

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.

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The fourth and fifth respondents did not appear in person, or by pleader.

The facts, in so far as they are material, and arguments appear from the following judgment of this Court delivered by.

NA'NA'BHA'I HARIDA'S, J. :—Bái Amrit instituted this suit to establish her right to certain property, moveable and immoveable, and recover possession of the same from the defendants.

The facts of the case, which are not disputed, are as follows :—One Ghelábhái Aditram, the head of a joint Hindu family, died in Samvat 1918 (A.D. 1861-62), leaving some ancestral property, the subject of this suit. The defendant, Bái Mánik, is his daughter-in-law, the widow of his son Maheshvar, who had predeceased him in Samvat 1913 (A.D. 1856-57), and the plaintiff Bái Amrit is the widow of Maheshwar's son, Jivá, who died a minor in Samvat 1921 (A.D. 1864-65).

The other defendants are Bái Mánik's vendees, and as such are in possession of a portion of the immoveable family property mentioned above.

The defendant, Bái Mánik, among other things, contended that she had sold two of the fields mentioned in the plaint, Nos. 321 and 292, to pay off family debts; that as to the rest of the immoveable property, a house and two other fields, Nos. 456 and 362, she was living in the former and maintaining herself from the produce of the latter, which amounted only to Rs. 30 a year; that she had always been in possession of the same from the time of her husband and father-in-law, and was entitled to continue in possession; that the plaintiff, being a childless widow, was entitled only to food and clothing, which she was willing to allow her according to her means; that neither by Hindu law nor by the usage of the country or of the caste was the plaintiff entitled to succeed to the family property; and that as her husband, Jivá, being himself deaf from birth and an idiot, had not succeeded to that property, she could not claim it as his heir.

The other defendants contended that they were *bonâ fide* purchasers for valuable consideration, the first two from Bái Mánik herself, and the other two from one Bháiji Raghunáth, another purchaser from her.

It has been clearly found by the Subordinate Judge that the sales by Bái Mánik to her first two co-defendants and to the vendor of the other two co-defendants were for family purposes, namely, for paying off debts incurred for the performance of the funeral ceremonies of her father-in-law and grandmother-in-law, and also of the marriage and funeral ceremonies of her son Jivá, the plaintiff's husband, and the appellant has failed to satisfy us that the Subordinate Judge was wrong in the view he took of the evidence on that point. Bái Mánik at the time of the sales above mentioned, was the only adult member of the family, and in management of the family property as such. She was, moreover, by Hindu law, the guardian of her late minor son and of her minor daughter-in-law, Bái Amrit, and competent in that capacity to deal with the family property for the benefit of the estate: *Bái Kesar v. Bái Gangá (a)*. It is true that she does not appear to have been appointed manager by the civil court under Act XX. of 1864. But seeing that she was manager *de facto* of the family, her sales in that character of portions of the family property for valuable consideration, which, when obtained by her, was actually applied to meeting family necessities, cannot, we think, be questioned. The Hindu law enables even a slave, *â fortiori*, therefore, a person in Bái Mánik's position, to bind the family by contracts made under the circumstances found in this case (b). We must, therefore, disallow that portion of the plaintiff's claim which relates to the property in possession of the co-defendants as purchasers.

As to the rest of the property, which Bái Mánik admits to be in her possession, the question arises what are the respective rights of Bái Amrit, the plaintiff, and Bái Mánik,

(a) 8 Bom. H. C. Rep. 31 A.C.J. (b) Coleb. Dig. I. Texts 191—193.

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the defendant? It is clear that upon the death of Maheshwar, in Samvat 1913, during the lifetime of his father, Ghelábhái, no portion of it passed to Báí Mánik. She, no doubt, was entitled to get a suitable maintenance out of it, but the property itself vested entirely in the surviving co-parceners, Ghelábhái and his grandson Jivá, unless either of them was by law disqualified to inherit, in which case it vested exclusively in the other. It has indeed been contended by Báí Mánik that deafness from birth and idiocy excluded Jivá altogether from the inheritance; that the whole of the property accordingly vested in Ghelábhái; and that upon his death, it devolved upon her as his heir, Jivá and Báí Amrit being entitled only to maintenance. If her allegations as to Jivá's deafness and idiocy were proved, such would, no doubt, be the result; but they are denied by the plaintiff, and the evidence in support of them has failed to satisfy us, as it has failed to satisfy the court below, that Jivá was either deaf from birth or an idiot. It is unnecessary for us to recapitulate the evidence of the different witnesses which has been reviewed at some length by the Subordinate Judge. The result of it seems to us to be that Jivá, though somewhat hard of hearing, and not by any means a clever boy, did hear what was said to him in a sufficiently loud tone; that he learned to speak; that he was sent to a school, which he attended for about three years; and that when he left it, at the age of 8, he was in the fifth class, and had studied as far as the Second or Third Book of reading. We are, therefore, of opinion that upon the death of Maheshwar, in 1913, the surviving members of the family, Ghelábhái and Jivá, became joint owners of the whole of the family property, and that, upon the death of Ghelábhái, in 1918, it vested solely in the survivor Jivá. Such being the case, it would, upon Jivá's death, in 1921, devolve upon the plaintiff, his widow, Báí Amrit, unless it be shown that the ordinary rule of Hindu law does not apply to this case.

It has been contended for Báí Mánik that, according to the custom of her caste, the property of Jivá, upon his

death, devolved, not upon his widow, Bái Amrit, but upon herself, his mother, and that Bái Amrit is entitled only to maintenance. In proof of such alleged custom our attention is directed to the evidence of several witnesses, which, however, we do not consider to be sufficient. It is urged, indeed, that the existence of such a custom was admitted by members of the caste so far back as half a century ago, and in support of this we are referred to Mr. Borradaile's Collection of Caste Rules. We find in it an answer to Question 6, given to him by certain members of the caste then residing in the city of Surat, to this effect :—"When a person at his death leaves no one but his mother and his wife, the succession devolves to the mother agreeably to the Shástra" (c). This is perhaps enough to lead one to infer that the witnesses, who now speak to the existence of the custom, are not inventing one for the purposes of this suit. But it is by no means sufficient to establish the custom itself; and having regard to the whole of their evidence, and bearing in mind that it is not shown to have ever been recognised by the Courts, that the oldest witness (No. 61, who is 72 years of age,) cannot mention a single case in which it was actually followed, that the other witnesses, who also depose to its existence, have, in stating instances, omitted all mention of the circumstances, or when they occurred, that persons belonging to, or connected with, the families in which the instances are deposed to have occurred have not been called to prove them, and also that the witnesses are not all agreed as to what the custom really is, we are unable to say that it is satisfactorily established; and we are the more inclined to this opinion when we find that other members of the same caste residing at Broach stated to Mr. Borradaile, about the same time, and in answer to the same question, that "If there be no other relation of a deceased man but his wife and mother, they will divide his inheritance equally between them" (d).

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(c) Borr. Caste Rules, Court Library Copy, pp. 14, 273.

(d) Borr. Caste Rules, Court Library Copy, p. 298.

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Such being our view of the evidence on this point, the respective rights of the plaintiff and Bái Mánik are determined by the ordinary rule of Hindu law, which in a case like the present, of what is termed "obstructed heritage," declares the widow of the deceased to be his heir in preference to his mother (e). The Subordinate Judge is clearly wrong in holding that, according to that rule, the mother and the widow are both equally his heirs, and the several texts which he cites in support of his opinion have, to our minds, little or no bearing on the subject. But, although the widow succeeds in preference to the mother, the latter is still entitled to get a suitable maintenance out of the family property. We must, therefore, at the same time that we fully recognize the plaintiff's right, make a proper provision for Bái Mánik's maintenance; and having regard to the amount of the family property in this case, we think substantial justice will be done by our passing the following order, namely, (1) that the defendant Bái Mánik make over to the plaintiff a moiety of the moveable property in her possession, or its value, as found by the Subordinate Judge, retaining the other moiety for her own use; (2) that the family dwelling-house be divided into two equal parts, one of which she is to make over to the plaintiff, retaining the other for herself to live in during her lifetime; and (3) that in the same way the two fields also, Nos. 456 and 362, be divided into two equal parts, one of which she should make over to the plaintiff, retaining the other for her own maintenance.

We, therefore, allow the plaintiff's claim to the extent specified above, and accordingly modify the Subordinate Judge's decree, directing Bái Amrit and Bái Mánik each to pay her own costs, and the former to pay the costs of defendants Nos. 2 to 5 throughout.

*Decree accordingly.*

(e) Vyav. May., Ch. IV., S. VIII, I., Miták., Ch. II., Sec. I., 2.