

by which this case is to be decided, the half-brother's right of succession takes precedence of that of the son of the brother of the whole blood : Stokes H. L. B. 445, 1 W. and B. 129. Several decisions to the same effect have been passed by the High Court of Bengal, and are referred to in Cowell's Digest.

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The cross appeal of Vyankâji has not been seriously pressed. We must confirm the decree of the District Court, with costs of each appeal on the party appellants therein.

Decree confirmed.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 169 of 1874.

March 16.

LAKSHMAN RA'MCHANDRA } *Defendants and Appellants.*
and others

SARASVATIBA'I..... *Plaintiff and Respondent.*

Maintenance—Ancestral property—Hindu law—Purchaser bonâ fide and for value.

The maintenance of a Hindu widow is not a charge on any ancestral property in the hands of a *bonâ fide* purchaser from her late husband's successors any more than the payment of unsecured debts due by the family.

The proposition in *Râmchurum Tewaree v. Mussamat Jasooda Koonver* (2 Agra 134) that the liability of family property, in the hands of a purchaser, for the maintenance of a widow, depends on the ability of her husband's heir to support her, dissented from.

THIS was a special appeal from the decision of W. H. Crowe, Acting Assistant Judge at Tanna, in Appeal No. 378 of 1872, confirming the decree of the Subordinate Judge of Alibâg.

The appeal was heard by KEMBALL and NA'NA'BHA'I HARIDA'S, JJ.

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Bhairavnāth Mangesh for the respondent.

The facts of the case and the arguments on both sides fully appear from the judgment of the Court delivered by

NA'NA'BHĀ'I HARIDĀ'S, J. :—The respondent, Sarasvatibāi, a Hindu widow, sued her nephew, Mahādev Nārāyan (not before the Court now), and the two appellants to recover from them Rs. 48 as her maintenance for 1869-70, and to have the same declared a charge, during her lifetime, upon certain ancestral property in the hands of the appellants.

The appellants are *bonā fide* purchasers of that property for valuable consideration, and the only ground on which it is sought to charge them with the maintenance is that they are now in possession of property, which, if it had remained undisposed of in the hands of her nephew, would have been liable for such maintenance.

The plaintiff's husband, according to her own statement, appears to have died about forty years ago, during the lifetime of his father. When the plaintiff's father-in-law died does not appear, nor is there anything to show when her brother-in-law, Nārāyan, died. But it seems that the property of the family, after their death, came into the possession of their sole heir, Mahādev Nārāyan, her nephew. It further seems that Mahādev sold a portion of it about seven years ago to the first appellant, who again sold a portion thereof to the second appellant.

What the occasion for the sale to the first appellant was has not been ascertained by the court below, though it appears from the Subordinate Judge's judgment, that the sale was made to pay off "debts," which Mahādev Nārāyan alleged to have been "contracted for family purposes." Whether such was really the case or not, there is no ground whatever for supposing that it was other than a *bonā fide* sale for valuable consideration.

Mahádev Náráyan, among other defences, which it is not necessary now to refer to, contended that as in a former suit the plaintiff was declared entitled only to Rs. 12, she could not in this suit claim more.

The other defendants, the appellants before us, contended that they were not liable at all, as they were *bonâ fide* purchasers for valuable consideration.

The Subordinate Judge of Alibág, and the Assistant Judge in appeal, awarded the plaintiff's claim with costs, declaring her entitled, during her lifetime, to receive annually Rs. 12 from her nephew, and Rs. 36 from the proceeds of the property in the possession of the appellants, *i.e.*, Rs. 18 from each of them.

The question which we have, therefore, to decide in this special appeal is whether, under the above circumstances, the property in the possession of the appellants is at all liable to be charged with the plaintiff's maintenance. This must evidently depend upon what rights Mahádev Náráyan and the plaintiff Sarasvatibái respectively had in the property before the sale of it by the former to the first appellant. If the vendor was absolute owner, it is clear the sale conveyed absolute ownership of the property to the vendee, the first appellant. But if that was not the case, it is equally clear that by the sale such right only passed to the vendee as was possessed by the vendor.

Upon the findings recorded by the lower courts, we must take it that the property in question was the ancestral property of Sarasvatibai's father-in-law; and such being the case, we must also take it that her husband had, from the time of his birth, a right in that property equal to his father's, which continued to his death, some forty years ago. In virtue of this right, he might have obtained a partition of that property from his father and other co-parceners, in which case, upon his death, Sarasvatibái would have succeeded to his share of it. But he died undivided, and, according

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to the Hindu law applicable to such cases on this side of India, the property vested in those co-parceners, of whom Mahádev Náráyan is now the sole survivor. While in his possession as such, he sold it to the first appellant. Unless, therefore, at the time of the sale, she had an interest in the property in the nature of a charge upon it, it would be difficult to hold that it did not pass absolutely to him.

It is contended for the respondent that she had such interest; that her maintenance was a "charge" on the ancestral property; and that, therefore, those who have purchased it, have done so subject to such "charge." In support of this contention, Mr. Bhairavnáth has cited to us several authorities, which we shall now examine to see if they establish the proposition contended for.

In *Shidápá v. Parsyá* (S. A. 433 of 1871), decided on the 18th December 1872, by Sir Charles Sargent and Mr. Justice Melvill, their Lordships had not to decide the question raised here, and they did not decide it. From the judgment recorded in the case, it would appear to have been a suit by a Hindu widow to eject a purchaser of some family property, and her claim was disallowed, their Lordships observing: "The plaintiff can, if so advised, bring another action for maintenance, but in the present suit, as she has failed to establish her claim to the property, we must reverse the decree of the court below, and disallow the claim." In that case, if they have expressed any opinion at all on the subject, it is one which rather doubts the soundness of the proposition now contended for since they remark: "In the present case, the defendant is a stranger, and the property, in respect of which the action is brought, would be liable (*if liable at all*) only under certain circumstances, the existence or non-existence of which cannot be ascertained without raising issues foreign to the contention between the parties, &c."

In the case of *Mussumat Golab Koonver and others v. The Collector of Benares and another* (a) there was no question,

(a) 4 Moore Ind. App. 246.

as in this case, between a widow and a *bonâ fide* purchaser for value of ancestral property, and it cannot, therefore, be said to have decided the point now raised. It was a case of confiscation by Government under Bengal Regulation XI. of 1796 of the whole property of a joint Hindu family, consisting of the widow and four sons of the last owner, for an offence of which three only of those sons were guilty, the fourth being a minor, and their Lordships of the Privy Council held that the confiscation did not affect the right of the fourth son, or of the widow to her maintenance out of the whole of the ancestral estate. They virtually declared liable to confiscation by Government such portion only of the whole estate as, upon a partition, would have fallen to the share of those three sons; and the widow's right to maintenance would appear to have been tacitly conceded by Government, for the judgment says (p. 258): "Nothing was urged at the bar against this right."

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In *Mussumat Khukroo Misraï v. Jhoomuck Lall Dass* (b), the question now raised did not properly arise between the parties, and though there is in the judgment a *dictum* to the effect that the widow "could make the estate chargeable with it into whose hands soever it had fallen under the foreclosure," no authorities are cited in support of the position, and it rather assumes that her claim for maintenance is in the nature of a "lien" on the estate. Besides, this *dictum* has reference to the contention in argument that as the widow's claim for maintenance was a charge on the estate, therefore she had an interest in keeping the estate in the family; and, moreover, the estate was only declared to be chargeable, if the widow failed in getting her maintenance from the members of her late husband's family.

The case of *Rámchandra Dikshit v. Sávitribái* (c), principally relied upon by the Subordinate Judge, and strongly pressed upon our attention by Mr. Bhairavnáth, though it

(b) 15 Cal. W. Rep. 263 Civ. Rul.

(c) 4 Bom. H. C. Rep. 73 A.C.J.

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might at first sight seem to do so, when it lays down that "By Hindu law the maintenance of a widow is a charge upon the whole estate, and, therefore, upon every part thereof," does not in reality determine the question now before us. Whether her maintenance is such "a charge" or not was not the point the Court was called upon to decide in that case, and we have the authority of the learned Judge himself, whose judgment contains those words, for saying that it did not decide that point; for, when in a later case (*d*), the case of *Rámchandra Dikshit v. Sávitribái*, was cited before him in argument as deciding that "the maintenance of a Hindu widow is a charge," &c., he observed: "The question there was as to whether one brother could be sued alone, and it was held, that he could" (*e*).

The case of *Shrimati Bhagabati Dasi v. Kanailal Mitter* (*f*) cited by Mr. Bhairavnáth in support of his proposition, is in reality more against than for his client. It decides (1st) that "as against one who takes as heir, a Hindu widow has a right to maintenance out of the property in his hands," which, no doubt, is as good law in this Presidency as it is in Bengal, but which does not apply to the present case; (2ndly) that she also has a right to maintenance out of such property in the hands of anyone who takes it with notice of her having set up a claim for maintenance against the heir"—as to the application of which to this case it is sufficient to say that it has never been contended that any such claim had been set up by the plaintiff, or that the appellants had any notice of it when they purchased the property sought to be charged; and (3rdly) that "by the law of Bengal she has no lien on the property for her maintenance against all the world irrespective of such notice."

The case of *Prosonno Coomarsein Mozoomdar v. The Revd. B. F. X. Barbosa* (*g*) does not seem to us to apply to

(*d*) *S. M. Niotarini Dasi v. Makhanlal Dutt*, 9 Beng. L.R. 11.

(*e*) *Id. Ib.*, p. 27.

(*f*) 8 Beng. L. R. 225.

(*g*) 6 Calc. W. Rep. Civ. R. 253.

the present case. There "a charge" in the strict sense of the term having been created by will upon an entire estate in favour of the respondent, and a portion of such estate having come into the appellant's possession as purchaser, it was held that the person in whose favour the charge was created was at liberty to proceed against the party in possession of any part of the estate subject to the charge, leaving such party to recoup himself by contribution from his co-sharers. To apply this decision to the present case, one must assume the very point that is sought to be established, namely, that a Hindu widow's claim to maintenance is "a charge" upon the estate.

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The learned authors of the Digest of Hindu Law certainly seem inclined to think that it is such a charge, and that any family property in the hands of a purchaser should, therefore, be regarded as subject to it (*h*); but they do not support their opinion by any reasoning or texts or decided cases, to enable one to determine whether it is well founded.

We last come to the cases of *Heera Lall v. Mussumat Kousillah (i)* and *Ram Churun Tewaree v. Mussumat Jasooda Koonwer (j)* also relied upon for the respondent.

In the first of these cases the facts are not fully set out in the report; but sufficient appears in it to enable one to guess with tolerable certainty what they were. It would seem that the amount of the widow's maintenance had been fixed at "four rupees per month," which must have been done either by a family arrangement or by a decree of the Court; that express mention was made of it in the sale deed, which also stipulated that that sum should be paid by the vendor—circumstances pointing to the inference that the parties were dealing with each other upon the basis of that maintenance being actually charged on the property, and that the vendee was anxious to free it from the charge; that the widow was no

(*h*) West and Bühler, Book II., Introduction, p. xxxviii, para. 2; *Ibid.* p. 32.

(*i*) 2 Agra 42.

(*j*) *Id.* Ib. 134.

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party to the deed ; and that from the moment she came to know of it, she " vigorously opposed the mutation of names." If such were the facts, the general question " whether the widow has an actual lien on the property of her deceased husband, or only a right of action against the heir personally, who takes the property," was by no means necessary to the determination of the case, and the court's answer to it, that " the widow's right is a charge on the property which formed the estate of her husband," stands upon no higher footing than a *dictum*. But if we have not rightly conjectured the facts, the case is certainly a direct authority in support of Mr. Bhairavnáth's contention, though it is not very clear why the court, holding as it did, and dismissing the purchaser's appeal, should have ordered that " the decree should be executed first against the heir Madho Singh" (who was not a party to the appeal) " and if he fails to pay it, then against the other defendant," the purchaser. If the widow's right was " a charge," why was she not to be at liberty to realize it out of such property in the first instance, she preferring so to do ?

In the other case of *Ram Churun Tewarce v. Mussamat Jasooda Koonwer (k)*, the doctrine of the widow's maintenance being " a charge " on the estate was sought, but in vain, to be carried to its logical consequence. The respondent, under Section 348 of the Civil Procedure Code, objected that " she should be permitted to enforce her claim against the property purchased by the appellant in the first instance, and not, as the Principal Sadar Amin had decided, after unsuccessfully endeavouring to enforce it " against her husband's heirs and their property. The objection, however, was disallowed, although it had been held that the appellant had purchased the property in execution of a decree in his own favour which the heirs, in collusion with him, had allowed to pass against themselves. This case lays down that property in the hands even of a collusive purchaser is not liable, except under certain circumstances ; and that the widow should proceed in the first instance against the heirs and their property. According to this decision, whether a widow's maintenance in

(k) . *Vide Sup.*

a given case is or is not a charge upon family property in the hands of a purchaser, must depend upon whether her husband's heirs are or are not able to support her—a proposition which appears to us to be unsupported by reason or authority. If her maintenance is really “a charge” upon the alienated property, it is not easy to perceive how it can cease to be so by the fact of the heirs having property which may be their own acquisition, nor, if at the time of the alienation the property does not pass to the alienee burdened with any such charge, how one can well be imposed upon it subsequently, merely because the heirs happen at the time to have no property, which may be the result of their own improvidence.

These authorities, then, do not seem to us to establish that the maintenance of a Hindu widow is a charge on any such property in the hands of a *bonâ fide* purchaser from her late husband's successors, and one of them at all events is certainly an authority the other way (*l*).

The texts, which relate to maintenance, occurring in the principal works of authority on this side of India, lay down generally that he who inherits a person's property is bound to maintain those whom that person was himself bound to maintain (*m*). But it will be seen that similar texts also enjoin upon him “the payment of debts” (*n*), “the initiation of the uninitiated as well as “the marriage of the unmarried members of the family” (*o*), and the performance of certain ceremonies for the spiritual benefit of that person (*p*), and all these are, in English works on Hindu law, spoken of as “charges on the inheritance” (*q*) no less than the maintenance of the dependent members of his family. If the latter, therefore, is “a charge” on the inheritance, it is so in no other sense than that in which the former are so.

(*l*) 8 Beng. L. R. 225.

(*m*) Vyav. May. Ch. IV., Sec. IV., 30; *Ibid.* Sec. IX., 22; *Ibid.* Sec. XI., 1, 3, 9, 12; Mit., Ch. II., Sec. I., 7, 12, 13, 20, 21; *Ibid.* Sec. X., 5, 15.

(*n*) Mit. Ch. II., Sec. XI., 24; Vyav. May. Ch. V., Sec. IV., 12, 14, 16, 17, 19.

(*o*) Vyav. May., Ch. IV., Sec. IV., 38-40; Mit., Ch. I., Sec. VII., 3-6.

(*p*) 2 Coleb. Dig. 576, 577 (Mad. Edn.); Vyav. May., Ch. IV., Sec. VIII., 29.

(*q*) 1 Str. H. L. 166, 170.

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Now it has been held both in Bengal and here that a creditor cannot follow the assets of a deceased Hindu into the hands of a *bonâ fide* purchaser for valuable consideration. See *Sinbassapa v. Moodkapa* (r), *Naroo Huree v. Konheir-Munolur* (s), *Jamiyatrām Rāmchandra v. Parbhudās Hathi* (t), and *Unnopoorṇa Dassia v. Gunga Narain Paul* (u).

It is indeed laid down in a work of great authority that "debts follow the assets into whosoever hands they come" (v), but, as observed by Westropp, C.J., in *Jamiyatrām Rāmchandra v. Parbhudās Hathi* (w), the proposition is "too broadly stated," and is not warranted by the authorities upon which it is based.

If, then, property in the hands of a *bonâ fide* purchaser cannot be pursued by a creditor of the deceased proprietor, it is difficult to see how the case of a widow, whom he was legally bound to maintain, no less than he was to pay his debts, is to be distinguished. What is there to render such property liable in the one case and not in the other ?

Moreover, it is difficult to understand when this "charge on the inheritance" is said to attach to the family property. The duty of maintaining a female legally rests with her husband from the moment of her marriage. No distinction is drawn in the Shâstras between wives and widows; if, then, her right to maintenance becomes a charge from the moment of marriage, every alienation made subsequently is subject to such burden—a liability capable of being enforced at any time when the wife or the widow is unable to obtain maintenance from her relatives.

We must, therefore, reverse the decrees of the lower courts so far as they affect the special appellants, or the property in their hands as purchasers. The sum of Rs. 12, which the plaintiff will receive under those decrees from her nephew Mahâdev Nârâyan may not be sufficient for her maintenance; but, inasmuch as she has chosen not to appeal against them, and inasmuch as he, Mahâdev Nârâyan, is not before us, we are unable

(r) 8 Harr. 232.

(u) 2 Calc. W. Rep. Civ R. 296.

(s) *Id. Ib.* 289(v) 1 Str. A. L. 166; 2 *Id.* 282.

(t) 9 Bom. H. C. Rep. 116.

(w) 9 Bom. H. C. Rep. 117.

to inquire into, or order any inquiry into, the sufficiency or suitability of that allowance; and as the special appellants were improperly made parties to this suit, we think they are entitled to their costs throughout.

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Decree accordingly.

[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 42 of 1872.

March 18.

BA'I AMRIT, widow of JIVA' } (*Original Plaintiff*)
MAHESHVAR } *Appellant.*
BA'IMA'NIK, widow of MAHESH- } (*Original Defendants*)
VAR, and four others } *Respondents.*

Hindu Law—Widow—Manager—Son's widow—Grandson's widow.

Alienations for family purposes of the ancestral estate by a Hindu widow (the mother of a minor son), though she was not appointed an administratrix under Act XX. of 1864, upheld as made by a *de facto* manager.

A Hindu died leaving him surviving a daughter-in-law and a grandson (the widow and son of a predeceased son). Subsequently his grandson died a minor, leaving his widow (also a minor) him surviving :

Held that the grandson's widow succeeded in preference to the son's widow, according to the rule of obstructed heritage, the latter being entitled to maintenance out of the family property.

THIS was an appeal from the decision of Bholánáth Sárábhái, 1st Class Subordinate Judge of Kaira, in the District of Ahmedabad, awarding to the plaintiff half a share in a part of the property claimed by her.

The appeal was heard by WEST and NA'NA'BHA'I HARIDA'S JJ.

Nagindás Tulsidás for the appellant.

Shántarám Náráyán for the first respondent, Báí Mánik.

Dhirajlál Mathurádás, Government Pleader, for the second and third respondents.