FULL BENCH.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Chandavarkar, Mr. Justice Batty and Mr. Justice Aston.

BASAPPA BIN FAKIRAPPA, A MINOR (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAYAVA KOM BASAPPA AND ANOTHER (ORIGINAL DEFENDANTS 1 AND 2), RESPONDENTS.* 1904. *August* 22

Hindu widow—Remarriage—Death of the son by first husband—Succession to the son.

A remarried Hindu widow is entitled to succeed to the property left by her son by her first husband, the son having died after the remarriage.

Akora Suth v. *Boreani*(1) followed.

SECOND APPEAL from the decision of J. C. Gloster, District Judge of Belgaum, confirming the decree of Vishvanath V. Vagh, First Class Subordinate Judge.

One Basappa Madimane died leaving him surviving a widow Rayava and a son Bhimappa. Rayava subsequently remarried and after the remarriage Bhimappa died. After Bhimappa's death his paternal uncle, Fakirapa, brought the present suit against Rayava and her alienees to recover from them the property left by the deceased Bhimappa on the ground that as Rayava had remarried she had lost her right to succeed to the property and that he was entitled to it as the nearest kinsman.

Defendant 1, Rayava, disputed the correctness of the allegation with respect to her remarriage.

The contentions of the other defendants proceeded on the same lines.

The Subordinate Judge held that even assuming that Rayava had remarried, she was entitled to succeed to the property left by the son of her first husband according to the decision in *Chamar Haru* v. *Kashi*.(2) He, therefore, dismissed the suit.

* Second Appeal No. 486 of 1903.

(1) (1863) 2 Beng. L. R. 199. (2) (1902) 26 Bom. 388.

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On appeal by the plaintiff the Judge summarily dismissed it under section 551 of the Civil Procedure Code (Act XIV of 1882) on the following grounds :—

In this case the applicability of the ruling in *Chamar Haru* v. *Kashi*(1) is not disputed, but it is contended that it is at variance with the Full Bench ruling in *Vithu* v. *Govinda*(2). In that case, however, it is clear that the question did not arise. It has reference to the widow's marriage after her succession to her son's estate. This distinction is pointed out by Ranade, J., pages 329, 330.

The plaintiff having presented a second appeal, it was also summarily dismissed by Chandavarkar, J., on the 30th September, 1903. The plaintiff thereupon preferred a second appeal under section 15 of the Letters Patent. The second appeal was admitted on the 7th January, 1904, by Jenkins, C. J., and Batty, J., who ordered that the appeal should be argued before a Full Bench. The appeal was, therefore, heard by a Full Bench consisting of Jenkins, C. J., Chandavarkar, Batty and Aston, JJ.

Krishnaji H. Kelkar, for the appellant (plaintiff) :—The Judge relied on the decision in *Chamar Haru* v. *Kashi*(1) which is based on sections 2 and 5 of the Hindu Widows Remarriage Act (XV of 1856). According to the Mitakshara and the Mayukh remarriage of a widow was considered to be concubinage. A remarried widow was thus subject to a grave disability and to save her from it and from other consequences following the remarriage, the Hindu Widows Remarriage Act was passed. The preamble to the Act clearly supports our contention. The Act in no way enlarged the rights of a widow, that is, the Act does, in no way, permit inheritance by a remarried widow in two families, namely, the family of her deceased husband and the family of her second husband. Section 1 of the Act legalizes the remarriage of a widow and section 2 lays down that the rights of a remarried widow in her deceased husband's family cease on her remarriage. We contend that the widow on her remarriage becomes civilly dead with respect to the family of her first husband and all its belongings. The section does not make any distinction between rights vested and not vested. It refers to all rights. Before the passing of the Act a remarried widow could not inherit in the

(1) (1902) 26 Bom. 388. (2) (1896) 22 Bom. 321.

family of her second husband, therefore in that respect section 5 of the Act comes to her rescue and gives her all the rights of inheritance in her second husband's family. That section does not in any way refer to her rights in the family of her first husband. They are determined by section 2. According to Hindu law the son of a widow who remarries would be a motherless son. Therefore to make a provision for such a contingency a remarried widow is allowed to have a right of guardianship of the son by her first husband under section 3 of the Act. Section 5, when read with section 2, shows that a remarried widow loses her rights in the first husband's family and gets certain rights in the second husband's family, which rights she could not have got under Hindu law. Section 5 does not say anything about interests, it refers only to rights, while section 2 is more extensive inasmuch as it refers both to rights and interests. As to the distinction between rights and interests, see Maxwell on Interpretation of Statutes, p. 445; *Moul* v. *Groenings*[1]. Therefore section 5 cannot be said to control section 2.

Remarriage of widows being strictly prohibited according to Hindu law, the Smriti writers had no occasion to consider the questions arising after a widow's remarriage. By the remarriage she ceases to be a *gotraja sapinda* of her deceased husband and thus becomes completely severed from his family. The authorities on the point are *Akora Suth* v. *Boreani*[2]; *Panchappa* v. *Sanganbasawa*[3]; *Vithu* v. *Govinda*[4]; *Matungini Gupta* v. *Ram Rutton Roy*[5]; *Parvati* v. *Bhiku*[6]; *Murugayi* v. *Viramakali*[7]; West and Bühler, p. 430; Stoke's Hindu Law Books, p. 435; Yajnyavalkya Smriti, verse 67; Mandlik's Hindu Law, p. 170; Sacred Books of the East, 25th Volume, p. 196.

It is now too late to contend that according to Hindu law a remarried widow can inherit the property of her son by the first husband.

We submit she would be a mother civilly dead.

(1) (1891) 2 Q. B. 443.
(2) (1868) 2 Beng. L. R. 199.
(3) (1899) 24 Bom. 89 at p. 93.
(4) (1896) 22 Bom. 321.
(5) (1891) 19 Cal. 289.
(6) (1867) 4 Bom. H. C. R., A. C. J., 25.
(7) (1877) 1 Mad. 226.

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Daji A. Khare, for the respondents (defendants 1 and 2) :—The Hindu Widows Remarriage Act does not apply to widows in whose castes remarriage is not allowed. But if the Act is to be considered as applying to all widows, still there is no authority to support the contention that a widow remarrying loses the right of inheritance to her son by first husband. There are authorities the other way : West and Bühler, pp. 387, 453, 512, 513 ; Customary Law of the Punjab, p. 18. Remarriage does not divest any rights : *Har Saran Das* v. *Nandi*[1]. It would not be correct to say that a widow belonging to a class in which remarriage is allowed, would, by her remarriage, forfeit her interest in her first husband's family. The ruling in *Vithu* v. *Govinda*[2] supports our contention. It lays down that by remarriage only widow's interest is lost and no other. The decision in *Panchappa* v. *Sanganbasawa*[3] does not touch the present question. The Mitakshara and the Mayukh throw no light on the subject. A widow's remarriage does not deprive her of the *gotra* of her former husband. It was argued that the text writers considered remarriage as concubinage, and that they ranked a remarried widow in the class of *Svairini*. That is not so. A *Svairini* is one who abandons her husband and behaves wantonly, while remarriage is second marriage with the performance of certain rites. Even a *Svairini* does not cease to be a mother. A mother's right to inherit depends upon propinquity more than on *gotra*.

The construction put on sections 2 and 5 of the Hindu Widows Remarriage Act in *Akora Suth* v. *Boreani*[4] is consistently followed in subsequent cases. In that case a Hindu died leaving a widow, a son, and a daughter him surviving. The widow remarried, and sued in right of inheritance, claiming the estate of her son by her former marriage which estate vested in him by the death of his father after the widow had remarried. It was held that the widow was entitled to succeed to the estate of her son by such former marriage, and that section 2, Act XV of 1856, did not deprive a Hindu widow upon her remarriage of any right or interest which she had not at the time of remarriage. Sec-

(1) (1889) 11 All. 330.
(2) (1896) 22 Bom. 321.
(3) (1899) 24 Bom. 89.
(4) (1868) 2 Beng. L. R. 199.

tion 5 of the Act provides for two sets of cases. The first clause of the section governs the present case. The second clause gives her a right to inherit in her second husband's family. It removes the disability under which a remarried widow laboured before the Act was passed. The Legislature has by the Hindu Widows Remarriage Act merely codified the customary law on the point.

Kelkar, in reply :—Referred to West and Bühler, pp. 110, 469; Mayne's Hindu Law, § 512, p. 640 (5th Ed.); Borradaile, Vol. I, p. 475; Borradaile, Vol. II, p. 397; *Omkar valad Narayan*[1].

JENKINS, C. J.:—Whatever might have been my view had the matter been uncovered by authority, it would (in my opinion) be wrong to disregard a rule affecting rights of property established as far back as 1868 by the decision of a Full Bench of the Calcutta High Court in *Akorah* v. *Boreanee*[2].

Therefore I would confirm the decree with costs.

CHANDAVARKAR, J. :—I concur.

BATTY, J. :—I concur.

ASTON, J. :—I also concur.

Decree confirmed.

G. B. R.

(1) (1883) P. J. p. 280.

(2) (1868) 11 W. R. 82 (Civ. Rul.); 2 Beng. L. R. 199.