partition, and rely upon the custom frequent in *deshpande* families, to which we have alluded. But in the present case he sues solely on the award, and does not abandon his claim to a partition, and we cannot, therefore, in this case consider whether, apart from the award, he is entitled to any and what allowance for his maintenance, in addition to the portion of the *vatan* of which he appears to be already in possession.

We reverse the decrees of the Courts below, and reject the claim. The plaintiff must pay the fees which he would have had to pay if he had not been allowed to sue as a pauper.

Decree reversed.

ORIGINAL CIVIL.

Before Mr. Justice Scott.

DAMODARMADHOWJI AND OTHERS, PLAINTIFFS, *v.* PURMANANDAS JEEWANDAS, DEFENDANT.*

PURMANANDAS JEEWANDAS, PLAINTIFF, *v.* DAMODAR MADHOWJI AND OTHERS, DEFENDANTS.†

1883 *January* 29.

Hindu law—Widow's property in moveable left to her by the will of her husband —Power of widow to dispose of such property by will—Practice—Amendment of plaint—Alternative case—Civil Procedure Code (XIV of 1882), *Sec.* 53.

In Western India a widow takes absolutely all moveable property bequeathed to her by her husband, and may dispose of such property by will.

Where a plaintiff's claim as originally stated in his plaint was based on the allegation of the invalidity of a will, an application at the hearing of the case to amend the plaint by inserting a clause submitting that, even if the will were valid, it did not dispose of the whole of the testator's property, was refused,—the Court holding, under section 53 of the Civil Procedure Code (XIV of 1882), that the case made by the proposed amendment would be inconsistent with the case made in the plaint as originally framed.

THE first (No. 237 of 1877) of the above suits was brought by the executors of the will of Ramkuverbai, widow of one Ranchordas Canjee, to recover from the defendant, Purmanandas Jeewandas, who was the nephew and residuary legatee of Ranchordas Canjee, the sum of Rs. 5,950 alleged by the plaintiffs to be payable to Ramkuverbai under the provisions of the will of Ranchordas Canjee.

* Suit No. 237 of 1877. † Suit No. 556 of 1877.

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The said will was dated 12th May, 1859, and contained the following clauses :—

"What is to be given to my wife, Ramkuverbai, in the event of my death is as follows :—

"One month after my death, Rs. 20,000 shall be credited in her name in our firm, and the interest thereof at the rate of annas five per cent., whatever it may amount to, shall be paid to her every year for her expenses.

"Should she proceed on the great pilgrimage of Shri Malhji, Rs. 5,000 shall be paid to her. Should my wife not agree with Bhai Purmanandas, and should she be obliged to live separate, Rs. 200 shall be paid to her every year out of my property for her expenses."

The plaint stated that, in accordance with the above provisions of the will, the defendant had made certain payments to Ramkuverbai in respect of the said sums of Rs. 20,000, &c., &., but that the defendant had not paid her the sum of Rs. 750 which accrued due on the 17th October, 1876, in respect of the interest on the said Rs. 20,000, nor the sum of Rs. 200 which accrued due on the same day in respect of the annual payments directed by the will.

The plaint further alleged that Ramkuverbai had proceeded on the great pilgrimage of Shri Malhji on 20th October, 1875, having previously demanded, but having failed to obtain, payment of the Rs. 5,000 from Purmanandas Jeewandas.

Before leaving Bombay on pilgrimage, Ramkuverbai on 18th October, 1875, appointed the plaintiffs her attorneys to demand and receive all moneys due to her under the will of Ranchordas Canjee. The defendant, Purmanandas Jeewandas, in January, 1876, made certain payments to the plaintiffs, as such attorneys, on account of the moneys due to Ramkuverbai.

On 4th April, 1877, Ramkuverbai died, having previously made her will, and appointed the plaintiffs her executors.

In his written statement Purmanandas Jeewandas alleged that the said Ranchordas Canjee and his brother Jeewandas Canjee

(the father of Purmanandas) were members of an undivided Hindu family, and that the property mentioned in the will of Ranchordas Canjee was ancestral property. He contended that the will of Ranchordas Canjee was void and inoperative, and denied that Ramkuverbai was legally entitled to the moneys given to her under its provisions. He further denied the right of Ramkuverbai to dispose by will of property which she took under the provisions of the will of Ranchordas Canjee, and he claimed all the property in her possession at the time of her death as his own.

The second of the above suits (No. 556 of 1877) was brought by Purmanandas Jeewandas against the executors of the will of Ramkuverbai.

The plaint prayed that the will of Ranchordas Canjee might be declared to be void and inoperative; that the property taken by Ramkuverbai under the provisions of the said will might be declared to belong to him, and that the defendants might be ordered to deliver and pay over to the plaintiff all such property as they had taken possession of; that an account might be taken of such property, and that the defendants might be restrained by injunction from interfering with such property, and for the appointment of a receiver.

At the hearing the following issues were raised:—

1. Whether Ramkuverbai had power to dispose of the sums of Rs. 5,000, Rs. 750 and Rs. 200 in the pleadings mentioned.

2. Whether the plaintiffs in Suit No. 237 of 1877 were entitled to recover the said sums, or any and which of them, from the defendants.

3. Whether Purmanandas Jeewandas was entitled to the relief prayed for in Suit No. 556 of 1877.

Latham (with him *Farran*) for the plaintiffs in the first suit and the defendants in the second suit.

Hon. *J. Marriott* (Advocate General) and *Lang* for the defendant in the first suit and the plaintiff in the second suit.

The following authorities were cited :—Mayne on Hindu Law, secs. 248-553 ; *Purmanundas Jeewandas* v. *Venayekrav Was-*

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sudeo(1); West and Bühler (2nd ed.), p. 457; *Balvantrav* v. *Purshotam*(2); *Bechar Bhagwan* v. *Bai Lakshmi*(3); *Pranjivandas* v. *Devkuverbai*(4); *Mussamat Thakoor Deyhee* v. *Rai Balukram* (5); *Bhugwandeen Doobey* v. *Myna Baee*(6); *Mussumat Thakoor Deyhee* v. *Rav Baluk Ram*(7); Norton's Leading Cases, p. 652; Mayne on Hindu Law, sec. 338; *Mussamat Bhogbutti Daee* v. *Chowdhry Bholanath*(8); *Sreemutty Rabutty* v. *Sibchander Mullick*(9); Grady's Hindu Law, pp. 455, 175.

SCOTT, J.—These two suits, arising out of the same causes of action and being between the same parties in the same interests, were tried together. In the first suit (No. 237 of 1877) the plaintiffs are the executors appointed by the will of Ramkuverbai *alias* Samkuverbai, widow of Ranchordas Canjee, and they claim from the defendant, Purmanandas, nephew and residuary legatee of the said Ranchordas Canjee, the sum of five thousand nine hundred and fifty rupees with interest. This sum of 5,950 rupees is due, they contend, to the deceased widow under the will of her husband, Ranchordas, who made provision for her by directing the payment of certain annual sums amounting to Rs. 950, and by also directing that Rs. 5,000 should be paid to her in case she performed a certain pilgrimage.

Purmanandas, as plaintiff of the second suit (No. 556 of 1877) against the said executors, prayed —

(1) That the will of Ranchordas be declared void; but this prayer was withdrawn at the hearing, in consequence of certain decisions on the point having been made in the higher Courts.

(2) That the property of Ramkuverbai, the widow, be declared to belong to the plaintiff, Purmanandas, and not to her executors, the plaintiffs in the first suit.

He further prays that an account, if necessary, be ordered; that a receiver be appointed; and that the executors (plaintiffs in the first suit) be restrained from dealing with the said property.

(1) L. R., 9 I. A., 86.
(2) 9 Bom. H. C. Rep. at p. 111.
(3) 1 Bom. H. C. Rep., 56.
(4) 1 Bom. H. C. Rep., 130.
(5) 11 Moore's I. A. at pp. 175-6.
(6) 11 Moore's I. A., 487.
(7) 11 Moore's I. A., 139 at p. 175.
(8) L. R., 2 I. A., 256.
(9) 6 Moore's I. A. 1.

The same contentions were raised in the respective written statements.

The performance of the pilgrimage, for which the 5,000 rupees were directed to be paid, was satisfactorily proved. The annual sum of Rs. 950 was paid until the last year. Purmanandas does not deny that he was liable to pay these sums to the widow in her life-time; but he maintained that she had only a life-interest in them; that she could not dispose of them by will, and that they reverted to him (Purmanandas) on her death. He also contended that the same rule applied as regards her jewellery and all her property.

In the course of the hearing of the suit the Advocate General on behalf of Purmanandas asked for an amendment of his plaint and written statement respectively, and it will be convenient to dispose at once of this question.

The case put forward on the pleadings on behalf of Purmanandas was that the will of Ranchordas was void; that the property which his widow took under that will was limited, and not absolute; and that the will of his widow was void.

The first point was subsequently abandoned, and the case then turned on the interest which the widow had in the property bequeathed to her by her husband, and on her power to deal with that property and her jewellery by will.

The Advocate General asked leave to amend the pleadings by the introduction of an alternative case based on the admission of the widow's testamentary power. The case before the Court was, in the Advocate General's words, that Ramkuverbai had no power to dispose of property inherited from her husband by his will, but that it would descend to her next heir, Purmanandas.

The Court was now asked, at the close of the plaintiff's case, to raise by amendment a new issue. Mr. Marriott asked to be allowed to show that even if Ramkuverbai had the testamentary power, the denial of which was the basis of his case, the will she made did not specifically dispose of all her property, and the residue being left to charitable objects of an unspecified and general character, could not legally be applied to charity at all, but would pass as under an intestacy to her heir, Purmanandas.

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Section 53 of the Civil Procedure Code (Act XIV of 1882) was relied upon in support of this application, together with the English rulings under the rules and orders of the Judicature Act.

As regards the English precedents on this point, it must first be remarked that the Judicature Act allows more latitude and scope to judicial discretion than is permitted by the Civil Procedure Act of 1882, as will be seen when they are read together. The rule under the Judicature Act (Rule 1, Order 27) is as follows :—

"The Court or a Judge may at any stage of the proceedings allow either party to alter his statement of claim or defence or reply . . . . . All such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties."

Now, section 149 of the Civil Procedure Code, which applies as well as the section quoted, only allows amendments of the issues that may be "necessary for determining the controversy between the parties", and section 53 contains a distinct proviso that "the plaint cannot be so altered as to convert a suit of one character into a suit of another and inconsistent character." The power given by these sections is clearly not so extensive as that given by the Judicature Act.

But a review of the cases in England shows that the parties are not allowed even there to raise by amendment an entirely new case. Thus in *Newby* v. *Sharpe*(1) an amendment converting a claim on the footing of a subsisting lease into a claim on the footing of eviction was thus commented on by the Appeal Court, *James, L. J.* :—"An amendment was allowed which appears to me of an unprecedented description, as it entirely alters the nature of the case made." *Thesiger, L. J.* :—"So far as the amendment raised the new case of eviction it ought not to have been allowed, for it changed the whole nature of the action." *Baggallay, L. J.* : "The amendment was only allowable so far as it sets out the covenant for quiet enjoyment."

This case was approved, but distinguished, in *Laird* v. *Briggs*(2) where in a suit claiming exclusive right to a foreshore an amend-

(1) 8 Ch. Div., 39. (2) 19 Ch. Div., 22.

ment was allowed enabling defendant to deny plaintiff's right altogether, although he at first only put forward a right of user by prescription. "The amendment is allowed," said Sir George Jessel, M. R., "with a view of trying the real question between the parties."

The rule as thus expressed by the Master of Rolls was more fully and clearly laid down recently by Mr. Justice Fry in *Blenkhorn* v. *Penrose*(1): "All such amendments in pleadings", his Lordship says, "are to be allowed as may be necessary for enabling the real question at issue to be tried, subject to the limitation that the whole nature of the action may not be changed by amendment."

The case cited from the Privy Council Reports(2) as admitting a very wide amendment was expressly stated by their Lordships to be an exceptional decision, on the special ground that the refusal of the amendment and a dismissal of the appeal would have enabled the defendant to have raised the defence of Statute of Limitation to the second suit.

The cases in the Indian Reports, in which amendments have been disallowed on the ground that they would alter the entire nature of the suit, are to be found collected in Mr. Broughton's commentary on the Act of 1877. But they may be summed up in the following rule enunciated by the Bombay High Court in *R. M. Modhe* v. *S. Dongre*(3): "A reasonable amendment, not inconsistent with the case as it originally stood, can be allowed."

It is hardly necessary for me to argue the question whether the suit or cause of action raised by the proposed amendment is inconsistent with the action as it originally stood. The original claim is entirely based on the invalidity of a will. The claim now raised by the amendment starts with the validity of the will as its basis, but says the will does not deal with all the property and asks for an account of what property comes under the alleged intestacy. This was certainly not the question in controversy between the parties. It entirely alters Purmanandas' cause of action in the one suit, his ground of defence in the other. To admit such an amendment would only throw the present suit

(1) 29 W. R., 237. (2) 11 Moo. I. A., 468. (3) I. L. R., 5 Bom. 609.

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into confusion. I shall hold it inadmissible under the provisions of the Civil Procedure Code.

I have, therefore, only to consider the merits of the two suits as they originally stood. Some evidence was given by Purmanandas to show that Ramkuverbai died possessed of a considerable amount of jewels. I do not think this fact was satisfactorily proved. All that appeared in evidence was that whilst living she was possessed of jewels, and at her death she had none. Nothing was shown which proved that her executors had not properly accounted for her estate. In any case that question cannot arise under the present suit. Nor can I now enquire into the disposal of a sum of Rs. 6,500 which the widow received from Purmanandas. Both these matters are outside the present case.

The present suits really turn on a question of law. It is admitted that, during her life-time, Ramkuverbai was entitled to receive the sum of Rs. 5,900 from Purmanandas. But Purmanandas denied that she had more than a life-interest in the sums bequeathed to her by her husband, or that she had any testamentary power concerning them. The will she made is said to be void, and these sums are claimed by Purmanandas.

A question of Hindu law arises here. The property which a widow can have in the moveables left her by the will of her husband is the question before the Court. Are they her own absolutely? Can she dispose of them by will or has she only a life-estate, and no power of alienation?

The authority of Mr. Mayne (Hindu Law, s. 553,) was cited in support of the contention that the property of a widow in her moveables is limited, and not absolute. He says: "Another point on which there appears to be much difference of opinion is whether a widow or other female heir has any larger power of disposition over moveable property than over immoveable property. It is now finally settled as regards cases governed by the law of Bengal and Benares that there is no difference." He adds that the Judicial Committee admits "that there ought to be a difference in this respect between the law of those provinces and that administered in the Mithila and in Western and Southern India. Certainly", he adds,

"as regards the latter districts there is a strong current of authority the other way."

I think Mr. Mayne goes too far when he says the point is finally settled as regards cases governed by the law of Bengal. The Judicial Committee strictly limited their decision in *Bhugwandeen Doobey* v. *Myna Baee* (1), (which is the case relied upon by Mr. Mayne,) to the cases governed by the law of the Benares School. In dealing with the cases cited contrary to their view their Lordships distinguish them all, and say "the Calcutta decision, so far as it mooted the question and the case in 2 Moo. I. A., were determined by the law of Mithila: the two cases from the High Court of Bombay were decided according to the peculiar law of the Bombay Presidency, including the Mayukha, and those at Madras according to the law of that Presidency."

In *Mussamat Thakoor Deyhee* v. *Rai Balukram* (2) their Lordships say that "although, according to the law of the western schools, the widow may have a power of disposing of moveable property inherited from her husband, which she has not under the law of Bengal, she is by the one law, as by the other, restricted from alienating any immoveable property which she has so inherited."

The question has, therefore, not been settled by the Privy Council as regards cases arising in the Bombay and Madras Presidencies and parts of the Bengal Presidency. I have collected the decisions of the various High Courts, and they clearly show that the current of authority in Western India, at any rate, is in favour of giving the widow full power over her moveables.

In *Bechar Bhagwan* v. *Bai Lakshmi* (3) it was held that "a Hindu widow's right to alienate moveable property inherited from her husband without the consent of his heirs is absolute." In *Pranjivandas* v. *Devkuverbai* (4) it was held that "the spirit and practice of Hindu law as recognized in Western India will be best construed by treating the widow as having uncontrolled power over the moveable estate." In *Balvantrav* v. *Pursho-tam* (5) Westropp, C. J., says: "The widow in this Presidency

(1) 11 Moore's Ind. Ap. at p. 513.
(2) 11 Moore's Ind. Ap. at p. 175.
(3) 1 Bom. H. C. Rep., 56.
(4) 1 Bom. H. C. Rep. at p. 133.
(5) 9 Bom. H. C. Rep, at p. 111.

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takes a limited estate in the immoveable property of her childless husband or son, but she takes his moveable estate absolutely."

In Calcutta the most recent decisions are equally clear and decided. In the case of *Koonjbehari Dhur* v. *Premchand Dutt*(1) the widow had received the property under the will of her deceased husband. "The Judge", says the High Court, "appears to have left entirely out of sight the common rule of Hindu law, which is that in respect of gifts by a husband to his wife she takes immoveables only for her life, and has no power of alienation, while her dominion over moveable property is absolute." It is worth nothing that in this case the Tagore Law Lectures for 1878 were quoted by the High Court as their authority for this common rule of Hindu law.

The same rule is laid down in *Venkata Rama Rao* v. *Venkata Suriya Rao* (2): "Immoveable property purchased by a widow by means of presents received from her husband during marriage and by money raised on mortgage of her *stridhan* property is *stridhan*, and, consequently, she can dispose of it by will."

The Privy Council in *Venkata Rama Rao* v. *Venkata Suriya Rao* (3) decided in favour of the widow's testamentary power over her absolute property, and a woman's power to devise by will her absolute property is now settled for the town of Bombay by Statute (see the Hindu Wills' Act incorporating section 46 of the Succession Act).

This *resume* of recent decisions shows a consensus of authority deciding that a widow may deal absolutely with moveables inherited from her husband.

The works of Hindu writers on which these decisions are based, have been overlaid, and perhaps obscured, by commentators. But the original texts certainly justify the decisions.

The Mayukha (which has a special authority in this province), c. 4, s. 10, No. 9, recites with approval the following rule of Narada as regards the widow's rights:—"Property given to her by her husband through pure affection the widow may enjoy at

(1) I. L. R., 5 Calc., 684. (2) I. L. R., I. Mad., 281.
(3) I. L. R., 2 Mad., 333.

her pleasure after his death, or may give it away, except land or houses." This rule is also quoted by Colebrook in his Digest, Vol. III, as text 476. It is cited in the Mitakshara, c. 1, sec. 1, No. 20, which is paramount with the Benares School, and it is given in the Dayabhaga which with Colebrook's Digest prevails in Bengal (c. 4, s. 23). The Vivada Chintamani (the authority in the Mithila) says, p. 261: "A woman can dispose of moveable property which has been given her by her husband, but she can never dispose of immoveable property." The Smriti Chandrika (which is paramount in Madras) quotes Narada's rule, and says it gives to the widow independent control over moveables; and the Sarasvati Vilas (which obtains in Southern India) gives to the rule the same interpretation. Thus the commentators of all the schools are of one opinion, and Nárádá's rule is of universal application.

Going back to earlier sources I find Yajnavalkya (Bk. II, sloka 143) says: "What has been given to a woman by her father, her husband or her brother or received by her before the nuptial fire, or on occasion of her husband's marriage with another wife and such like, is called *stridhan*." The Mitakshara, para. 2, s. 2, s. 11, expands the words "and such like" into "acquisitions by inheritance, purchase, partition, gift, finding". The Dayabhaga completes the chain by defining *stridhan* as that which a woman may alien or use independently of her husband. The Tagore Will Case lays down the rule that devisees take as they would if the testator had given the property to them in his life-time—L. R., Ind. App. (Sup. Vol.), p. 68.

The passage on which the opposite view to the one I have followed is founded, is from Catyayana, and is cited in Colebrook's Digest, Vol. III, text 477. The second paragraph is specially relied upon: "What a woman has received as a gift from her husband she may dispose of at pleasure after his death if it be moveable, but as long as he lives let her preserve it with frugality, or she may commit it to his family. (2) The childless widow preserving inviolable the bed of her lord, and strictly obedient to her spiritual parents, may frugally enjoy the estate until she die; after her the legal heirs shall take it."

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This second paragraph, read alone, has certainly a restrictive character; but when read together, as it must be, with the first paragraph it can only be taken to refer to immoveables. If it is taken to refer to all kinds of property, it establishes a contradiction with the preceding paragraph, and destroys the value of the whole rule. It is noteworthy that this restrictive second paragraph is not cited by any of the various commentators of the western schools, whilst the more liberal rule of Narada is reproduced by commentators of all the schools.

In any case I am bound to follow the current of the decisions I have cited, and the law as laid down by the Mayukha. On this side of India no doubt remains on the subject, and I am glad that my decision favours the modern tendency in India, as elsewhere, to elevate the position of women and to increase their independence.

My judgment will be for the plaintiffs in Suit No. 237 of 1877 on all the issues which remained to be tried in both cases.

All costs of both actions to be paid by defendant in second suit.

Second suit to be dismissed with costs.

Decree for Rs. 5,950 with interest according to first para. of plaint in Suit 273 of 1877.

Judgment for plaintiffs.

Attorneys for plaintiffs in Suit 237 of 1877 and defendants in Suit 556 of 1877.—Messrs. *Prescot and Winter.*

Attorneys for defendant in Suit 237 of 1877 and plaintiff in Suit 556 of 1877.—Messrs. *Macfarlane* and *Edgelow.*