table that this contention is valid. It is an elementary matter that the Receiver of the High Court does not represent the owner of an estate. He is an officer of the Court, and as such cannot sue or be sued except with the permission of the Court.

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As against the Receiver therefore the decree must be set aside with costs in both Courts.

The costs of the Receiver will be in proportion to the claim against him.

Appeal allowed.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Beverley.

ISREE PERSHAD SINGH AND ANOTHER (DEFENDANTS) *v.* NASIB KOOER AND OTHERS (PLAINTIFFS).*

1884 *July* 22.

Hindu Law—Mitakshara—Share of widow mother on partition in ancestral and proceeds of ancestral property.

A Hindu mother on partition is entitled to a share equal to that of a son both in the ancestral property of her husband and in all property acquired with the proceeds of such ancestral property.

Sudanund Mohapattur v. *Soorjamoney Dayee* (1) dissented from.

THIS was a suit by a Hindu widow to obtain, after a partition had been come to in the family (the family being governed by the Mitakshara law), a share in such property equal to the share of a son.

Nasib Kooer, the plaintiff, was the wife of one Baijnath Singh who died in 1263, leaving him surviving his two widows and four sons, members of a joint Mitakshara family. After the death of Baijnath, the family remained under the management of Nasib Kooer. In 1276 Kasida Kooer (the other widow) died; and in 1281 a separation took place in the joint family, and the properties were partitioned off; no share in this partition was allotted to Nasib Kooer, although she retained in her possession the whole of a certain mouzah called Lodipore; after their separation the two eldest sons continued to live together, whilst the two younger lived also by themselves. Nasib Kooer, according to her own

* Appeal from Original Decree No. 803 of 1882, against the decree of Baboo Matadin Roy, Bahadur, Subordinate Judge of Gya, dated the 25th July 1882.

(1) 11 W. R., 436.

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statement, which was disputed, living at Lodipore. In March 1878 the two elder brothers (defendants Nos. 1 and 2) brought a suit against Nasib Kooer for partition of mouzah Lodipore, in which the Court directed a partition, and directed that a one-fifth share should be allotted to Nasib Kooer as the widow of Baijnath Singh to whom the mouzah had formerly belonged. Nasib Kooer then demanded from her sons a one-fifth share in the whole of the estate left by Baijnath Singh. The two younger sons (defendants 3 and 4) expressed their willingness to make over to her a one-tenth share in the estate, and on the refusal of the elder brothers to make over the remaining one-tenth share, Nasib Kooer brought this suit on the 25th July 1882 for the purpose of obtaining possession of one-fifth share of the estate. The defendants Nos. 1 and 2 contended that the plaintiff had waived her right to partition, and that certain of the properties claimed were acquired by them after the death of their father. The defendants 3 and 4 were made *pro forma* defendants, and did not dispute their mother's claim.

The Subordinate Judge held that the plaintiff had not waived her right to share in the partition; and on the other question (issue No. 6), as to what properties were acquired by the defendants after Baijnath's death, and whether or no the plaintiff was entitled to share in them, he found that the defendants had failed to prove that any property had been exclusively acquired by any one of them; but that on the contrary, the properties which were purchased after the death of Baijnath Singh, were purchased at the time the plaintiff was acting as the guardian of her sons, and were purchased out of the proceeds of certain properties left by their ancestors and acquired by her husband, and that no property have been purchased since the partition. He therefore gave the plaintiff a decree.

The defendants Nos. 1 and 2 appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Amerkali Mookerjee* for the appellant contending that, although the plaintiff was entitled on partition to share in the ancestral property, which came to the family through Baijnath, yet she was not entitled to share in any of the properties which had been purchased by them, or

her as manager, since Baijnath's death, nor to share either in the proceeds of the ancestral property since Baijnath's death or in any other property which might have been purchased with those proceeds. *Gunga Pershad* v. *Sheodyal Singh* (1).

The case of *Sudanund Mohapattur* v. *Bonomallee* (2) shows that property acquired from the income of ancestral property is not to be considered ancestral property.

Mr. *C. Gregory* (with him Baboo *T. C. Paulit*) for the respondent cited *Sudanund Mohapattur* v. *Soorjoomoney Dayee* (3) and *Shudanund Mohapattur* v. *Bonomallee Dass Mohapattur* (4), and *Macnaghten Cons. Hindu Law*, pp. 51 and 54 as showing that a Hindu mother could share in the proceeds of ancestral property, also *Mayne's Hindu Law*, p. 250.

Judgment of the High Court was delivered by

GARTH, C.J.—This suit was brought by the plaintiff Mussumat Nasib Kooer to recover a one-fifth share of the estate of her deceased husband, Baijnath Singh, under these circumstances.

Baijnath Singh was the head of a Mitakshara family, consisting of his two wives (the plaintiff, and one Mussumat Kasida Kooer, who is since dead) and four sons, who are the defendants in this suit, and the family were possessed of several ancestral properties.

Baijnath died on the 13th Aughran 1263 Fusli; and after his death, and that of Mussumat Kasida Kooer, the four brothers separated, and a partition of the family property was made by the plaintiff with the consent of her sons, the plaintiff retaining in her own possession an estate called Lodipore, upon the ground that it was her *stridhan*.

At this time, it appears the two elder brothers (the defendants 1 and 2), separated themselves from their two younger brothers (the defendants 3 and 4), who continued to live with the plaintiff; and afterwards, the defendants 1 and 2 brought a suit against the plaintiff for a partition of Lodipore, upon the ground that it was not the plaintiff's *stridhan*, but was subject to partition like the rest of the ancestral property. This suit was successful, and consequently the plaintiff had to give up the

(1) 9 C. L. R., 417 (420).
(2) 1 Marshall, 317 320).
(3) 11 W. R., 436.
(4) 6 W. R., 256.

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exclusive possession of Lodipore, which was declared to be subject to partition.

The plaintiff then brought this suit to recover her one-fifth share of the rest of the ancestral property. She says, that when the partition took place, she was content to forego her share, upon condition that her exclusive right to Lodipore was admitted, but as she has been now deprived of four-fifths of Lodipore, she insists upon her right to a one-fifth of the rest.

The lower Court has decreed her claim: and, as we consider, justly. We think it plain that she only waived her right when the partition was made upon the understanding that she was to retain Lodipore; but now that she has been deprived of that, she is justified in insisting upon her rights under the partition.

A question, however, has arisen upon the sixth issue, which we have thought it right to hear fully argued. The appellants (defendants 1 and 2) contend, that the plaintiff is not entitled to a share in any of the properties, which have been purchased by them (or by her as the manager of the property), since the death of Baijnath out of the proceeds of the ancestral estate. They say, that although the plaintiff (as Baijnath's wife), is entitled upon partition to an equal share with a son *in all the ancestral property*, which came to the family through Baijnath, she is not entitled to a share either in the proceeds of that property since Baijnath's death, or in any other properties which have been purchased with those proceeds.

It is argued that a wife is only entitled on partition to a share of that which was her husband's, because she has to be maintained out of that property, and her share upon partition is given to her as representing, or instead of, her maintenance; but no part of the property before partition is her's; it belongs to the sons conjointly; they may spend the proceeds of it as they think proper; and whether they spend those proceeds, or hoard them up, or purchase other property with them, the wife has no part or lot in those proceeds.

In support of this view we have been referred to certain texts of the Mitakshara, and to an expression of opinion by Mr. Justice MITTER in the case of *Gunga Pershad* v. *Sheodyal Singh* (1).

(1) 9 C. L. R., 417.

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The question there was, whether in the case of a Mitakshara family, consisting of a father and sons, the sons were entitled to any share in property which their father had purchased before their birth from the proceeds of an ancestral estate. Mr. Justice MITTER says that in his opinion they were not. He considers that property acquired out of the income of ancestral property is not property inherited, and, therefore, if the father acquired such property before the birth of his sons, they had no interest in it.

The view thus expressed by Mr. Justice MITTER would, if it were established law, seem in favor of the defendants' argument in the present case, because, if the proceeds of ancestral property, although hoarded up or laid out in other property by the sons, are to be considered as the self-acquired property of the sons, there would seem good reason why the mother should not have any share in them upon partition.

But this was only an expression of opinion by Mr. Justice MITTER and the case was decided upon another ground. In fact, that learned Judge observes, that as his opinion was opposed to a previous decision of this Court in the case of *Sudanund Mohapattur* v. *Soorjoomoney Dayee* (1), he could not have overruled that decision without referring the point to a Full Bench.

In this case, of course, we are in the same position; and although we much respect the opinion of Mr. Justice MITTER, especially in a matter of this kind, we think we ought not to refer the point to a Full Bench, unless our own view was that Mr. Justice MITTER was right.

We find, however, other authorities besides the case in the 11th Weekly Reporter, which are certainly in conflict with Mr. Justice MITTER'S view.

Macnaghten in his "Considerations on the Hindu Law," p. 51, lays down the law thus: "The mother shall not be entitled to share in the property acquired by the individual exertions of one of her sons, nor in the property acquired by the joint exertions of them all, unless it shall appear that such acquisitions were made out of the patrimonial wealth, in which case she shall be entitled to share in the *increase* of the patrimonial wealth upon partition."

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And, again, on page 54 he says: "Partition, to entitle the mother to a share, must be made of ancestorial property or of property acquired by means of ancestorial wealth."

And Mr. *Mayne*, in his work on Hindu law, quotes this last extract from *Macnaghten* as being the approved rule in such cases.

We think, therefore, that as these authorities seem strongly in favor of the plaintiff, and as we do not see any such reason to the contrary as would justify us in referring the question to a Full Bench, we should decide the point in favour of the plaintiff and dismiss this appeal with costs.

Appeal dismissed.

ORIGINAL CRIMINAL.

Before Mr. Justice Field.

QUEEN EMPRESS *v.* MATHEWS.

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July 21.

Incriminating statement by Prisoner to Police Officer—Evidence of Police Constable.

A policeman on being cross-examined stated, that when he arrested the prisoner, the prisoner said to him, some Chinamen *at the time of the occurrence* came out with hatchets; in re-examination the policeman so far altered the words stated to have been used by the prisoner as to substitute for the words *at the time of the occurrence* the words *at the time*, and on being asked if the prisoner had explained "what time," answered he said at the time I struck the deceased.

Counsel for the prisoner interposed and objected to the evidence. The Standing Counsel contended that he was entitled to clear up a matter which had been left in doubt by the cross-examination.

Held, that the evidence could not be given.

ONE Mathews had been committed to the Sessions by the Presidency Magistrate of Calcutta, charged with murder. At the trial a police officer was examined for the prosecution, and in the course of cross-examination gave the following answer to Mr. *Gasper*, who appeared for the defence.

A.—The prisoner, when I arrested him, said "some Chinamen at the time of the occurrence came out with hatchets."