

1880

7 BAHAN
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the decision above mentioned, the first ground of appeal must be allowed to be valid.

But as regards the merits of the case, I am of opinion that s. 44 of the Rent Act implicitly authorizes tenants of all classes to construct wells for the improvement of the land held by them, and it is not pretended that the well constructed by the defendant is not calculated to benefit the land. The plaintiff's suit therefore fails and has been properly dismissed. I would dismiss the appeal with costs.

STUART, C. J.—Mr. Justice Pearson has prepared a judgment in this reference which I have perused and considered, and in which I entirely concur, both as regards the order he proposes and the reasons he assigns for that conclusion.

Appeal dismissed.

1880
July 28.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

BILASO (PLAINTIFF) v. DINA NATH AND OTHERS (DEFENDANTS).*

Hindu Law—Mitakshara—Joint undivided property—Widow's rights—Partition.

A Hindu widow, entitled by the Mitakshara Law to a proportionate share with sons upon partition of the family estate, can claim such share, not only *quoad* the sons, but as against an auction-purchaser at the sale in the execution of a decree of the right, title, and interest of one of the sons in such estate before voluntary partition.

A certain dwelling-house was originally the ancestral property of one Beni and his brother Udai. Beni died leaving issue two sons, the defendants Lali Mal and Puran Mal, and a widow, the plaintiff, the mother of the defendants Lali Mal and Puran Mal. After the death of Beni and of Udai the share of the heir of Udai of the house, *viz.*, one moiety, was purchased by the defendant Dina Nath, who obtained a partition of this share. Subsequently the defendant Dina Nath purchased the rights and interests of the defendant Puran Mal in his father's moiety of the house in the

* Second appeal, No. 165 of 1880, from a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 5th December, 1879, modifying a decree of Pandit Indar Narain, Munsif of the city of Bareilly, dated the 28th August, 1879.

execution of a decree. In June, 1879, the defendant Lali Mal obtained a decree against the defendants Dina Nath and Puran Mal for the partition of one-fourth of the house. The plaintiff now claimed the establishment of her right to, and partition of, one-third of her husband's moiety of the house, as against the defendant Dina Nath and the defendants Lali Mal and Puran Mal, alleging that she and her sons according to Hindu law shared equally. The defendant Dina Nath set up as a defence to the suit that a Hindu mother might claim her share of the ancestral family property upon the sons dividing it amongst themselves, but that she could not enforce a partition of the property as against the auction-purchaser of the rights and interests of the sons. The Court of first instance disallowed this defence, and gave the plaintiff a decree. On appeal by the defendant Dina Nath, the lower appellate Court dismissed the suit, holding that the plaintiff might claim maintenance or the right to reside in the house, but could not enforce a partition against an auction-purchaser. On appeal by the plaintiff to the High Court the Division Bench before which the appeal came for hearing (STUART, C. J., and STRAIGHT, J.,) referred the following question to the Full Bench, viz., "Whether a Hindu widow, entitled by the Mitakshara to a proportionate share with sons upon partition can claim such share, not only *quoad* the sons, but as against an auction-purchaser at a sale in execution of the right, title, and interest of one of the sons, before voluntary partition," the order of reference being as follows :

ORDER OF REFERENCE.—The question raised by this appeal is whether a Hindu widow, entitled by the Mitakshara to a proportionate share with sons upon partition, can claim such share, not only *quoad* the sons, but as against an auction-purchaser at a sale in execution of the right, title, and interest of one of the sons before voluntary partition. The point is one of serious complexity and difficulty, and having regard to its importance and some conflicting decisions, we refer it to the Full Bench.

Munshi Hanuman Prasad, for the appellant.

The Junior Government Pleader (Babu Dwarka Nath Banarji),
for the respondents.

The Full Bench delivered the following

BILASO
v.
NATH.

JUDGMENT.—The plaintiff in this case, Bilaso, is a Hindu widow, the mother of two sons, Puran Mal and Lali Mal, who were members of an undivided family, and before partition the right, title, and interest of one son, Puran Mal, in a house forming the ancestral property were sold in execution of a decree and purchased by one Dina Nath, and subsequently the other son, Lali Mal, obtained a decree against the auction-purchaser entitling him to half the house. Bilaso has brought a suit to recover from the auction-purchaser and her son Lali Mal her share on partition of the property. The question referred to us is whether a Hindu widow, entitled by the Mitakshara to a proportionate share with sons upon partition, can claim such share, not only *quoad* the sons, but as against an auction-purchaser at a sale in execution of the right, title, and interest of one of the sons before voluntary partition.

In an undivided family consisting of mother and sons, the mother is only entitled to maintenance so long as the family remains undivided in estate; but in case a partition is made the law gives her a right to an assignment of a share in the property left by her husband equal to a son's share. The right the mother has is a right to participate in the property left by her husband, and it has been described as a latent and inchoate right of participation which becomes effective when separation takes place. Such being the right of the mother, and the son's obligation towards her in respect of the assignment of a specific share of the property on partition, we have to see what position the purchaser in execution of the right, title, and interest of a member of an undivided family takes.

In *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (1) their Lordships of the Privy Council, referring to a co-parcener in an undivided family, observe: "His rights may pass to strangers, either by alienation, or, as in case of creditors, by operation of law, but in all cases those who came in, in the place of the original co-sharer, by inheritance, assignment, or operation of law, can take only his rights as they stand, including of course a right to call for a partition (2)." And more recently in *Deendyal Lal*

(1) 6 Moo. I. A., 526.

(2) At p. 539.

v. Jugdeep Narain Singh (1) it was held that the right of the purchaser at the execution-sale is limited to that of compelling the partition which his debtor might have compelled, had he been so minded before the alienation of his share took place. The auction-purchaser of the undivided interest of the son thus stands strictly in the place of the latter and is in no better position, and is bound by obligations which bound his vendor, and the mother's right to an assignment of a share out of the whole joint property will accrue on a partition being made, and is of a character which cannot be defeated by the purchaser. It may be noticed that in the case of *Deendyal Lal v. Jugdeep Narain Singh* (1) already referred to, their Lordships expressly refrained from making any declaration as to the extent of the judgment-debtor's undivided share acquired by the auction-purchaser, as they observe if a partition takes place his wife may be entitled to a share. The answer to the reference should be in the affirmative.

1859)

 BILASO
 &
 DINA NATHI

 PRIVY COUNCIL.

SOPHIA ORDE AND ANOTHER (PLAINTIFFS) *v.* ALEXANDER SKINNER
 (DEFENDANT).

P. C.*
 1860
 June 10 & 11

[On appeal from the High Court for the North-Western Provinces at Allahabad.]

Act VIII of 1859 (Civil Procedure Code), s. 5—What constitutes “dwelling” within the meaning of that section—Commission, under a will, payable to manager of joint estate.

A testator bequeathed the income of his “altamgha,” “zamindári,” and “thikadári lands” situate in the districts of Delhi, Hissar, and Bulandshahr, to his five sons in equal shares, and to their issue; directing that one of the sharers should manage the estate, accounting yearly to the others, and receiving ten per cent. per annum. The lands described as “altamgha” were in the Bulandshahr district, within the local limits of the jurisdiction of the Civil Court of Meerut; and on them an establishment was maintained at the expense of the estate. At Hansi, in Hissar, there was also a residence belonging to the estate, and another at Delhi. The will directed that the brothers might, if they liked, live together at Bilaspur, and build houses “with mutual consent in the altamgha and zamindári;” also that certain memorials of the testator were to be retained by the manager at Bilaspur.

* Present: SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. F. COLLIER.

(1) L. L. R., 3 Calc., 198.