The 17th January 1871.

Present:

The Hon'ble L. S. Jackson and W. Ainslie, *Judges.*

Hindoo widow—Ancestral property—Reversioners—Alienation—Maintenance.

Case No. 156 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 21st April 1870.

Mussamut Bhugobutty Dayee (Defendant), *Appellant,*

versus

Chowdhry Bholanath Thakoor and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan for Appellant.

Baboos Unnoda Pershad Banerjee and *Mohesh Chunder Chowdhry* for Respondents.

Also the cross-appeal No. 169 of 1870.

O had, by the *Kirtima* form, adopted his nephew G, and then, shortly before his death, executed an ekrarnamah, whereby he directed that, excepting a portion which he bestowed in absolute gift upon his daughter S, the remainder of his property, moveable and immoveable, was to be enjoyed for her lifetime by his wife C, and after her death to become the absolute property of the adopted son. As the parties lived in the Mithila country, the adopted son concurred in the devise, and executed an instrument of corresponding tenor, with this difference that it allowed the widow to make necessary and reasonable expenses. The adopted son predeceased the widow, who had also been pre-deceased by her daughter S, who left a daughter B. On the death of the widow (C), the heirs of the adopted son (G) sued B for the property which had been left to G.

HELD that, under the discretion vested in the widow, she was at liberty to invest for the benefit of her daughter and granddaughter sums of money in the purchase of immoveable property for their maintenance.

HELD that the title to the property did not, by the death of G, become absolutely vested in C; but that the claim of G's heirs to inherit in succession to G was postponed (as G's rights had been by the agreement) until the time of C's death, when it came into force in the same manner as if the ekrarnamahs had never been executed.

A widow enjoying the immoveable property of her deceased husband is not entitled to alienate either immoveable property or any property which she may have purchased out of the profits of such estate.

Jackson, J.—THESE two appeals, No. 156 and No. 169, arise out of the same decision of the Court of the Subordinate Judge of Tirhoot in the suit brought by Chowdhry Bholanath Thakoor and others against Mussamut Bhugobutty Dayee and others.

That which the plaintiff sought in this suit was to recover from the hands of the defendant, Mussamut Bhugobutty Dayee, and other defendants who are her lessees as to some of the property in dispute certain property, moveable and immoveable, which had been for many years in the hands of, and enjoyed by, one Chunderbutty, who was the widow of Oodun Thakoor, who died on the 23rd Falgoon 1234 Fuslee.

It seems that Oodun Thakoor (how long before his death does not appear) had adopted, by the Kirtima form, Chowdhry Greedharee Thakoor, the son of his own brother, Chowdhry Goonakur Thakoor; and then Oodun Thakoor, in the month of Magh, or a few weeks before his death, executed an instrument called an ekrarnamah, by which he directed that, excepting a certain portion of his property which he bestowed in absolute gift upon Mussamut Suttobutty, the remainder of his property, moveable and immoveable, was to be enjoyed for her lifetime by his wife Mussamut Chunderbutty, who was to expend the proceeds thereof, but was not to alienate any portion of it, and upon death it was to become the absolute property of the adopted son.

These parties living in the Mithila country, and the adopted son having a vested interest in the property, it was necessary, in order to give validity to the instrument, that he should concur in the devise so made, and accordingly the adopted son appears to have executed an instrument of corresponding tenor, by which he also on his part concurred in making over this property for her lifetime to the adopting mother—the only noticeable difference as to expression in the two deeds being that in the deed of the son the widow is allowed to make what are called *laboodee* or necessary and reasonable expenses.

The adopted son, Gireedharee Thakoor, died on the 27th Assin 1260, and the widow Chunderbutty Dayee died in the month of Pous 1274, thus surviving the adopted son by about 14 years and her husband somewhere about 40 years. The daughter Suttobutty also pre-deceased her mother, and died in the year 1259, leaving one daughter, the defendant Bhugobutty, against whom this suit has been brought.

The plaintiffs set forth the whole of these facts in their plaint, they allege Gireedharee Thakoor to have died leaving them as his heirs, though for some reason or other

their pleader, in answer to a question of the Subordinate Judge, appears to have stated that his clients did not claim as heirs of Gireedharee, but merely mentioned his death incidentally. The plaintiffs, however, claim manifestly as heirs both of Oodun Thakoor and Gireedharee Thakoor. It seems to me, therefore, that the answer made by the pleader to a question of the Court upon what clearly was a point of law ought not to prejudice the plaintiffs, who have set out the whole of the facts of their case, and have left it to the Court, as it certainly was the Court's business, to apply the law which may be applicable to them.

The defendant Bhugobutty Dayee contends that she is the heiress of her mother's mother, that the property was, in fact, the grandmother' *streedhun*, that the grandmother did not take as an ordinary Hindoo widow, but that the effect of the deed under which she held was taken in connection with the death of Gireedharee before the mother to vest the property in the mother absolutely, so as to defeat all claim of the heirs of Gireedharee or others.

The Subordinate Judge has given the plaintiffs a decree in respect of the immoveable property which admittedly came from Oodun Thakoor, but has allowed the defendant to retain possession of all the other property in suit, which I shall presently state as being divided for the purposes of argument into four classes.

In respect of that portion of the Subordinate Judge's decision which is in favor of the plaintiffs, I think the decision was right, although not for the reasons stated by the Court below. Shortly, the effect of the two ekrarnamahs, which have been read to us, appears to me to be this, that by an understanding between Oodun Thakoor and his adopted son, carried out in these instruments, it was agreed that, notwithstanding the adoption, Chunderbutty should take and enjoy the estate of her husband, whose death was then apprehended, and which did shortly afterwards occur, in the same mode as she would have taken, and enjoyed it if no adoption had taken place.

In this point of view, it appears to me that the succession and rights of Gireedharee were by agreement postponed until after the death of Chunderbutty, and consequently, Gireedharee having pre-deceased her, the rights of the reversionary heirs were in like manner postponed until the time of her death; and as they could not, at any rate, have claimed if Gireedharee had pre-deceased the adoptive father, until the death of Chunderbutty, it seems to me their claim to inherit in succession to Gireedharee comes into force at the time of the death of Chunderbutty just in the same manner as if those deeds had never been executed. There seems to be no ground for the contention that, by the death of Gireedharee, an absolute title to this property vested in Chunderbutty, and it seems quite clear that the terms of the instruments in no sense support that argument.

For these reasons, I consider that the Court below was right in giving the plaintiff a decree for the property numbered 1 to 12, and that the defendant's appeal in respect of that property ought to be dismissed with costs.

Then follows the appeal of the plaintiffs in regard to the rest of the property. That property has been classified in this way. It consists, firstly, of the properties numbered 13, 14, 18, and 19, in the Schedule annexed to the plaint, which are properties acquired by Chunderbutty in her own name out of the funds derived from the income of the estate which she took; secondly, the properties numbered 15, 16, and 17, which are properties acquired from the same sources, but acquired in the names of Chunderbutty's daughter and granddaughter and for their benefit; thirdly, the properties numbered from 21 to 30, which are moveable properties acquired from the same sources; and fourthly, those numbered 20, and 31 to 34, which are the family-premises and gardens standing on the site of the land, which by the decree we have given, goes to the plaintiff.

And as regards the first of these classes of property, namely, those which appear in the form of immoveable property purchased from the accumulations made by Chunderbutty from the profits of the estate which she received, there are several decisions, of which I may refer to that reported in 9 Weekly Reporter, page 584, and another to be found in I. Agra High Court Reports, page 219, by which it has been distinctly held that, in cases of a widow enjoying the property of her deceased husband, she is not entitled to alienate immoveable property or any property that she has purchased out of the profits of such estate, any more than she can alienate the immoveable property itself of which that estate

consists. No authority whatever has been shown to us on the other side; and it seems to me that those decisions are substantially in conformity with the Hindoo Law. I think, therefore, that in regard to those properties the plaintiffs were clearly entitled to a decree.

In regard to the second class, namely, the property which Chunderbutty purchased from the profits of her husband's estate, and which she appears to have bestowed upon her daughter and daughter's daughter, the case is otherwise. The widow was allowed, under the deeds which conveyed the property to her, to enjoy it for her lifetime, and incur all needful expenses. Now, it seems to me that, under the discretion so vested in her, she would be quite at liberty to invest, for the benefit of her daughter and granddaughter, sums of money in the purchase of property for their maintenance; and in that way she seems to me to have clearly understood and to have acknowledged the distinction between money so expended and money which really remained in her hands, although the form of it was changed by its being invested in immoveable property. As regards the properties numbered 15, 16, and 17, therefore, the decision of the Court below should, I think, be affirmed.

As regards the properties numbered from 21 to 30, these appear to follow the same principle as that laid down in regard to the first class of property, and the plaintiff will, therefore, be entitled to a decree for the moveable property; but as no evidence has been laid before us as to the value of this property, we feel unable to come to any conclusion as to what award should be made in respect of that property. All we can do is to declare that the plaintiffs are entitled to recover the moveable property left by Chunderbutty, which she acquired directly from Oodun Thakoor, or purchased out of the proceeds of his estate.

Then as to the fourth class of properties numbered 20 and 31 to 34, these also appear to follow the same rule, that is to say, the rule applicable to property representing either ancestral property or improvement of such property, or alteration or improvement made out of the ancestral funds, which must go to the heirs of Gireedharee, and not to the defendant, who is the daughter's daughter of Chunderbutty.

It appears that no evidence was given to show that these properties stand in the name of the defendant or her mother, and I understand also that no evidence was given to show from what sources these properties were acquired. That, therefore, is an additional reason for allowing the plaintiff's claim in respect of them. Our order, therefore, in this appeal will be that the order of the Lower Court, except as to the properties numbered 15, 16, and 17, will be reversed, and that the parties will pay and receive costs in the Lower Court in proportion to the value of the properties decreed and disallowed; and in this Court the plaintiffs, appellants, will recover the costs of the appeal from the defendants, excepting only the costs of that portion of the property in respect of which no specific decree has been given, the respondents paying their own costs of this Court.

Ainslie, J.—I concur.

The 20th January 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Bond-suit—Decree for land—Section 27, Act XXIII. of 1861.

Case No. 326 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judge of East Burdwan, dated the 12th July 1870, reversing an order of the Moonsiff of Pothna, dated the 10th January 1870.

Talun Bibee (Judgment-debtor), *Appellant,*

versus

Tenoo Bibee (Decree-holder), *Respondent.*

Baboo Romanath Bose for Appellant.

Baboo Kishen Succa Mookerjee for Respondent.