tenant for life in such cases ; but if the partition is made in pursuance of an agreement between the tenant for life and the other party, under such circumstances the Court would direct it to be referred to a master to enquire and state whether it will be for the future benefit of the remainder-men that the agreement should be carried into execution without any variations, or, if with variations, what the variations ought to be."

The same duty is cast upon a Court of Justice here, namely that it should be satisfied that the decree for partition, if made, would not in any way act injuriously to the interests of the future heir.

For the foregoing reasons we are of opinion that the decision of the lower Court is erroneous. The decree of that Court is, therefore, reversed, and the case remanded for re-trial in accordance with the observations made above. The costs of the hearing before us will abide the result.

Appeal allowed.