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agreement of 1888 which having been entered into by all Hamir Singh's reversioners cannot be objected to by the plaintiff who was subsequently born.

We, therefore, accept the appeal and, setting aside the order of the lower appellate Court, restore the decree of the first Court, dismissing the plaintiff's claim with costs throughout.

Appeal accepted.

APPELLATE CIVIL.

Before Mr. Justice Scott-Smith and Mr. Justice Martineau.

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May 21

HIRA AND ANOTHER (DEFENDANTS), *Appellants*,

versus

BUTA (PLAINTIFF), AND BHUDHU, ETC., (DEFENDANTS), *Respondents.*

Civil Appeal No. 2516 of 1915.

Hindu Law—whether an after-born son divests his mother's estate as a widow, from the date of his birth or from the date of his father's death.

The house and site in dispute belonged to the plaintiff's father *T*, a Hindu, who died in May 1911. On the following July the property was sold by *T's* widow *R*. The plaintiff who was born to *R* five days after the sale, sued to contest its validity. The first Court decreed the claim, holding that the plaintiff was in contemplation of law actually existing at the time of his father's death, that at the time of the sale he, and not his mother, was the owner of the property, and that, therefore, the sale by the latter was void. The decree was upheld by the District Judge on appeal.

Held, on second appeal that the rights of a son under Hindu Law in the estate left by his father commence at birth and not before, and that *R* was consequently at the date of the sale competent to alienate the property for necessity.

Bamundoss Mookerjea v. *Mussammat Tarinee* (1), followed. Mayne's Hindu Law, 8th Edition, page 499, and West and Buhler's Digest of Hindu Law, 3rd Edition, volume I, page 803, referred to.

Jatindra Mohan v. *Ganendra Mohan* (2), *Mussammat Mangli*, v. *Sobha Singh* (3), *Minakshi* v *Virappa* (4), and *Ramakrishna* v. *Tripurabai* (5), distinguished; *Sabapathi* v. *Somasundaram* (6), and *Hanmant Ramachandra* v. *Bhimacharya* (7), not followed.

(1) (1859) 7 Moo. I. R. 169 P. C.
(2) (1872) 9 Beng. L. R. 377 P. C.
(3) (1913) 20 Indian Cases 272.
(4) (1884) I. L. R. 8 Mad. 89.
(5) (1908) I. L. R. 33 Bom. 88.
(6) (1892) I. L. R. 16 Mad. 76.
(7) (1887) I. L. R. 12 Bom. 105.

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HIRA v. BUTA.

Second appeal from the decree of W. deM. Malan, Esq., District Judge, Jullundur, dated the 27th May 1915, confirming that of Khan Ahmad Hussain Khan, Munsif, 1st class, Jullundur, dated the 11th November 1914, decreeing the claim.

TEK CHAND, for Appellants.

KANWAR NARAIN, for Respondents.

The judgment of the Court was delivered by—

MARTINEAU, J.—The house and site in suit belonged to Thakur, who died in May 1911. On the 14th of July 1911 his widow, *Mussammat* Ralli, sold the property to defendants 3 and 4. The plaintiff, who is the son of Thakur, sues for possession, contesting the validity of the sale effected by his mother. He brought the suit under the impression that his mother had sold the property as his guardian during his minority, but it turned out that she had sold it as its owner, five days before the plaintiff was born.

The Munsiff held that the plaintiff, who was in his mother's womb at the time of his father's death was in contemplation of law actually existing at that time, and that on his birth he divested the estate of his mother whose title was inferior to his own. He held in consequence that at the time of the sale the plaintiff was the owner of the property and not *Mussammat* Ralli and that, therefore, the sale by her was void. He accordingly passed a decree in the plaintiff's favour without going into the question of necessity.

On appeal the District Judge held that any action taken by *Mussammat* Ralli in regard to the property should be regarded as action taken by a guardian on behalf of an infant in the womb and would have to be justified by necessity. He did not, however, go into the question whether necessity for the sale had been proved or not. He upheld the decree apparently on the ground that a widow with child was not competent to alienate property to which she would have no right if the child turned out to be a son—a position which seems hardly consistent with the view first expressed by him that she could sell for necessity.

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The defendants have preferred a second appeal to this Court. The appeal came before a learned Judge in Chambers, who referred the following question to a Division Bench :—

Under Hindu Law was the plaintiff's mother *Mussammat* Ralli, absolute owner of the property in dispute during the interval between her husband's death, and the birth of the plaintiff, who was in her womb at the time of the death of her husband, and was she empowered under Hindu Law to sell the said property as owner thereof shortly before the plaintiff was born ?

Mr. Tek Chand, who appears on behalf of the appellants, informs us that his argument was not correctly understood by the learned Judge. He does not contend that *Mussammat* Ralli was the absolute owner of the property during the interval between her husband's death and the plaintiff's birth, but contends that she was the owner with the usual widow's estate, with power to alienate only for necessity. The question referred to the Division Bench does not, therefore, arise. The learned counsel on both sides have, however, agreed that the appeal should be decided by this Bench, and it has accordingly been argued before us.

It is not disputed that the right of succession under Hindu Law vests immediately on the death of the owner of the property and cannot remain in abeyance, nor is it disputed that the plaintiff divested the estate of his mother whose title was inferior to his own, and that he is competent to contest the validity of the sale. The question is only whether *Mussammat* Ralli's estate was divested from the date of the plaintiff's birth or from the date of his father's death.

Jatindra Mohan v. *Ganendra Mohan* (1) is cited by Mr. Kanwar Narain on behalf of the respondents to show that under Hindu Law a gift to a child *en ventre sa mère* is valid. That ruling does not cover the point before us.

In *Sabapathi* v. *Somasundaram* (2) it was held that under Hindu Law a son conceived was equal to a son born, and that accordingly an alienation by a

(1) (1872) 9 Beng. L. R. 377 P. C (2) (1892) I. L. R. 16 Mad. 76.

Hindu to *a bonâ fide* purchaser for value was liable to be set aside by a son, who was in his mother's womb at the time of the alienation, to the extent of his share.

Mussammat Mangli v. *Sobha Singh* (1) was a case in which a suit was brought for pre-emption by a person who had not been born at the time of the sale. The Court held that under Hindu Law a child begotten had, if subsequently born, all the rights of a child in existence.

In *Minakshi* v. *Virappa* (2) it was held that in accordance with Hindu Law obtaining in the Madras Presidency the right of a son in the womb to ancestral property could not be defeated by a will or gift.

Ramakrishna v. *Tripurabai* (3) relates to the effect of an adoption by a Hindu widow on a transfer previously made by her of a part of her estate. That case is not in point as the transfer was one made without necessity.

In *Hanmant Ramachandra* v. *Bhimacharya* (4) it was held that a posthumous son took the family property by right of survivorship on the principle of relation back to the time of the father's death, which applied in the analogous case of inheritance and partition, and that the rights of such a son stood on the same footing as those of a son *in esse* at the time of the father's death.

On behalf of the appellants Mr. Tek Chand has referred to (*i*) paragraph 499 of Mayne's Hindu Law, 8th Edition, in which it is stated that a child who is in the mother's womb at the time of the death is, in contemplation of law, actually existing and will *on his birth* divest the estate of any person with a title inferior to his own who has taken in the meantime; (*ii*) West and Buhler's Digest of Hindu Law, 3rd Edition, volume 1, at page 803, where it is stated that it is only on the actual birth of the son that his co-ownership arises; & (*iii*) *Bamundoss Mookerjea* v. *Mussammat Tarinee* (5) which is a judgment of the Privy Council in an appeal from a decision of the Sudder Dewanny Court of Bengal.

(1) (1913) 20 Indian Cases 272 (3) (1908) I. L. R. 33 Bom. 88.
(2) (1884) I. L. R. 8 Mad. 89. (4) (1887) I. L. R. 12 Bom. 105.
(5) (1858) 7 Moo. I. A. 169 P. C.

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This last judgment appears to settle the question in dispute. Their Lordships of the Privy Council said that they entirely agreed in the principles laid down in the judgment of the Sudder Court, and expressed their entire concurrence in the judgment of that Court on the question of law. We have, therefore, to turn to the judgment of the Sudder Court in that case to see what was decided.

The question in the case was whether a widow, who had been empowered by her husband to adopt a son, could sue in her own right for a share of the ancestral estate. The argument for the appellant was that a widow having permission to adopt was to be regarded as *enceinte*. The Court accordingly went into the question whether a son's rights in the estate commenced at birth or while he was in the mother's womb, remarking on page 181 "If no text can be shown for the suspension of the rights of a widow actually pregnant, it is still more certain that there is no similar provision for divestiture of right in the case of a widow held only to be constructively pregnant of a son through the effect of a permission to adopt." The learned Judges quoted the following passage from Colebrooke's translation of the Daya Bhaga, Chapter I section 45: "They who are born, and they who are yet unbegotton, and they who are actually in the womb, all require the means of support; and the dissipation of their hereditary maintenance is censured." With regard to this passage they observed that the very terms of the text providing for sons yet unbegotton referred to a contingent and future, and not to a present, right. At page 183 they said: "The afterborn son's right is to his share of the estate as is stands at the time of his birth, and not retrospectively with reference to its state at any supposed period of his conception." Further on, at page 184, with reference to a remark made by a certain commentator, they said: "Here is an express and indeed, to our minds, a conclusive reference to actual birth after the death of a father, as the period of commencement of right." Again, on page 189, the learned Judges remarked: "The truth is, that the supposition of a positive and actual right vested in an embryo which may never come into full existence is one which must almost be rejected on the mere statement of it."

It is clear, therefore, from the above-mentioned judgment of the Sudder Court of Bengal, which was adopted in its entirety by the Privy Council, that the rights of a son under Hindu law in the estate left by his father commence at birth and not before. Even if this were not so, the widow would still be competent to make an alienation for the benefit of her unborn child. To hold that she cannot alienate any of the property left by her husband at all till the child is born would be anomalous, as the child may prove to be a daughter or may be still-born, in which case an alienation made by her before the child's birth would, if made for necessity, be valid. Moreover we do not think that there is any thing in Hindu Law in support of the proposition that a pregnant widow in possession of the usual life estate has no power to deal with it at all until she be delivered of her child, and has in fact less power than she has after the birth, when she can admittedly alienate for necessity.

Following *Bamundoss Mookerjea* v. *Mussammat Tarinee* (1) we hold that *Mussammat* Ralli's estate was divested only on the plaintiff's birth, and that she was the owner of the property on the date of the sale and was competent to alienate it for necessity.

The other questions arising in the case have not been decided by the lower Courts. We accordingly accept the appeal, set aside the decrees of the lower Courts, and remand the case to the Court of first instance under order XLI, rule 23, Civil Procedure Code, for disposal according to law. Stamps on the appeals in this Court and in the lower appellate Court will be refunded, and other costs will be costs in the case.

Appeal accepted.

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(1) (1856) 7 Moo. I. A. 169 P. C.