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according to the value or amount of the subject matter in dispute. In the present case the respondent has valued the relief which he seeks in his cross-objection at Rs. 1,000. He must, therefore, pay this large fee when the appellant in the case can appeal on payment of only Rs. 10. It appears to me that this is perhaps due to an oversight at the time when Act V of 1908 was passed in not adding the words "or cross-objection" to article 17 of schedule II. I allow the respondent three weeks within which to make good the deficiency.

### APPELLATE CIVIL.

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*Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.*

RAMZAN (PLAINTIFF) v. RAM DAIYA (DEFENDANT),\*

*Hindu Law—Mitakshara—Joint Hindu family—Hindu widow—Widow's right of residence in joint family house—Effect of alienation during the life-time of widow's husband.*

When a right of residence or maintenance comes into existence in favour of the widow of a man who was lately a member of a joint Hindu family, she takes that right in the property as it stands at the time of her husband's death. She cannot set up her right of maintenance or residence as against alienations effected during the life-time of her husband. *Ajudhia Prasad v. Jasoda* (1) followed.

A widowed daughter-in-law is debarred from setting up the plea of the invalidity of [an alienation effected by] the father-in-law during her husband's life-time. *Sohni v. Mohan Kuar* (2) followed.

THE facts of this case were as follows :—

One Shankar and his son, Ram Charan, constituted a joint Hindu family. Shankar executed a simple mortgage of a dwelling house which was ancestral family property and in which, it appeared, the family resided. Some time after the mortgage Ram Charan died, leaving a widow, Musammam Ram Daiya. Thereafter the plaintiff-appellant acquired by private purchase from Shankar a portion of the house. He also acquired the remaining portion by purchase at auction sale in execution of the decree which was obtained on the mortgage aforesaid. On

\*Second Appeal No. 716 of 1916, from a decree of Ram Chandra Chaudhri, Officiating District Judge of Allahabad, dated the 2nd February, 1916, reversing a decree of Triloki Nath, Second Additional Munsif of Allahabad, dated the 5th of January, 1915.

(1) Weekly Notes, 1887, p. 279. (2) (1911) 9 A.L.J., 23.

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attempting to take possession of the house he was resisted by Musammat Ram Daiya. He brought a suit against her for possession, and the defence set up was that she had a right of residence in the family dwelling house in which she had been residing since her marriage and that the plaintiff was fully aware of the fact; that the mortgage was not executed for legal necessity and was not binding on her; nor was the decree passed on that mortgage, to which she was no party, binding on her. The court of first instance held that as the mortgage had been executed at a time when Ram Charan was alive, no right, available against the mortgagees, of residence in the house had become vested in the defendant; and on the authority of *Ajudhia Prasad v. Jasoda* (1) and *Sohni v. Mohan Kuer* (2); the court decreed the suit. The lower appellate court was of opinion that the criterion was whether the alienation was one which would have bound the husband of the defendant; and it remitted an issue as to whether the mortgage was for legal necessity or an antecedent debt and binding on the son. This issue was found in the negative, and the lower appellate court held that Musammat Ram Daiya's right of residence arose on her husband's death, there being at that time no valid hypothecation. The appeal was accordingly decreed. The plaintiff came to the High Court in second appeal.

Dr. S. M. Sulaiman, for the appellant :—

The issue remitted by the lower appellate court did not arise, because the widow of a predeceased son possesses no interest in the property and is not entitled to raise the question of legal necessity for the debt contracted by the father; *Sohni v. Mohan Kuer* (2). Even upon the issue as remitted the court went wrong, inasmuch as it placed the burden of proving the nature of the debt upon the plaintiff. For, if the defendant's husband had now been alive, the burden of proving that the debt was of such a nature as he would not be liable as a Hindu son to pay would be upon him, the property having already passed out of the family by auction sale in execution of the mortgage decree against the father; *Debi Singh v. Jia Ram* (3). And it would not be necessary for the creditor to show that the debt was for the benefit of the family; *Babu Singh, v. Bihari Lal* (4)

(1) Weekly Notes, 1887, p. 279.

(2) (1911) 9 A. L. J., 23.

(3) (1902) I. L. R., 26 All., 214.

(4) (1908) I. L. R., 80 All., 156.

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*Mata Din v. Gaya Din* (1). An auction-purchaser need not prove the existence of legal necessity or even that he made inquiries as to the existence of any legal necessity; *Trevelyan on Hindu Law*, p. 298. The mortgage having been made in the life-time of the defendant's husband, her right of residence as that of a Hindu widow had not then accrued. The widow never acquired as against the mortgagees an absolute right of residence. The alienation was made before such a right had vested in her and she cannot resist the plaintiff's claim; *Ajudhia Prasad v. Jasoda* (2). A clear distinction, forming the basis of the decision, was drawn in that case between cases where the mortgage or other alienation is made before, and cases where it is made after, the right of residence becomes vested in the widow. The defendant did not even allege, much less prove, that the house in suit was the one and only house for the dwelling of the family.

Munshi *Gokul Prasad*, for the respondent:—

According to the texts of Hindu law-givers it is the bounden duty of every owner of property and of his successors to provide for the maintenance of dependents of the family, and he or they cannot alienate the property in such a manner as to defeat the right of maintenance of the dependent members; *Vyavastha Chandrika*: Book I, Part I, p. 256; *Smriti Chandrika*: (Translated by T. K. Iyer), Edn. 1867, p. 158, Ch. XI, Sec. 1. By marriage a Hindu female becomes such a member of the family, and her maintenance is obligatory on the members of the family who are in possession of the family property. This was laid down by the Allahabad High Court in *Musammatt Lalti Kuar v. Ganga Bishan* (3), where a father-in-law in possession of the family property was held to be bound to provide maintenance to the widow of a predeceased son. Under the Hindu Law the right of dependent members to reside in the family dwelling-house and their right to get maintenance are co-extensive and stand on the same footing; so that the right of residence of Hindu females is a paramount right which cannot be defeated by alienation by the owner of the property, and the alienee cannot turn them out; *Katyayana*: 2 Colebrooke's Digest, p. 133; *Mitra*: Law

(1) (1909) I. L. R., 81 All., 599. (2) Weekly Notes, 1887, p. 279.

(3) (1875) 7 N. W. P., H. O. Rep., 261

Relating to Hindu Widow, Edn. 1881, p. 466 ; *Mayne* : Hindu Law, 8th Edn., p. 644 ; *Ghose* : Hindu Law ; 3rd Edn., Vol I, p. 319 ; *Mangala Debi v. Dina Nath Bose* (1), *Jamna v. Machul Sahu* (2), *Becha v. Mothina* (3).

This broad rule has, however, been qualified by case-law to this extent that an alienation made for the purposes of averting a calamity or for legal necessity will override the rights of maintenance and residence of the female members, just as it will override the proprietary right of all the co-parceners themselves ; *Ramanadan v. Rangammal* (4). The existence of legal necessity for the alienation being the criterion for deciding whether the right of residence of the female members is affected by the alienation, the lower appellate court was right in remitting the issue it did. And the *onus* was rightly laid on the plaintiff, for it is upon a person dealing with a qualified owner to prove the existence of legal necessity ; *Sahu Ram Chandra v. Bhup Singh* (5).

The auction purchaser who derives title from the mortgagee has no higher rights than the latter. Further, the facts of the present case show that the auction purchaser was not a *bond fide* purchaser without notice, but was aware of the widow's right of residence in the house he was purchasing, and this apart from the rule laid down in the case of *Ramanadan v. Rangammal* (4) that in such cases the purchaser may always be presumed to have had notice. The finding on the issue being that there was no legal necessity for the mortgage the right of residence of the defendant is paramount over the right of the auction-purchaser and the defendant cannot be ousted by him ; *Gauri v. Chandramani* (6). The case of *Ajradhia Prasad v. Jasoda* (7) relied on by the appellant is distinguishable. There the alienation was made by all the members of the family, so that no question of legal necessity could arise, while here the mortgage was made by the father alone in the life-time of his son. Should that case, however, be regarded as laying down the broad proposition that the right of residence does not vest in a female member of a joint Hindu

(1) (1869) 4 B. L. R., 72. (O. C. J.)

(4) (1888) I. L. R., 12 Mad., 260.

(2) (1879) I. L. R., 2 All., 315.

(5) (1917) I. L. R., 39 All., 437.

(3) (1900) I. L. R., 23 All., 86.

(6) (1876) I. L. R., 1 All., 262.

(7) Weekly Notes, 1887, p. 279.

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family till she becomes a widow, the case would be opposed to the texts and authorities. From what has already been submitted it follows that the right of residence is not a right peculiar to a widow but is one which attaches to every Hindu female from the moment she becomes a member of the family by her marriage. This right is not in any way enlarged by her becoming a widow. The only point of difference between the right of a wife and that of a widow in the matters of maintenance and residence is that a wife has an additional right, available against her husband alone, of getting maintenance and residence irrespective of his possession of any property. Her right against the other co-parceners and the widow's right against the surviving co-parceners are equal and are dependent on such co-parceners being in possession of family property; *Surampalli Bangaramma v. Surampalli Brambaze* (1). The point decided in *Sohni v. Mohan Kuer* (2), relied on by the appellant, does not touch the facts of the present case. There the widow was setting up a right of ownership in herself through her husband, and it was rightly held that, her husband's share having lapsed by survivorship to the other co-parceners, there was no interest in the property outstanding which the widow in right of her husband could seek to protect by raising the plea of absence of legal necessity. She was not claiming a right of residence as a Hindu widow. In the present case the defendant is not seeking to claim for herself any right derived from her husband in the property. She is not claiming *through* him; she is claiming an independent right which the Hindu Law confers on her as a Hindu female, and which she could have enforced *against* her husband.

Dr. S. M. Sulaiman, was not heard in reply.

MUHAMMAD RAFIQ and PIGGOTT, JJ. :—This second appeal by the plaintiff in a suit for ejectment arises under the following circumstances :—

There was a joint Hindu family consisting of a father, Shankar, and his son, Ram Charan. Shankar mortgaged a certain house which formed part of the ancestral family property, and in which it would seem that he and his son were residing, although it is not clear that this point has been specifically considered by the

(1) (1908) I. L. R., 31 Mad., 388. (2) (1911) 9 A.L.J., 23

courts below, by a simple mortgage in favour of one Musammat Dhan Devi. Ram Charan died, after this mortgage had been contracted, leaving him surviving a widow, Ram Daiya, who is the defendant respondent in this case. Shankar subsequently sold a  $\frac{2}{3}$  share of the house in question to the plaintiff, Ramzan. The latter induced the mortgagee to accept redemption of this share on payment of  $\frac{2}{3}$  of the mortgage debt. After this Musammat Dhan Devi, the mortgagee, brought a suit for sale against Shankar, who had now become by survivorship the sole owner of the entire house. She obtained a decree for the sale of the remaining  $\frac{1}{3}$  share of the house in satisfaction of  $\frac{1}{3}$  of the original mortgage debt. This decree the plaintiff, Ramzan, who had already become the owner of the remaining  $\frac{2}{3}$  share of the house, purchased from Musammat Dhan Devi. He took out execution, brought this  $\frac{1}{3}$  share to sale and purchased it himself. On attempting to take possession of what he had purchased he was resisted by the defendant Musammat Ram Daiya. Hence this present suit, in which the plaintiff claims actual possession of the share of the house purchased by him at the auction, along with an injunction restraining the defendant from interfering with his possession. The suit has been resisted simply on the ground of defendant's right of residence in the ancestral family house as a Hindu widow. The first court overruled this contention and decreed the claim. The learned District Judge held that the question of the defendant's right of residence depended on the question whether or not the original alienation, that is to say, the mortgage by Shankar of the entire house, had been made for legal necessity. He remitted an issue on this point, and on receiving a finding that legal necessity was not proved, he has dismissed the plaintiff's suit altogether. The plaintiff comes to this Court in second appeal. The decision of the lower appellate court is certainly unfair to the plaintiff to some extent, as the latter was at least entitled to formal possession subject to the alleged right of residence of the defendant for her life-time. On the decree of the lower appellate court as it stands, it is difficult to see how the plaintiff can ever enforce his proprietary rights hereafter. We are asked, however, by the plaintiff to consider the question whether his suit ought not to have been decreed as brought. In our opinion it ought to have

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been decreed. We have been referred to a great deal of case-law on the subject of a Hindu widow's right of residence and maintenance. It is unnecessary to go into the principles laid down by these decisions. The point in the present case is that, at the time of the original alienation from which the present plaintiff eventually derives his title, that is to say, the mortgage by Shankar of the entire house, the present defendant was not a Hindu widow. She was the wife of Ram Charan and was living with him and with her father-in-law. The decision of this Court in the case of *Ajwdhia Prasad v. Jasoda* (1) shows the distinction to be drawn between an alienation effected to the prejudice of existing rights of maintenance and residence in favour of widowed ladies depending upon a joint family, and an alienation effected by the male members of a family in connection with which a right of residence or maintenance is set up by a lady who was bound at the time by the action of her husband and who claims to have become entitled to residence or maintenance, since the date of the alienation, by reason of her husband's death. Some of the arguments addressed to us on behalf of the respondent in this case have really called in question the correctness of this decision. We can only say that we are not prepared to re-consider it. It seems reasonable to say that, when a right of residence or maintenance comes into existence in favour of the widow of a man who was lately a member of a joint undivided Hindu family, she takes that right in the property as it stands at the time of her husband's death. She cannot set up her right of maintenance or residence as against alienations effected during the life-time of her husband. Now what the learned District Judge has called upon the plaintiff to prove in the present case is that the mortgage effected by Shankar was binding upon his son Ram Charan. This is precisely the plea which a Bench of this Court refused to allow a widowed daughter-in-law, in the position of the present defendant, to set up in the case *Sohni v. Mohan Kuer* (2). If the defendant cannot plead that the alienation made by Shankar did not bind Ram Charan, that is to say, did not affect the rights of Ram Charan in the house in question, then it is impossible to see why she should not be just as much bound by the alienation as she

would have been if Ram Charan had concurred in making it. The issue remitted by the learned Judge raised a question which might have been litigated upon an objection taken by Ram Charan himself, but which this Court refused to allow to be taken by a person in the position of Ram Charan's widow. We must hold, therefore, that the principle of the decision in *Ajudhia Prasad v. Jasoda* (1) governs the present case, and, as we are not prepared to dissent from it or re-consider it we must allow this appeal. We do so accordingly. We set aside the decree of the lower appellate court and restore that of the court of first instance, with costs throughout.

*Appeal allowed.*

## APPELLATE CRIMINAL.

*Before Justice Sir Pramada Charan Banerji.*

EMPEROR v. CHANDAN SINGH AND OTHERS\*.

Act No. XLV of 1860 (*Indian Penal Code*), sections 304 and 325—*Assault committed by three persons armed with lathis—Intention—Culpable homicide—Grievous hurt.*

Three persons attacked a fourth with *lathis* and death ensued through a fracture of the skull of the person so attacked. There was, however, no evidence to show that the common intention of the assailants was to cause death or which of them actually struck the blow which fractured the skull of the deceased.

*Held* that the offence of which the assailants were guilty was that of causing grievous hurt and not that of culpable homicide not amounting to murder. *Emperor v. Bholu Singh* (2) followed.

THE facts of this case were as follows :—

One Girdhar Singh was attacked when seated at his *chaupal* by three persons, who had enmity with him, armed with *lathis*. These persons knocked down Girdhar Singh, as he was attempting to retreat into his house, which adjoined the *chaupal*, and inflicted various injuries. The skull was extensively fractured and Girdhar Singh died in consequence the same evening. It was not, however, clear from the evidence which of the assailants was actually responsible for the fracture of the skull. The

\* Criminal Appeal No. 668 of 1917, from an order of W. F. Kirton, Sessions Judge of Aligarh, dated the 23rd of July, 1917.

(1) *Weekly Notes*, 1897, p. 279.

(2) (1907) I. C. R., 39 All., 262.

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