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sentence, the appellate court cannot be held to have exercised its discretion unwarrantably in directing the applicants to furnish security. For these reasons I dismiss the application.

Application rejected.

FULL BENCH.

1920

December, 20.

Before Justice Sir Pramada Charan Banerji, Mr. Justice Tudball and Mr. Justice Gokul Prasad.

SRI RAM JANKIJI BIRAJMAN MANDIR (DEFENDANT) *v.* JAGDAMBA PRASAD (PLAINTIFF).*

Hindu law—Hindu widow—Widow's estate—Property acquired by widow without the aid of the husband's estate and without detriment to it—Widow's power of disposition over property so acquired—Widow not trustee for reversioner—Act No. II of 1882 *(Indian Trusts Act), section* 90.

A Hindu widow in possession as such of her husband's estate acquired certain property through the exercise of a right of pre-emption which she had in that capacity. The pre-emptive price was not, however, paid from the husband's estate, but was raised by means of a mortgage on part of the pre-empted property.

Held that the property thus acquired did not, in the absence of evidence of any intention on the part of the widow that it should do so, form part of the husband's estate, but it remained the separate property of the widow.

Held also that section 90 of the Indian Trusts Act, 1882, had no application to the facts of the case.

IN this case the widow of a separated Hindu, being in possession as such widow of her husband's estate, purchased, in the exercise of a right of pre-emption possessed by her in virtue of the possession of her husband's estate, certain property which had belonged to one of the reversioners of the estate. The widow, however, did not pay the pre-emptive price out of money derived from her husband's estate, but she raised the necessary funds by mortgaging part of the pre-empted property. She held the property so acquired till her death, when she made an endowment of it by will in favour of an idol. After the death of the widow one of the husband's reversioners brought a suit to recover the pre-empted property upon the ground that it formed

* Second Appeal No. 1288 of 1917 from a decree of E. H. Ashworth, District Judge of Cawnpore, dated the 13th of November, 1917, reversing a decree of Ladli Prasad, Subordinate Judge of Cawnpore, dated the 31st of May, 1916.

part of the husband's estate, and the widow had no power to deal with it by will. The court of first instance dismissed the suit, holding that the widow had in fact made a will in favour of the idol, and was competent to make it. Upon appeal, the lower appellate court reversed the decision of the court of first instance upon the sole ground that the will, if executed, could have no operation, inasmuch as the property pre-empted by the widow must be deemed to be part of the estate of her husband. The defendant appealed to the High Court.

Pandit *Rama Kant Malaviya* (with the Hon'ble Dr. *Tej Bahadur Sapru*), for the appellant.

Mr. *M. L. Agarwala* (with him Pandit *Baldeo Ram Dave* and Munshi *Haribans Sahai*), for the respondent.

BANERJI, TUDBALL and GOKUL PRASAD, JJ. :—The question which we have to consider in this case is whether a Hindu widow in possession of her husband's estate, who acquires property without the aid of the estate or without detriment to the estate, can make a disposition of that property by will. This question does not seem to us to involve any point of great difficulty. What happened in the present case was this. A Hindu widow, Musammat Kaunsilya, was in possession of her husband's estate as his heir. The reversioners to the estate had executed a mortgage of their own property and their mortgagee obtained a decree against them for foreclosure and thus acquired the property. Thereupon Musammat Kaunsilya brought a suit against him for pre-emption and obtained a decree. She paid the amount of the pre-emption money by raising a loan by mortgaging a portion of the property pre-empted and subsequently discharged the loan by selling a portion of that property. It is said that as regards the remainder of the property she made an endowment in favour of an idol, to take effect after her death and that she executed a will for that purpose. The present suit was brought by a person who claimed to be the reversioner of her husband, to set aside the transfer on the ground that she was not competent to devise the property by will. She has died, and the reversioner claims to have succeeded to the property. The court of first instance dismissed the suit, holding that the widow had in fact made a will in favour of the idol and was competent

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SRI RAM JANKIJI BIRAJMAN MANDIR v. JAGDAMBA PRASAD.

to make it. Upon appeal, the lower appellate court reversed the decision of the court of first instance on the sole ground that the will, if executed, could have no operation, inasmuch as the property pre-empted by the widow must be deemed to be a part of the estate of her husband. We are of opinion that this view of the court below is erroneous. The widow was in possession of her husband's estate as such. If she had purchased this property out of the savings of the estate and had never intended to make it a portion of her husband's estate, there can be no doubt that the reversioner could not challenge a transfer of that property made by her. In the present instance she purchased the property not with the help of her husband's estate, in the sense of raising money on the security of that estate or out of the income of the estate, but she raised the money by borrowing it on the security of the property purchased. The only difference between the case of an ordinary purchase and the present case is that the property was acquired by right of pre-emption, but the right of pre-emption alone could not have entitled her to the property unless she was in a position to pay the pre-emption money. Therefore, in our opinion the payment of the pre-emption money was the essential condition upon which she acquired the property. It is true that she could pre-empt the property because she was in possession of her husband's estate, but that does not, in our opinion, make the property acquired by her a part of that estate. She could not be treated as a trustee for her husband or as a trustee for the reversioner. It was a mistake, in our opinion, to think that she was a mere tenant for life. Her position as regards her husband's estate was that of an owner with limited rights. Those rights merely restricted her power of transferring the estate but she was entitled to pre-empt the property inasmuch as she was to all intents and purposes a co-sharer in the village, a portion of which was sold. On behalf of the respondents reference was made to section 90 of the Trusts Act (No. II of 1882). In our opinion that section has no application to the present case. The words "person interested" in that section cannot be held to apply to the case of a Hindu reversioner. Such a reversioner has no vested interest in the estate which is

in the possession of a widow and the property acquired by her cannot be claimed by the reversioner during the life-time of the widow; so that the condition of things contemplated by section 90 could have no application to the case of an acquisition of property by the widow and to a Hindu reversioner. In our opinion the mere fact of the widow being in possession of her husband's estate could not in any sense justify the inference that the property purchased by her without any detriment to the estate or without the help of the estate itself could be treated as a part of the estate, and in this sense we think the view of the lower appellate court was incorrect. We, therefore, answer the question referred to us in favour of the appellant. Both parties are agreed that there are other questions which arise in the case and which have to be determined by the lower appellate court, and both of them are also agreed that we should deal with the case and pass final orders in it so far as this appeal is concerned. We accordingly allow the appeal, set aside the decree of the court below and remand the case to that court under order XLI, rule 23, of the Code of Civil Procedure with directions to re-admit it under its original number in the register and dispose of the other points according to law. Costs here and hitherto will be costs in the cause.

Appeal allowed and cause remanded.

APPELLATE CIVIL.

1920

December 21.

Before Mr. Justice Piggott and Mr. Justice Walsh.

MASIH-UN-NISSA BIBI AND OTHERS (DEFENDANTS) *v.* KANIZ SUGHRA BIBI (PLAINTIFF).*

Civil Procedure Code, 1908, *section* 105 (2); *order XLI, rules* 23 *and* 25—*Procedure—Appeal—Distinction between an order under rule* 23 *and an order under rule* 25.

Where in the course of an appeal a Judge or a Bench has made an order under order XLI, rule 25, of the Code of Civil Procedure, 1908, referring issues for trial by the lower court, it is open to the Judge or Bench before whom the appeal ultimately comes for disposal to consider whether such an order was necessary, and, if it is found that it was not necessary, the order and the subsequent findings may be ignored.

*First Appeal No. 91 of 1920 from an order of Muhammad Shafi, Subordinate Judge of Saharampur, dated the 8th of March, 1920.