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and determined according to law. There will be no order for costs.

KHAJA MOHAMAD NOOR, J.—I agree.

Reference rejected.

WORT, J.

APPELLATE CIVIL.

Before Jwala Prasad and James, JJ.

RAM SURAT MAHTON

v.

HITANANDAN JHA.*

Hindu Law—Mitakshara School—widow, power of, to alienate husband's estate—limitations—legal necessity or husband's directions, proof of, whether necessary for justifying alienations for charitable and religious purposes—portion of husband's estate, mortgage of, for the excavation and consecration of tank, whether is valid.

A Hindu widow takes the estate of her husband solely for the good of his soul, and she has power to spend the income of the estate and to alienate it, provided it is done for the good of her husband's soul. In order to justify an alienation for religious and charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, the widow is not bound to prove legal necessity or any express direction by her deceased husband.

Where, therefore, a widow, governed by the Matakshara school of Hindu Law mortgaged 1 bigha 4 cottahs of land out of her husband's estate which comprised of 12 bighas of land for the excavation and consecration of a tank, and there was no recital in the bond that the excavation was in pursuance of the directions of her husband or for his spiritual benefit, *held*, that the alienation was valid.

* Appeal from Appellate Decree no. 609 of 1929, from a decision of F. E. Madan, Esq., I.C.S., District Judge of Muzaffarpur, dated the 11th January, 1929, setting aside a decision of Babu Baidyanath Das, Munsif of Sitamarhi, dated the 8th September, 1928.

Khub Lal Singh v. Ajodhya Misser(1), *Ram Sumaran Prasad v. Gobind Das*(2) and *Collector of Masulipatam v. Cavalry Vencata Narrainapah*(3), followed.

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Appeal by the defendant 2nd party.

The facts of the case material to this report are stated in the judgment of Jwala Prasad, J.

Manohar Lal and *A. K. Mitra*, for the appellant.

A. B. Mukherji and *Bhagwan Prasad*, for the respondents.

JWALA PRASAD, J.—This is an appeal by the defendant 2nd party against the decision of the District Judge of Muzaffarpur, dated the 11th January, 1929, decreeing the plaintiffs' suit.

The plaintiffs are reversionary heirs of one Ramji Jha. Defendant no. 1 Musammat Rambati Ojhain is the widow of Ramji Jha. Ramji Jha died about the year 1321 (1914). Defendant no. 1, his widow, executed a *rehannama* (Exhibit A2) on the 7th of March, 1919, in favour of defendant 2nd party in respect of a loan of Rs. 250 taken for the purpose of excavating a tank. The property mortgaged was 1 bigha 4 cottahs of *brit lakhiraj* land. On the 23rd of January 1923, she executed another *rehan* bond (Exhibit A3) in favour of the defendant 2nd party, taking a further loan of Rs. 750. She mortgaged the same property, 1 bigha 4 cottahs, which was mortgaged in the first bond, in respect of the entire loan of Rs. 1,000. The purpose of the further loan of Rs. 750 was stated in the bond to be to perform the consecration ceremony of the tank. The plaintiffs seek to obtain a declaration that the mortgage bond of 23rd January, 1923, executed by the Musammat was

"without any legal necessity whatsoever..... and cannot be binding against the plaintiffs or any future heirs after the death of defendant no. 1."

(1) (1915) I. L. R. 43 Cal. 574.

(2) (1926) 7 Pat. L. T. 821.

(3) (1861) 8 Moo. I. A. 529.

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Musammat Rambati Ojhain defendant no. 1 did not enter appearance, and the suit was contested only by defendant 2nd party, Ram Surat Mahton, the mortgagee. He supports the alienation made by the widow upon the ground that the excavation of the tank and its consecration were valid and legal necessities of the widow as conducive to the spiritual bliss of her husband.

The Munsif, who tried the case, upheld the contention of the defendant 2nd party, and dismissed the suit.

On appeal the learned District Judge reversed the decision of the Munsif and decreed the plaintiffs' suit, holding that it was not proved that the widow was under any legal obligation to excavate the tank, or that she had any necessity to borrow or that a bona fide enquiry was made. This finding of the Court below is challenged in second appeal and it is urged that the finding is illegal and has not been arrived at upon an appreciation of the evidence in the case and in fact the evidence has been misread and misconstrued by the Court below.

It is undisputed that the lady actually took the loan in question from defendant 2nd party and spent it on the excavation of the tank and its consecration. No doubt there is no recital in any of the two bonds (Exhibits A2 and A3) of 1923 to the effect that the tank in question was excavated under the direction given by the husband of the widow before his death, or that it was excavated for the spiritual benefit of the husband. But the evidence in the case, notably on behalf of the plaintiffs, clearly shows that the digging of the tank in question was in the contemplation of the husband of the widow and that, as a matter of fact, the tank was dug in accordance with his wishes. The learned District Judge has referred to the evidence of the plaintiffs' witnesses nos. 4 and 6 on this point; but to my mind he has misconstrued the evidence as not definitely showing that there was

a direction by the husband to have the tank in question excavated. As regards witness no. 6 the learned Judge says that

" P. W. 6 states that his widow did so in accordance with his wishes,"

but he interprets it as not conveying the meaning that there was an express direction by the husband and he observes :

" P. W. 6 explains generally that by doing such works one goes to heaven."

The evidence of that witness is simple and runs as follows :—

" According to Ramji's wishes his widow got a tank excavated and built a temple about one man's height. One goes to heaven by such acts."

The last sentence does not qualify in any way the first one. It refers to the general belief amongst the Hindus that by digging tanks and building temples one goes to heaven, but the first statement of the witness is a clear statement of a fact, namely, that the tank was excavated and the temple built in part in accordance with the wishes of Ramji to his widow. Witness no. 4 says that

" Rambati (widow) did these works of religious merit, viz., the excavation of the tank, construction of the temple in part, going on pilgrimage to Janakpur and Maniary and so on, so that it may be of spiritual benefit to the soul of the deceased."

He further says that

" Ramji was a religious man and given to Puja. He excavated a pyne for the public. Ramji did not excavate any tank or construct any temple. Had he been alive, he would have excavated the tank and constructed the temple."

The learned District Judge is perhaps under a misapprehension that the widow, in order to justify an alienation, must show that the digging of a tank and the building of a temple, etc., were done either under the express direction of her husband or expressly for the benefit of the soul of her husband. In this to my mind the learned Judge has erred, and the reply

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is given by Mookerjee and Newbould, JJ. in the case of *Khub Lal Singh v. Ajodhya Misser*(1) where the recitals in the bond to the effect that the husband of the widow had enjoined her to carry on the digging of a tank and its consecration were not proved. Their Lordships say: "Assume, then, that the alleged instructions have not been proved, still the fact remains that the widow raised money and applied the same for completion of the buildings and for the excavation and consecration of a tank in connection with the temple. The water of the tank would be needed for purposes of ablution and worship; but, even apart from this, the excavation and consecration of a tank are acts of higher religious merit, as is authoritatively laid down in a series of texts quoted in the *Jalashaoisargatattwa* of Raghunandana and the *Chaturvarga Chintamani* of Hemadri [*Danakhanda*, Chapter XIII, Asiatic Society's Ed. p. 1003].

In the case of *Ram Sumaran Prasad v. Gobind Das*(2) the texts on the subject of almost all the Rishis were quoted and it was shewn that the Rishis laid down that a widow takes the estate of her husband solely for the good of his soul, and her power to spend the income of the estate or to alienate the entire estate would be valid provided it is done for the good of her husband's soul. She takes an absolute estate of her husband for that purpose. For worldly purposes she has to justify alienation by showing legal necessity. Among other authorities I will content myself by quoting the *Mitakshara*, a branch of the Hindu law which governs the parties in question and *Viramitrodaya*, Chapter III, part 1, section 2, quotations wherefrom have already been made in the aforesaid case of *Ram Sumaran Prasad v. Gobind Das*(2). It runs as follows:—"She takes the entire estate of her husband and is enjoined to perform acts calculated to increase the prosperity of

(1) (1915) I. L. R. 43 Cal. 574.

(2) (1926) 7 Pat. L. T. 821.

her and her lord, such as, performing shradhas, digging wells, etc., and giving presents with pious liberality in proportion to the wealth inherited by her.

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Thus, the performance of religious and charitable purposes and acts conducive to the welfare of her husband are the objects for which she takes the estate of her husband. Accordingly, Smritichandrika in Chapter XI says that she possesses independent power of making gifts for religious and charitable purposes, for such gifts 'her husband even if wanting a son shall reach the heavenly abodes' and for purposes not being religious or charitable but purely temporal, such as, gifts to dancers, etc., she has no independent power. Hence arises the restriction imposed upon the widow's power of disposition." These text books received the interpretation of Turner, L. J. in the case of *Collector of Masulipatam v. Cavalry Vencata Narrainapah*(¹) who stated the law as follows:

"For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity."

There has, therefore, been some confusion, about the true nature of the power possessed by a Hindu widow in respect of dealings with her husband's property for religious and charitable purposes and for worldly purposes, in the mind of the learned District Judge when he says that the legal obligation to excavate the tank or the necessity to borrow has not been proved. The very fact that she dug the tank and constructed a temple in part justifies her

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act and it is only to be shown whether she could have met that expense out of any money in her hand. The husband of the lady had been borrowing and also lending money and some time before his death he also sold some of his properties and he left 12 bighas of land and certain money due to him. The lady has not been found to be extravagant in her expenses. She paid off some of the debts of her husband. She also advanced small savings on two occasions, namely, Rs. 60 in 1920 and Rs. 30 in 1923. None of the Courts below has found as a fact that she had Rs. 1,000 in her hand in order to defray the expenses of excavating the tank in question and performing the consecration thereof. The plaintiffs' witnesses have been silent as to her having been in any way extravagant. They rather show that both the husband and the wife were religious.

Now the widow had 12 bighas, as observed above, and she gave in usufructuary mortgage for a temporary period 1 bigha and 4 cottahs only for Rs. 1,000. She has not sold the property, and still it is capable of redemption and the proportion of the land given in mortgage is not excessive in consideration of 12 bighas of land which she inherited from her husband. In the case of *Khub Lal Singh v. Ajodhya Misser*⁽¹⁾ cases have been cited to shew that alienations for religious purposes of three-sixteenth, more than one-fourth and less than one-third have been upheld. The mortgage in this case was, therefore, not extravagant; far less can it constitute waste, the loan being invested in tank and temple, permanent immovable properties.

The result is that the decree of the Court below is set aside and that of the Munsif is restored with costs throughout.

JAMES, J.—I agree.

Appeal allowed.

(1) (1915) I. L. R. 43 Cal. 574.