Before Mr. Justice Mitter and Mr. Justice Field.

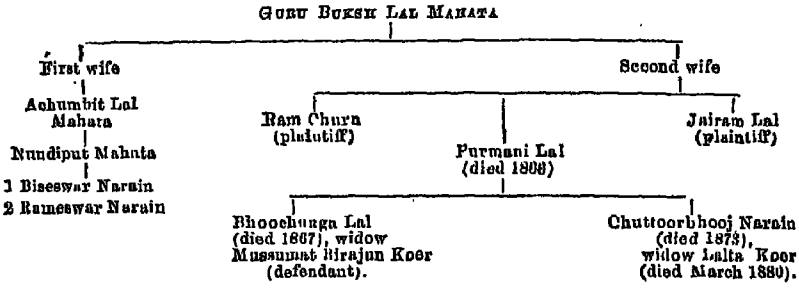
1884 *January* 11.

BIRAJUN KOER (ONE OF THE DEFENDANTS) *v.* LUCHMI NARAIN MAHATA AND OTHERS (PLAINTIFFS).*

Hindu Law, Widow—Right of childless widow to alienate moveable property—Mithila law—Inheritance.

Under the Mithila law a childless Hindu widow, although she cannot alienate the immoveable property, has an absolute right over the moveable property inherited from her husband, and can alienate it in any manner she pleases, and she has also an absolute power to dispose of the profits of the estate during her lifetime.

THIS was a case in which the plaintiffs laid claim to certain property by way of inheritance under the Mithila law. The following table shows the state of the family at the time the suit was filed :—



The original plaintiff died after the institution of the suit, and the principal respondents were their legal representatives.

The plaintiffs as the uncles of Chuttoorbhooj Narain brought the suit on the death of his widow Lalta Koer for a declaration of their title to, and for possession of, the estate, consisting of moveable and immoveable property left by him, as being his next heirs under the Mithila law. They alleged that the entire share of his father Purmani Lal came to be acquired by him as being the surviving son, his brother Bhoochunga Lal having died while in a joint estate with him, thereby precluding his widow, the defendant Birajun Koer, from inheriting any share therein.

In answer to the suit Birajun Koor alleged that her husband was living in a state of separation from his brother Chuttoorbhooj

* Appeal from Original Decree No. 96 of 1882, against the decree of Baboo Mohendra Nath Bose, Rai Bahadoor, First Subordinate Judge of Tirhoot, dated the 22nd December 1881.

Narain, and that she therefore succeeded *him* as heiress under the Hindu law. She admitted that after the death of her husband the entire estate remained in the hands of Chuttoorbhooj Narain so long as he lived, but alleged that he was acting as pure trustee on her behalf. She further alleged that on the death of Chuttoorbhooj his widow Lalta Koer and she, the defendant, jointly took out letters of administration, and remained in possession of the whole estate as heiresses-at law until the death of Lalta Koer, and she further set up a verbal gift from the latter in regard to her portion of the property. She further contended that even if she were not the heiress to her husband she was still the heiress of *Chuttoorbhooj as being* the nearest *sapinda gotraja*, and this contention was also raised in the appeal, but was not pressed. She also contended that by Lalta Koer joining her in the administration, it was to be presumed that she had made a gift of one molety of the estate to her, and by virtue of such gift she was entitled to retain that moiety under the Hindu law, which she maintained authorises a widow to deal with the moveable portion of her husband's estate in any manner she pleases. She also claimed the other moiety under the alleged gift above alluded to.

The nature of the properties claimed, together with the evidence offered on either side in support of the above contentions and the findings of the lower Court, are sufficiently stated for the purpose of this report in the judgment of the High Court.

Mr. *Evans*, Baboo *Chunder Madhub Ghose* and Baboo *Abinash Chunder Banerjee* for the appellant.

Baboo *Mohesh Chunder Chowdhry*, Baboo *Hem Chunder Banerjee* and Baboo *Taruck Nath Palit* for the respondents.

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

MITTER, J.—This is an appeal against a decree in favor of the plaintiffs passed by the Subordinate Judge of Tirhoot. The claim of the plaintiffs was for the recovery of the estate of one Chuttoorbhooj Narain. The (defendant) appellant is the widow of Bhoochunga Lal, brother of Chuttoorbhooj. Purmani Lal,

1884

BIRAJUN KOER v. LUCHMI NARAIN MAHATA.

father of Bhoochunga Lal, and Chuttoorbhooj Narain, was a uterine brother of the original plaintiffs, *viz.*, Ram Churn and Jairam Lal. The original plaintiffs died after the institution of the suit and the principal respondents are their legal representatives. Purmani Lal died in the year 1273 F.S. (1866), Bhoochunga Lal in the year 1274 F.S. (1867), and Chuttoorbhooj Narain in the month of Baisack 1280 F.S. (April 1873).

The plaintiffs alleged that the three brothers, Ram Churn, Purmani and Jairam were joint in food and estate; that Ram Churn separated from the joint family in the month of Baisack 1275 F.S. (April 1868); and that after the death of Bhoochunga Lal, Chuttoorbhooj separated from Jairam in the year 1279 F.S. (1872). That the entire estate left by Purmani became vested in Chuttoorbhooj, the appellant Birajun the widow of his brother, who lived with him jointly, receiving maintenance from the estate. That on the death of Chuttoorbhooj Narain, the estate in question devolved under the Mithila law which governs the family upon his widow Lalta Koer, who out of affection for the appellant, and with a view to please her, caused her name to be associated with her "in the village and Court papers," but that she (Lalta) alone remained in possession of the estate, the appellant living jointly with her and receiving maintenance as before. That there was a Banking Kotee at Bettea, which on partition of the family property fell to Jairam Lal and Chuttoorbhooj Narain in equal shares. That the Maharajah of Bettea was a debtor of this Banking Kotee, and that as security for this debt he executed on the 18th Bhadur 1288 (22nd August 1276) a bond in favor of Jairam as well as Lalta Koer, and the appellant, representing the deceased Chuttoorbhooj Narain, for the amount of Rs. 2,08,275. That out of the money left by Chuttoorbhooj Narain, Lalta Koer purchased several immoveable properties in the names of Gopi Lal, Jugger Nath Pershad and Ram Sahi Lal. That Lalta Koer died on the 2nd Falgoon 1287 (March 1880), and that on her death under the Mithila law of inheritance the original plaintiffs as next heirs-at-law became entitled to the entire estate which was in the possession of Lalta Koer as Hindu widow. That after the death of Lalta Koer the Maharajah of Bettea, notwithstanding the plaintiff's right being notified to him, paid Rs. 30,000

to the appellant out of the money due under the bond dated the 22nd August 1876, and that out of the aforesaid Rs. 30,000 the appellant advanced Rs. 15,000 as a loan to one Mr. Hudson under a bond executed by him. Upon these allegations the plaintiffs sought to establish their right in the properties, moveable and immoveable, left by Chuttoorbhooj as well as the bonds executed by the Maharajah of Bettea and Mr. Hudson, and in the properties purchased after the death of Chuttoorbhooj Narain in the names of Gopi Lal, Jugger Nath Pershad and Ram Sahi, and for the recovery of possession of such of them as are capable of being reduced to possession, making these persons defendants along with Birajun Koer, the appellant before us. The plaintiffs further prayed that the maintenance of the appellant be fixed by the Court.

The appellant, who was the principal defendant, alleged in her written statement that her husband was separate from his brother Chuttoorbhooj Narain, and that on her husband's death she allowed her brother-in-law to manage the entire property, as she had confidence in him and lived with him jointly. That after the death of Chuttoorbhooj she and the widow of Chuttoorbhooj, *viz.*, Lalta Koer, remained in joint possession of the said estate. That Lalta Koer before her death made a gift of her share of the estate in question to the appellant. That certain shares of mouzahs Chattopore and of Sadipore were purchased by the appellant and Lalta Koer in the names of Jugger Nath Pershad and Gopi Lal respectively out of the profits of their joint estate. That even if the gift made by Lalta Koer be not established, and if it be proved that her husband was joint with Chuttoorbhooj, the appellant is entitled to a moiety of the moveable property under the arrangement between herself and Lalta Koer.

The lower Court finds that Bhoochunga Lal at the time of his death was joint in food and estate with his brother Chuttoorbhooj; that the act of Lalta Koer in the matter of associating the name of the appellant in the village and Court papers does not amount to a gift of any interest in the property; that the said act is not binding upon the respondents; that the verbal gift set up by the appellant is not established; that the properties purchased out of the profits of the estate left by Chuttoorbhooj

1884

BIRAJUN KOER v. LUCHMI NARAIN MAHATA.

would pass to the (plaintiffs) respondents with the *corpus;* that the Rs. 30,000 paid by the Maharajah of Bettea to the appellant represent a portion of the saving by Lalta from the profits of her husband's estate; and that the (plaintiffs) respondents as the heirs-at-law of Chuttoorbhooj are entitled to the said money; and that mouzah Mudhopore is not proved to have been purchased by Lalta Koer, but is the property of the defendant Ram Sahi. As regards houses Nos. 88 and 89 of the schedule to the plaint the plaintiffs gave up their claim to them. The lower Court fixed Rs. 4,800 annually as the maintenance of the appellant, and declared that the Rs. 15,000 out of the Rs. 30,000 paid by the Maharajah of Bettea and appropriated by the appellant should be considered as a charge upon this maintenance. In accordance with these findings a decree has been made in favor of the respondents. The defendant Birajun Koer has preferred this appeal against the said decree, and the respondents have taken certain objections to it under s. 561 of the Civil Procedure Code.

The appellant contended in the lower Court that, taking all the facts stated in the plaint as correct, she as a nearer *sapinda* to Chuttoorbhooj Narain than the original plaintiffs had under the Hindu law of inheritance a preferential right to his estate. But the lower Court decided this question in favor of the plaintiffs. This ground of defence has also been taken in the petition of appeal. The learned Counsel for the appellant, without giving it up, intimated to the Court that he would not repeat the arguments in support of his contention upon this point, as they were advanced on more than one occasion in recent cases and were considered and disposed of by the Court adversely to the contention.

Upon the evidence on the record there is not the slightest doubt that the findings of the lower Court that Bhoochunga Lal was separate from Chuttoorbhooj Narain, and that the alleged verbal gift by Lalta Koer to the appellant is not established, are correct. The principal question that has been discussed in appeal is the nature and the effect of the arrangement under which the name of the appellant was associated with that of Lalta Koer in respect of the properties in dispute after the death of Chuttoorbhooj Narain.

The evidence upon this point is meagre and has left on my mind the impression that for some reason or other, which is not apparent, the parties have not placed before the Court all the circumstances relating to this arrangement.

Biseswar Narain, witness No. 1 for the plaintiffs, says upon this point, that after the death of Chuttoorbhooj Narain, Lalta Koer and Birajun Koer entered upon the possession of the property left by him; Lalta consented to this arrangement out of "generous affection" for Birajun Koer. In cross-examination, the witness thus explains what this "generous affection" means. He says that in consequence of Birajun Koer's lamentations and cries, Lalta Koer associated her in the management of the affairs of the estate left by her husband. Gobind Lal, witness No. 2 for the plaintiffs, similarly says that it was in consequence of Birajun Koer's weeping and crying for her share that this arrangement was come to, but the witness is unable to say why Lalta assented to it. According to Gobind Dyal, the witness No. 3 for the plaintiffs, Birajun Koer's name was associated because he and the other well-wishers and the old servants of the family considered that this should be done with a view that Lalta might not maltreat her and refuse to maintain her. But this witness admits that Birajun Koer does not appear before him, and it is therefore probable that he was not aware of her lamentations and weepings for her share, if there were such "lamentations and weepings." Plaintiff's witness No. 4, Srikissen Lal, deposes to Birajun Koer and Lalta Koer being in joint possession of the estate left by Chuttoorbhooj Narain. The witness No. 5, Parmessuri Sahi, says that the name of Birajun Koer was jointly used along with that of Lalta Koer in consequence of the former claiming her share as the heiress of her husband. To the same effect is the deposition of Jugger Nath Pershad, the witness No. 1 for the defendant. Upon this point, the above is a summary of the oral evidence on the record.

The documentary evidence begins with the joint application of Birajun Koer and Lalta Koer, dated the 26th June 1873, for obtaining a certificate under Act XXVII of 1860 to collect the debts due to the estate of Chuttoorbhooj Narain. It is stated in this application "that these two ladies with mutual

1884

BIRAJUN KOER v. LUCHMI NARAIN MAHATA.

consent have been in possession of all properties left by Chuttoorbhooj Narain by right of heirship." The rest of the documentary evidence consists of petitions, &c., in which these two ladies join with the co-sharers in various matters connected with the family properties, they being treated as jointly in possession of the property left by Chuttoorbhooj Narain as joint heiresses.

Upon this evidence it is clear to me that upon the death of Chuttoorbhooj Narain, Birajun Koer claimed a right in the property left by him. Whether that claim was based upon a right of inheritance to her husband's share, or upon her own right of maintenance, or upon a supposed right which, as the senior widow in the family, she might have thought that she was entitled to claim, it is not clear upon the evidence. But the evidence leaves no doubt in my mind that she put forward a claim with some degree of earnestness, and that with the advice of relatives, friends and servants of the family, Lalta agreed to settle this matter with her sister by making her a joint owner of the estate. As this estate had been hitherto treated as the sole property of Chuttoorbhooj Narain, it was thought that the best way of carrying out the arrangement would be to treat both these ladies as joint heiresses of Chuttoorbhooj Narain, although it was well known that Lalta alone was his heiress-at-law. The nature of the arrangement in question was therefore that Birajun was to remain in joint possession of the estate along with Lalta Koer as a Hindu widow.

The plaintiffs in this suit, as well as other co-sharers in the family estate, recognised this arrangement, but there is nothing on the record from which I can say that they *agreed* that this arrangement was to remain in force till the death of the (defendant) appellant.

This being the nature of the arrangement, the next question is, what is its effect as regards the right under the law of inheritance which accrued to the plaintiffs upon the death of Lalta Koer, the widow of Chuttoorbhooj Narain.

The plaintiffs claim through Chuttoorbhooj Narain and therefore they are not bound by the arrangement made by Lalta Koer. As I have already remarked their recognition of the arrangement does not amount to a relinquishment of their right and

title on the death of the appellant. Upon the death of Lalta therefore the arrangement must be considered to have come to an end, unless she had the power under the Mithila law to alienate absolutely or for a definite period, even after her life, any portion of the property left by Chuttoorbhooj Narain. There is not the slightest doubt that she had no such power, so far as immoveable property is concerned. As regards the moveable property, the Subordinate Judge says that it is a settled law in Mithila that she has that power. It seems to me that, although the Subordinate Judge is in error in thinking that the law upon this point has been settled, yet his conclusion is right.

This case comes from Tirhoot, and is therefore to be decided in accordance with the *Vivada Chintamoni* and *Retnaker* works of paramount authority in the countries governed by the Mithila law. It seems to me that according to these two *Nibondhas*, a Hindu widow succeeding to her husband's estate has the power of disposing absolutely of moveable properties inherited by her. The following passages from the *Vivada Chintamoni* support this view :—

"Katiyana says that a woman on the death of her husband may enjoy his estate according to her pleasure; but in his lifetime she should carefully preserve it. If he leave no estate, let her remain with his family.

"A childless widow, preserving her chastity, shall enjoy her husband's property with moderation, as long as she lives. After her death, the heirs shall take it."

This admits of two meanings. The one is that, on the death of the husband, his property devolves on his wife and becomes her own in default of other heirs. The other is that the property which she enjoys with the consent of her husband in his lifetime is to be regarded as her peculiar property.

Katiyana says as to the first of these: "Let a woman on the death of her husband enjoy her husband's property at her discretion."

This refers to property other than immoveable.

The following provision is made for immoveable property: "Let a woman enjoy it with moderation as long as she lives. After her death, let the heirs take it."

1884

BIRAJUN KOER v. LUCHMI NARAIN MAHATA.

"Moderation" means without much expenditure.

"Childless widow" means one who has no heir of her own.

On the second it is said that "while he lives she should carefully preserve it," or in other words, the property shall be protected in the lifetime of the husband. If her husband have left no wealth, the widow should live with his family. Hence the immoveable property, which a woman gets after the death of her husband, cannot be disposed of at her pleasure. The meaning of this is consonant with that of the husband's donation (which can only be enjoyed but not spent).

The texts of Katiyana do not refer to the peculiar property of a woman. The inconsistency owing to this is removed by the similarity of meaning. "As a woman cannot make a present of or at pleasure dispose of immoveable property, given to her by her husband in his lifetime, so she cannot dispose of any immovsable property which she inherits on his death." (*Vivada Chintamoni*, p. 263).

On the other hand, the following passage may be cited in support of the contrary view. Thus it is said in the Mahabharat "for women, the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth." Here *waste* means sale and gift at their own choice, p. 292.

It seems to me that the general rule laid down thus is subject to the exception mentioned at page 262, *viz.*, that a widow has the power of alienating absolutely the moveable property inherited by her, from her husband.

Of these passages the same view was taken by the pundits who were consulted in *Sreenarain Rai* v. *Bhya Jha* (1). The same view is expressed in Colebrooke's Digest, Vol. III, p. 468 (London edition of 1801). "But the authors of the *Retnaker* and *Vivada Chintamoni*," says the compiler of the Digest, "contend that a wife cannot give away the immoveable property of her husband, which has devolved on her by the failure of male issue; but she may give away moveable effects. They expound the text of Katiyana as relating to the personal estate of her husband which has devolved upon her." In *Doonga Dayee* v. *Poorun*

(1) 2 Sel. Rep., 23.

Dayee (1), which is a Tirhoot case, the same view of the law was taken, although the learned Judges to a great extent relied upon the Mitakshara law which, however, as decided by the Judicial Committee of the Privy Council in *Bhugwandeen Doobey* v. *Myna Baee* (2), does not authorize the widow to alienate absolutely the moveable property inherited by her from her husband. But the learned Judges also refer to the *Vivada Chintamoni*.

There being then in the Mithila law this distinction as to the disposing power of the widow between the moveable and immoveable property, the arrangement by which Lalta Koer made the appellant her co-parcener in the estate left by Chuttoorbhooj is binding upon the respondents so far as the moveable property is concerned, but is not binding upon them so far as the immoveable property is concerned. Upon this point therefore the decree of the lower Court must be varied.

The next point that was urged before us is that the decision of the lower Court as regards the properties acquired out of the profits of the estate of Chuttoorbhooj after his death is erroneous. It seems to me that as regards those properties, the appellant is entitled to retain a moiety share. By the arrangement already referred to, she became a joint owner with Lalta in the estate in question, and consequently the respondents cannot claim the whole of these properties. According to Hindu law, Lalta Koer had full power to dispose of the profits of the estate during her lifetime, and by the arrangement in question she allowed a moiety share in these profits to the appellant. The respondents cannot therefore lay claim to the whole of the after-acquired properties, but only to a share to the extent of one-half. Upon this point also the decree of the lower Court must be modified.

The respondents object to the decree of the lower Court, fixing Rs. 400 as the monthly maintenance of the appellant, as too exorbitant. Having regard to the value of the estate in dispute, I should have considerably reduced the amount, even if the decree of the lower Court had remained unaltered. But as that decree will be modified in favor of the appellant by dismissing the plaintiffs' claim to the extent of a half share, in respect of the

(1) 5 W. R., 141 ; 1 I. J., N. S., 128.
(2) 11 Moore's I. A., 487.

1884

BIRAJUN KOER v. LUCHMI NARAIN MAHATA.

personal properties and the properties purchased after the death of Chuttoorbhooj, the amount of maintenance must be still more considerably reduced. Having regard to the status of the parties and the value of the immoveable property of the appellant's husband for which the respondents will obtain a decree, and taking into consideration that under our decree the appellant will be entitled to not an inconsiderable portion of the estate left by Chuttoorbhooj, I am of opinion that Rs. 25 should be fixed as the monthly maintenance to be allowed to the appellant out of the estate of her husband which has devolved upon the respondent.

We accordingly modify the decree of the lower Court. The respondents will get a decree for the properties claimed with the exception of a moiety of the personal properties and the properties purchased in the benami of Jugger Nath Pershad and Gopi Lal; the suit must also fail as regards the money (Rs. 30,000) paid by the Maharajah of Bettea, and consequently the money covered by the bond executed by Mr. Hudson. The maintenance of Birajun Koer will be fixed at the rate of Rs. 25 per month. Costs of all the parties to this appeal will come out of the estate. The order as to costs in the decree of the lower Court will stand.

Appeal allowed and decree modified.

Before Mr. Justice Tottenham and Mr. Justice Norris.

1884 *February* 4.

KRISHNA LALL DUTT (PLAINTIFF) *v.* RADHA KRISHNA SURKHEL AND OTHERS (DEFENDANTS.)*

Limitation Act (XV of 1877), *Sch. II, Art.* 138—*Possession, Suit for—Auction purchaser, Suit by, for possession.*

Where it was shown in a suit by an auction-purchaser at an execution sale that the formal possession obtained by him through the Court had not been followed by any act of possession, and consequently that it had been infructuous, *Held* that the purchaser was entitled to bring a suit to obtain actual possession, but was bound to bring it within twelve years from the date of the sale, the period prescribed by Art. 138, Sch. II of the Limitation Act (Act XV of 1877).

* Appeal from Appellate Decree No. 145 of 1883 against the decree of S. H. C. Tayler, Esq., Judge of Beerbhoom, dated the 10th October 1882, affirming the decree of Baboo Manu Lall Chatterjee, Subordinate Judge of that district, dated the 7th June 1882.