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The order for imprisonment in default of payment of the compensation awarded is, we think, illegal. See the case of *Ranjeevan Koormi* v. *Durga Charan Sadhu Khan* (1).

We set aside the Joint Magistrate's order under section 560, Code of Criminal Procedure, and direct that the sum of Rs. 50, if realized from the complainant, be refunded to him.

S. C. B. *Order set aside.*

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

1895 *February* 19.

RASUL JEHAN BEGUM (DEFENDANT) *v.* RAM SURUN SINGH AND OTHERS (PLAINTIFFS).*

Hindu Law, Widow—Hindu Widow, Custom of remarriage of—Forfeiture—Decree granted on a different cause of action.

A Hindu widow, on remarriage, forfeits the estate inherited from her former husband, although, according to custom prevailing in her caste, a remarriage is permissible. *Murugayi* v. *Viramakali* (2) followed; *Matungini Gupta* v. *Ram Rutton Roy* (3) referred to; *Har Saran Das* v. *Nandi* (4) dissented from.

Plaintiffs' suit was that they were co-owners with *B* of a certain property as members of a joint family under the Mitakshara law; that after *B*'s death, a 3½ annas' share of the property was registered under the Land Registration Act in the name of *A*, the mother of *B*, although the plaintiffs were the owners in possession, and *A* was entitled only to maintenance; that a gift was made of 1½ annas' share by *A* to her daughter and daughter's son, without right, and the donees having granted a *zuripeshgi* lease in respect of that share, the *zuripeshgidars* took possession thereof. The plaintiffs, accordingly, prayed for recovery of possession by establishment of their alleged right of ownership, or, in the alternative, for a declaration that they were reversionary heirs to the estate of *B*, and, as such, not bound by the gift and the *zuripeshgi* lease aforesaid. *A* died during the pendency of

* Appeal from Appellate Decree No. 1169 of 1893, against the decree of G. G. Dey, Esq., District Judge, Shahabad, dated the 21st of April 1893, affirming the decree of Babu Abinash Chunder Mitter, Subordinate Judge of that District, dated the 25th of August 1892.

(1) I. L. R., 21 Calc., 979.
(2) I. L. R., 1 Mad., 226.
(3) I. L. R., 19 Calc., 289.
(4) I. L. R., 11 All., 330.

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the suit. It was found that plaintiffs were not co-owners with *B* as alleged; but that, as reversionary heirs, they became entitled to possession upon *A*'s death, after the institution of the suit. *Held*, that as the plaintiffs had claimed to recover possession in the suit, and as *A* died before the case was taken up for trial, the plaintiffs were entitled to the relief, although they asked it on a ground different from that on which they recovered judgment.

THE material allegations in the plaint in this case were, that the plaintiffs, and one Lalu Ram and his son Bhima Ram, were members of a joint family governed by the Mitakshara law, and 7 annas of Mouza Dumri was their joint-family property; that Lalu Ram died first and then died Bhima Ram, leaving him surviving his mother Akalo Koer and his widow Badamo Koer, both of whom lived in the joint family; that, on the passing of the Land Registration Act (Bengal Act VII of 1876), a 3½ annas' share was registered in the name of Akalo Koer to please her, but the plaintiffs remained as owners in possession; that subsequently, in 1880, Akalo Koer executed a deed of gift of 1½ annas' share in favour of her daughter and daughter's son (defendants Nos. 1 and 2); that they, in 1886, let out this share in *zuripeshgi-ticca* for a term of seven years; and that the *zuripeshgidars* (defendants Nos. 4 and 5) took possession under the lease. The plaint then proceeded to state that Akalo Koer (defendant No. 3) had only a widow's interest, to be maintained in the family, and she had no right to make the gift aforesaid, and that she had, in 1889, executed an *ikrarnama* in favour of the plaintiffs, acknowledging their ownership, and admitting that she had only a right of maintenance. The plaintiffs, under the above circumstances, prayed for the recovery of possession of the share with mesne profits, or, in the alternative, for a declaration that they were the reversionary heirs of Bhima Ram, and, as such, not bound by the deed of gift executed by defendant No. 3 and the *zuripeshgi* deed executed by the defendants Nos. 1 and 2.

The defendant No. 4, who is now represented by the appellant, in his written statement, denied the allegations made by the plaintiffs as regards joint family and joint possession, and averred that a 3½ annas' share in the *mouza* was the self-acquired property of Lalu Ram; that Bhima Ram having died during the

lifetime of his father, Akalo Koer succeeded to the property after Lalu Ram's death, and was still in possession thereof ; that the defendants Nos. 1 and 2 were the lawful heirs of Lalu Ram, and the gift in their favour and the *zuripeshgi* lease executed by them in favour of defendants Nos. 4 and 5 were valid transactions ; and, furthermore, that Akalo Koer had, since the institution of this suit, sold 1½ annas' share to the defendant No. 4.

Akalo Koer, originally the defendant No. 3, died while the suit was pending in the Court of first instance.

The Subordinate Judge, in whose Court the suit was instituted, found, on evidence, that the allegations made by the plaintiffs as regards joint ownership were not true ; but he found that Bhima Ram survived his father Lalu Ram and inherited his property ; that after Bhima Ram's death, his widow Badamo Koer had succeeded to his estate, but as she took a second husband, she forfeited her rights as Bhima Ram's widow, and Akalo Koer, as mother, took possession of his estate. The Subordinate Judge held that, as Akalo Koer had died after the institution of this suit, the plaintiffs, as reversionary heirs, became entitled to a decree for possession of the share in question.

The District Judge, on appeal, observed that, in the present case, remarriage being allowed by the custom of the caste, Act XV of 1856 did not apply to it ; but that the rule of forfeiture in that Act was based on the general principle of Hindu law, and even when a remarriage was permitted by custom, the widow by remarrying forfeited her interest in the first husband's estate. The District Judge concurred in the findings arrived at in the Court of first instance, and upheld the decree of that Court.

The defendant, Rasul Jehan Begum, appealed to the High Court.

Babu *Umakali Mukerjee* and Moulvie *Syed Mahomed Tahir* for the appellant.

Moulvie *Mahomed Yusuf* for the respondents.

Babu *Umakali Mukerjee.*—It is found in this case that there was a custom permitting remarriage of widows among the caste (Agarhari) to which Bhima Ram belonged. The provision of

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forfeiture in Act XV of 1856, therefore, does not apply to this case. The case of *Har Saran Dass* v. *Nandi* (1) is in point. There is nothing in the Hindu law to divest the widow of her rights in her former husband's estate. The case of *Moniram Kolita* v. *Keri Kolitany* (2) supports my contention. The case of *Matungini Gupta* v. *Ram Rutton Roy* (3) is a ruling on a different point, and in the case of *Murugayi* v. *Viramakali* (4) it was found that there was a practice, or custom, among the Sudra castes of the Deccan, under which widows gave up their interest on remarriage. Here the custom found is in favour of remarriage. No custom has been found, or inquired into, whereby the widow forfeits her estate on re-marriage. As Badamo Koer has not forfeited her interest, the present suit cannot succeed. Moreover, the plaintiffs claimed to recover possession, on the ground that they were members of a joint family with Bhima Ram. That ground has failed, and the plaintiffs are not entitled to a decree for possession in this suit. Akalo Koer was alive when the suit was brought, and there was no cause of action for recovery of possession. Treating the suit as declaratory, it is barred by limitation.

Moulvie *Mahomed Yusuf* for the respondents was not called upon.

The judgment of the Court (GHOSE and GORDON, JJ.) was delivered by

GHOSE, J.—This was a suit for recovery of possession of certain properties covered by a deed of gift executed by one Mussamat Akalo Koer in favour of defendants 1 and 2 on the 9th March 1880, or, in the alternative, for a declaration that the said deed of gift was invalid and not binding on the plaintiffs. The plaintiffs claimed as reversionary heirs to the estate left by one Bhima Singh. They alleged that they and Bhima Singh formed members of a joint Hindu family governed by the Mitakshara law, and that, after Bhima Singh's death, they were in possession of the entire joint-family property, but that Mussamat Akalo, the mother of Bhima Singh, unlawfully executed the said deed of gift in favour of defendants 1 and 2. The plaintiffs further stated that the said

(1) I. L. R., 11 All., 330.
(2) I. L. R., 5 Calc., 776 ; L. R., 7 Ind. App., 115.
(3) I. L. R., 19 Calc., 289. (4) I. L. R., 1 Mad., 226.

lady had executed an *ikrarnama* in September 1889 in favour of the plaintiffs, admitting their title to the property in question. The suit, we may here mention, was commenced in the lifetime of Mussamat Akalo, but she died pending the suit and before the trial came on, and one of the questions that seems to have been raised in the Court below was whether the plaintiffs could succeed in recovering possession of the property in suit, the widow having been alive upon the date of the institution of the suit.

The defendant appellant claimed under a *zuripeshgi* lease from defendants 1 and 2, and she pleaded that neither Bhima Singh nor Lalu Ram, his father, formed members of a joint Hindu family with the plaintiffs; that Bhima Singh had predeceased Lalu Ram; that, upon Lalu Ram's death, the property devolved upon his widow Mussamat Akalo; and that the said lady was justified in making the deed of gift of the 9th March 1880 in favour of defendants 1 and 2.

Both the Courts below seem to have found that the plaintiffs and Bhima Singh did not form members of a joint Hindu family, but that, upon Lalu Ram's death, the property devolved upon Bhima Singh, his son, and that Mussamat Akalo was not justified in executing the deed of gift in favour of defendants 1 and 2. It would, however, appear that, at the trial in the Court of first instance, a question was raised, apparently for the first time, by the defendant, to the effect, whether the plaintiffs could succeed, because, assuming that Bhima Singh survived Lalu Ram, he was succeeded by his widow, Mussamat Badamo Koer. It appeared that this person, after succeeding to the estate of Bhima Singh, remarried, and, upon this remarriage taking place, the estate went into the hands of Mussamat Akalo; for that is the way in which we read the judgment of the Munsif, who held that, upon Mussamat Badamo Koer taking a second husband, she lost all rights to the estate left by Bhima Singh; and that his mother, therefore, was in possession under the Hindu law as his next heir; and that, after her death, the plaintiffs were entitled to succeed. Upon the question that was raised whether the plaintiffs could recover in this action, the suit having been instituted at a time when Mussamat Akalo was alive, both th Courts were of opinion that, inasmuch as before the decree was

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pronounced in the suit, the plaintiffs were entitled to succeed to the estate in the possession of Mussamat Akalo, there was no reason why they should be driven to a second suit. And the learned District Judge, with reference to the question as to the right of Mussamat Badamo Koer, the widow of Bhima Singh, which seems to have been also raised before him in appeal, says as follows: "In the present case remarriage is allowed by the custom of the caste, and I do not understand Act XV to apply to such cases. But it seems to me that, as remarked by Mr. Justice Wilson in *Matungini Gupta* v. *Ram Rutton Roy* (1), the rule of forfeiture in Act XV is based on the general principle of Hindu law; and that, even when a second marriage is permitted by custom, it entails forfeiture of all interest in the first husband's estate. It is clear, in the present case, that this was recognised, as Bhima's widow has been excluded from the inheritance for more than twenty years and has advanced no claim to it." In the result, the Courts below decreed the plaintiffs' suit for recovery of possession of the property in question.

On second appeal, by the defendant, it has been contended before us, in the first instance, by the learned vakil on her behalf, that, according to the custom prevailing in the caste to which the plaintiffs' family belongs, remarriage of widows being permissible, Mussamat Badamo Koer did not in law forfeit her interest in her husband's estate, which she took upon his death. With reference to this point, it seems to us, in the first place, that the question does not properly arise in the case, because, as I have already pointed out, it was no part of the defendant's case that Badamo Koer succeeded Bhima Singh in this property as his widow, and that Badamo Koer continued, even after her remarriage, to hold the estate, or to be entitled to that estate at the time of the institution of the suit. On the other hand, her case was that Bhima Singh had predeceased Lalu Ram, and he had, therefore, no title at all to the property in question. And referring to the judgments of both the Subordinate Judge and the District Judge, it seems to us that, although Badamo Koer did succeed to the estate as the widow of Bhima Singh, still, upon her remarriage, she ceased to have any connection with that estate; and that, upon that event taking place, it went

(1) I. L. R., 19 Calc., 289 (at p. 292).

into the hands of Mussamat Akalo as the nearest heiress to her son Bhima Singh. If, however, it be necessary for us to express any opinion upon the question of law that has been raised before us, we think it would be sufficient for us to refer to the case of *Murugayi* v. *Viramakali* (1), in which the learned Judges, who decided it, upon this question expressed themselves as follows: "Now the principle on which a widow takes the life interest of her deceased husband, when there is no male heir, is that she is a surviving portion of her husband, and where the rule as to remarriage is relaxed and a second marriage permitted, it cannot be supposed that the law which these castes follow would permit of the remarried widow retaining the property in the absence of all heirs for the continuance of the fiction upon which the right to enjoyment is founded;" and that is also the view that was expressed by Wilson, J., in the case of *Matungini Gupta* v. *Ram Rutton Roy* (2), and we may say that we entirely agree in it. It seems to us that, upon the remarriage taking place, the widow, though, according to the custom prevailing in her caste, a remarriage was permissible, forfeited the estate, which was but a widow's estate that she had inherited from her husband, and that the property devolved upon Mussamat Akalo as the legal heiress of her son Bhima Singh.

Another point that has been raised before us by the learned vakil is as to whether the plaintiffs were entitled to a decree for possession in this case, the suit having been instituted during the lifetime of Mussamat Akalo. No doubt the ground upon which the plaintiffs based their action was a different one from that upon which they have recovered judgment in this case. They sued upon the ground, as I have already mentioned, that they and Bhima Singh formed members of a joint Hindu family; but it would appear that all the issues which bore upon the respective cases which the parties sought to make in the first Court were raised in that Court; and it transpired at the trial that, although Bhima Singh did not form a member of the joint Hindu family with the plaintiffs, still the deed of gift, executed by Mussamat Akalo in March 1880, was a deed which she was not justified in executing—a deed which was altogether inoperative, so far as the plaintiffs' reversionary heirs were concerned. It will be remem-

(1) I. L. R., 1 Mad., 226. (2) I. L. R., 19 Calc., 289.

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bered that the suit, as brought in the first Court, was not a suit for a declaratory relief only, but a suit for that relief as also for possession. It seems to us that the plaintiffs having claimed for recovery of possession in the suit, and Mussamat Akalo having died previous to the time when the case was taken up for trial, there is no reason why the plaintiffs should be driven to a separate suit for recovery of the same relief which they asked for in this suit, but which they asked upon a ground somewhat different from that upon which they have been allowed to recover judgment. We think, upon the whole, that there are no sufficient reasons for our interference with the judgment of the Court below, and we accordingly dismiss this appeal with costs.

We may add that our attention was called by the learned vakil for the appellant to the case of *Har Saran Das* v. *Nandi* (1), in the Allahabad Court, in which the learned Judges seem to have expressed themselves to the effect that a widow, belonging to a caste which in remarriage is permitted, does not, upon her second marriage, forfeit her interest in the estate, and that section 2 of Act XV of 1856 does not apply to such a widow. It does not appear that the true position of a Hindu widow inheriting the estate of her husband was considered in that case. That was considered in the cases of *Murugayi* v. *Viramakali* (2) and *Matungini Gupta* v. *Ram Rutton Roy* (3) to which we have already referred.

S. C. C. *Appeal dismissed.*

CRIMINAL REVISION.

Before Mr. Justice Norris and Mr. Justice Beverley.

DHARAM CHAND LAL (PETITIONER) *v.* QUEEN-EMPRESS (OPPOSITE-PARTY).*

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March 6

Penal Code (Act XLV of 1860), section 186—Nazir's power of delegation—Civil Procedure Code (Act XIV of 1882), section 251—Court Fees Act (VII of 1870), section 22.

* Criminal Revision No. 751 of 1894, against the order passed by Babu A. C. Chatterjee, Deputy Magistrate of Purneah, dated the 24th of September 1894.

(1) I. L. R., 11 All., 330.

(2) I. L. R., 1 Mad., 226. (3) I. L. R., 19 Calc., 289.