* *P. C.* 1889 *February* 23, 27 *and April* 3.

HEMANGINI DASI (PLAINTIFF) *v.* KEDARNATH KUNDU CHOWDHRY (DEFENDANT).

[On appeal from the High Court at Calcutta.]

Hindu Law—Partition—Widow—Maintenance of Hindu widow where there are sons by different mothers, how chargeable.

When the Hindu law provides that a share shall be allotted to a woman on a partition, she takes it in lieu of, or by way of provision for, the maintenance for which the partitioned estate is already bound. According to Jimutavâhana, referred to by Jaganatha (Colebrooke), commenting on v. 89 of Chap. 2, Book V, it is a settled rule that a widow shall receive from sons, who were born of her, an equal share with them; and she cannot receive a share from the children of another wife. So long as the estate remains joint and undivided, the maintenance of widows is a charge on the whole; but where a partition takes place, among sons of different mothers, each widow is entitled to maintenance only out of the share or shares, allotted to the son or sons, of whom she is the mother.

Jeeomony Dossee v. *Attaram Ghose* (1) referred to and approved.

APPEAL from a decree (29th July 1886) of the High Court (2), reversing a decree (11th April 1885) of the Second Subordinate Judge of the Hughli District.

The question raised on this appeal related to the rights of a widow to maintenance, her deceased husband having left sons, of one of whom she was the mother, and a partition taking place among them.

The object of the suit was to establish against the whole estate of the deceased, Taracharan Kundu Chowdhry, who died in April 1865, the right of the plaintiff as his widow to maintenance; and when it was instituted on the 13th September 1884, there had been no partition among his sons, who were Hurrish Chunder, his son by the plaintiff, and two other sons by a wife who predeceased her husband, *viz.*, Kedernath and Annoda Pershad. The latter dying in 1882, left a widow and two minor sons, whose guardian was Kedarnath. The latter, the present respondent, represented when this suit was brought two-thirds of the paternal estate.

**Present:* LORD HOBHOUSE, LORD MACNAGHTEN and SIR R. COUCH.

(1) Macnaghten's Cons. H. L., p. 64.

(2) I. L. R., 13 Calc., 336.

On the 11th November 1884, after the institution of this suit, Hurrish Chunder brought two other suits against Kedarnath himself, and in his capacity of guardian of the wards, for an account and a partition of the joint estate of Taracharan deceased. Hemangini Dasi, the plaintiff in this suit, was stated in Hurrish Chunder's plaints to have been made a party by reason of her having instituted this suit; but no issue was recorded, or decided, as to her rights to maintenance; and, on the 20th February 1886, decrees in those two suits, declaring Hurrish Chunder's right to one-third of his father's estate generally, directed an account and partition.

In the present suit the widow claimed a decree for Rs. 300 for her maintenance, and Rs. 200 for religious observances, and that these sums might be declared charges on the whole estate of the late Taracharan. By the effect, however, of the decrees for partition obtained by Hurrish Chunder, whom his mother had made a defendant along with Kedarnath (though Hurrish Chunder did not defend or appeal), two principal questions arose in the present suit, which had been instituted before the other two suits. These questions were the following:—

The first of them was whether the Courts below, when dealing with the question as to the plaintiff's right as a widow to have suitable maintenance awarded to her out of the entire estate of her late husband, were justified in taking into their consideration a state of facts, *viz.*, the decrees above referred to for partition which did not exist till after the institution of the present suit. And the second question was, assuming the affirmative of the first, whether the effect of a partition between the plainitff's step-son and step-grandchildren on the one side, and her own and only son on the other, by which partition the latter took a separate third share, was or was not, by Hindu law, to discharge Kedarnath's and his wards' two-thirds shares from the plaintiff's claim for maintenance, limiting that claim to the share of Hurrish Chunder, her own son, both in matter of amount and as regards security.

As to the first of these questions, the Subordinate Judge was of opinion that, as the present suit was instituted before the partition proceedings, the latter would not affect the plaintiff's

1889

HEMANGINI DÁSI v. KEDARNATH KUNDU CHOWDHRY.

claim. And as to the second, he referred to the case, relied on by the respondent, of *Jeeomony Dossee* v. *Attaram Ghose*, cited at p. 64 of Sir F. Macnaghten's Considerations on Hindu Law, where a point is stated as to whether a mother (not a party to that suit) of an only son, her husband having left other sons was entitled on partition between her son and the other sons to a separate share; and it was determined that she was not so entitled, but must look to her son for maintenance. And the Subordinate Judge was of opinion that, as the mother referred to in that case was not a party to the suit, the question as to her right never properly rose in her absence, and the decision could not guide him.

He made a decree for what he considered to be a suitable maintenance (allowing no arrears or back maintenance) *viz.*, Rs. 180 by the year; and he directed that the appellant might realize two-thirds of this amount from the respondent, as representing two-thirds of the entire estate, and the remaining one-third from the share of her son, Hurrish Chunder.

Kedarnath appealed to the High Court, the plaintiff cross-appealing, because the decree gave her less than she claimed.

The High Court (Petheram, C. J., and Ghose, J.) did not maintain the judgment of the first Court, but, as to the first of the above questions, held that they were bound to take the subsequent partition into consideration, and to make such a decree as would be consistent with the true estate of the family, as it existed at the time they were dealing with it.

As to the second question, they held that, up to the time of the decree for partition defining the separate shares of the members of the family, the plaintiff was entitled to claim her maintenance against the whole estate; and subsequently thereto, to claim her maintenance only against the share allotted to her son: but that, as after a separation between the sons and Hemangini in February 1883, the latter had received her maintenance from her own son Hurrish Chunder alone, she had no claim for maintenance against her step-sons; with the result that so far as Kedarnath and his wards were concerned, the suit ought to be dismissed.

Accordingly, reversing the decree of the lower Court, the High Court dismissed the suit against him; and their decree declared

the plaintiff entitled, from the time of her separating from her son, Hurrish Chunder, to be paid by him out of that portion of the estate of his late father Tarachand Kundu now in his hands, Rs. 150 a month as maintenance. The judgment of the High Court is reported in I. L. R., 13 Calc., 336.

The plaintiff, having obtained a certificate that the suit fulfilled the requirements of s 596 of the Civil Procedure Code, appealed to the Queen in Council, on the ground that she had a right to maintenance out of the whole estate of her deceased husband, upon which the charge for her maintenance should continue, even after partition amongst her son and step-sons.

Mr. *R. V. Doyne* and Mr. *J. D. Mayne*, for the appellant, argued that the High Court was wrong in holding the effect of the partition to be to make the maintenance of this widow a charge only on her own son's share in the family estate, and proportionate only to the value of that share. They contended that, on the contrary, by the Hindu law, the widow's maintenance was regarded as a charge upon, and proportionate to, the whole estate of her deceased husband. It was in conformity with the family distribution made by that law that the widows should share, and share alike, in the whole estate. It had been rightly taken as beyond a doubt, in the High Court, that her maintenance, if she had been childless, would have been a charge on the whole estate, not affected by any partition. Also, a widow having sons but no step-sons, and having lived with them whilst the family continued joint, would be on a partition entitled to a share equal to that allotted to a son, and her rights might be shown by supposing a case of a widow having three sons of her own, there being three other sons not by her; in such a case her right would be to have a one-seventh share in the whole estate, and not merely a one-fourth of a half. There was no authority for a change being made in the widow's position, as a consequence of a partition which she could neither bring about nor avert. The right of a widow to her maintenance arose by marriage. It existed during the life of the husband, who could not free himself from it, and it attached upon the whole inheritance which he left, immediately upon his death.

Reference was made to Strange's Hindu Law, Edn. 1830, Vol.

1889

HEMANGINI DASI v. KEDARNATH KUNDU CHOWDHRI.

I, pp. 171, 291, Vol. II, Appendix to Chap. VIII, pp. 290, 307; Dayabhaga, Chap. III, sec. 1, para. 12, and sec. 2, paras. 29, 30, and 31; Macnaghten's Principles of Hindu Law, Vol. I, Chap. IV, of Partition, Vol. II, Chap. V; Jaganatha Colebrooke's Transl., Book V; Macnaghten's Cons. on Hindu Law, p. 60: *Jeeomony Dossee v. Attaram Ghose* (1); *Sheodyal Tewaree* v. *Jadunath Tewaree* (2); *Nittokissoree Dassee* v. *Jogendronath Mullick* (3); *Madhavkeshav Tilak* v. *Gangabai* (4).

It was in regard to the mother's rights over the father's estate that she had her claim to maintenance and to a share; and there was no authority for the opinion that the mother took a share of her son's share. It was incorrect to say that a widow's maintenance was a charge on a son's share; it being, on the contrary, a charge that took priority of any rights upon partition, that dated from her marriage, that affected the whole estate of her husband as a charge thereon; and a charge which like the husband's debts must be provided for. More than one text supported the view that it was a charge upon the whole estate.

Strange's Hindu Law, Vol. I, Chap. Partition; Vol II, Precedent at pp. 351, 352, 353, with notes by Ellis, Colebrooke, and Sutherland, at the latter page; West and Buhler, Hindu Law (Bombay) p. 791.

Her share, if she took a share, was a charge on the whole property in the hands of all the sons. She was an inchoate heir till she had issue, and with her original right to charge the whole estate she remained, that right being paramount to the son's right to partition. This was not, in effect, contravened by the decision in *Sorolah Dassee* v. *Bhoobun Mohun Neoghy* (5). The mother's right was to maintenance attaching over the whole estate; but, if she took a share in lieu, her right was to a share equal to that of her son, and this was the measure of it.

Mr. *T. H. Cowie, Q.C.*, and Mr. *J. H. A. Branson*, for the respondent, argued in support of the decision of the High Court. The question was completely covered by the authority of decided cases, according to which the plaintiff, on the partition of the family estate, was entitled to have her maintenance charged

(1) Macnaghten's Cons. H. L., p. 64.
(2) 9 W. R., 62.
(3) L. R., 5 I. A., 55, 56.
(4) I. L. R., 2 Bom., 639.
(5) I. L. R., 15 Calc., 292.

upon and paid out of the share of her own son only, she not being entitled to charge the shares of her step-sons, as well as that of her own son. Upon the partition, the widow ceased to belong to one family with the step-sons, and had no claim upon their shares in the divided estate.

Reference was made to Jaganatha's Digest (Colebrooke), Book V, Chap. II, para. 89, and a sentence in the Commentary thereon referring to the opinion of Jímútaváhana and the rest; Dayabhaga, Chap. III.

Sir F. W. Macnaghten, in his "Considerations" published in 1824, cited decisions of 1809, 1811 and 1813, (see p. 39; also pp. 48, 51, 60, 66 and 75) showing that this was the settled law in 1814.

In 1821, there was the decision in *Krisnanund Chowdree* v. *Rookeenee Dibia* (1); and in 1866, there was a case to the like effect in *Cally Churn Mullick* v. *Janova Dassee* (2) decided by Mr. Justice Phear.

Mr. *R. V. Doyne* replied.

Their Lordships' judgment was delivered on a subsequent day (3rd April) by

SIR R. COUCH.—The appellant is the widow of Taracharan Kundu, who died on the 19th of April 1865. He left one son, Hurrish Chunder, by the appellant, and two sons, Kedarnath (the respondent) and Annoda Pershad, by another wife who died before him. Annoda Pershad died in June 1882, leaving a will by which Kedarnath was appointed executor of his estate. The suit was brought on the 13th September 1884 by the appellant, against Kedarnath in his own right and as executor to the estate of Annoda Pershad, and against Hurrish Chunder, and the plaint prayed to have it held that the plaintiff was entitled to get Rs. 500 a month from the properties left by her husband, for the expenses of her religious acts and her maintenance, and that the Rs. 500 a month might be declared to be a charge upon the whole of his estate. It also prayed for a decree for Rs. 3,016-9-3 on account of maintenance for the past six months and one day. After the institution of the suit, and before the filing, on

(1) 3 Sel. Rep. (1827), p. 70. (2) 1 Ind. Jur., N.S., 284.

1889

HEMANGINI DASI v. KEDARNATH KUNDU CHOWDHRY

the 6th December 1884, of a written statement by Kedarnath, Hurrish Chunder, who attained his majority on the 3rd November 1882, instituted two suits against Kedarnath, and others, members of another branch of the family, who were co-sharers with Taracharan in different properties, for a partition of the joint family property. This was stated in the written statement of Kedarnath, and it was pleaded that, if the plaintiff was entitled to any maintenance, her claim to it would lie against her son, to be paid out of his share of the joint property which would be allotted to him after partition. On the 20th February 1886, decrees for partition were made in those suits. The judgment of the High Court, on appeal from the Subordinate Judge, was given on the 29th July 1886, and they held, contrary to the decision of the Subordinate Judge, that subsequently to the decree for partition, the plaintiff was entitled to maintenance only against the share allotted to her son; and as to the claim for past maintenance, which was for the period since the family had separated in food and worship, she having been maintained in the family of her son could not claim maintenance from her step-sons or their shares, though her son might possibly claim contribution. Accordingly they dismissed the suit as against Kedarnath.

The decision as to the arrears has not been questioned before their Lordships, and they entertain no doubt that the High Court was right in taking into consideration the decree for partition. The main question is one upon which there is no distinct text in the Hindu law books. So long as the estate left by Taracharan remained joint and undivided, the plaintiff was, no doubt, entitled to claim her maintenance out of the whole estate. Does that right continue to exist after partition, or is there substituted for it a right to maintenance out of her son's share? According to the Dayabhaga, Ch. III, sec. 1, vv. 12, 13, where there are many sons of one man by different mothers, but equal in number and alike by class, partition may be made by the allotment of shares to the mothers, and while the mother lives, the sons have not power to make a partition among themselves without her consent. In this case the mother seems to take on behalf of her sons. It would seem to follow

that, after such a partition, a mother's right to maintenance would be out of the share she took, and not out of shares taken by the other mothers.

When the Hindu law provides that a share shall be allotted to a woman on a partition, she takes it in lieu of or by way of provision for the maintenance for which the partitioned estate is already bound, and thus it is material to see in what way she takes a share. According to Jímútaváhana, it is a settled rule that a widow shall receive from sons who were born of her, an equal share with them, and she cannot receive a share from the children of another wife; therefore she can only receive her share from her own sons. (Colebrooke's Digest, Book V, Ch. II, v. 89, 3rd Ed., Vol. II, p. 255.) In Sir F. Macnaghten's Considerations on Hindu Law, p. 64, a case in the Supreme Court of *Jeeomony Dassee* v. *Attaram Ghose* is reported, which was a suit for partition, where a man died leaving two widows and three sons by one, and one son, Attaram, by Luchapriah the other; and it is said that it was understood and admitted that Luchapriah was not entitled to any separate property upon a partition made between her only son and his three half-brothers, and that she was to look to him for her maintenance.

The Subordinate Judge, in his judgment, said the question who was to give the maintenance never properly arose in that suit in the absence of Luchapriah, and if any such question was then decided, it was an *obiter dictum*. The question did arise between Attaram and his half-brothers, and if the contention of the present appellant, that the maintenance is a charge upon the estate and to be taken into account in making the partition, is right, the Court should have provided for it. The case appears to be a direct authority upon the question in this appeal. Then there is a case reported at p. 75, where a man had three sons by his first wife, two by his second, and two by his third, and all survived him. In a suit for partition, it was declared, in accordance with the authority in Colebrooke's Digest, before noticed, that the first wife was entitled to one-fourth of the three-seven parts of her sons, and the second wife to one-third of the two-seven parts of her sons. Nothing is said as to the third wife, one of whose sons had died, and she was his heir.

1889

HEMANGINI DASI v. KEDARNATH KUNDU CHOWDHRY.

The argument addressed to their Lordships for the appellant was that the maintenance is a charge on the estate, and like debts must be provided for previous to partition. But the analogy is not complete. The right of a widow to maintenance is founded on relationship, and differs from debts. On the death of the husband, his heirs take the whole estate; and if a mother on a partition among her sons takes a share, it is taken in lieu of maintenance. Where there are several groups of sons, the maintenance of their mothers must, so long as the estate remains joint, be a charge upon the whole estate; but when a partition is made, the law appears to be that their maintenance is distributed according to relationship, the sons of each mother being bound to maintain her. The step-sons are not under the same obligation.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court, and dismiss the appeal. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Barrow & Rogers.*

C. B.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Tottenham, Mr. Justice Trevelyan, Mr. Justice Ghose and Mr. Justice Beverley.

1889
July 15.

QUEEN-EMPRESS *v.* SARAT CHANDRA RAKHIT.*

Sessions Judge, Jurisdiction of—Sanction to prosecute by District Judge—Trial by same Judge as Sessions Judge—Criminal Procedure Code (Act X of 1882), ss. 195, 487—Penal Code, s. 196.

A Sessions Judge is not debarred by s. 487 of the Criminal Procedure Code from trying a person for an offence punishable under s. 196 of the Penal Code, when he has, as District Judge, given sanction for the prosecution under the provisions of s. 195 of the Code of Criminal Procedure.

* Full Bench on Criminal Appeal No. 327 of 1889, against the decision of F. H. Harding, Esq., Officiating Sessions Judge of Chittagong, dated the 11th March 1889.