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RAJA SATYA SARAN GHOSAL BAHADUR v. BHAIRAB CHANDRA BRAHMO.

Baboo *Gopal Lal Mitter* for respondent.

PEACOCK, C. J.—The question decided by the Division Bench, in respect of which this appeal has been brought, arose in a special appeal from the decision of the Principal Sudder Ameen. We agree with Mr. Justice Loch in thinking that execution was barred by limitation. Nothing was done upon the petitions of the 4th May 1861 and 14th August 1862, and they were consequently struck off for default. They did not, therefore, keep the execution alive.

The appeal is dismissed with costs.

Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice L. S. Jackson, and Mr. Justice Macpherson.

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AKORA SUTH (DEFENDANT) *v.* BOREANI (PLAINTIFF.)*

Re-marriage of Hindu Widow—Act XV. of 1856, *ss.* 2, 3, 5—*Inheritance.*

A Hindu died, leaving a widow and minor son and daughter. The widow re-married after her husband's estate had vested in her son. The son subsequently died; and his step-brother took possession of the property. The widow then brought a suit against the step-brother for possession. *Held* that the suit was maintainable, and that she could properly succeed as heir, to her son, notwithstanding her second marriage.

THE plaintiff in this case sued, originally as manager and guardian of her minor daughter Dhan Mala, but was subsequently permitted to amend the plaint under section 73 of Act VIII. of 1859, by making herself a party, and suing in her own name, as well as guardian to her daughter. The suit was for obtaining possession of 19 bigas of land, and value of certain properties laid at Rs. 149-12. Peokan, the husband of the plaintiff, died possessed of 19 bigas of land in Mauza Ubeagram, and movable property valued at Rs. 133-8. At the time of his death, he left behind him his widow the plaintiff, his son Bhakat

* Appeal No. 22 of 1868 under section 15 of the Letters Patent of the 28th December 1865, against a judgment of Mr. Justice Kemp prevailing against that of Mr. Justice E. Jackson, dated the 10th June 1868, in Special Appeal No. 2704 of 1867, from a decree of the Deputy Commissioner of Nowgong, dated 6th August 1867.

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Ram, and his daughter Dhan Mala. The plaintiff married a second husband. At this time Bhakat Ram was alive, and his father Peokan's estate had vested in him. Subsequently he died, and his step-brother the defendant took possession, and urged that, since the plaintiff had taken a second husband, she could not act as a guardian of the minor, as provided by sections 2 and 3 of Act XV. of 1856; and that, as she had not acted in conformity with the requirements of Act XL. of 1858, she could not bring an action, and that the late Bhakat Ram held the properties of his father Peokan, deceased; but that on his demise, the defendant was entitled in preference to either the plaintiff or her daughter, who were only entitled to maintenance.

The Moonsiff supported the claim of the plaintiff, and gave a decree in her favour accordingly.

This decree was affirmed by the Deputy Commissioner.

Defendant then appealed to the High Court on the following grounds:—

1. Both Courts erred in declaring Boreani heir of her first husband's deceased son Bhakat Ram; for under section 2, Act XV. of 1856 (1), all her rights and interest in the pro-

(1) *Act XV. of* 1856, *Sec. II.*—All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband, or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall, upon her re-marriage, cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same.

Section III.—On the re-marriage of a Hindu widow, if neither the widow, nor any other person, has been expressly constituted by the will or testamentary disposition of the deceased husband, the guardian of his children, the father or parternal grandfather or the mother or paternal grandmother of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in Civil cases in the place where the deceased husband was domiciled at the time of his death, for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit, to appoint such guardian who, when appointed, shall be entitled to have the care and custody of the said children; or if any of them, during their minority, in the place of their mother; and in making such appointment, the Court shal be guided, so far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother. Provided that, when the said children have not property of their own sufficient for their support and proper

perty ceased and determined upon her re-marriage as if she had died.

2. The daughter Dhan Mala has no right, under Hindu Law, to the property left by her deceased brother Bhakat Ram, and therefore the defendant, step-brother of Bhakat Ram's father, is the rightful heir of the property in dispute.

3. The lower Court has misunderstood section 5 of Act XV. of 1856.

4. Under section 3 of Act XV. of 1856, Boreani cannot sue as guardian of her minor daughter; the true legal guardian being the defendant.

5. The Court below was wrong in allowing such an amendment of the plaint as changed the very nature of the suit from the suing as guardian only, to suing for herself, and also as guardian.

The Judges of the Divisional Bench (KEMP and E. JACKSON, JJ., differed in opinion). KEMP, J., supporting the judgment below, JACKSON, J., reversing it.

KEMP, J.—The defendant is the special appellant. It is stated in the plaint that one Peokan died, leaving a widow the plaintiff, a son Bhakat Ram, and a daughter Dhan Mala, him surviving. The defendant is the step-brother of Peokan.

The plaintiff re-married, and she now sues in right of inheritance, claiming the estate of her son Bhakat Ram, which became vested in him on the death of his father Peokan.

The lower Courts have given the plaintiff a decree. In special appeal it is contended

First.—That the Court of first instance was wrong in allowing such an amendment of the plaint as changed the very nature of the suit.

education whilst minors, no such appointment shall be made otherwise, than with the consent of the mother, unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.

Section V—Except as in the three preceding sections is provided, a widow shall not, by reason of her re-marriage, forfeit any property or any right to which she would otherwise be entitled and every widow who has re-married shall have the same rights of inheritance as she would have had, had such marriage been her first marriage.

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Second.—The lower Court has erred in declaring that the plaintiff is entitled to succeed to the estate of her son Bhakat Ram; inasmuch as under the provisions of section 2, Act XV. of 1856, all her rights and interests in that estate ceased and determined upon her re-marriage.

On the first point I am of opinion that the lower Courts were not wrong in arraying the plaintiff amongst the parties to the suit under section 73, Act VIII. of 1859. The plaintiff first sued as guardian of her daughter a minor; but finding that she had a personal right in the estate claimed, and that she was likely to be affected by the result of the suit, she applied to be made co-plaintiff, and her application was granted; the character of the suit was not changed; and as the objection is, at the best, a technical one, and the order admitting her to be made a party to the suit, does not affect the merits of the case, or the jurisdiction of the Court, I would reject it under the provisions of section 350, Act VIII. of 1859.

On the second point, which is a novel one, I am of opinion that the decision of the Court below is right.

At the time of the re-marriage of the plaintiff, her son, Bhakat Ram, was alive, and the estate of the former husband of plaintiff was vested in the said Bhakat Ram. Section 2, Act XV. of 1856 runs thus:—"All rights and interests which any widow may have in her deceased husband's property, by way of maintenance, or by inheritance to her husband, or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without any express permission to re-marry only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage, cease and determine as if she had then died, and the next heirs of her deceased husband and other persons entitled to the property on her death, shall thereupon succeed to the same."

At the time of her re-marriage, no rights and interests to either in the estate of her deceased husband, or in the estate of his lineal successor the son, had become vested in the plaintiff; therefore, no estate in which she had any rights and interest ceased and determined upon her re-marriage. After the re-marriage the son died, and the estate which he inherited from his father, devolved

on the plaintiff; and under section 5 of the same Act, *viz.*, XV. of 1856, she does not, by reason of her re-marriage, forfeit her right thereto. 1868 AKORA SUTHI v. BOREANI.

I would dismiss this special appeal with costs and interest.

E. JACKSON, J.—I agree with Mr. Justice Kemp on the first point argued. I would not now reverse the decision of the lower Court, on the ground of the amendment allowed in the plaint. Whether that was strictly legal or not, it is not a point affecting the merits of this case. I differ from my learned colleague in the interpretation which he puts upon Act. XV. of 1856, and more especially upon section 2 of that Act. I do so with some hesitation, as the words of the section are somewhat ambiguous. "All rights and interest which any widow may have in her deceased husband's property, by way of maintenance, or by inheritance to her husband, or to his lineal successors shall, upon her re-marriage, cease and determine as if she had then died, and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same."

The plaintiff in this case is a widow and has re-married. At the date of her re-marriage, her deceased husband's property had been inherited by his son. The son has since died, and the plaintiff now claims to succeed to her son's estates. The right which she now claims is a right in her deceased husband's property, by inheritance to his lineal successor. But it is said that the widow had no such right at the time of her re-marriage, and such right did not, therefore, cease and determine: that the law, in fact, alludes only to such property as the widow had inherited before her re-marriage. I think that the words of the Act bear a more extended signification; and that "upon her re-marriage" should not be read as at the date of such re-marriage, but with reference to such re-marriage. All right which the widow has in her deceased husband's property, by inheritance to him or to his lineal successor, ceases by reason of her re-marriage; and in consequence of her re-marriage, as if she had then died, and, therefore, that is, when her right has ceased, the next heirs shall inherit. The policy of the law appears to me to be one, which is generally acknowledged in all society, and which is

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perhaps more especially required to be put in force in Hindu society, *viz.* that the widow by re-marriage shall not take her late husband's proprety away from his family, and into the hands of her new husband. Take the case of a joint Hindu family of six brothers. One of them dies, leaving a minor son and a widow. The minor son takes his father's property; his mother remains; and if the minor son dies before attaining majority, he cannot make a will, and the result will be, if she can inherit the property that the widow being re-married, takes a share with the joint brothers of her first husbands's property, and is entitled to a share in the family-house and every thing that the family possesses; and to enjoy this, she will have a right to bring her new husband into the family. The policy of the law seems to me to be to prevent any further interference by the widow after the re-marriage in her deceased husbands's property, and that the rights of the widow in her deceased husband's property cease on her re-marriage. Upon her re-marriage, she is to be dead to all rights of inheritance to her deceased husband's property, not only dead at that moment to such rights as she has inherited, but dead then, and for the future, to all such rights. Section 3 of the Act supports this view. The family of her deceased husband can, by petition to the Court, deprive the widow of even the guardianship of her children on her re-marriage. Section 5 of the Act seems to me to refer more especially to her new husband's property. It would include also all property left by will or as heir to any one, except her late husband and his lineal successors, but the widow cannot, under the law, inherit from anyone, except the husband and his lineal successors.

I would reverse the Judge's decision, and dismiss the plaintiff's suit with all costs.

KEMP, J.—Under section 15 of the Letters Patent, dated 28th December 1865, the appeal will be dismissed with costs and interest.

The defendant then appealed under the 15th section of the Letters Patent against the decision of KEMP, J.

The grounds were

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1. That the plaintiffs should not have been allowed to amend her plaint.

2. That KEMP, J. had put a wrong construction on sections 2 and 5 of Act XV. of 1856.

3. That whatever rights and interests plaintiff might have had, by inheritance to her husband's lineal successor, had ceased and determined by her re-marriage as if she had died.

Baboos *Annada Prasad Banerjee* and *Khettra Mohan Mookerjee* for appellant.

Baboo *Chandra Madhab Ghose* for respondent.

PEACOCK, C. J.—It appears to me that the decision of Mr. Justice Kemp is correct.

The object of the Act was to remove all legal obstacles to the marriage of Hindu widows. Looking to the words of section 2, I am of opinion that it was not the intention of the Legislature to deprive a Hindu widow, upon her re-marriage, of any right or interest which she had not at the time of her re-marriage. The words of the section are:—"All rights and interests which any widow may have in her deceased husband's property, by way of maintenance, or by inheritance to her husband, or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property with no power of alienating the same, shall, upon her re-marriage, cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same."

In the present case, at the time of her re-marriage, the property belonged to her son, and she had no right or interest in that property. It came to her by inheritance from her son, who died after her re-marriage. If the son had pleased, he might have given the property to his mother, notwithstanding her re-marriage. At the time of her re-marriage, she had no interest in her deceased husband's property, by inheritance to her husband, or to his lineal successors. It could not, therefore, cease or determine

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upon her re-marriage; and if she had died at the time when she re-married, the property would never have descended to her.

Section 5 to which Mr. Justice Kemp alludes, says that, "except as in the three preceding sections provided, a widow shall not, by reason of her re-marriage, forfeit any property or any right to which she would otherwise be entitled; and every widow who has re-married, shall have the same rights of inheritance as she would have had, had such marriage been her first marriage."

The right of inheritance from her son, after her re-marriage, did not, as it appears to me, fall within any of the exceptions referred to in section 5.

Our decision is in accordance with the judgment of Mr. Justice Kemp. That judgment is, therefore, affirmed, and this appeal will be dismissed with costs.

L. S. JACKSON, J.—I concur in this judgment, although at first I had a certain difficulty. The words of section 2 are somewhat embarrassing, and the impression left on my mind is that the Legislature had an intention, which it has failed to carry out in words. I can hardly suppose that the Legislature intended a Hindu widow to be capable of inheriting the property of her son, she having previously re-married, when, if she had re-married, while in the enjoyment of such property she would have been by such re-marriage, entirely divested of that property. For, although it is true that, if the son had been living at the time of her re-marriage, in certain circumstances, he could have had the option of depriving her of the succession, or confirming it on her, still it might, and probably would, in most instances, happen that at the time of re-marriage the son was an infant. But it is not our province to set aside the clear meaning of the words of the Legislature merely for the purpose of getting rid of apparent inconsistencies.