*Judgment of the Lords of the Judicial Committee of the Privy Council on the appeal of Moniram Kolita* v. *Kerry Kolitany, from the High Court of Judicature at Fort William in Bengal, delivered* 13*th March* 1880.

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Present:

Sir James W. Colville.
Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.

THIS is an appeal from a decision of a full bench of the High Court of Judicature at Calcutta. It was admitted by virtue of a special Order of Her Majesty in Council, whereby the Appellant had leave to appeal in the form of a special case upon the following questions, viz.,—

1st. Whether, under the Hindoo law, as administered in the Bengal School, a widow who has once inherited the estate of a deceased husband is liable to forfeit that estate by reason of unchastity; and,

2nd. Whether the forfeiture, if any, is barred by Act XXI. of 1850.

The appeal was admitted, on account of the importance of the questions submitted for determination and the great interest which the Hindoo community take in it.

The case came in the first instance upon special appeal before a Division Bench, consisting of Mr. Justice Bayley and Mr. Justice Dwarkanath Mitter, who were of opinion that the Defendant had, by reason of unchastity, forfeited

her right in her husband's property, but in consequence of a contrary ruling of the High Court referred the two questions above mentioned to a Full Bench, with their remarks thereon.

The Full Bench consisted of the Chief Justice and nine other Judges, and the majority held that the widow, having once inherited the estate, did not forfeit it by reason of her subsequent unchastity. Three of the Judges, however, viz., Mr. Justice Kemp, Mr. Justice Glover, and Mr. Justice Dwarkanath Mitter, dissented from the opinions expressed by the majority of the Court. The case is fully reported in the 13 Bengal Law Reports, p. 1.

The subject has been very elaborately discussed by the Chief Justice and the other Judges of the Full Bench, and it has also been fully argued before their Lordships on behalf of the Appellants. The Respondent did not appear.

The opinion of Mr. Justice Mitter, who was himself a learned and accomplished Hindoo lawyer, and those of the other two Judges who were in the minority, are entitled to very great weight, but, having considered and weighed all their arguments, their Lordships are unable to concur in the opinions which they expressed.

The earliest case in which the subject was fully discussed in the High Court is the case of Matangini Debi *v.* Srimati Jagkali Debi. 5 Bengal Law Reports, 463, which was the cause of the reference.

That case was originally tried before Mr. Justice Markby, who delivered a judgment in which he showed much research and great knowledge of the subject. The case was appealed to the High Court, and heard before the then Chief Justice and Mr. Justice Macpherson, who affirmed the judgment of Mr. Justice Markby.

Their Lordships will, in the first instance, advert to the judgments of the dissentient Judges,

and in particular to the opinion expressed by Mr. Justice Mitter, on referring the case, and to his judgment after the argument in the Full Bench. Reasoning from the general notions of the Hindoo commentators, touching the frailty and incapacity of women, and the necessity for their dependence upon and control by some male protector; and, from the origin and nature of a widow's interest in the property which she takes in succession to her husband, he arrived at the conclusion that she is, as he expresses it, "a trustee for the "benefit of her husband's soul"; that inasmuch as, by reason of unchastity subsequent to her husband's death, she becomes incapable of performing effectually the religious services that are essential to his spiritual welfare, she ceases to be capable of performing her trust, and must therefore be taken to have broken the condition on which she holds the property, and to have incurred the forfeiture of her estate. It may be remarked that the other two dissentient Judges different from Mr. Justice Mitter's view of the nature of a Hindoo widow's estate, and, therefore, from a good deal of the reasoning upon which his conclusion is founded. But, however that may be, their Lordships entirely concur with the Chief Justice and the majority of the Judges in rejecting the somewhat fanciful analogy of trusteeship.

Mr. Justice Glover's judgment is founded upon the express texts, and upon the ground that by reason of unchastity a widow becomes incapable of performing those religious ceremonies which are for the benefit of her husband's soul. He draws a distinction between a widow and a son, and says (Report p. 55):—

"The theory of the Hindu law of inheritance is the capability by the heir of performing certain religious ceremonies which do good to the soul of the departed, and he takes who can render most service. The sons down to the third generation could do most, offer most oblations, and

confer greatest benefits, therefore they are first in the line of heirship. The *widow comes next, as being able to confer considerable, though less, benefits,* and *it is only because she is able to do this that she is allowed to take her husband's share.*

"It would seem, therefore, to be a condition precedent to her taking that estate, that she shonld be in a position to perform the ceremonies, and offer the continual funeral oblations, which are to benefit her deceased husband in the other world; and in this respect her position is very different from that of a son. The son confers benefits upon his father from the mere fact of being born capable of performing certain ceremonies. His birth delivers him from the hell called *put;* and, whether in after-life he offer the funeral oblations or no, *he succeeds to his father's inheritance from the fact of being able to offer them.* With the widow it is not so; she can only perform ceremonies and offer oblations so long as she continues chaste, and directly she becomes unchaste, from that moment her right to offer the funeral cake ceases."

These reasons do not appear to be sufficient to support the learned Judge's conclusion that a widow forfeits her estate when she ceases to be able to perform the necessary religious ceremonies. It is admitted that she may by law hold the estate without performing them, and that she may give, sell, or transfer the estate to another for her own life. Nor does there appear to be any sufficient reason for the distinction attempted to be drawn between a son or other heirs and a widow with reference to the forfeiture of the estate when the person who has succeeded to it has become incompetent to perform the duties which he or she ought to perform. The proprietary right of a son by inheritance from his father is expressly ordained, because the wealth devolving upon sons benefits the deceased (Dayabagha, cap. 11, s. 1, v. 38), and the right of succession of other heirs to the property is also founded on competence for offering oblations at obsequies (18th verse), see also verse 32. But a son, even if by the mere fact of his birth he delivers his father from the hell called *put,* is, according to the Dayabagha, excluded for certain causes from inheritance in the same manner as other heirs (*see* The Dayabagha, cap. 5, paras. 4, 5, and 6); but, if he once succeeds, the estate is

not divested for anything less than degradation, though causes which would have excluded him if they had existed before succession arise after the estate has descended. This is admitted by Mr. Justice Mitter, Record, p. 7.

Their Lordships will proceed to consider the principal texts upon which the learned Judges who were in the minority founded their judgments.

Mr. Justice Mitter, in his judgment, p. 40, says :—

"Of all the authorities above referred to, the Dayabhaga of Jimuta Vahana, the acklowledged founder of the Bengal school, is undoubtedly the highest ; and it is therefore to the Dayabhaga that I shall first direct my attention. I do not wish, however, to go over all the texts quoted and relied upon by the author of that treatise in discussing the widow's right of succession. I will refer to two of those texts only,—namely, the texts of Vrihat Menu, cited in v. 7, s. 1, Ch. xi. of Mr. Colebrooke's translation of the Dayabhaga; and that of Catyayana, cited in v. 56 of the same section and chapter. These two verses are as follows :—

'(1.) The widow of a childless man, keeping unsullied her 'husband's bed, and persevering in religious obser- 'vances, shall present his funeral oblation and obtain 'his entire share.'

'(2.) Let the childless widow, keeping unsullied the bed of 'her lord, and abiding with her venerable protector, 'enjoy with moderation the property until her death. 'After her let the heirs take it.'

With regard to the former of the texts above cited, although the present participle is used, it clearly refers only to the conduct of the widow up to the time of her husband's death, and not to her conduct subsequently. It cannot mean up to the time of her presenting the funeral oblation ; for, notwithstanding the order of the words, the meaning of the text is, that having obtained the husband's share, the patni or widow should perform those ceremonies conducive to the spiritual benefit of her husband and herself, which can be accomplished by wealth and which a female is competent to perform. *See* The Vira Mitrodaya, cap. 3, pt. 1, s. 2, and the Smriti

Chandrika, cap. 11, s. 1, vs. 13, 16, and 20. In this view the text would run thus,—"The widow "of a childless man having kept unsullied her "husband's bed, and persevered in religious "observances, shall obtain his entire share, and "present his funeral oblation."

Mr. Justice Glover points to the words "persevering in religious observances," to prove that the whole text applies to a period subsequent to the husband's death, and as referring to a continually abiding condition, because he assumes that a wife cannot perform religious observances during her husband's life, and that, therefore, those words must have relation to a period after her husband's death. But the assumption does not appear to be correct, for in the Smriti Chandrika, cap. 11, s. 1, verse 17, the meaning of the words, "persevering in religious observances" are thus explained, "practising "religious ceremonies even during the lifetime "of the husband, with the husband's permission," &c., whence the inference is drawn, in verse 18, that a patni to inherit her husband's estate must be a pious woman. And again in verse 12, a virtuous woman is "one that lives with her "husband, associating with him in the perform-"ance of rites ordained by Cruti and Smruti, "and observing fastings and other religious "ceremonies."

The second of the texts relied upon is that of Catyayana.

It is important to see for what purpose the text was cited, and with that view to refer to the verses immediately preceding those in which the text is cited, for there is nothing more likely to mislead than to read a single paragraph from the Dayabagha or Mitakshara alone without studying the whole chapter, and in some cases, even, without studying several chapters of the same treatise.

In cap. 11, s. 1, the author of the Dayabagha, verse 54, sums up his argument in support of the widow's right to succeed to the entire property of her husband, for which purpose he had cited the text of Vrihat Menu. He says:—

"By the term 'his share' is understood the entire share appertaining to her husband, not a part only," (the translator adds the words "sufficient for her support").

And then in verse 55 he concludes:—

"Therefore the interpretation of the law is right as set forth by us," viz., that "the widow's right must be affirmed to extend to the whole estate of her husband" (v. 6).

He then proceeds, in verse 56, to deal with the mode of enjoyment, and to show that notwithstanding a widow takes the entire estate, she is not entitled to make a gift, sale, or mortgage of it, to the exclusion of her husband's heirs. He says:—

"But the wife must only enjoy her husband's estate after his demise; she is not entitled to make a gift, mortgage, or sale of it."

And, then in support of that proposition, he refers to the second text cited, and proceeds:—

"Thus Catyayana says:—'Let the childless widow, pre-'serving unsullied the bed of her lord, and abiding with her 'venerable protector, enjoy with moderation the property 'until her death. *After her death* let the heirs take it.'"

Mr. Justice Mitter in his judgment remarks, at p. 41, that the author of the Dayabagha cited that text, not for the purpose for which he cited that of Vrihat Menu, viz., that of establishing a widow's right to succeed to the entire estate of her deceased husband, but for that of defining the nature and extent of the interest which devolves upon her by virtue of that right.

In his remarks made on referring the case, however, he reasons upon it as an isolated text, and says (Report, p. 16):—

"This passage shows clearly, not only that the widow's right is a mere right of enjoyment, the word 'enjoyment' being understood in the sense explained above, but that the exercise of that right is absolutely dependent on her 'preserving unsullied the bed of her lord.' *The participial form* of the word 'preserving,' *i.e.*, continually preserving, which is also the

form used in the original (*palayanta*), proves conclusively that the injunction is one in the nature of a permanently abiding condition, which a widow is bound at all times, and under all circumstances, to satisfy; and the right of enjoyment conferred upon her being expressly declared *to be subject to such a condition*, every violation of it must necessarily involve a forfeiture of right."

Mr. Justice Glover also, at page 57, expresses a similar opinion, and he refers to the present participle "preserving" as denoting continuance, and as referring to the time after the widow has taken the property originally, and, he adds besides, if the words "keeping unsullied" refer only to past time, what is to be made of the other part, which he assumes to import a condition, viz., "living with her venerable protector." "She "cannot," he says, "live with him until she is a "widow, and while she lives with him she is to "keep unsullied her husband's bed." It is by treating the words "living with her venerable protector" as constituting a condition that he endeavours to add force to his argument that the words "keeping unsullied the bed of her lord" also express a condition. But that argument fails, inasmuch as it has been expressly held by the Privy Council, in the case of Cossinaut Bysacht *v.* Hurrosoondery Vyarastha Darpana, 97 and 2, Morley's Digest, 198, that the words "abiding "with her venerable protector" do not create a condition of forfeiture in case of her refusing to abide with him. Referring to that decision, Mr. Justice Mitter says that it lends in an indirect way considerable support to his view, inasmuch as that particular case was decided expressly upon the ground that the widow had not changed her residence for unchaste purposes. Their Lordships, however, are of opinion that the words "abiding with her venerable protector" do not, under any circumstances, create a condition or a limitation of a widow's right to enjoy the property of her husband to the period during which she abides with her protector.

They agree with the Chief Justice in the opinion which he expressed at p. 82, that neither the words "preserving unsullied the bed of her lord," nor the words "and abiding with her venerable protector," import conditions involving a forfeiture of the widow's vested estate; but even if the words were more open to such a construction than they appear to be, their Lordships are of opinion that what they have to consider is not so much what inference can be drawn from the words of Catyayana's text taken by itself, as what are the conclusions which the author of the Dayabhaga has himself drawn from them. It is to that treatise that we must look for the authoritative exposition of the law which governs Lower Bengal, whilst on the other hand nothing is more certain than that, in dealing with the same ancient texts, the Hindoo commentators have often drawn opposite conclusions. Now how has Jimuta Váhana dealt with this particular text? It has been seen for what purpose he cited it; but how does he comment on it in the rest of the section in which it occurs? He comments on the words "venerable protector" (v. 57); he defines who are intended to take after the demise of the widow under the term "the heirs" (vs. 38 and 59); glances at her duty to lead an abstinent, if not an ascetic, life, and to avoid "waste" (vs. 60 and 61), and deals with her power of alienation, and the limitations upon it (vs. 62, 63, and 64). But he nowhere says one word from which it can be inferred that, in his opinion, the text implied continued chastity as a condition for the duration of her estate, or that a breach of chastity subsequent to the death of her husband would operate as a forfeiture of her right. It can scarcely be supposed that a commentator so acute and careful as Jimuta Váhana, if he had drawn from the text of Catyayana the inference that a widow was to forfeit the estate if she

should become unchaste after her husband's death, would not have stated that inference clearly by saying, in verse 57, "let her enjoy "her husband's estate during her life, or so long "as she continues chaste," instead of using only the words "during her life" and stating that "when she dies" the daughters and others are to succeed.

The right to receive maintenance is very different from a vested estate in property, and therefore what is said as to maintenance cannot be extended to the case of a widow's estate by succession. However, the texts cited in regard to maintenance show that when it was intended to point out that a right was liable to resumption or forfeiture clear and express words to that effect were used. Jimuta Vahana in cap. 11, s. 1, verse 48, of The Dayabagha refers to a text of Nárada, in which he says, "Let them allow a "maintenance to his women for life, provided "they keep unsullied the bed of their lord. But "if they behave otherwise the brother may "resume that allowance." How different are those words from those used in the text of Catyayana.

Mr. Justice Mitter, in order to get rid of the argument that a daughter becoming a sonless widow or unchaste after having succeeded to the estate of her father does not forfeit the estate, argues that the texts to which he refers are applicable to a daughter as well as to a widow, and he refers to verse 31 s. 2 cap. 11 of the Dayabagha to show that the text of Catyayana is applicable to all women. (*See* Report p. 45 and 46, 48 and 49).

It seems clear, however, that though an unchaste daughter is excluded from inheriting her father's estate, or an unchaste mother that of her son, it is not by virtue of either of the above-mentioned text of Vrihat Menu or that of Catyayana.

Those texts have reference to the bed of the deceased owner of the estate. The words, "his funeral oblation," and "his share," and "the property," have reference to the oblation, the share, and the property of the lord or husband mentioned in the preceding parts of the texts, whose estate is to be inherited, and not to the husband or lord whose estate is not to be inherited, such as the husband or lord of a daughter or mother, as the case may be, of the deceased owner, who, in default of a widow, may be next in succession to inherit his estate.

Verse 31, s. 2, c. 11, only extends to other women the rule applicable to a wife, that a gift, sale, or mortgage of the estate is not to be made, and that after her death the heirs of the deceased owner are to take, and not that part of the rule which is included in the words "keeping unsullied the bed of her lord." This is made clear by Section 30, in which it is said :—

"Since it has been shown by a text cited (Section 1, verse 56) that on the decease of the widow in whom the succession had vested, the legal heirs of the former owner who would regularly inherit his property if there were no widow in whom the succession vested, namely, the daughters and the rest, succeed to the wealth ; therefore, the same rule (*concerning the succession of the former possessors* next heirs) is inferred *à fortiori* in the case of the daughter and grandson (meaning a daughter's son), whose pretensions are inferior to the wife's."

Then comes Section 31, which is in the words following :—

"The word 'wife' in the text above quoted (Section 1, v. "56) is employed with a general import, and it implies that "the rule," (meaning the rule referred to in cap. 11, s. 2, and para. 30) "must be understood as applicable generally to the "case of a woman's succession by inheritance.

Their Lordships have dwelt at some length upon the two texts that have been considered, since it is upon them that the arguments of the dissentient Judges are mainly founded. For the reasons above stated, they are of opinion that these texts, neither expressly nor by necessary implication, affirm the doctrine that the estate

of a widow, once vested, is liable to forfeiture by reason of unchastity subsequent to the death of her husband.

The Judgments of the High Court have so exhaustively reviewed the later authorities upon this question that their Lordships do not think it necessary to go through the same task. It is sufficient to say that in their opinion those authorities, though in some degree conflicting, greatly preponderate in favour of the conclusion of the majority of the Judges of the High Court.

In their Lordships' view it has not been established that the estate of a widow forms an exception to what appears to be the general rule of Hindoo law, that an estate once vested by succession or inheritance is not divested by any act which, before succession or incapacity, would have formed a ground for exclusion of inheritance.

The general rule is stated in the Vira-Mitrodaya, a book of authority in Southern India (*see* 12 Moore's Ind. Appeals, 466, and Mr. Colebrook's Preface to the Dayabagha), and which may also, like the Mitakshara, be referred to in Bengal in cases where the Dayabagha is silent. It is there said, in para. 3 of the chapter on Exclusion from Inheritance (cap. 8), " amongst them, " however, an outcast (patita) and addicted to vice " (upa pátáki) are excluded if they do not perform " penance, and then in para. 4" the exclusion again of these takes place if their disqualification occur previously to partition (or succession), but not if subsequently to partition (or succession), for there is no authority for the resumption of alloted shares. In para. 5 it is said that the masculine gender in the word " outcast," &c., is not intended to be expressive of restriction, and that the law of exclusion based upon defects excludes the wife or the daughters, female heirs, as well.

Mr. Justice Jackson has ably pointed out the great mischief, uncertainty, and confusion that might follow upon the affirmance of the doctrine that a widow's estate is forfeited for unchastity, particularly in the present constitution of Hindoo society, and the relaxation of so many of the precepts relating to Hindoo widows. The following consequences may also be pointed out.

According to the Hindoo law, a widow who succeeds to the estate of her husband in default of male issue, whether she succeeds by inheritance or survivorship (as to which *see* the Shivagunga case, 9 Moore's Ind. Appeals, 604) does not take a mere life estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest. Her estate is an anomalous one, and has been compared to that of a tenant in tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband. But whatever her estate is, it is clear that until the termination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband (*Id.* 604). The succession does not open to the heirs of the husband until the termination of the widow's estate. Upon the termination of that estate the property descends to those who would have been the heirs of the husband if he had lived up to and died at the moment of her death. (Moore's Ind. Appeals, 400.)

If the widow's estate ceases upon her committing an act of unchastity, the period of succession will be accelerated and the title of the heirs of her husband must accrue at that period. Suppose a husband dies leaving no male issue and no daughter, mother, or father, but leaving a chaste wife, a brother, a nephew, the son of the surviving brother, and other nephews, sons

of deceased brothers. The wife succeeds to the estate and the surviving brother is her protector. (*See* Dayabhaga, cap. 11, s. 1, v. 57). If he survive the widow, he, according to the Bengal school, will take the whole estate, as sole heir to his deceased brother, and the nephews will take no interest therein, for brothers' sons are totally excluded by the existence of a brother (Dayabhaga, cap. 11, s. 1, v. 5; *id.* cap. 11, s. 6, v. 1 and 2). The surviving brother may be advanced in years; the widow may be young. The probability may be that she will survive him. If her estate were to cease by reason of her unchastity, the benefit which he would derive from her fall would give him an interest in direct conflict with his moral duty of shielding her from temptation. But, further, the widow has a right to sell or mortgage her own interest in the estate, or in case of necessity to sell or mortgage the whole interest in it. (Dayabhaga, cap. 11, s. 1, v. 62.) If her estate ceases by an act of unchastity, the purchaser or mortgagee might be deprived of his estate if the surviving brother of the husband should prove that the widow's estate had ceased in consequence of an act of unchastity committed by her prior to the sale or mortgage.

Again, if the surviving brother should die in the lifetime of the widow all the nephews would succeed as heirs of their deceased uncle; but if the son of the surviving brother could prove that the widow's estate had ceased, by reason of an act of unchastity committed in the lifetime of his father, and that consequently the estate had descended to his father in his lifetime, he would be entitled to the whole estate as heir to his father, to the exclusion of the other nephews. Thus the period of descent to the reversionary heirs of the husband might be accelerated by an act of unchastity committed by the widow; the

course of descent might be changed by her act, and persons become entitled to inherit as heirs of the husband, who if the widow had remained chaste would never have succeeded to the estate; and others who would otherwise have succeeded would be deprived of the right to inherit.

In the case of Sremathi Matangini Debi *v.* Srimati Jagkali Debi, 5 Beng. Law Reports, 490, the following remark was made by the then Chief Justice. He said:—

"In the case of Katama Natchier *v.* The Rajah of Shiva Gunga (9 Moore I. A., 539) it was held that a decree in a suit brought by a Hindu window binds the heirs who claim in succession to her; but that can only be in a suit brought by her so long as she holds a widow's estate. It would cause infinite confusion if a decree in a suit brought by a widow could be avoided, if it could be shown that she had committed an act of unchastity before she commenced the suit. But if the rule contended for is correct, and the estate which a widow takes by inheritance is merely an estate so long as she continues chaste, all the acts which a Hindu widow could do in reference to the estate might be avoided by raking up some act of unchastity against her. Inconvenience would not be a ground for deciding a case like the present, if the law were clear upon the subject; but it is an argument which may be fairly adduced when the authorities in favour of the opposite view are merely the expressions of opinion by Hindu law officers, or by European or modern text writers, however eminent, or even decisions of a Court of Justice, when they are in conflict with the decisions of other Courts of equal weight."

Upon the whole, then, their Lordships, after careful consideration of this question, and of the authorities bearing upon it, have come to the conclusion that the decision of the majority of the Judges was the correct one, and it is important to remark that the High Court at Bombay, in the case of Privali *v.* Bhiku, 4 Bombay High Court Reports, p. 25, and the High Court in the North-Western Provinces, in the case of Bhagwanli *v.* Ruor Man Tinari, 2 Ind. Law Reports, 145, have given judgments to the same effect as that of the Full Bench at Calcutta in the present case.

The widow has never been degraded or deprived of caste. If she had been, the case might

have been different, subject to the question as to the construction of Act 21 of 1850; for upon degradation from caste before that Act a Hindu, whether male or female, was considered as dead by the Hindu law, so much so that libations were directed to be offered to his manes as though he were naturally dead. See Strange's Hindu Law, 160 and 261, Menu, cap. 11, s. 183. His degradation caused an extinction of all his property, whether acquired by inheritance, succession, or in any other manner. Dayabagha, chapter 1, paras. 31, 32, and 33. The opinion of Mr. Colebrooke in the Trichinopoly case is founded on the distinction between mere unchastity and degradation.

It is unnecessary to determine what would have been the effect of Act 21 of 1850, if she had been degraded or deprived of her caste in consequence of her unchastity.

Their Lordships, for the above reasons, will humbly advise Her Majesty to affirm the judgment of the High Court.

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