Privy Council Appeal No. 74 *of* 1927.

Oudh Appeals Nos. 10 *and* 11 *of* 1926.

Gauri Nath Kakaji - - - - - - - - *Appellant*

v.

Musammat Gaya Kuar - - - - - - - *Respondent*

FROM

THE CHIEF COURT OF OUDH

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5th JULY, 1928.

Present at the Hearing:

LORD SHAW.
LORD CARSON.
LORD SALVESEN.
SIR JOHN WALLIS.

[*Delivered by* LORD SALVESEN.]

This appeal arises out of a suit at the instance of the surviving widow of Laiq Singh who was the owner of certain villages situate in the District of Hardoi. The plaintiff in that suit, who is the respondent here, prayed for decree for possession of the villages in question at that time in possession of the appellant under mortgages in favour of his author. The Subordinate Judge of Hardoi granted decree in the respondent's favour, but only on the footing that in so far as the mortgages which had been granted by the senior widow were justified by necessity, she was bound as a condition of obtaining possession to pay the amount due to the mortgagees. From his judgment an appeal was taken to the Chief Court of Oudh which by decree dated the 4th March, 1926, reversed the judgment and decree dated the 29th April, 1924, of the Subordinate Judge and held that the respondent was entitled to an unconditional decree for possession of the villages. From this decree the present appeal has been brought.

The material facts have been so fully dealt with in the judgment of the Chief Court of Oudh that it is unnecessary to

recapitulate them except in the barest outline. The owner of the villages, Laiq Singh, was a Hindu who owned seven villages and shares in others. He died on the 13th August 1885 and was survived by two widows, Musammat Umrao and the respondent. Prior to his death he had burdened his estate by mortgages for the principal sum of Rs. 28,000 bearing interest at the usual rate. This obligation was recognised by the widows and after a suit had been commenced by the mortgagees against them a compromise was effected in 1887 under which they agreed to divide the responsibility. Umrao Kunwar, who had at the time (presumably under an arrangement with her co-widow) obtained sole possession of a half share in the villages of Sakraori and Janwar, agreed to transfer the possession of this property to the mortgagees that they might enjoy the usufruct and repay themselves the principal sum of Rs. 15,983.6 and interest, while the respondent agreed to pay Rs. 17,779 in cash on condition that on such payment she was to be held under no liability in respect of her husband's mortgages. The respondent did in fact discharge this liability, but the senior widow did not put the mortgagees in possession of her share in the villages until some years thereafter. It has been however found as a fact that the rents of the villages collected by the mortgagees have long since extinguished the principal sum and interest due to them in respect of Laiq Singh's mortgages.

Following on this compromise the widows proceeded to partition Laiq Singh's property through the Revenue Courts, that is to say, as afterwards explained, to separate and divide the enjoyment of the widow's life estate. In the final result the villages specified in the plaint were assigned to Umrao and the other villages to the respondent. During this period the relations between the two widows were anything but friendly. The senior widow had by a suit at the instance of a boy whom she said she had adopted with her husband's authority sought to deprive the respondent of any share in his inheritance. This suit failed.

In consequence of Umrao's failure to put the mortgagees in possession of her half share in the two villages they in 1889 raised an action against her. Ultimately it was arranged that the whole of Janwar which had fallen to Umrao at partition should be handed over to the mortgagees and that Sakraori should be exempted from any charges in respect of the deceased husband's debt. From this time forwards the two widows were entirely separate, each dealing with the properties that fell to them respectively under the partition as if they were separate owners of the life estate therein.

On the 28th April, 1891, Umrao executed a mortgage for Rs. 38,000 in favour of the appellant's author. Under this deed she mortgaged with possession the four villages in suit, and on the 23rd August, 1891, she executed a deed in respect of further charges for Rs. 1,200. The first mortgage included the debt undertaken in terms of the compromise (since discharged out of the usufruct) and the balance consisted of further debts incurred

by Umrao. Possession was ultimately obtained by the mortgagees in 1905.

Musammat Umrao died in 1908. The other widow, the respondent, brought the present suit within 12 years of her death. The sole question for our decision is whether these two mortgages of 1891 are valid and binding on the respondent who succeeded in 1908 to the villages by right of survivorship. This question of law has been decided by the Chief Court of Oudh in the negative.

The general law is so well settled that it scarcely requires restatement. If a Hindu dies leaving two widows, they succeed as joint tenants with a right of survivorship. They are entitled to obtain a partition of separate portions of the property so that each may enjoy her equal share of the income accruing therefrom. Each can deal as she pleases with her own life interest, but she cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the rights of the survivor or a future reversioner. If they act together they can burden the reversion with any debts contracted owing to legal necessity, but one of them acting without the authority of the other, cannot prejudice the right of survivorship by burdening or alienating any part of the estate. The mere fact of partition between the two, while it gives each a right to the fruits of the separate estate assigned to her, does not imply a right to prejudice the claim of the survivor to enjoy the full fruits of the property during her life time. These principles have been established by a long series of decisions, one of the earliest and most authoritative of which is a case of *Doobey* v. *Myna Baee* (11 Moore's I.A. 487), the head note of which contains the following passage :—

> " Where a childless Hindu dies leaving two widows surviving, they succeed by inheritance to their husband's property as one estate in coparcenary, with a right of survivorship : and there can be no alienation or testamentary gift by one widow without the concurrence of the other."

In that case there had been a division effected by the Judge of Benares of the estate between the two widows and the argument was that such division having been acquiesced in, the estate of the one widow became a divided and separate estate which she was competent to leave to whomsoever she pleased. This contention was negatived by the Privy Council. In the course of his long and detailed judgment, Sir James Colvile said :

> " The estate of two widows who take their husband's property by inheritance is one estate. The right of survivorship is so strong that the survivor takes the whole property to the exclusion even of daughters of the deceased widow. They are, therefore, in the strict sense coparceners, and between undivided coparceners there can be no alienation by one without the consent of the other."

The authority of this case has not been questioned before the Board, but it was contended that as the Subordinate Judge found that the elder widow had incurred debts of necessity which she had charged by the mortgages in favour of the appel-

lant upon the villages which had been assigned to her under the partition agreed upon by the parties and confirmed by the Court, these mortgages were binding on the survivor. In support of this argument, he maintained that the respondent had impliedly consented to such a dealing by the elder widow with the property of which she had the sole management under the partition between them. Express consent was not alleged, and indeed under the only issue which deals with this matter it appears to be assumed that no consent was ever given. That issue is expressed in these terms :—

> " 2. Were the said mortgages made for a legal necessity and for payment of antecedent debts ? Are they for that reason binding on the plaintiff, even though they were not made with her consent ? "

It was, however, contended that while no express consent was ever given, such consent is to be implied from the proved facts. Both Courts have found that no consent on the part of the respondent can be inferred to the granting of the mortgages which are charged. Their Lordships are quite content with the conclusion reached by the High Court, which is thus expressed :—

> " The most that this evidence can establish is that Umrao Kunwar and Gaya Kunwar each acted independently of one another in making transfers. Each asserted a right, which was not possessed, to deal absolutely with the property in her separate possession. . . . The circumstance that neither objected to a transfer made by the other cannot in our opinion be construed to mean more than that neither objected to the other making a transfer, provided that transfer did not affect her own interests in the event of her succeeding to the estate by survivorship. . . . We find an absolute absence of evidence which would justify us in drawing a conclusion that Gaya Kunwar consented to the transfers in question."

There remains the question whether to the extent that the mortgages were made for a legal necessity they are binding on the respondent. This was not expressly decided by the case in 11 Moore's I.A., which dealt with a gratuitous alienation by one widow to the prejudice of the other, but it was made the subject of decision in the well-known case of *Gajapati Radhamani* v. *Pusapati Alakarajeswari* (19 I.A. 184). There it was held, as expressed in the head note, that a mortgage by a Hindu widow, even for necessary purposes, without the concurrence of her co-widow is not binding upon the joint estate which has descended from their deceased husband so as to affect the interest of the co-widow, but the question was left open whether a " case for borrowing without the co-widow's consent could be established so as to empower one widow so to bind the estate," and the only thing that was definitely decided was that it could not do so where the concurrence of the co-widow was not even applied for.

Their Lordships can conceive of cases where when the concurrence of the co-widow has been asked for to a borrowing by the other for necessary purposes and unreasonably refused,

a mortgage for such a debt granted only by the one widow might be held binding on what may be termed the corpus of the estate. That case does not arise here. Umrao Kunwar never asked the respondent to consent to the granting of the mortgages in dispute. What attitude the respondent might have taken up had such a request been made can only be matter for conjecture.

The decision of the Board was pronounced in 1892 and, with the exception of two cases to which reference is afterwards made, it has been consistently followed.

The two cases which are founded on as forming an exception to the general current of authority are *Kalliyansundaram Pillai* v. *Subba Moopanar* (14 M.L.J. Rep., p. 139, decided in 1904), and *Jan Narain Singh* v. *Muna Lal* (26, Allahabad Law Journal 268). In the former the head note bears that "a mortgage executed by the senior widow for a necessary purpose without the concurrence of the junior widow will be binding upon the latter." This broad proposition is not supported by the actual decision, and it is explained in the recent case of *Valluru Appalasuri and others* v. *Sasapu Kannamama Nayuralu* (49 M.L.J., p. 479), on the footing that the Judges were of opinion on the facts of that case that the senior widow was recognised as manager or agent of the other, and that such an inference can be made only in a case where there was no known hostility between the widows and was not possible where (as in the present case) the widows were hostile to each other.

In the second case above referred to there was undoubtedly an expression of opinion by the learned Judges of the High Court of Allahabad that where two Hindu widows have separated for purposes of conveniently enjoying the estate left by the husband if one of them alienates a portion of the estate in her possession under the pressure of legal necessity, the reversioner is bound by such alienation. This opinion was not necessary for the decision of the case for the Court had already held that the widow who had not executed the mortgage deeds challenged was nevertheless a consenting party to this alienation. It may be noted that the case arose not between the survivor of the widows and the mortgagee but between the mortgagee and the reversioner after the death of both widows. The opinion of the High Court was therefore *obiter* and it is not consistent with the judgment of the Privy Council in 19 I.A.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs to the respondent.

In the Privy Council.

GAURI NATH KAKAJI

v.

MUSAMMAT GAYA KUAR.

DELIVERED BY LORD SALVESEN.

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