

(1879) 06 CAL CK 0001

Calcutta High Court

Case No: None

Ishri Dutt Koer and
Others

APPELLANT

Vs

Hunsbutti Kerain and
Others

RESPONDENT

Date of Decision: June 24, 1879

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 15

Citation: (1880) ILR (Cal) 512

Hon'ble Judges: Broughton, J; Ainslie, J

Bench: Division Bench

Judgement

Ainslie, J.

Budhnath Koer died, leaving two widows and a daughter. He was one of four brothers, but separate in estate from the others. The plaintiff's are the representatives of those brothers, and the widows and daughter's minor daughter are the defendants in this suit.

2. On the 21st December 1873, the widows executed a deed of gift in favour of the daughter Dyjhi, who has since died. By this instrument they gave her, with immediate possession, the properties mentioned in the first and second schedules annexed thereto; the properties mentioned in the third schedule they retain for life without the power of alienation, but on their deaths they were to become absolutely vested in the daughter.

3. The properties in the first schedule are described as self-acquired, and those in the third are of both kinds.

4. Some contention has arisen upon the meaning of the words "mahsook khas" (self-acquired), and it was suggested by the appellants that these words, upon which the plaintiffs in part found this case as setting up a title adverse to them, do not

necessarily imply that the properties so described were purchased out of the separate funds or stridhan of the donors; and that, consequently, there is nothing in them which the plaintiffs can object to, as attacking their title as reversioners and giving them a cause of action, but it is abundantly clear that this contention cannot be maintained.

5. The words used are those always used to describe property so acquired, that the acquirer has a complete power of disposal over it. It is evident from the body of the deed that they were used in this sense, because if they were intended to apply to property which, though acquired after the husband's death, was understood to be, in eye of the law, part of the husband's estate, there would be no meaning in speaking of the daughter as "heir of our husband and of us, the declarants" She would, in such case, derive no title by inheritance from the widows, but only from her father. Further, it appears from the written statements of both parties, and other portions of the record, that both parties understood these words to imply properties independently acquired by the widows, which they were capable of alienating at will; the plaintiffs' case is, that these were acquired from the profits of the estate, and therefore not self-acquired; and the defendant Bechni, who is the person really interested in defending this suit, by her guardian asserts in paragraph 6, that they are not portions of the estate of Budhnath, because they are the self-acquired properties of the widows. The attempt to interpret the words as only referring to the fact of purchase by, the widows without implying purchase in their own separate account is vain, and it must be held that the widows did intentionally state in the deed of gift that they were sole and uncontrolled owners of these properties.

6. The plaintiffs have made both the widows and the granddaughter parties to this suit, but they admit that the life-interest of the widows still continues, and will continue so long as they may live.

7. They ask for a declaration,--firstly, that the deed of gift is void as against them, the next heirs after the determination of the life-interest of the widows; secondly, that the interest of the minor is co-extensive with that of the widow; and thirdly, that the properties described as self-acquired have been acquired out of the profits arising from the husband's estate, and are subject to the same rule of inheritance as the parent estate.

8. The cause of action is said to have arisen on two separate dates,--the date of the execution of the deed, and the date of the subsequent death of Mussamut Dyjhi. This has given rise to a good deal of comment, but is not a matter of importance as regards the decision of this appeal. Supposing the suit to be maintainable, it is on the ground that the widows, and Dyjhi, now represented by her daughter Bechni, combined by gift and acceptance to sever a portion of Budhnath's estate, with a view to misappropriate that portion and deprive the next heirs thereof.

9. The first part of the plaintiffs prayer cannot be entertained. It was competent to the widows to make a gift of their life-interest, and the fact of their making such a gift is in no sense prejudicial to the plaintiffs. So long as either widow survives, it is admitted by the plaintiffs that there is a continuing life-interest. The plaintiffs affect to treat this as having reverted to the donors on the death of Dyjhi, and consequently denounce the possession of her husband on behalf of her daughter as a trespass, but although the gift is not in expressed terms to Dyjhi and her heirs, the absence of words of inheritance does not necessarily make the gift one for the life only of Dyjhi. The words "in future we have and shall have on no account directly or indirectly any claim, right, demand or dispute with reference to the possession of, and title to, the aforesaid property granted in gift," clearly express the intention of the donors to make an absolute indefeasible gift of whatever interest they had in the property, and such interest, so long as it may last, is capable of being enjoyed by the heirs of the donee, and independently of this, the possession of Bechni by her father as derived from, and with the consent of, the widows, is not per se that of one holding the estate adversely to those entitled to succeed to Budhnath. At the date of the institution of this suit there was no overt act on the part of Bechni's father to which the plaintiffs can point as certainly hostile. They simply expected hostility, but they cannot found a right of action in their own suspicions and expectations. There is nothing in the deed which is patently adverse to the plaintiffs' interest (unless it be in the reference to self-acquired property to be dealt with further on). It truly describes the widows as heirs to Budhnath and with equal truth describes Dyjhi as the then next heir after them selves. It does not in express terms purport to create a larger interest than, according to Hindu law, they and Dyjhi could be legally possessed of. The only words on which such a construction can be put are--"we have made a gift of the undermentioned lands;" but these words must be read with the context, and seeing that the donors speak of themselves as taking as widows and expressly refer to the shasters as determining the right of inheritance of the daughter, it is by no means necessary to construe these words as intended to convey more than the legal interest of the widows, or to assert more than the legal rights of the daughter. The same words as applied to the self-acquired property not being controlled by the reference to widows' and daughter's rights, but being read in conjunction with the assertion that this property was at their absolute disposal, may convey a larger interest in these lands; but that is still only because they convey the whole legal interest, whatever it may be, which the widows believed themselves to hold.

10. Similarly, the second part of the plaintiffs' prayer must be rejected; it may be that the father of the minor did and does suppose himself to have on behalf of his daughter a larger interest than the widows and his wife could jointly possess, but he was free to entertain such a belief, and up to the date of this suit it is not suggested that he had done anything to give effect to it. It is said that he subsequently caused his daughter's name to be registered in the Collector's books, but this, clearly he

was entitled to have done, as the person entitled to present possession; and even if this transaction could be noticed at all, we are not in possession of specific information about it, and are not at liberty to presume that he has done anything that he was not legally entitled to do.

11. In the third portion of their claim, the plaintiffs aver that there has been an open attack on their reversionary interest by an attempt to sever a portion of the estate which should descend to them and to treat it as not belonging to that estate, with the object of eventually depriving them thereof, and they claim to have it declared that the property so severed, does belong to Budhnath's estate.

12. The defendants contend that such a declaration is not within the purview of Section 15, Act VIII of 1859, by which this suit is governed; and that even if the Court is competent to make it, this is a case in which, in the exercise of a sound discretion, it should abstain from doing so. They further contend, that the properties in Schedule (ii) of the deed of gift to Dyjhi were self-acquired properties purchased by the widows out of their separate funds, and that even if they were purchased with savings from the income of the Budhnath's estate, the widows had a right to dispose of the income at their own pleasure, and although they have converted it into land, this does not alter the character of their right.

13. The general effect of Section 15, Act VIII of 1859, was fully discussed in the case of *Kathama Natchiar v. Dorasinga Tever* (L.R. 2 IndAp 169 ; S.C. 15 B.L.R. 83); the conclusion is given at page 187: "It appears, therefore, to their Lordships, that the construction which must be put upon the clause in question is, that a declaratory decree cannot be made unless there be a right to consequential relief capable of being had in the same Court, or in certain cases in some other Court. They admit the qualification introduced by the case of *Fyz Ali--Sadut Ali Khan v. Khajeh Abdool Gunny* (11 B.L.R. 203). This qualification, which does not affect the present suit, consists in the last words "or in certain cases in some other Court." The consequential relief here referred to is present or immediate relief. Their Lordships cited the case of *Sreenarain Mitter v. Kishen Soondery Dasse* (11 B.L.R., 171), in which it was said: "It has been held that, under the 15 and 16 Vict., cap. 86, Section 50, a declaratory decree cannot be made unless the plaintiff would be entitled to consequential relief if he asked for it--*Rooke v. Lord Kensington* (2 K. & J., 753). The 15th section of Act VIII of 1859 is in similar terms." And also the case of the *Raja of Pachete--Raja Nilmony Singh v. Kally Churn Battacharjee* (L.R., 2 IndAp, 83; S.C. 14 B.L.R., 382), where it was said: "A similar clause in this country has been held to give a right of obtaining a declaration of title only in those cases in which the Courts could have granted relief, if relief had been prayed for, and that doctrine has been applied to this clause in the Indian Act. Now, applying that test, in their Lordships' opinion this suit is not maintainable."

14. They then point out that the case of *Fyz Ali* (11B.L.R., 203) is not in conflict with this, as that suit was intended to prepare the way for a suit in the Revenue Court,

which alone could give the consequential relief, that, but for the constitution of the Indian Courts, might have been asked for in the suit.

15. They then proceeded to examine the English cases, which clearly lay down that there must be a right to present relief, which the Court could grant if prayed for. Further on, a passage is cited from a judgment of the Madras Court, in which Chief Justice Scotland said: "It has been decided by this Court that the rule of the Equity Courts in England is not applicable to declaratory suits here, and it is now settled that a suit praying nothing more than a declaration of title is maintainable under the 15th section of the Code of Civil Procedure, although no consequential relief be grantable upon the declaration, if a good ground for seeking the protection of such a" suit is shown to exist." Upon this Sir J. Colvile, delivering the judgment of their Lordships, remarks: "What I have already said on the part of their Lordships shows that they dissent from that position." Their Lordships further rejected as unsound a reason for the exercise of the discretion to make a declaratory decree which had been put forward in certain cases, namely, the absence in India of the power to entertain a suit to perpetuate testimony, as to which it was observed that in no case is it a satisfactory reason. Their Lordships said: "The proper remedy for such a defect in the administration of justice, if it exists, is an act of the Legislature. It cannot be supplied by putting an erroneous construction, or a different construction from that which prevails in other parts of India, upon a Statute which has no reference to the subject."

16. Having thus laid down the general rule, their Lordships refer to a class of suits which are exceptional: "The arguments now under consideration are founded on the right of a reversioner to bring a suit to restrain a widow, or other Hindu female in possession, from acts of waste, although his interest during her life is future and contingent. Suits of that kind form a very special class, and have been entertained by the Courts *ex necessitate rei*. It seems, however, to their Lordships that, if such a suit as that, is brought, it must be by the reversioner, with that object and for that purpose alone, and that the question to be discussed is solely between him and the widow; that he cannot, by bringing such a suit, get, as between him and a third party, an adjudication of title which he could not get without it."

17. The conclusion of the matter was, that even if the plaintiff had proved acts of waste against the widow, for which purpose it might have been necessary for him to prove a title sufficient to give him a *locus standi* in Court, that would not give him a right as against another defendant to have the question (of title to the estate after the widow's death) arising between them determined by a declarator.

18. This decision does not go so far as to bar a suit during the lifetime of a widow against her alienee to obtain a declaration that his interest is to determine with the life-estate of the widow. Such suits are recognized by the Legislature, for by Article 124 of schedule ii of the Limitation Act of 1871, and now by Article 125 of Act XV of 1877, a period of limitation is provided for them, and they have been entertained. In

the case of *Tekait Doorga Pershad v. Tekaitni Doorga Konwari* (L.R., 5 IndAp, 149; S.C. I.L.R., Cal, 190; 3 C.L.R., 31) before the Judicial Committee of the Privy Council, which was a suit of this nature, a declaratory decree was indeed refused; but in the exercise of discretion, and not because the suit could not be entertained. But although it may be that such suits can be brought, there is nothing in the judgment in the case of *Kathoma Natchiar v. Dorasinga Tever* (L.R., 2 IndAp, 169; S.C. 15 B.L.R., 83) above referred to, which, as I understand it, gives the plaintiffs a right to a declaration. In the case of *Sreenarain Mitter v. Kishen Soondery Dassee* (11 B.L.R., 171), their Lordships (p. 190), say: "It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not, under all the circumstances of the case, to grant the relief prayed for. There is so much more danger in India than here of harassing and vexatious litigation, that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation."

19. Assuming that the present suit does not fail on the ground that it is inadmissible u/s 15 of Act VIII of 1859, I think we ought, in the exercise of our discretion, to abstain from making a declaratory decree.

20. If the question of the widow's power to alienate property acquired out of savings from the income of her husband's estate had been concluded by authority, there would perhaps be no reason for doing so, but it seems to me that there is no authoritative ruling on the subject. There is a passage in the judgment of the Judicial Committee in *Mussamut Bhugobutty Dayee v. Chowdhry Bholanath Thakoor* (L.R., 2 IndAp, 256; S.C. 7 B.L.R., 93), which may at first sight appear to treat the matter as beyond a doubt, but on examination I do not think it can be said to settle anything. In the first place, it is to be observed, that this passage, beginning, if she took the estate only of a Hindu widow" (p. 260), is not material to the decision, and is only illustrative of what had been said just before, that the interpretation rejected would materially change the nature of the estate taken by Chunderbutti. Of this there can be no doubt. Whatever the incidents of a Hindu widow's estate may be, it is certainly not identical with the interest of a female who takes a life-interest by gift or bequest; because, at least as to moneys or properties acquired by the female tenant, and not specifically disposed of by her, in the one case her husband's heirs, and in the other, her own heirs, succeed, and, as the judgment points out, the Hindu widow under certain circumstances has a power of alienation which the life-tenant has not.

21. Although the particular words "one consequence, no doubt, would be, &c," are not essential to the decision, they are not therefore to be neglected or put aside on slight grounds; but I think that, with all respect to their Lordships, it is open to this Court to examine their dictum, and that we are not bound to accept it as beyond question. As I. said before, this passage is only by way of illustration, and it was not

necessary to do more than indicate in a general way the difference in the positions of the Hindu widow and the life-tenant by grant. That the particular statement referred to cannot be taken to be conclusive appears to me clear from the context. It is said, "one consequence, no doubt, would be, that she would be unable to alienate the profits," but it is said, a few lines further on; "she certainly would have the power of selling her own estate." The estate here alluded to, is obviously her estate as widow, for the power to sell her husband's estate under certain circumstances had been already mentioned. But if she can alienate her widow's estate, this is simply alienating the profits.

22. Moreover, the words "she would be unable to alienate the profits" are immediately qualified by the addition, "or at all events, whatever she purchased out of them would be an increment to her husband's estate, and the plaintiffs would be entitled to recover possession of all such property, real and personal." This qualification seems to me to show, that there was no intention in their Lordships' minds to decide judicially at that time what the incidents of a Hindu widow's estate are. If the words "and left undisposed of at her death" had followed after "purchased out of them," the illustration would have been equally opposite, and would then certainly have been beyond doubt; but I venture to think that by cutting down the first statement "she would be unable to alienate the profits," which was clearly too wide, their Lordships may not have gone far enough; they may have overlooked the question which arises in this case: it was said in the judgment of this Court, then before them on appeal, that "in cases of a widow enjoying the property of her deceased husband, she is not entitled to alienate Immovable property, or any property that she had purchased out of the profits of such estate any more than she can alienate the Immovable property itself of which that estate consists"--*Mussamut Bhugobutty Dayee v. Chowdhry Bholanath Thakoor* (L.R., 2 IndAp 256); and it is possible that this led to the statement in the judgment of their Lordships being in the form in which it is reported. In the case of *Gonda Kooer v. Kooer Oodey Singh* (14 B.L.R., 159), decided in the previous year, their Lordships expressly reserved the question of the effect of a distinct intention on the part of a widow to appropriate to herself and sever from the bulk of the estate such purchases as she may have made, and I am not aware that, in the fifteen months that elapsed between the delivery of this judgment and the judgment in *Bhugobutty Dayee's* case (L.R., 2 IndAp, 256; S.C. 7 B.L.R., 93), any other appeal was decided in which the question was considered. In my opinion, therefore, this judgment is not conclusive. It seems to me that, if it is within a Hindu widow's power to dispose of the surplus profits from her husband's estate remaining after due provision has been made for the duties which the widow is bound to perform, it must be equally within her power to do so, whether she does it at once as the profits reach her, or whether she allows them to accumulate.

23. Suppose that she has a surplus income of Rs. 1,000 per annum, and wishes to buy a property of the value of Rs. 5,000 to give to some one other than a reversionary heir of her husband. If she can dispose of the surplus at once, she can,

by giving it for five successive years, enable the person intended to be benefited to buy the property. I can conceive no reason for not allowing her to accumulate the necessary funds to buy it herself, and give it away. Indeed, in this latter case, the reversioner has an advantage, for if the widow happens to die without disposing of the fund, or that into which it may be converted, it will come to him. On this point, I think, there is no difference of opinion. Such property never passes as stridhan to the heirs of the widow, but goes, if undisposed of by the widow in her lifetime, to the heirs of her husband.

24. If the widow can make effective arrangements for carrying out her wishes it is useless to say she cannot do so directly; it clearly is opposed to public policy to force her to adopt a circuitous course instead of a simple straight forward one, and, as already observed, it is not in the interest of the next taker of the husband's estate to do so.

25. If a distinction is to be drawn between current income and accumulations, where is the line to be drawn? When does the surplus cease to be part of the current income? There is no rule requiring a widow to make up her accounts at stated intervals, and carry unexpended balances to the credit of the husband's estate. How are we to say that up to 31st December she is free to spend the money in hand as she chooses, but on the 1st January it lapses like an unexpended assignment of public money at the close of the financial year. Who is to audit her accounts? If she is accountable to the heirs of her husband, not only for the safe custody of his estate, but for the expenditure of the income, then I can understand that she is not free to give away Immovable property purchased out of the surplus (I may say once for all that, in speaking of surplus income, I assume that it is a bond fide surplus, and that the expenditure of it will not involve any improper alienation of the corpus to meet charges which a widow is required to provide for); indeed, in such case, I do not see how she is at liberty to give away or squander any portion of the income, whether as cash or after it has been converted into property of any description.

26. In the case of *Kery Kolutony v. Moneeram Kolita* (13 B.L.R., 1). Mr. Justice Dwabkanath Mitter, in the referring order, at page 6, speaks of the widow as nothing more than a trustee for the soul of her husband; and commenting on a passage of the *Dyabhaga* (chap. xi, Section i, v. 61), says: "It is clear from this passage that every use made by a Hindu widow of the estate inherited from her deceased husband, which is not conducive to his spiritual welfare, is, under the Hindu Law current in the Bengal school, an unauthorized act of waste." In the view taken by the learned Judge a widow clearly cannot give away property purchased out of the profits of her husband's estate, whether the purchase-money be taken from current income or from past accumulations; but that view was expressly dissented from by the learned Judges who concurred with him generally on the question before the Full Court,--see the observations of Mr. Justice Glover, at page 53, and Mr. Justice Kemp, at p. 76, and the learned Chief Justice, Sir Richard Couch

(in whose Judgment Justices Macpherson, Pontifex, and I myself concurred), said,--"a widow is not a trustee, she has the usufruct as well as the property in the thing inherited from her husband."

27. This is in consonance with the decision of a Full Bench in the case of Gobindmani Dasi v. Sham Lal Bysak (B.L.R., Sup. Vol., 48). Sir Barnes Peacock there said: "Upon the whole, after considering all the cases upon the subject, we are of opinion that a conveyance by a Hindu widow, for other than allowable causes, of property which has descended to her from her husband, is not an act of waste which destroys the widow's estate, and vests the property in the reversionary heirs, and that the conveyance is binding during the widow's life."

28. It is unnecessary to quote other cases, for it is now well settled that a widow can alienate her estate,--i.e., she can anticipate the profits; but that she is answerable to any one for the way in which she expends the money so raised, provided that the reversionary estate is not diminished from what it was when it came into her hands, has never been held, as far as I know.

29. But if she may create a fund for a specific purpose by anticipating profits, on what principle is she to be debarred from doing the same thing by accumulating them? I fail to see any. That money so accumulated, if unappropriated is not capable of being inherited as stridhan, tends to support Mr. Justice Dwarkanath Mitter's view of the widow's rights, but whatever may have been the views of Hindu Commentators, we must now take it as settled by a long course of decisions that the Hindu widow is not restricted, as he suggests, in the enjoyment of her husband's estate. The fact that unappropriated profits or properties purchased, and not disposed of in the widow's lifetime, do not pass as stridhan, may be explained on the theory that when a widow has at her death left money accumulated or property purchased out of surplus profits, and not appropriated to any person during her life, it was her intention to add such moneys or properties to the estate, and to abstain from exercising her full rights over them.

30. In the case of Sreemutty Puddo Monee Dossee v. Dwarka Nath Biswas (25 W.R., 335), Mr. Justice Jackson, who delivered the judgment of the Court, said (p. 340): "There are certainly no materials for a determination whether she (the widow) bought it out of current income or accumulations. But we are inclined to think this enquiry unimportant, and to base our decision, if necessary, on a broader and clearer ground, viz., that Rash Monee having purchased this land (if she did so) with moneys derived from the income of her husband's estate then lying in her hands, was competent afterwards to alienate her right and interest in whole or in part, to reconvert them into money, and spend it if she chose."

31. This decision is in conflict with that of the same learned Judge (to which I was also a party) in the case of Mussamut Bhugobutty Dayee v. Chowdhry Bholanath Thakoor (7 B.L.R., 93; S.C. 15 W.R., 63), but it was then observed that no authority

had been shown on the other side, and I may further observe that of the two cases cited,--viz., Chundrabulee Debia v. Brody (9. W.R. 584; S.C. 5 Wym., 335) and Nihal Khan v. Hurehurn Lall (1 AH.C.R 219),--I find, on re-examination, one to be opposed to the other, and to be opposed to the general statement of the law in the judgment, though it otherwise supported the judgment in the particular case. In the case of Mussamut Bhagobutty Dayee v. Chowdhry Bholanath Thakoor; (7 B.L.R., 93; s.c., 15 W.R., 63) it was said: "And as regards the first of these classes of property, namely, those which appear in the form of Immovable property purchased from the accumulations made by Chunderabulee from the profits of the estate which she received, there are several decisions which I may refer to--that of Chundrabulee Debia v. Brody (9 W.R., 584; S.C. 5 Wym., 335), and another Nihal Khan v. Hurchurn Lall (1 AHC R 219), by which it has been distinctly held that, in cases of a widow enjoying the property of her deceased husband, she is not entitled to alienate Immovable property or any property that she has purchased out of the profits of such estate, any more than she can alienate the Immovable property itself of which that estate consists. No authority whatever has been shown to us on the other side, and it seems to me that these decisions are substantially in conformity with the Hindu Law."

32. This view is supported by the Agra case, but the whole of that judgment on the point is contained in the following words: "Purchases with such funds would not belong to the widow otherwise than as the lands from which this money arose belonged to her." (In this case the widow had alienated, and the alienation was cancelled.)

33. But in the case of Chundrabulee Debia v. Brody (9 W.R., 584 , S.C. 5 Wym., 335) there had been no alienation by the widow, and the question was whether the property was stridhan. The present learned Advocate-General, Mr. Paul, with Baboo Onocool Chunder Mookerjee and Baboo Kali Prossunna Dutt, were for the appellant, and the argument, as stated in the judgment, was, that although the widow was allowed to make the fullest use of the usufruct of the estate while she lived, whatever she left behind became the property of the next heir, and was not liable for the widow's personal debts.

34. This was the view taken by Mr. Justice Glover: "A Hindu widow, with a life-interest in her deceased husband's estate, would be entitled to make the fullest use of the usufruct of that estate: and it seems doubtful, under the late rulings of the Privy Council, whether she could be in any way restrained, however wasteful her expenditure, so long as she kept within the limits of her income, and made no attempt at alienation." (Here the learned Judge obviously refers to alienation of the corpus, and this probably was overlooked when the case was quoted as an authority.) "If, on the contrary, she chooses to economize, she can, during her lifetime, give away her savings to any one she pleases; but if she have left savings undisposed of at the time of her death, these would form part of the estate, and go

with that estate to the next heir of her husband." Mr. Justice Kemp said: "She (the next heir) succeeds to the residue of the estate after the widow's use of it. These accumulations cannot be considered to be the stridhan of the widow."

35. In the case of *Mussamut Bhugobutty Dayee v. Chowdhry Bholanath Thakoor* (7 B.L.R., 93; S.C., 15 W.R., 63) the particular properties (13,14, 18, 19), in the schedule with which the Court was dealing in the passage quoted above, were left undisposed of at the death of the widow Chundrabullee so that the judgment in *Chundrabullee Debia v. Brody* (9 W.R., 584; S.C. 5 Wym., 335.) was clearly an authority on the question of how they were to descend on the death of the widow, though not for the broad proposition laid down. There was indeed another set of properties to which the rule would have applied, but that the Court considered that the widow had special authority to deal with them, so that in fact the correctness of the rule was not essential to the decree made. In the case of *Sreemutty Puddo Monee Dossee v. Dwarka Nath Bisivas* (25 W.R., 335), Mr. Justice Jackson has not alluded to this case, though he has departed from the view therein expressed.

36. As at present advised, I am inclined to think the later view taken by the learned Judge to be a necessary consequence of the widow's power to alienate her widow's estate. Every person may dispose by will of that which he or she may alienate inter vivos, and this would seem to involve this consequence--that a Hindu widow may keep property acquired from accumulations in her own hands up to her death, and then sever it from the estate of her husband, so that although it will not pass as stridhan under Hindu Law, she can secure that it shall pass as if the law regulating the descent of woman's property applied to it. This is an extension of a Hindu widow's dominion over property which she only holds for the estate of a Hindu widow, which may be a logical consequence of the decisions as to the status of such persons, but which it is not easy to reconcile with what I believe to be the universal custom of the country.

37. It is unnecessary to go through all the cases on the subject of a Hindu widow's power of alienation. I have said enough to show that the question now before us is one of great difficulty and importance, and one that could not properly be decided without a reference to a Full Bench. It seems to me that we ought not to allow this suit to be protracted, and great additional expenses to be incurred, when it is quite possible that the widows or one of them may survive the plaintiff's, so that the estate may never vest in them, and the decision arrived at may prove no bar to further litigation.

38. The Privy Council have laid down the rule, that a Court should not entertain a suit u/s 15, Act VIII, 1859, when the object of it is to determine the title of the plaintiff as next heir after the death of a female holder, and I am inclined to say, that it also should not do so when the object is to determine the title of the next heir to take, as belonging to the estate of the last male holder, property which at his death did not in any shape form part of it; but it is not necessary to go so far as this at

present: for the purposes of this appeal it is sufficient to say, that the Court will not, in a declaratory suit, decide intricate questions of law, when no immediate effect, and possibly no future effect, can be given to its decision, and when the postponement of the decision to the time when there may be before the Court some person entitled to immediate relief (if the decision is in favour of the plaintiff) will not prejudice his rights in any way.

39. I would therefore allow the appeal, and dismiss the suit with costs here and in the Court below.

Broughton, J.

40. I concur in the opinion that the plaintiff is entitled to no declaration so far as regards the property which is described in the deed as the estate of Budhnath. It appears to be settled law throughout India that a widow holding a Hindu widow's estate has a right to alienate to the extent of her own interest. This, so far as Lower Bengal is concerned, was decided in the case of *Gobindmani Dasi v. Sham Lal Bysak* (B.L.R., Sup. Vol., 48).

41. Several decisions of the Courts in the other Presidencies are quoted in support of this proposition in Mr. Mayne's work on Hindu Law and Usages, Section 544, and the judgments of the Judicial Committee of the Privy Council in the cases of *Mussamut Bhugobutty Dayee v. Chowdhry Bholanath Thakoor* [L.R., 2 IndAp, 256 (see p. 261)] and of *Rajah Nilmony Singh v. Kally Churn Bhattacharjee* [L.R., 2 IndAp, 83 (see p. 85); S.C, 14 B.L.R., 382] are to the same effect.

42. It follows, therefore, that as the widows in the present case are alive, the alienation of their life-interest in favour of the daughter of one of them, and of her heirs, and the right of the grand-daughter, the only child of the daughter, now deceased, to present possession, cannot now be questioned.

43. With regard to the properties which are described as self-acquired, the widows purported to separate them from the husband's estate, and to convey to the daughter Dyjhi and her heirs a larger interest than their life-interest. This, coupled with the possession which the husband of Dyjhi took on her behalf, and which since her death he still retains, and defends on behalf of her minor daughter, is an alienation beyond the power of the widows, if this property is really a part of the estate of their deceased husband.

44. That, in cases of dealing with the husband's estate by the widow, declarations have been made and may be made, appears to be established. In the case of *Gobindmani Dasi v. Sham Lal Bysak* (B.L.R., Sup. Vol., 48) already cited, Peacock, C.J., said: "Our decision will not preclude the reversionary heirs, even during the lifetime of the widow, from commencing a suit to declare that the conveyance was executed for causes not allowable, and is, therefore, not binding beyond the widow's life. Nor will it deprive the reversionary heirs, during the lifetime of the widow, of their

remedy against the grantee to prevent waste or destruction of the property, whether moveable or immoveable, in the event of their making out a sufficient case to justify the interference of the Court." In the case of *Raj Lukhee Dabea v. Gokool Chunder Chowdhry* (13 I.A., 209, 224; S.C, 3 B.L.R.P.C. 57), the Judicial Committee say: "Some question has been made at the bar as to the right of a person, who is a presumptive heir in reversion to question such a transaction; but their Lordships, if it were necessary to decide the point, would find it extremely difficult to overrule the many cases in which that right has been more or less recognized."

45. In *Koer Goolab Singh v. Rao Kurun Singh* (14 I.A., 176, 193; s.c, 10 B.L.R., 1), the nearest reversioner was charged as concurring in certain illegal alienations, and it was held that the next reversioner could sue to protect the estate.

46. In the case of *Kathama Natchiar v. Dorasinga Tever* (L.E., 2 I.A., 169) the Judicial Committee refused to make a declaratory decree. The case for the plaintiff was, that the first defendant, favouring the second defendant's title, and concerting with him in opposition to the plaintiff, had employed an agent and executed a power-of-attorney to him, for the purpose of assisting the second defendant to possess himself of the zamindary, and withhold possession after her death. On this, their Lordships remark: "It can, from the very nature of the instrument, operate only during the zamindar's lifetime, and we are not to assume that any act will be done under it which the plaintiff would have a right to impeach. But if any such act is done under it, as for instance, if she were to devolve the succession upon her son, so that his interest might become absolute, or the like, their Lordships, by their decision upon the present question, would by no means preclude the plaintiff from seeking to impeach that act and to treat it as invalid." (Pages 189, 190.)

47. The 124th clause of the schedule of the Limitation Act of 1871, which applies to this case, prescribes a period of twelve years from the date of the alienation, within which a suit may be brought during the lifetime of a Hindu widow by a Hindu entitled to the possession of land on her death to have the alienation made by the widow declared to be void except for her life. The person "entitled to the possession of land on her death" must mean the person, who, if he survived her, would be so entitled, for until the widow's death it cannot be said who would be her husband's heir.

48. The question then arises, whether the property bought by the widows in this case forms part of the estate of the husband, or whether they can dispose of it.

49. It has been found by the Subordinate Judge, and his finding is supported by the evidence, that the properties were purchased out of the profits of the husband's estate.

50. It appeared to me at first sight that the Judicial Committee had decided that property so purchased belonged to the parent estate. In the case of *Mussamut Bhugobutty Dayee v. Chowdhry Bholanath Thakoor* (L.R., 2 IndAp, 256, 260, 261),

their Lordships observe: "If she" (i. e., the widow) "took only the estate of a Hindu widow, one consequence no doubt would be, that she would be unable to alienate the profits, or at all events, whatever she purchased would be an increment to her husband's estate, and the plaintiffs would be entitled to recover all such property." I agree, however, in thinking with Mr. Justice Ainslie that these words were used rather to show that the widow had more than a widow's estate under the deed, which was to be construed in that particular case, than to lay down a general proposition of law. And, moreover, the property which had in that case been purchased out of the savings, was not alienated by the widow who purchased it during her lifetime, but was left to descend to whoever was entitled to it at her death; and it was held that it belonged to the husband's heir, on the ground that she held it as a Hindu widow. The Judicial Committee held, that she had large interest under a family settlement, but used the words I have already quoted. Two of the authorities cited by the learned Judge of the High Court who delivered the judgment appealed to the Privy Council, were instances of property not disposed of or attempted to be disposed of by the widow during her lifetime. They were *Chunderabulee Debia v. Brody* (9 W.R., 584; s.c., 5 Wym., 335); *Vyavastha Darpana* by Shama Charan Sircar, p. 64; the third, the case of *Nihal Khan v. Hurchurn Lall* (1 AHCR 219), is not clear as reported. It is not stated who were the parties to the suit, or under what circumstances, and at what time, the widow disposed of the property.

51. The power of selling her own estate, which the Judicial Committee in the same case--*Mussamut Bhugobutty Dayee v. Chowdhry Bholanath Thakoor* (L.R., 2 IndAp, 256, 260, 261)--concede to the Hindu widow, appears be inconsistent with a restriction upon her dealings with the accumulations, or with property purchased during her lifetime with such accumulations; for, until the income is accumulated, it is hers to do as she likes with it, and the fact that she lays it by cannot alter its character. Nor, as it seems to me upon the authorities, does it affect her power to deal with it in her lifetime, although after her death, if she has not so disposed of it, it goes to her husband's heirs as an increment to his estate and not to hers as her separate property.

52. The case of *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick*, in 6 I.A., 526, where the question of a widow's right to accumulations was discussed upon demurrer, and in 9 I.A., p. 123, where it was finally decided, was not a case in which any question directly arose as to accumulations made by the widow herself. In that case there were two *ikrarnamas* or wills or family settlement, under which one of the sons took an interest in family property. This interest was held to determine upon his death. The family, before his death, was joint, and accumulations were made which were joint, and interest accrued on them after his death. The question was, whether his widow and heiress was entitled to a share in the accumulations, or whether they went, under the will or settlement, with the corpus of the estate, to his four surviving brothers. It was decided that the widow was entitled to a Hindu widow's interest in the one-fifth part of the accumulations winch accrued during the

lifetime of her husband, and absolutely to the subsequent accumulations of interest.

53. It is to be observed with reference to this case that the Supreme Court gave the widow a Hindu widow's interest in the accumulations made between the death of the testator and of her husband, and also in the subsequent interest on those accumulations. Her counsel on appeal contended successfully that she was entitled to the interest which had accrued since her husband's death absolutely, and this must have been on the footing of a Hindu widow's right to enjoy absolutely the whole of the income of her deceased husband's estate, and to an entire dominion over such income. There was no contention made by the counsel for the respondent against this further claim.

54. In the case of *Bissonath Chunder v. Section M. Bamasoonderee Dossee* (12 I.A., 41), the accumulations after the death of the testator were held to belong to the sons in like manner, irrespective of the directions in the will which passed the corpus of the joint estate to them, and the widow of one of the sons, who were five, and who were likewise entitled to the corpus, with benefit of survivorship under the will, was held entitled to one-fifth of the accumulations made between the death of the testator and of the husband, and one-fifth of the subsequent interest thereon in both cases as heir to her husband under the Bengal law. All was given to her for the estate of a Hindu widow, but no question was raised as to any distinction between the accumulations before the husband's death and after it.

55. These cases were followed in the case of *Pannalal Seal v. Section M. Bamasoondari Dasi* (6 B.L.R., 732).

56. In a subsequent case--*Gonda Kooer v. Kooer Oodey Singh* (14 B.L.R., 159)--the question was, whether purchases made by a Hindu widow out of the proceeds of her husband's estate formed an increment to that estate, or were disposable by the widow by gift during her lifetime, or by will. The case was one which had arisen in the North-Western Provinces, and the property purchased, if disposed of at all, was disposed of by the will of the widow. Their Lordships of the Judicial Committee observed: "It has been further argued that even if the presumption be that such purchases are increments to the husband's estate, it may be rebutted by clear proof of her intention to sever them from that estate, and to treat them as made in her own right, whereupon she acquires the power to dispose of them, and that such intention is proved in this case. The principal authority relied on by the appellant was *Sreemtty Soorjeemoney Dossee v. Denobundoo Mullick* (9 I.A., 123) where it was declared by this Board, varying the decree of the late Supreme Court at Calcutta, that the widow was entitled absolutely in her own right to all such interest and accumulations, as, since the death of her deceased husband, had arisen from one-fifth part of the accumulations which she had before been declared entitled to hold and enjoy as a Hindu widow in the manner prescribed by the Hindu law.

Although the decree in that case made a distinction between the principal funds to which the widow was entitled as heiress of her husband, and the accumulations of income which had arisen therefrom since his death, and in terms treated her right to the latter as absolute and unqualified, it is never the less to be observed that there were no questions in that case as to any conflicting rights between her heirs and the reversionary heirs of her husband. The case, moreover, was governed by the law of Bengal, and the accumulations of income, to which the widow was declared absolutely entitled, were the produce of a reserve fund. Their Lordships cannot, therefore, regard this case as a conclusive, or even a direct, authority upon the question raised on this appeal.

57. Their Lordships then proceeded to consider the evidence bearing upon the widow's intention in dealing with the property she had thus purchased, and after finding that she had evinced no intention to sever it from the parent estate, proceeded to say: "It, therefore, becomes unnecessary to decide what might have been the effect of a distinct intention on her part, if it had been proved, to appropriate to herself, and to sever from the bulk of the estate, such purchases as she had made, with a view of conferring them on her adopted son."

58. In the present case the widows have done more than appropriate to themselves, and to sever from the bulk of the estate such purchases as they have made with a view of conferring them upon the daughter and her heirs; they have actually so conferred them, so far as their power to do so extends. In the case of *Sreemutty Puddo Monee Dossee v. Dwarka Nath Biswas* (25 W.R., 335), Mr. Justice L. Section Jackson says: "If the property was not purchased with private funds of Rash Monee's own, there are certainly no materials for a determination whether she bought it out of current income, or accumulations; the former is quite as possible as the latter. But we are inclined to think this enquiry unimportant, and to base our decisions, if necessary, on a broader and clearer ground, viz., that Rash Monee having purchased this land (if she did so) with moneys derived from the income of her husband's estate then lying in her hands, was competent afterwards to alienate her right and interest in whole or in part, to reconvert them into money, and to spend it if she chose."

59. Mr. Justice Macpherson, on the other hand, in the case of *Grose v. Amirtamayi Dasi* (4 B.L.R., O.J., 142), observes that, "although the theory of the Hindu law is, that the income of the husband's estate shall go to the widow for her maintenance, and for the performance of pious duties, that theory by no means necessarily embraces the large lump sum of accumulations. According to all the older authorities on Hindu law, accumulations should be treated in the same way as the corpus, and I think they should be so treated now in the absence of any distinct authority to the contrary."

60. These authorities, however, were dealt with in the case of *Gobindmani Dasi v. Sham Lal Bysak* (B.L.R., Sup. Vol., 48), and were held to be insufficient to prevent the

widow making an alienation, which should be valid during her own life.

61. It appears to me that the question before us is one which is not to be determined in a suit for a declaratory decree, that it is by no means clearly established by the authorities whether the widow had or had not power to alienate for a period extending beyond her own life property which she had purchased from savings of income derived from her late husband's estate made after his death, and while she was entitled to a Hindu widow's interest in it. I am inclined to think that the authorities in favour of her power to do so must prevail; if so, no declaration could of course be made against their validity. If we were bound to make a decree, the matter should, I think, be referred to a Full Bench, as there seems to be a direct conflict between the cases of *Grose v. Amirtamayi Dasi* (4 B.L.R., O.J., 42) and of *Sreemutty Puddo Monee Dassee v. Dwarka Nath Biswas* (25 W.R., 335). But as we have a discretion in the matter, it would be better to abstain from making any declaration.