Judgement of the Lords of the Judicial Committee on the appeal of Isri Dut Koer and another v. Hunsbutti Koerain and others, from the High Court of Judicature at Fort William in Bengal, delivered 11th July 1883.

Present:

LORD WATSON.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

This is a litigation concerning the succession to the estate of one Budnath Koer, a Hindoo who died towards the end of the year 1857. He left two widows Hunsbutti and Chunderbutti who are still living; and one child the daughter of Chunderbutti, who was named Dyji Ojhain, and who has since died, leaving only a daughter. On the death of Dyji the collateral male relatives of Budnath became his presumptive heirs, subject to the interest of the widows. They are the Plaintiffs and the Appellants. The Defendants and Respondents are the two widows and Bachni the daughter of Dyji.

On the 21st December 1873 the widows executed a deed whereby, after stating that with the exception of Dyji there was no heir of their husband or of themselves, they made a gift to her of certain lands and villages, only retaining to themselves a life interest in part of them. Some of the property is described as mouzahs

exclusively acquired by the widows out of their own fund, and the rest is described as having been left by their husband Budnath.

Dyji died in the year 1875, and in the course of the next year the Plaintiffs brought their suit. The material parts of the prayer are for a decision that the deed of December 1873 is null and void as regards the reversionary interests of the Plaintiffs, and for a declaration that the properties acquired by the widows are part and parcel of their husband's estate.

By their written statements, and by the mouth of their Pleader, the three Defendants set up in substance the same defence. They say first, that the Plaintiffs having only a contingent interest cannot maintain the suit; secondly, that if a widow releases her interest to her husband's heir presumptive, whlch Dyji was, the absolute interest becomes at once vested in such heir, and therefore the inheritance devolved on Bachni; thirdly, that at least the properties which were purchased by their own money either received from their parents or given to them by Budnath during his lifetime formed no part of Budnath's estate.

In the month of September 1877 the case was heard and decided by the Subordinate Judge of Tirhoot. He found that the properties purchased by the widows were so purchased out of the profits of Budnath's estate, and were accretions to that estate. He held that the conveyance to Dyji did not vest the inheritance in her, because she was heir only to a woman's estate, and the prescribed course of inheritance would be changed if she took an estate transmissible to her own heirs. And he gave the Plaintiffs the decree they asked.

The Defendants appealed to the High Court, and in June 1879 the case was heard by a Divisional Bench, consisting of Justices Ainslie

and Broughton, who reversed the decree below and dismissed the suit with costs. From that decree the Plaintiffs bring the present appeal.

The learned Judges think that the first part of the Plaintiffs' prayer cannot be entertained, because it is clearly competent to the widows to convey their own interest; because as regards Budnath's original property it is not necessary to construe the deed of 1873 as doing more; and because as regards the after-purchases the widows only convey such legal interest as they believe themselves to hold. Their Lordships are unable to follow this reasoning, even when confined to Budnath's original estate. The Defendants have not met the Plaintiffs by saying that by the conveyance Dyji got nothing more than the widows' interest; they have contended that by coalition with Dyji's inheritance it gave her an estate transmissible to her own heirs. If then the true construction of this transaction be that it passes only the widows' interest, it materially concerns the Plaintiffs to have that construction established. In this part of their prayer they ask nothing more favourable to themselves, and as between themselves and the Defendants who allege an adverse construction, they are clearly entitled to as much, unless they are excluded by the rules relating to declaratory decrees.

The after-purchases fall under the same observations; and with respect to them two other substantial questions are raised, one of fact and one of law. First, the Defendants deny that they were made out of the proceeds of Budnath's property, and this issue has been decided against them in both Courts, and is no longer a matter of dispute. Secondly, they contend that such purchases are not to be treated as accretions to the property from the proceeds of which they were

made, but belong to the widows who made them.

The learned Judges below do not treat the latter question as unimportant to the Plaintiffs; but they consider it to be one of great difficulty, unsettled by authority, and requiring reference to a Full Bench. In their judgment therefore the case is not a proper one for a declaratory decree. Mr. Justice Ainslie states the principle of their decision as follows :—

"It seems to me that we ought not to allow this suit to be protracted and great additional expense to be incurred, when it is quite possible that the widows or one of them may survive the Plaintiffs, so that the estate may never vest in them and the decision arrived at may prove no bar to further litigation.

"For the purposes of this appeal it is sufficient to say that the Court will not, in a declaratory suit, decide intricate questions of law, when no immediate effect and possibly no future effect can be given to its decision, and when the postponement of the decision to the time when there may be before the Court some person entitled to immediate relief (if the decision is in favour of the Plaintiff) will not prejudice his rights in any way."

This suit was instituted before the passing of the Specific Relief Act, and its propriety must be tried by the law as it stood under Section 15 of the Procedure Code of 1859. That section does not confer any right to declaratory relief in any given case, but merely enacts that no suit shall be liable to objection on the ground that a merely declaratory decree is sought, and that it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief.

It is true that the apparently wide door here opened for declaratory suits is greatly narrowed by the decision that, as a general rule, the Court shall not make a declaration except in cases in which the Plaintiff could if he chose seek some consequential relief. That doctrine was clearly laid down in the case of Kathama Natchiar, L. R. 2

Ind. App. 169, but it was there stated to be subject to exceptions. Their Lordships think, and here they agree with the learned Judges below, that such a suit as the present falls among the exceptions.

It is laid down, and in their Lordships' opinion correctly, in Shama Churn Sircar's Vyavastha Durpana, that "if a widow, without "consent of her husband's heirs, dispose of his "property for purposes not sanctioned by law, "they are entitled to interfere and prevent any "such wrongful alienation by her." Yet it is clear that a widow may alien her own interest. If then she executes a conveyance valid for her own interest but purporting to convey a larger interest to the grantee, it is difficult to see how the reversioner can get any relief except a declaration that the conveyance is void *pro tanto*. He cannot set the deed aside, because it is partly valid; nor can he affect the possession, which the widow has a right to keep or to give up to another. Such suits as the present one would seem to be, at least in many cases, the only practical mode of enforcing the heirs' right to interfere with a widow's alienation. That they are known to the law is clear, for Act IX. of 1871 by Art. 124 prescribes the time for bringing a "suit during the life of a Hindoo "widow by a Hindoo entitled to the possession "of land on her death, to have an alienation "made by the widow declared to be void except "for her life." That is precisely the first part of the Plaintiffs' prayer in this suit. And the person "entitled" must mean the presumptive heir who would be entitled if the widow died at that moment.

It is true that the foregoing considerations do not settle the case, for there remains a discretion in the Court, which may find it, as the High Court has found it, inexpedient to grant the

relief asked. But their Lordships think that a strong case of inexpediency should be shown for refusing declaratory relief to classes of persons expressly recognized by the law as suitors for such relief. They do not say that there may not be such a case, but they cannot find it here.

The only reason assigned for refusing relief on the ground of discretion is that part of the case raises a difficult point of law, the decision of which, though involving expense and delay, may after all not be binding upon the actual reversioners. That may be a reason more or less weighty according to circumstances. In this case it does not apply to the original estate of Budnath, as to which the Plaintiffs are clearly right and the Defendants clearly wrong in their contention. Nor is it readily conceivable that the decision will be fruitless; because the question of law is of such a nature that its decision, though not binding as *res judicata* between the widows and a new reversioner, would be so strong an authority in point as probably to deter either party from disputing it.

Moreover, it is to be observed that objections resting on the difficulties of the dispute are of much more weight in a preliminary stage than in a Court of Appeal. If the Defendants had in the first instance objected to declaratory relief and had taken the opinion of the Subordinate Judge on that point, there would then have been more ground for refusing relief in order to save expense and litigation. But they did not do that. They disputed the whole case of the Plaintiff. An important issue of fact, and two important issues of law, were decided by the First Court in the Plaintiff's favour. After all this it comes very late for the Court above to reverse the action of the Court below on the ground of discretion and in order to save further litigation and expense.

For the above reasons their Lordships think that they are bound to decide the issues raised in this case.

So far as regards the contention of the Defendants that Dyji could by the conveyance take an absolute estate transmissible to her heirs, the High Court have not expressed any opinion adverse to that of the Subordinate Judge, and their Lordships need do no more than express agreement with him.

The difficult question of the after-purchases is very ably discussed by the learned Judges below, who would probably, if compelled to decide, have decided against the Plaintiffs. The difficulty is enhanced, if not created, by the later current of decision, which gives to the widow a more free and complete usufruct of her husband's property than is accorded to her by the texts and earlier decisions; a modification of the law which is strongly illustrated by the conflicting opinions of Mr. Justice Dwarkanath Mitter and his colleagues in the case of Kerry Kolitani, reported in 13 Beng. L. R., p. 1.

The question was argued at the bar as though it were necessary to divide all the property of a widow into two classes; one being her stridhan, and the other her husband's estate over which she has the widow's right and no more. But the very question is, whether, having regard to the widow's freedom in enjoying her husband's property, and to her established right to alienate her own interest in it, she has not a kind of property the nature of which must remain undecided till her disposal of it or her death. It is impossible to read Mr. Justice Ainslie's forcible argument, without feeling that it is difficult to specify the point of time at which the widow loses her control over the unexpended portion of her income from her husband's estate. If she may spend or give

away the whole, may she not put some by? If she saves one year or month, may she not spend those savings the next year or month? If she may save and spend again, may she not place her savings so as to get some income from them? And so on through all the steps of the *sorites*.

To decide this question it is necessary to examine the authorities, which are by no means in accord. But their Lordships do not treat as authorities on this question the numerous cases cited at the bar, to show that a widow's savings from her husband's estate are not her stridhan. If she has made no attempt to dispose of them in her lifetime, there is no dispute but that they follow the estate from which they arose. The dispute arises when the widow, who might have spent the income as it accrued, has in fact saved it and afterwards attempts to alienate it. And the existing conflict of opinion upon it makes it desirable to pass the authorities briefly under review.

The earliest case which is relied on as an authority for the widow's power of alienation was decided by this Board in the year 1862, and is reported in 9 Moo. Ind. App. p. 123. The case however was of a different sort. A Hindoo testator's estate was under administration, and there was dispute as to the interests taken by some of the parties. One of them died during the litigation, leaving a widow. He was ultimately declared to be entitled to an absolute interest in a share of the property, and the question then arose, how the income which had accrued from his share should be disposed of. The Supreme Court held that both the income which accrued during his life and that which accrued after his death should be held by his widow in that character. On appeal that decree was varied, and it was declared that, so far as regarded the accumulations after the death of the

legatee, his widow was entitled to them absolutely in her own right. Here then the widow had not saved the income in question; she had never had the option of saving or spending it; and all that was done was to recognize her right to the full usufruct and control over it.

In the year 1866 the High Court of Agra expressly decided the point in question. A Hindoo widow purchased property and afterwards alienated it. The Court first found that it was purchased with the proceeds of her husband's property, and then held that it was ancestral and the alienation invalid.

In the case of Grose *v.* Amirtamayi Dasi, decided by the Calcutta High Court in 1869 and reported in 4 Bengal L. R. Orig. Juris. p. 1, Mr. Justice Macpherson held, while saying that he had formerly thought the contrary, that accumulations ought to follow the corpus. In that case however the accumulations accrued before the widow recovered the estate, and the opinion expressed by Mr. Justice Macpherson seems to be at variance with the decision reported in 9th Moore.

In the case of Bholanath *v.* Bhagabatti, decided in 1871 and reported in 7 Beng. L.R. 93, the Calcutta High Court (Jackson and Ainslie, J.J.) held that a Hindoo widow could not alienate property acquired by her out of the income of the husband's estate, but that she could make valid gifts to her daughter and granddaughter by buying property in their names.

This case came before the Privy Council in 1875, when it was held that the widow held the husband's estate not in her capacity of widow but as taker of a life interest under a settlement. But in their judgment the Board said, "If she took the estate only of a Hindoo "widow, one consequence no doubt would be "that she would be unable to alienate the profits,

" or that at all events whatever she purchased out " of them would be an increment to her husband's " estate." (2 Ind. App. 260.)

In the year 1874, before the appeal in the last case was heard, another case in which the point was discussed had come before the Board, Gonda Koer *v.* Koer Oodey Singh, reported in 14 Beng. L.R. p. 159. In that case there was no alienation by the widow, and the Board treated the point thus :—" It therefore becomes unnecessary to " decide what might have been the effect of a " distinct intention on her part, if it had been " proved, to appropriate to herself and to sever " from the bulk of the estate such purchases as " she had made with the view of conferring " them on her adopted son." As the case stood, the widow's purchases accrued to her husband's estate.

In 1876 the point came again before the Calcutta High Court. The Division Bench, consisting of Judges Jackson and Macdonell, thought that their decision might be rested on other grounds, but expressed themselves as prepared to base their decision on the ground that a Hindoo widow, having purchased land with the money derived from the income of her husband's estate, is competent afterwards to alienate her right and interest in whole or in part, to reconvert the land into money, and to spend it if she chooses (25 Weekly Rep. p. 340).

This is the state of the authorities, and their Lordships, differing from the learned Judges below, think it must be taken as adverse to the claim made on behalf of the widow. They do not rest on what was said by them in Bholanath's case as decisive of this case, for the observation must be taken as applied to the then pending case, and it was, moreover, extra-judicial, and is fairly open to the qualifications with which Mr. Justice Ainslie reads it. Nor do they think it

possible to lay down any sharp definition of the line which separates accretions to the husband's estate from income held in suspense in the hands of the widow, as to which she has not determined whether or no she will spend it. As before said, they feel the force of Mr. Justice Ainslie's reasoning on this point.

In this case the properties in question consist of shares of lands, in which the husband was a shareholder to a larger extent. They were purchased within a short time after his death in 1857. No attempt to alienate them was made till 1873. The object of the alienation was not the need or the personal benefit of the widows, but a desire to change the succession, and to give the inheritance to the heirs of one of themselves in preference to their husband's heirs. Neither with respect to this object, nor apparently in any other way, have the widows made any distinction between the original estate and the after-purchases. Parts of both are conveyed to Dyji immediately, and parts of both are retained by the widows for life. These are circumstances which, in their Lordships' opinion, clearly establish accretion to the original estate, and make the after-purchases inalienable by the widows for any purposes which would not justify alienation of that original estate.

The result is that, in their Lordships' opinion, the decree of the High Court should be reversed, and that of the Subordinate Judge restored, and that the Respondents should pay the costs incurred in the High Court and the costs of this appeal. They will humbly advise Her Majesty in accordance with this opinion.