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when partition was completed and was finally confirmed, the whole mahal was divided into separate *pattis*, and the plots in suit were taken out of the plaintiffs' *patti*, and one of them allotted to the defendants and the second to the *patti* of Jagannath. In place of these plots, plot $\frac{43}{1}$ was allotted to the plaintiffs' *patti*. This is a matter which is entirely within the jurisdiction of the Revenue Court, and by section 233(*k*) of Local Act III of 1901 no suit or other proceeding can be instituted in the Civil Court with respect to it. The case which has been relied upon by the lower appellate court is clearly distinguishable. In that case land belonging to a different mahal had been taken from the mahal and added to the mahal under partition. The case differs *toto coelo*. We decree the appeal, set aside the order of the court below, and restore the decree of the court of first instance with costs in all courts.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin.

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February 1.

DURGA DAT AND OTHERS (PLAINTIFFS) *v.* GITA AND OTHERS (DEFENDANTS).*

Hindu law—Hindu widow—Nature of estate held by two widows succeeding jointly—Power to partition.

Whatever limitations there may be upon the power of alienation of one of two Hindu widows succeeding as such to a life interest in their husband's estate, so long as the property remains undivided, there is nothing to prevent them effecting a partition of such estate. *Mussammat Sundar* v. *Mussammat Parbati* (1) and *Kanni Ammal* v. *Ammakannu Ammal* (2) followed. *Ram Piyari* v. *Mulchand* (3) distinguished. *Bhugwandeen Doobey* v. *Myna Baee* (4) and *Gajapathi Nilamani* v. *Gajapathi Radhamani* (5) referred to.

THE facts of this case were as follows:—

One Bidya Ram died leaving two widows, Gita and Mulo. The two widows jointly succeeded to the property left by Bidya Ram. Mulo made a gift of her share in the property to the plaintiffs, Durga Dat and his Brother Lachman Prasad, on 7th February, 1908. The plaintiffs made an application for mutation of

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* Second Appeal No. 160 of 1910 from a decree of B. J. Dalal, District Judge of Shahjahanpur, dated the 6th of December, 1909, reversing a decree of Gopal Das Mukerji, Munsif of Bisauli, dated the 28th of August, 1909.

(1) (1889) I. L. R., 16 I. A., 186; I. L. R. 12 All., 51.
(2) (1899) I. L. R., 23 Mad., 504.
(3) (1884) I. L. R., 7 All., 114.
(4) (1867) 11 Moo. I. A., 487.
(5) (1877) I. L. R., 1 Mad., 291.

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names but the application was dismissed on the objection of Musammat Gita. The plaintiffs thereupon brought this suit on the basis of the gift for a declaration of their right in the zamindari portion of the property and for possession of a moiety of a house by partition. The plea in defence, among other things, was that the transfer in favour of the plaintiff was void and inoperative. The Munsif found in favour of the plaintiffs, and decreed the suit. The defendants appealed to the District Judge, who, holding that a co-widow could not alienate the share even for her lifetime, dismissed the suit. The plaintiffs appealed.

Mr. *Abdul Raoof*, for the appellant, contended that a Hindu co-widow was perfectly competent to alienate her interest in her husband's property in whatever way she chose to enure at least for her lifetime. He submitted that the case of *Ram Piyari* v. *Mulchand* (1), relied upon by the lower appellate court, proceeded upon a misconception of the ruling of Their Lordships of the Privy Council in *Bhagwandeen Doobey* v. *Myna Baee* (2). Moreover, it was clearly distinguishable from the present case. In *Mussammat Sundar* v. *Mussammat Parbati* (3) the Privy Council clearly held that a partition like the one claimed in the present case could be allowed. He also relied on *Kanni Ammal* v. *Ammakannu Ammal* (4) and *Vadali Mamidigadu* v. *Kotipalli Ramayya* (5).

Babu *Sital Prasad Ghose*, for the respondents, submitted that the case in I. L. R., 7 All., 114, was absolutely indistinguishable from the present case. The case in 11 Moo. I. A., 487, was an authority for the proposition that a suit for partition like the present could not be entertained. In the case in 16 I. A., 186, Their Lordships of the Privy Council were dealing with a case in which the widows had nothing more than a possessory title, not with a case like the present in which the widows claimed to be in possession for their lives by rights of inheritance to their deceased husband. In a case like the present the estate was of the widows and was a joint estate, and neither of them could alienate her own share in the property without the consent of the

(1) (1884) I. L. R., 7 All., 114.
(2) (1867) 11 Moo. I. A., 487.
(3) (1889) L. R., 16 I. A., 186.
(4) (1899) I. L. R., 23 Mad., 504.
(5) (1902) I. L. R., 25 Mad., 334.

other. The Madras case relied upon by the other side could not be regarded as authority where there was an authority to the contrary of this Court in I. L. R., 7 All., 114.

Mr. *Abdul Raoof*, was not called upon to reply.

STANLEY, C. J., and GRIFFIN J.:—One Bidya Ram died, possessed of a 20 biswas mahal in mauza Sarah Bandlia, and also a house and two inclosures situated in the same village. He died about 30 years ago, leaving two widows, namely, Musammat Gita and Musammat Mulo, who thereupon became entitled to his property to the extent of Hindu widows' estates. Musammat Mulo on the 7th of February, 1908, executed a deed of gift of her entire share in the property in favour of the plaintiffs. The plaintiffs applied in the Revenue Court for mutation of names in respect of the zamindari property and also sought delivery of possession of a share in the house by partition. Musammat Gita objected to the mutation applied for and refused to deliver up possession of any portion of the house or to allow partition of it. It is stated and not denied that Musammat Gita also executed a deed of gift in favour of the defendant, Sri Ram, not merely of her share of the property but of the entire zamindari property and the house and its enclosures.

The suit out of which this appeal has arisen was instituted by the plaintiffs for the purpose of obtaining a declaration that, under the deed of gift to them of the 7th of February, 1908, they are entitled to 10 biswas out of the 20 biswas mahal in question and of having a partition of the house and the inclosures.

The court of first instance gave a decree to the plaintiffs, but upon appeal the learned District Judge set aside the decree of the court below and dismissed the plaintiffs' claim on the ground that Musammat Mula had no authority to part with her life interest in any portion of the property without the consent of her co-widow. The learned Judge in the judgement observes as follows:—

"The ruling in the case of *Ram Piyari* v. *Mul chand* (1) is supported by the authority of the Privy Council and has not so far been overruled. It may appear strange that a co-widow can't part with her life interest in a property held jointly with other co-widows, but such is the enunciation of the law. I do not believe that Mr. Mayne is correct in stating as a general rule of law that 'it

(1) (1884) I. L. R., 7 All., 114.

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has been held that a widow can alienate her life interest as against her co-widows just as she can against her reversioners.'"

Mr. Mayne's statement of the law on the subject is to be found in paragraph 554 of his work on Hindu Law, at page 752, 7th edition. It runs as follows:—

"Where several widows hold an estate jointly, or where one holds as manager for the others, each has a right to her proportionate share of the produce of the property, and of the benefits derivable from its enjoyment. And the widows may be placed in possession of separate portions of the property, either by agreement among themselves, or by decree of court, where from the nature of the property, or from the conduct of the co-widows, such a separate possession appears to be the only effectual mode of securing to each the full enjoyment of her rights. But no partition can be effected between them, whether by consent or by adverse decree, which would convert the joint estate into an estate in severalty, and put an end to the right of survivorship."

There are two objects which may be attained by partition. The one is to get rid of the right of survivorship in joint property, and the other to obtain a division of the joint property for the purpose of more convenient enjoyment of it without affecting any right of survivorship and without creating a right in the estate in severalty. It is clear that one of two widows cannot either by agreement, or by recourse to law, obtain a partition of joint property which will prejudice the right of survivorship of her co-widow or the rights of the reversioners after the death of the survivor of the widows. But the question before us is whether or not a donee of one of two widows can obtain from the court a decree for partition of joint property which will have effect during the lives of the widows. According to Mr. Mayne such a partition may be carried out.

The case of *Ram Piyari* v. *Mulchand* has been strenuously relied upon as a ruling which supports the contention of the respondents that there cannot be a partition between widows of a deceased Hindu which will be effectual during their joint lives. The facts of that case shortly stated are these:—One Badri Dayal was the owner of a house. He died, leaving two widows, Chandan Kunwar and Ram Piyari, and a daughter by Chandan Kunwar. On the death of Badri Dayal, his estate passed to his widows, *between whom there had been no partition.* On the 29th of November, 1892, Chandan Kunwar sold the house to Mulchand, but Mulchand did not succeed in obtaining

possession of the property and he, thereupon, on the 28th of May, 1883, sued his vendor and others for possession of it. He did not implead Musammat Ram Piyari, but she was made a defendant at her own request. The claim of Mulchand was to obtain possession of the entire house. MAHMOOD and DUTHOIT, JJ., held that one of the widows was not competent to *alienate the property* which she had so derived from her husband without the consent of the other even for purposes of legal necessity. The learned Judges quote several rulings of their Lordships of the Privy Council, and amongst others the ruling in *Bhagwan Deen Doobey* v. *Myna Baee* (1), as supporting the view taken by them. In that case Their Lordships stated the law as follows:—

"The estate of two widows who take their husband's property by inheritance is one estate. The right of survivorship is so strong that the survivor takes the whole property to the exclusion of daughters of the deceased widow. They are, therefore, in the strictest sense co-parceners, and between undivided co-parceners there can be no alienation by one without the consent of the other."

This passage from Their Lordship's judgement is quoted as authority for the proposition that between co-widows there cannot be partition, nor can one widow alienate her share for her life without the consent of her co-widow. It appears to us that what was intended by Their Lordships by the word alienation in the passage, which we have quoted, is alienation of the absolute interest in property and not the alienation of a widow's life estate. Referring to *Bhagwan Deen* v. *Myna Baee*, Their Lordships in the subsequent case of *Gajapathi Nilamani* v. *Gajapathi Radhamani* (2) carefully guard themselves against expressing any opinion as to the right of Hindu widows to partition property which has devolved upon them for life. They say:—

"Therefore, their Lordships, guarding themselves against being supposed to affirm by this order that either widow has power to dispose of the one-fourth share of the estate allotted to her, or that they have any right to a partition in the proper sense of the term, are not disposed to vary the form of the order under which one-fourth of the profits of the estate will go to each widow during their joint lives, their respective rights by survivorship and otherwise remaining unaffected."

It appears to us that the decision in *Ram Piyari* v. *Mulchand* is not an authority for the proposition which has been contended for by the learned vakil for the respondents.

(1) (1867) 11 Moo. I. A., 487. (2) (1877) I. L. R., 1 Mad., 291.

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Now turning to the case of *Mussammat Sundar* v. *Mussammat Parbati* (1), we find an express statement of Their Lordships of the Privy Council upon this question. In that case one Baldeo Sahai died, leaving two widows, and possessed of movable and immovable property. This property he had bequeathed to one Prem Sukh, his sister's son, whom, it is said, he had previously adopted and who died a minor shortly after the death of Baldeo Sahai. The widows took possession of the property of which they were so possessed, and it was contended that the other widow was not competent to maintain a suit for partition of the property of which they were so possessed, and it was contended that the other widow was not competent to maintain a suit for partition of the estate. In the course of the judgement of Their Lordships delivered by LORD WATSON, he observed that the only issue which it was necessary to consider was the sixth which was in these terms:—

"Has the plaintiff a right to have the property in dispute divided in equal shares as she claims?"

We may observe here that the learned Judges of this Court, PETHERAM, C. J. and BRODHURST, J., had held that she had no such right, over ruling the decision of the Subordinate Judge. In the course of the judgement, LORD WATSON remarked:—

"Their Lordships are at a loss to understand, at all events, to appreciate the grounds upon which the Chief Justice (PETHERAM, C. J.) endeavours to differentiate between the authorities which he cites, the import of which he correctly states, and the position of the parties to this action. Their (*i.e.*, the two widows') possession was lawfully obtained, in this sense, that it was not procured by force or fraud, but peaceably, no one interested opposing. In these circumstances it does not admit of doubt that they are entitled to maintain their possession against all comers except the heirs of Prem Sukh, or Baldeo Sahai, one or other of whom (it is unnecessary to say which) is the only person who can plead a preferable title. But neither of these possible claimants is in the field, and the widows have therefore each of them an estate or interest in respect of her possession which cannot be impaired by the circumstance that they may have ascribed their possession to one or more other titles which do not belong to them. *It is impossible to hold that a joint estate is not also partible;*....."

This appears to us to be a clear authority for the contention of the learned counsel for the appellants that Hindu widows who become entitled to an estate for their lives on the death of their husband are entitled to have a partition of their interests.

(1) (1889) L. R., 16 I. A. 186.

In the Madras High Court in the case of *Kanni Ammal* v. *Ammakannu Ammal* (1), the facts of which are substantially on all fours with the case before us, SHEPHARD and BENSON, JJ., held that partition may be enforced by one of two sisters. In that case a party purchased certain property from one of two sisters jointly entitled to their deceased father's estate under the Hindu law and resold it, whereupon the other daughter sued or a declaration that the sales were invalid as against her and prayed that the property might be restored to her and her sister, or that there might be a partition of it. It was held that she was entitled to partition. The learned Judges in their judgement, after quoting a number of authorities, observe :—

"Having regard to those authorities we must hold that, while one of two daughters cannot by any alienation alter the character of the daughter's estate so far as concerns the right of survivorship or the rights of reversioners, she may alienate her interest in the property or have that interest taken and sold in execution of a decree against her. She may also, subject to the same condition, demand a partition of the property."

This decision appears to us to be in accordance with the rulings of the Privy Council and to be consonant with Hindu law.

For the reasons we must allow the appeal. We observe that the court of first instance in its decree declared the plaintiff entitled to get profits to the extent of the share of Musammat Mulo. In their plaint they do not ask for mesne profits. It may be said that by this decree mesne profits were awarded, but such was evidently not intended. We therefore think it right to delete from the decree of the court of first instance the words "and that they are entitled to get profits to the extent of that share." We accordingly set aside the decree of the lower appellate court and restore the decree of the court of first instance with this modification, namely, that the words "and that they are entitled to get profits to the extent of that share" be deleted and a clause inserted to the effect that any partition of the house or zamindari property which may be carried out under this decree shall not operate so as to prejudice the reversionary heirs or the right of the surviving widow to enjoy the entire property during her life after the death of her co-widow. The rights of the plaintiffs shall only enure during the lifetime of their donor.

(1) (1889) I. L. R., 23 Mad., 504.

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We direct that the parties shall bear their own cost in the lower appellate court and that the appellants shall have their costs of this appeal.

Appeal decreed.

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February 6.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin.

MAHDI HUSAIN AND ANOTHER (DEFENDANTS) *v.* SUKH CHAND AND OTHERS (PLAINTIFFS)*

Money deposited "in usum jus habentis" improperly withdrawn by a person not entitled to it—Money had and received.

Where money is deposited in Court *in usum jus habentis*, and it is withdrawn by a person who is declared not to have any right thereto, the money so obtained may properly be held to be received for the use of the person entitled to it. *Litt* v. *Martindale* (1), referred to.

THE facts of this case are fully stated in the judgement of the court.

Mr. *G. W. Dillon* (with him Mr. *Abdul Raoof*), for the appellants.

Dr. *Satish Chandra Banerji* (with him Babu *Surendra Nath Sen*), for the respondents.

STANLEY, C. J. and GRIFFIN, J.:—This was a suit for a refund of Rs. 842 paid in satisfaction of a decree under the following circumstances. On the 31st of March, 1883, the plaintiffs mortgaged certain property in favour of one Kallu Mal. Kallu Mal died, leaving his widow, Musammat Gulab Dei and a minor son Har Saran. On the 4th of December, 1897, Musammat Gulab Dei, as mother and guardian of her infant son, transferred the mortgagee rights under the mortgage to Musammat Shibia. Subsequently, on the 18th of March, 1900, Har Saran, who was still a minor, purported to transfer the mortgagee rights in the mortgage to the defendants. The defendants, on the 21st of May, 1900, instituted a suit for sale on foot of the mortgage of 1883 and obtained a decree which was made absolute on the 14th of September, 1901. Musammat Shibia was not a party to these proceedings. On the 5th of November, 1900, Musammat Shibia brought a suit to enforce the mortgage of

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* Second Appeal No. 994 of 1909 from a decree of Louis Stuart, District Judge of Meerut, dated the 27th of July, 1909, confirming a decree of Hanuman Prasad, Third Additional Munsif of Meerut, dated the 21st of April, 1909.

(1) (1856) 18 C. B., 314.