Special Appeal No. 389 *of* 1865

1867. Oct. 9.

PÁRVATI kom DHONDIRÁM.....*Appellant.*

BHIKU kom DHONDIRAM.....*Respondent*

Hindu widow—Remarriage—Incontinence—Loss of Caste—Act XV. of 1856—*Act XXI. of* 1850.

D., a Pardesi Hindu residing at Násik, died leaving two widows, B. and P. B. who was the first wife, though not incontinent, had been turned out of his house by her husband some time after he married P. by *pat.*

In a suit by B. to recover a moiety of D.'s estate, P., while admitting that she herself had been leading a life of prosituation since D.'s death resisted a partition of his catate, on the grounds that B. had since D.'s death cohabited with M. and subsequently married with R.—both of which allegations B. denied :—

Held, that, though, by Hindu law, incontinence excluded a widow from succession to her husband's estate, yet if the inheritance were once vested, it was not liable to be divested, unless her subsequent incontinence were accompanied by degradation ; but that, by Act XXI. of 1850, deprivation of caste can no longer be recognised as working a forfeiture of any right of property, or affecting any right of inheritance.

Held, however, also that if B. had duly remarried, she would cease to have any right to recover or hold any part of her late husband's property ; and, as the District Judge, on appeal, had left the fact or B.'s remarriage unascertained, that his decree must be reversed, and the case remanded for a finding on that question.

THIS was a special appeal from the decision of A. St. J. Richardson, District Judge of Ahmednagar, in appeal Suit No. 53 of 1865, reversing the decree of **Náráyan Govind** Munsif of Násik.

The facts are stated in the judgment.

The case was argued before WESTROPP and WARDEN, JJ.

Reid and *Vishvanath Govind Cholkar* for the appellant relied upon Act XV. of 1856, Sec. 2.

Shantaram Narayan, for the respondent :—Bhiku denies the remarriage, and has done so throughout. The Judge does not find that she has remarried. He must be understood as having determined that she belonged to a caste which may remarry. Such castes to do fall within Act XV. of 1856, which replies only to Hindu who could not remarry. Incontinence subsequent to the death of a

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husband does not divest property once vested in the title in the widow, whether or not she were ever in possession.

Reid, in reply, cited Steele 170, to show that a widow by remarriage abandons all right to her first husband's property; and as to incontinuance 1 Stra. H. L. 176.

Cur. adv, vult.

WESSROPP, J :—This is an action by Bhiku against Párvati and her father, Mánsing, to recover from them Rs. 2,392, alleged to be the moiety in value of the estate of Dhondirám, deceased.

The first wife of Dhondirám was Bhiku. Subsequently he married, by *pat*, Párvati, who was then a widow; and about one year and a half afterwards, he returned his first wife, Bhiku, out of his house. The Judge finds that, during Dhondirám's lifetime, Bhiku neither deserted him nor was unchaste. Dhondirám died in Posh, Shake 1781 (December 1859). The defendant Pârvti possessed herself of his property, moveable and immoveable. Neither of the courts below appears to have found that any case of appropriation of the property of Dhondirám had been established against the defendant Mánsing.

Párvati (who, the Judge states, admitted that, since Dhondirám's death, she has been living as a prostitute) relying perhaps, on the maxium *in pari delicto potior est conditio defendentis*, resisted a partition of the property, on the ground that, subsequently to the death of Dhondirám, Bhiku had cohabited with Mirdha valad Náráyan (an assertion which does not seem to have been proved), and afterwards married one Rámsing, both of which allegations Bhiku denied.

The Munsif held the marriage of Bhiku to Rámsing to be proved; and therefore that she could not take any share in the property of her first husband, Dhondirám.

On appeal by Bhiku to the Judge of Ahmednagar, he reversed that decree; and held that Bhiku entitled to recover Rs. 800, which he found to be a moiety in value of the

property of Dhondirám, which had come to the hands of Párvati; and ordered her to pay the costs of the suit.

Against that decree Párvati has appealed to this court.

It appears to us that the Judge has not, in his decree, come to any certain finding as to whether Bhiku, subsequently to Dhondirám's death, actually married, or merely cohabited with, Rámsing.

The parties are both Hindus, and Pardesis; there does not appear to have been any evidence that they were of a caste subject to any special laws or customs as to marriage or succession.

Where there are two widows, who were both the lawful wives of a deceased Hindu, who dies separate and without leaving male issue, they succeed to equal moieties of his property, moveable and immoveable: West and Buhler, Bk. I., pp. 88, 89, 91; Mayukha, Ch. IV., Sec. VIII., pl. 9; 1. W. H. Macnaghten, H. L. 19, Steele, p. 43, para. 25, and p. 232, para. 72; *Doe d. Baughutty Rawr* v. *Radakisson Mookerjee* (*a*), *Rumex* v. *Bhajee* (*b*), *Sree Muttee Muttee* v. *Ramconny Dutt* (*c*); and see *Rindamma* v. *Venkaturaonappa* (*d*).

But if either widow remarry after the death of her husband, she can neither recover nor retain a share of his property. By remarriage she forfeits her right to it. This is so as well by Hindu Law (*e*) as also by Act XV. of 1856, Sec. 2, in cases falling under that enactment.

If, therefore, Bhiku actually married Rámsing, she must fail in this suit.

But as, upon the Judge's decree, we are unable to say whether she married Rámsing or merely cohabited with him, it behoves us to consider what is the legal result of the incontinence of a Hindu widow, who, as we are bound to hold in the present case, continued virtuous during her

(*a*) Supplt. to Morton's R. by Montriou, 314.
(*b*) 1 Bom. H. C. Rep. 66.
(*c*) East's Notes; 2 Mor. Dig., pp. 80, 81, 82.
(*d*) 3 Mad. H. C. Rep. 268.
(*e*) Steele, pp. 170, 177; West and Ruhler, Bk. I, pp. 96, 99.

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husband's lifetime, and in whom, accordingly, at his death a moiety of his property vested in interest, although she has been kept out of possession of it by his other widow.

By the Hindu Law, incontinence excludes a widow from succession to her husband's estate: Mayukha, Chap. IV., Sec. VIII., pl. 2, 4, 8, 9 (*f*); Mitákshará on inheritance, Chap. II. Sec. I., pl. 19, 29, 30 (*g*); Daya Krama Sangraha, Ch. I., Sec. II., pl. 3 (*h*); 2 W. H. Macnaghten 20 21; *Doe d. Radamoney Raur* v. *Neelmoney Doss* (*i*); 3 Colebrooke's Dig., 474, 478, 479, 576, paras. ccccv., cccevüi., ccccix., ccccIxxvii. Some of the above quoted writers speak of suspicion of incontinence as sufficient to justify her exclusion. But the better opinion seems to be that nothing short of actual infidelity disqualified: 1 Stra. H. L. 136; 2 *Ibid.*, note by Mr. Ellis, p. 271; Steele (*j*), a high authority on this side of India, and Macnaghten (*k*) speak of adultery or incontinence and nowhere of mere suspicion of those sins, as affecting the widow's right to succeed to or hold the property of her husband. In *Doe d. Radamorey Raur* v. *Neelmoney Doss* above mentioned, proof of the incontinence of the lessor of the plaintiff was given.*

If, however, the inheritance be once vested in the widow, it is not, by Hindu Law, liable to be divested, unless her subsequent incontinence be accompanied by "loss of caste, unexpiated by penance and unredeemed by atonement:" 1 Stra. H. L. 136, 163, 164, 244. Mr. Sutherland also rests the forfeiture on degradation from caste. See his remark in 2

(*f*) Stokes' H. L. Bks., pp. 84, 86. (*g*) *Ibid.*, pp. 432, 436.
(*h*) *Ibid.*, p. 474. (*i*) Supplt. to Morton's R. by Montriou, p. 314.
(*j*) p. 43, para. 25; pp. 173, 174, para. 19; and see per *Arnould*, J., 1 Bom. H. C. Rep. 69.
(*k*) 2 W. H. Macnaghten, 20, 21.

Note.—As to partial or total loss of *maintenance* as a consequence of incontinence, see 1 Stra. H. L. 172, 244; 2 *Ibid.* 273, note by Mr. Ellis. 2 Macn. H. L 112, Case V.; 1 Mad. H. C. Rep. 372; 2 Mad. H. C. Rep; 337 [but that was a case of divorce]; Maukha, Ch. IV., See VIII., pl. 9; Stoke's H. L. Bks., p. 86; Mitàk. Ch. II., Sec. I., pl. 37, 38; Stokes' H. L. Bks., p. 439; Steele, p. 42, para 25; pp, 173, 174, paras 18, 19; 7 Macn. S. D. A. Red. 144.—Ed.

Stra. H. L. 269, Appendix. So too Mr. Colebrooke says : " Nor after the property has vested by inheritance, does she forfeit it, unless for loss of caste, unexpiated by penance, and unredeemed by atonement." See his remark 2 Stra. H. L. 272, App. Not only incontinence after the husband's death (Steele, p, 41, para. 23). but, in many cases, even adultery in his lifetime, may be expiated by penance (*l*). The penance is generally prescribed by an assembly of the caste (*m*). The power to degrade was, in the first instance, with the caste themselves, assembled for the purpose ; from whose sentence, if not acquiesced in, there lay an appeal to the King's Courts : 1 Stra. H L. 162.

There has not been finding in this case as to whether Bhiku had been put of caste ; or, if so, whether she has since, by penance, expiated her incontinence, if any. We have, however, arrived at the conclusion, that modern legislation has rendered those questions immaterial. At the first glance at Act XXI. of 1850, we had some doubts, arising from its preamble, whether the Act applied to the case of a widow degraded from caste on the ground of incontinence. But a closer examination of that enactment removed the doubt. The Legislature did not simply extend the Bengal Reg. VII. of 1832, Sec. IX., which is set forth in the preamble, to the rest of British India ; but reciting that it would be beneficial to extend its " principle " throughout British territory, enacted that " so much of any law or usage, now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories." The Act is not limited to renunciation of religion only, but, after providing

(*l*) Steele pp. 39, 40, para. 19 ; pp. 172, 173, 174, paras. 15, 19.

(*m*) *Ibid.*, Pref., p. x., and p. 174.

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for that case, specially includes deprivation of caste, and is not restricted to deprivation of caste on any particular ground. Hence deprivation of caste, whether it be for change of religion, or for unexpiated incontinence, or any other cause, can no longer be recognised as either working a forfeiture of any right or property already vested in interest, or as impairing or affecting any right of inheritance.

We have consulted the Chief Justice, and our other learned brethren usually sitting at the Appellate Side of the Court, and find that they concur in that view of Act XXI. of 1850, which appears to have been the same as was taken by Sir Lawrence *Peel*, C.J., in *Doe d. Saummoney* v. *Dosee* v. *Nemychurn Doss* (*n*). a case decided in July 1851. The lessor of the plaintiff was a Hindu widow, who had inherited her husband's property, but had been deprived of possession, and sued to recover it. The defence was that she had forfeited her right in the property, by reason of her having, since his death. led an immoral and unchaste life. Peel, C.J., referring to Act XXI. of 1850, gave a verdict in her favour.

We must hold that, although Bhiku may have been incontinent, and may consequently have been expelled from caste, she would not, upon those grounds, be disqualified to obtain a partition in her favour of Dhondirám's property.

If however, she have duly remarried, she would cease to have any right to recover or hold any part of the property of Dhondirám. The Judge having left the fact of remarriage unascertained, we must reverse his decree, and remand the cause for the determination of that question, for which purpose fresh evidence may of course be taken. The burden of proof of the affirmative of that issue will lie upon Párvati, who pleads this remarriage as a forfeiture of Bhiku's right. If the present Judge decide that issue in the affirmative, *i.e.*, against Bhiku, there should be a decree by him in favour of the defendant Párvati; but, having regard to her conduct, and that of the deceased

(*n*) 2 Taylor & Bell 300.

Dhondirám, we think such decree should be without costs. If the Judge decide the question of the alleged remarriage of Bhiku in the negative, there should be a decree in her favour for a moiety of the property of Dhondirám, which has come to the hands of Párvati, with costs; and the Judge should ascertain, as accurately as he can, the value of that property. So far as we can gather from the judgment of the late Judge, he arrived by simple conjecture at the value of certain gold ornaments, part of the property.

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WARDEN, J., concurred.

Decree reversed, and suit remanded.

Special Appeal No. 164 *of* 1867.

June 24.

HARJIVAN ANANDRÁM ....*Appellant.*

NÁRAN HARIBHÁI .....*Respondent.*

Hindu law—Gift of Land—Possession.

Held that a gift of land is not complete, by Hindu law, without possession or receipt of rent, by the donee.

THIS was a special appeal from the decision of J. R. Naylor, Acting Senior Assistant Judge of the Surat District at Broach, in Appeal Suit No. 72 of 1865, reversing the decree of the Munsif of Hansot.

The facts sufficiently appear in the following judgment, recorded in appeal:—

"This action was instituted by Harjivan Anandsám to recover possession of two bighás of land in the village of Asthá, Parganá Hansot, from Náran Haribhái, who held the land as tenant.

"Náran Haribhái's defence was that he had cultivated the land for more than thirty years; and that, if the deed of gift produced by the plaintiff in support of his title be true, he could not account for his (defendant's) having paid the rent of the land, since the date of deed, to the donor.

"The Munsif decreed for the plaintiff, with costs, on the