

(1961) 08 CAL CK 0003

In the Calcutta High Court

Case No : Appeal from Original Decree No. 52 of 1951

Nakul Chandra Mondal and Others

APPELLANT

Vs

Khuda Biswas alias Khuda Bux and Others

RESPONDENT

Date of Decision : 09-08-1961

Acts Referred:

Constitution of India, 1950 — Article 258

Citation : 66 CWN 149

Hon'ble Judges : Chatterjee, J; Bachawat, J

Bench : Division Bench

Advocate : Chandra Nath Mookerjee, for the Appellant; Hari Prasanna Mukherjee and Jagannath Gangopadhyay, for the Respondent

Judgement

Bachawat, J.—This appeal arises out of a suit for the recovery of khas possession and declaration of the plaintiffs' title to the properties mentioned in the schedules ka and kha to the plaint. One Dulal Mondal owned these properties at the time of his death which took place sometime in 1330 B.S. corresponding to the year 1923-24. He had two wives named Jaladbarani and Taramoni. By his will dated the 26th July 1921 he provided that after his death Jaladbarani would get and enjoy for her life the properties mentioned in schedule ka to the plaint. The will was duly probated. He died childless leaving behind him surviving his two widows Jaladbarani and Taramoni as his heirs. His two sisters Nirodebarani and Kulamandalini were then alive. His other sister Pushpa had predeceased him. Immediately after his death Taramoni married for the second time. By section 2 of the Hindu Widow's Remarriage Act, 1856 on her re-marriage all rights and interests which she had in Dulal's properties ceased and determined as if she had then died. Between the years 1924 and 1943 Jaladbarani executed several deeds of absolute sale in respect of the properties mentioned in the schedules ka and kha to the plaint. The defendants contend that Jaladbarani alienated all these properties for legal necessity. Jaladbarani died on the 20th Agrayayan 1353 B.S. corresponding to December 6, 1946. Both Nirodebarani and Kulamondalini were then alive. Kulamondalini died some time thereafter. P.W. 11

cannot say when she died. Her son Giri Mondal P.W. 12 said on November 15, 1950 that she died about 2 or 2 1/2 years ago in the month of Kartick. Akhil, D.W. 1 said on November 15, 1950 that she died in Chaitra before last. Kulamandalini therefore died some time during the period November/December 1948 and March/April, 1949. I am satisfied that she died sometime before April 5, 1949. On April 5, 1949 Nirodebarani executed a deed of sale of all the suit properties in favour of the plaintiffs. The plaintiffs instituted this suit on May 31, 1949. Nirodebarani was then alive. The plaintiffs have impleaded as defendants to the suit all the persons claiming to be transferees of the suit properties from Jaladbarani. Taramoni is also impleaded as a proforma defendant. The plaintiffs claim that Dulal was governed by the Mitakshara School of Hindu Law. that on the death of Jaladbarani his sisters Nirodebarani and Kulomandalini succeeded to the suit properties as his heirs under the Hindu Law of Inheritance (Amendment) Act 1929 (Act II of 1929), that on Kulomandalini's death Nirodebarani became the sole owner of those properties and that by virtue of their purchase from Nirodebarani they have acquired title to the properties. The defendants dispute those contentions. The trial Court dismissed the suit. On appeal a Bench of this Court framed the following two additional issues:

- (1) Did Dulal Mondal or his ancestor migrate from any place in Bihar?
- (2) Was Dulal Mondal of Umrapur, District Murshidabad governed by the Mitakshara School of Hindu Law?

By its order dated the 11th March 1959 the Bench directed the Trial Court to try those issues after taking additional evidence and to return the evidence and its findings to this Court. The Trial Court has duly made the return with the finding that the two additional issues should be answered in the negative. The appeal stands assigned to this Bench.

2. The first question that arises for decision is whether Dulal was governed by the Law of Mitakshara. If he was governed by the Dayabhaga Law his sisters could not be his heirs and the plaintiffs cannot succeed. Now Dulal lived in Umrapur, P.S. Suti. a border village in the District of Murshidabad in the then Province of Bengal. Since he lived in Bengal proper presumably he was subject to the Dayabhaga Law which prevails there. But this presumption may be rebutted and it may be shown that he was subject to the Law of the Mitakshara. In matters such as succession, inheritance and marriage the civil rights of a Hindu are determined by the Hindu Law. But the Hindu Law has several Schools, each School having a territory where it is recognized as the paramount authority. Presumably a Hindu owes obedience to the school of Hindu Law which prevails in the territory where he dwells. The School of Hindu Law to which a Hindu owes obedience becomes his personal law. If he migrates to another territory he carries with him his personal law and it is presumed that he continues to be governed by the law to which he originally owed obedience, see (1) AIR 1921 59 (Privy Council) ; Parbati Kumar v. Jagadish Chunder, (2) 29 LA. 82; Ratcheputti Dutt Jha v. Rajunder Narain Rao (3) 2 M.I.A. 132. The latter presumption may

again be rebutted and it may be shown that the migrating Hindu has adopted the system of Hindu Law which prevails in the new territory. Thus it may happen that in the same territory different Hindus are subject to different schools of Hindu Law. Now there is no direct evidence that Dulal or his ancestors migrated to Bengal from Bihar where the Law of the Mitakshara prevails. Dulal was a Dhanuk by caste. The evidence shows that a close community of Dhanuk families is settled in 20 border villages in the District of Murshidabad. Some Dhanuks are settled in Maldah and other Districts of Bengal also. There is no direct evidence that the Dhanuk community settled in Bengal came from Bihar. There is however a considerable body of indirect evidence showing that the ancestors of the Dhanuk community of Murshidabad migrated from Bihar and settled in Murshidabad and also that the community is governed by the Mitakshara School of Hindu Law.

3. Dhanuk is primarily a Bihari caste. The members of this caste are found chiefly in Bihar. In this connection our attention was drawn to the following standard works of reference, viz., the Tribes and Castes of Bengal by H. H. Risley, 1891, Vol. I pages 220-1 and Vol. II, appendix 1, page 39; The Census of India Report, 1901 by E.A. Gait, Vol. VI, part 1, article 258 at page 139, articles 570 and 571 at pages 361-63, articles 587 - 596 at pages 369-374, article 634 at page 390, appendix VI at page XXXIV and appendix VII at page XLVIII; Hunter's Statistical Account of Murshidabad, pages 42, 44, 51 and 53 and the Bengal District Gazetteer for Bhagalpur (1911) by J. Byrne, page 52. In the Census of India Report, 1901, Vol. VI, part 1, article 634 at page 390, the learned author gives a map showing the distribution of Dhanuks in Bihar and the adjoining areas and observes:

The Dhanuks are a Bihar caste with nearly 600,000 representatives. They are most numerous in Darbhanga, Monghyr and Bhagalpur, and very few are found outside these three districts and the tracts immediately adjoining them. * * * In Bhagalpur and Monghyr, Dhanuks are said to be also known as Jaiswar Kurmis and this may have sometimes led to confusion.

4. In appendix VI, page XXXIV of the Census Report, the author states that the Dhanuk caste is to be found chiefly in Bihar. In appendix VII, page xlviii of the Report the author gives the various subcastes of Dhanuk, such as Dudhwar, Jaiswar and Magahia and states that in Monghyr it is doubtful whether the Jaiswars are Dhanuks or Kurmis. Article 596 at page 373-4 of the Report gives the place of Dhanuk caste in the caste precedence in Bihar. Dhanuk is one of the castes from whom water may be taken and who have good Brahmans as their priests. They correspond to the Nabasakha group in the scheme for Bengal proper. The Dhanuk caste does not find any place in the caste precedence in Bengal proper given in articles 587 to 593 at pages 369 to 373 of the Report. Article 570 at pages 361 to 362 of the Report suggests that the Dhanuk caste is tribal in origin and that its original tribal name has been replaced by the Sanskrit derivative Dhanuk indicating archers. The Tribes and Castes of Bengal by H. H.

Risley (1891) Vol. I, page 220 describes Dhanuk as, "a cultivating caste of Behar" and discusses the question whether the Dhanuks can be regarded as a branch of the Kurmis. In the same book Vol. II, appendix I, page 39 the author states that in Purneah there is a subcaste of Dhanuk bearing the name "Mandal". In Hunter's Statistical Account of Murshidabad, Vol. IX at page 44 the number of Dhanuks in Murshidabad is given as 4487. At page 53 the author says "Dhanuk, 4487. This is properly a Behar caste. It is not found in the south-eastern part of Bengal, and is more numerous in Maldah and Murshidabad than in the whole of the remainder of the Province * * * The Deputy-Collector states that in Murshidabad they are cultivators. In the Census Report for Bengal they are included among the castes engaged in domestic service." The Dhanuk caste is said to be in some way connected with Kurmis who are described at page 51 as an up-country caste of shopkeepers, cultivators, and domestic servants. At page 42 the author says "The District of Murshidabad, partly from its geographical position, and partly from its history, contains a very mixed population. The Bengalis of the delta, the hill tribes from Chutia Nagpur, and the peculiar Hindu Castes of Behar, are all represented."

5. At the trial of the case a number of Dhanuks gave evidence. All the Dhanuk witnesses bear the surname, Mondal, of them P.W.1 and D.W.4 are residents of Santhal Parganas. P.W.2 and 6 are residents of District of Monghyr, P.W.3 comes from Patna, P.W. 14 is a resident of District of Muzaffarpur. P.Ws. 4 and 9 are residents of Seralkasempur, P.W. 7 comes from Dhoaputnagpur, D.W. 2 comes from Bauri Kuri and D.W. 3 comes from Hasupur, all in the District of Murshidabad. P.W.s 5, 8, 10 and D.W. 1 are residents of Lokaipur in the District of Murshidabad and P.W.s 11 and 12 are residents of the village Umrapur in the District of Murshidabad where Dulal lived and died. P.W. 5 and D.W. 1 say that they are Khotta Hindustanis. P.W.s 6, 7, 8, 9 and 11 say that the Dhanuks of Murshidabad speak in Hindi with their women folk. They can also speak Bengali. P.W. 10 does not know Khotta Hindi. D.W. 3 who comes from Murshidabad says that he speaks in Khotta Hindi with his family members. The net effect of the evidence is that the Dhanuk community of Murshidabad generally speak in Hindi with their women folk. The language used by them shows close contact with up-country people. They still regard themselves as Khotta or up-country men.

6. P.W.s 1 and 11 say that the marriages of the Dhanuks of Murshidabad are performed according to Hindustani rites. P.W. 14 says that there is geet i.e., songs are sung at the marriage ceremony. D.W. 3 says that in marriages of their community gauna takes place. The evidence of P.W.s 1, 2, 4, 6, 7, 9 and 11 shows that the same religious and social rites and the same customs and usages are observed by the Dhanuk community of Murshidabad as are observed in Bihar. P.Ws. 7 and 8 describe these customs as Hindusthani or Khotta customs. P.W.s 4, 9 and 11 said that they do not observe Bengali customs in marriages and religious ceremonies. We prefer their testimony to that of D.W.s 1 and 2 who said that they observe customs and usages as they obtain in Bengal. P.W. 10 said that their usages are partly of Bengal and partly of Bihar. The overall effect of the

evidence is that the Dhanuk Community of Murshidabad generally observe the same customs and usages as are observed by their community in Bihar.

7. The Dhanuks of Bihar and Murshidabad form a compact social unit. There is constant inter-marriage between them. Bihari bridegrooms take bride from Murshidabad. Thus Jugal Kishore Mondal, the brother of P.W. 6 of Monghyr, P.W. 3 Ganesh of Patna and his son married in Murshidabad and the mother's sister of P.W. 11 Nakul of Murshidabad married in Patna. Similarly Murshidabad bridegrooms take brides from Bihar. Thus P.W. 4 Mahendra and his son married in Bihar. D.W. 2 of Murshidabad admitted that he had relations in Bihar. I do not accept the testimony of the witnesses for the defendant that the Dhanuks of Murshidabad have no social or matrimonial connection with up-country people. There is close social and marriage tie between Dhanuks of Murshidabad and those of Bihar. The marriages lead to constant migration of Murshidabrd brides to Bihar and of Bihari brides to Murshidabad.

8. In the Census of India Report 1901, Vol. VI, part 1, page 355, footnote states that prolonged residence of persons of Bihari castes in Bengal generally results in their being placed under a ban as regards marriage. In Sir Herbet Risley's The People of India, 2nd edition, page 88 the author observes that if members of a caste leave their original habitat and settle permanently in another part of India, the tendency is for them to be separated from the parent group and to develop into a distinct caste. They are generally placed under a ban as to intermarriage with the parent group. Those who settle in Bengal are called khottas, they some time assume a distinctive caste-name and all traces of their original affinities disappear and there remains only a dim tradition of their migration "from the West". The evidence shows that the Dhanuks of Murshidabad have not been placed under a ban of inter-marriage with their Bihari caste-men. They still consider themselves to be a part and parcel of the parent group. Their social relations with their Bihari caste-men are still vigorous and active. There is much more than a dim tradition of migration from Bihar. They still maintain close contact with their Bihari caste-men. The evidence of P.W. 11 shows that they are sometimes called Magadha Dwijawar Dhanuka to indicate that their ancestors hailed from Maghad or Bihar.

9. The evidence of P.W.s 1, 5, 8, 9 and 10 and D.W.s 1, 3 and 4 shows that up-country Kanyakubja Brahmins act as their priests and perform their religious rites. These Brahmins are called Missirs The names of two such priests are Mahendra Nath Tewari of Badamtala and Jitendra Nath Dikshit of Gambhira both in the District of Murshidabad. In the Tribes and Castes of Bengal (1891) Vol. II, appendix 1, page 14, H. H. Risley points out that the Kanyakubja or Kanaujia Brahmans of Bihar bear the titles of Missir or Misra Dichit or Dikshit and Tiwari. The Bengali Brahmans do not bear these titles. The employment of Bihari Kanaujia Brahmans is a circumstance showing that the Dhanuks of Murshidabad are governed by the Law of Mitakshara. The evidence of P.Ws. 2, 4, 5, 6, 10 and 14 shows that the Bihari Brahmans as also their yajmans. the Dhanuks of

Murshidabad, are governed by the Mitakshara Law.

10. The evidence of P.W. 8 who is a Dhanuk of Murshidabad shows that in obedience to the Law of the Mitakshara the widows of brothers living jointly get maintenance only and that accordingly the widows of his two brothers were given maintenance. D.W. 1 attempted to say that at Talapur the widow of a predeceased brother inherited along with the surviving brother but in cross-examination he was unable to give the name of the widow.

11. Exhibits 4A, 4B and 6 show that in ore litigation some of the parties who were Dhanuks of Murshidabad said that they were governed by Mitakshara Law. The point was however not decided by the Court.

12. There is evidence to show that in recent times some Dhanuk families have migrated from Bihar and settled in Murshidabad. Thus the evidence of P.W. 14 shows that Haradhan the father of the plaintiffs migrated from Nilchawk of Monghyr and settled at Umrapur in the District of Murshidabad.

13. Summarising the evidence, it appears that the Dhanuks of Murshidabad (a) employ Bihari priests to perform their religious rites and ceremonies, (b) generally observe Bihari customs and usages, (c) belong to a well-recognized Bihari caste, (d) have no place in the caste precedence in Bengal Proper, (e) still regard themselves as Khottas or up-country men, (f) speak Khottai Hindusthani with their women folk, (g) have a tradition of migration from Bihar, (h) are small in number compared to the main body of their Bihari castemen, (i) constantly inter-marry with their Bihari castemen, (j) allow migration of brides from Bihar to Murshidabad and vice versa, (k) from time to time receive within their fold families migrating from Bihar. All these facts indicate that the ancestors of the Dhanuks of Murshidabad came from Bihar.

14. In AIR 1930 133 (Privy Council) dealing with the question whether a certain family originally came from the District of Delhi and settled in East Khandesh district within the Presidency of Bombay, Lord Buckmaster observed, "The evidence upon it is undoubtedly slight; but there is some evidence which, in their Lordships' opinion, is sufficient to show that that was the origin of the family. There is the definite statement that the old customs prevailing on the Delhi side were still good among the family, and, in their Lordships' opinion, that can only be properly referable to the fact that those customs had been introduced into their present place from Delhi, whence they had originally sprung."

15. An inference that the ancestors of a family or a group of families migrated from one State to another may properly be made from the known facts of the case though there is no direct evidence of the migration and though the date of migration is not known. In *Kesheo Rao Bapurao v. Sadashibao* (5) A.I.R 1938 Nag. 163: ILR 1938) Nag. 469, such inference was drawn in the case of Maharashtra Brahmins resident in the Central Province. Once migration of the ancestors of the family from Bihar to Bengal is proved the migrating family is presumed to retain its original personal law and to continue to be governed by it.

To raise this presumption it is not necessary to establish the precise date of migration or to prove that the migration took place before the foundation of Dayabhaga School in Bengal proper, see *Ramesh Chandra Sinha Vs. Md. Elahi Buksh*, and *Chandrakanto Goswami Vs. Ram Mohini Debi and Others*, . The decision in *Pitambar Chandra v. Nishikant*, (8) 31 C.L.J. 52: 24 C.W.N. 215 does not lay down the law correctly on this point. Proof of the date of migration is necessary where such date is material. Thus the changes which may have been engrafted on the Mitakshara Law in Bihar subsequent to the migration to Bengal will not be applicable to the migrants, see *Brindaban Singha v. Chandubala Devi*, (9) ILR (1951) 2 Cal. 225. In the instant case such changes, if any, are not material. The amendment of the Mitakshara Law by the Hindu Law of Inheritance (Amendment) Act 1929 (Act II of 1929) extends to the whole of India and is not peculiar to Bihar. Upon the evidence on the record I am satisfied that the ancestors of the Murshidabad Dhanuks including the ancestors of Dulal migrated from Bihar and settled in Murshidabad and that they carried with them the Mitakshara law by which they were originally governed and they continue to be governed by such law. Even if it be assumed that the Dhanuka of Murshidabad and their ancestors were all along residents of Bengal and were not emigrants from Bihar, the evidence points to the conclusion that they have adopted the Mitakshara Law as their personal law and are governed by it. This conclusion is reinforced by the instance of inheritance according to the Mitakshara Law referred to by P.W. 8 in his evidence.

16. The plaintiffs have relied on some other more facts to establish that the Dhanuks are governed by Mitakshara Law. The evidence shows that in their community the *sradh* ceremony used to be performed on the 30th day and that in recent times the *sradh* ceremony is performed by some on the 30th day and by others on the 12th day. This fact cannot lead to a conclusion one way or the other. The same period of impurity is prescribed by the Bengal and Benaras Schools, see *Pitambar Chandra v. Nishikant*, (8) 24 C.W.N. 215 at 220. The Bihari priests sometimes use Hindu *Satkarnamala* and *Purohitdarpan*. But these books are used both in Bengal and in Bihar. There is some evidence that the Chain Mondals of Murshidabad are governed by Mitakshara Law" and that the Dhanuks have social intercourse with them, other than inter-marriage. But the question whether the Chain Mondals are governed by Mitakshara Law is not material to this case. We have not relied on all these facts in coming to our conclusion that Dhanuks are governed by Mitakshara Law.

17. The Mitakshara is recognized as the paramount authority in Bihar. The Mitakshara has several Schools; in Mithila, the Mithila School prevails, in the rest of Bihar, the Benaras School prevails. It is not necessary to decide by which of these Mitakshara Schools Dulal was governed. For the purposes of this case it is sufficient to say that he was governed by the Mitakshara Law. The issues in this case receive the same answers whether he was subject to the Benaras School or to the Mithila School of Mitakshara Law.

18. The next question is whether Dulal's sisters succeeded to his estate on the death of Jaladbarani as his heirs under the Hindu Law of Inheritance (Amendment) Act (Act II of 1929). The point must be considered separately in respect of the schedule ka and schedule kha properties. Dulal died some time in 1923-4. Act II of 1929 came into force on February 21, 1929. The Act is expressed to alter the order of succession to the estate of a Hindu male dying intestate; it applies to persons subject to the Law of Mitakshara in respect of the property of males not held in coparcenary and not disposed of by will. The Act is not retrospective; nevertheless it applies not only to the case of a Hindu male dying intestate on or after February 21, 1929 but also to the case of a Hindu male dying intestate before that date if he was succeeded by a female heir who died after that date, see *Lala Duni Chond and ors. v. Musammat Anar Kali*, (10) 73 I.A. 187. In giving reasons for this decision Mr. M. R. Jayakar observed:

The succession does not open to the heirs of the husband until the termination of the widow's estate. On its termination 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". Now a Hindu may die partly testate and partly intestate. Clearly Dulal died intestate in respect of schedule kha properties. Those properties were not disposed of by his will. On his death his two widows as his next heirs took a widow's estate in the schedule kha properties as joint tenants with right of survivorship. On re-marriage of Taramoni the entire widow's estate in those properties vested in Jaladbarani as if Taramoni had then died. On Jaladbarani's death the properties except those which had been alienated by her for legal necessity descended to Dulal's sisters Nirodebarani and Kulomandalani as his next legal heirs.

19. The point still remains whether Dulal's sisters succeeded to the schedule ka properties on the death of Jaladbarani. In order to answer this question it is necessary to consider the provisions of Dulal's will. Under this will Jaladbarani got the schedule ka properties for her life time. The question is: did she get a widow's estate in the technical sense or did she get a life estate?

20. The conception of the Hindu widow's estate is peculiar to Hindu Law. The widow or other limited heir takes a special and qualified estate. She holds an estate of inheritance to herself and to the heirs of the last full owner. Upon her death the estate passes to the next heirs of the last full owner. So long as she is alive, no one has a vested interest in the succession, see *Bhugwan Deen Dubey v. Myna Bae*, (10) 11 M.I.A. 487, 511-2, 514; *Moniram Kolita v. Keri Kolutani* (12) ILR 5 Cal. 776, 789; 7 I.A. 115, 154; *Janaki Ammal v. Narayanswami Aiyar*. (13) AIR 1916 P.C. 117; 43 I A. 207. 209. The whole estate is for the time vested in her and she represents it completely. Her position is that of an owner, her powers in that character are however limited. She may, as owner, alienate the property for necessary purposes.

21. The limited owner takes the special and qualified estate as heir. The same estate may also be created by will. The widow's estate and its special line of

succession are known to Hindu Law and a devisee under a will may well take that estate, *Lakshmana Nadar and Others Vs. R. Ramier*, 304 Mahajan, J. observed:

* * * It is now settled that a Hindu can confer by means of a will on his widow the same estate which she would get by inheritance. The widow in such a case takes as a devisee and not as an heir. The Court's primary duty in such case is to ascertain from the language employed by the testator "what were his intentions" keeping in view the surrounding circumstances, his ordinary notions as a Hindu in respect to devolution of his property, his family relationships etc.; in other words, to ascertain his wishes by putting itself, so to say, in his arm-chair.

22. A Hindu may by his will create any estate known to Hindu Law. He may give a widow's estate, or if he likes he may give a life estate in the strict sense. The issue in a given case is: what estate he created? The answer turns on a true interpretation of his will. The widow's estate is indicated, where during the life of the devisee the estate is completely represented by her and during her life no one else has a vested remainder or a vested interest in the succession. On the other hand a life interest is indicated where a vested remainder is given to some one else. Again the devisee's power of alienation for necessary purposes indicate a widow's estate and its absence indicates a life estate. In *Lakshmana Nadar and Others Vs. R. Ramier*, the testator by his will provided that his wife would during her life enjoy the entire properties that after her death his daughter and her heirs would enjoy them with absolute rights and powers of alienation, such as gift, exchange, and sale from son to grandson and so on for generations and that as regards the payment of maintenance to the widow of the predeceased son the testator's wife would pay as she would please and would obtain a release deed. The Supreme Court held that the direction to pay the maintenance of the widow of the predeceased son did not in the circumstances give the wife the full powers of alienation enjoyed by a Hindu widow, that the daughter took a vested interest in the properties on the death of the testator and that consequently the testator's widow took an estate more like the limited estate in the English sense of the term than like a full Hindu widow's estate. In that case Mahajan, J. observed :

The widow cannot be held to have been given a full Hindu widow's estate under the will unless it can be said that under its terms she was given the power of alienation for necessary purposes, whether in express terms or by necessary implication.

23. In the same judgment Mahajan, J. approved of and distinguished the decision in *Ram Bahadur v. Jagannath Prasad*, (15) AIR 1918 Pat. 469. In the Patna case the will provided that if any daughter or son be born to the testator during his life time, such son or daughter will be the owner of all his properties, but if there be no son or daughter, his niece Sahodra would take a bequest of a lakh of rupees, and the rest of the movable and immovable properties would remain in possession of his wife until her death, and after her death would pass

into the possession of his niece; but if on the death of his wife and niece there be living a son and a daughter born of the womb of the niece, then 2/3rds of the movable property would belong to the son and 1/3rd to the daughter absolutely. In one passage, the Will described the niece's estate as an estate "without power of alienation". The will also provided "But as regards the immovable property none shall have the least right of alienation. They will of course be entitled to enjoy the balance left after payment of rent etc." The Patna High Court held that the niece's son and daughter had a contingent and not a vested interest in the remainder, that the estate was completely represented first by the testator's widow and thereafter by his niece, that his niece took a woman's estate in the technical sense and not merely a life estate and that the will did not impose an effective fetter on the power of alienation for legal necessity enjoyed by the holder of a woman's estate. Chapman, J. observed: "The fact is that in cases of this kind it is very easy to use the words "without power of alienation" in a loose sense, that is to say, to use them in the sense without power of alienation except in the case of recognized legal necessity. * * * Where a testator is found to have intended to create a woman's estate, an estate which is entirely representative though restricted; an absolute prohibition of alienation even for the purposes of the preservation of the estate should be regarded as coming within the principle above laid down and rejected as being an attempt to take away that which the law attaches to the estate which the giver has sufficiently shown his intention to create".

24. We must now turn to Dulal's will and construe it. The will is short and simple in language and is expressed to be an arrangement in respect of some of his properties after his death. The relevant portion of the will is as follows:

1. Out of all ancestral and self-acquired movable and immovale properties which I have at present and which will be acquired in future my wife Sri Jalad Barani Mondalini will get after my death and enjoy for life 59 Bighas 6 1/2 Cottas (Fifty nine Bighas and six and half Cottas) of land let out in Bhag and one room fit for residence and one cow. She will not at any time be entitled to make any kind of transfer by way of gift, sale etc. If after my death my said wife goes to her father's place and lives there she will not get the said properties. If she lives in my family-dwelling house, she will enjoy the aforementioned properties.

25. Now Dulal had no issue. He had two wives. He was suspicious of the fidelity of his wife, Taramoni. In fact Taramoni re-married immediately after his death. His intention was to exclude Taramoni from the inheritance of the properties disposed of by his will. Those properties formed the major and the most valuable part of his estate. Under the will Jaladbarani would get those properties and enjoy them for her life. He made no disposition of the remainder expectant on the termination of her estate. Plainly he intended that the remainder should not vest in his heirs immediately on his death. He could not have intended that the remainder would vest on his death in Jaladbarani and Taramoni as joint tenants with rights of survivorship. No one would have a vested interest in the remainder

during the subsistence of the estate given to Jaladbarani. The entire ownership for the time vested in Jaladbarani and was completely represented by her. She alone would get as a Hindu widow and enjoy for her life part of what she and the other widow would have got as co-heirs on his dying wholly intestate. His paramount intention to be gathered from the will in the light of the surrounding circumstances is that Jaladbarani would take a widow's estate under the will.

26. The will provided that Jaladbarani would not at any time be entitled to make any kind of transfer by way of gift, sale etc. Read literally, this restraint against alienation is repugnant to both a life-estate and a widow's estate. Considering that during the lifetime of Jaladbarani, she alone represented the estate and no one else had a vested interest therein, the testator could not have intended that she would have no power of alienation even for purposes of preservation of the estate. He had sufficiently shown his intention to create a widow's estate. He indicated somewhat loosely the ordinary restrictions on alienation inherent in a widow's estate. An absolute prohibition of alienation in all circumstances would be repugnant to the widow's estate created by the will and as such invalid. Properly read the will prohibited alienations except for purposes for which the holder of a widow's estate could lawfully alienate the estate.

27. The will also provided that if after her husband's death Jaladbarani would go to her father's place and live there she would not get the properties and that if she would live in his family dwelling house she would enjoy them. The requirement of residence by the widow in her husband's family dwelling house or with her husband's family as a condition of her enjoyment of his property by his widow is in accord with the orthodox Hindu conception of a widow's estate. The widow is the surviving half of her husband and she should live in his family dwelling house so that she may better continue his tradition as if he were alive. The ancient scripture enjoins the childless widow to enjoy her husband's property until her death "abiding with her venerable protection" see Kalayayana cited in Jimuta Vahana's Dayabhaga, Chapter 11, section verse 56, that is to say, abiding with her father-in-law or others of her husband's family see Dayabhaga Chapter 11, section 1, verse 57, J. C. Ghose's Hindu Law, 1st Edition. Volume II, pages 890, 982; Shyama Charan Sarkar's Vyavastha Darpana, 3rd Edition, Vol. I, pages 43-4. This duty of "abiding with the venerable protector" is now regarded as a moral duty; those words do not involve a forfeiture of the widow's vested right, she does not forfeit her vested right by refusing to reside in the husband's family dwelling house or with her husband's family, see Moniram Kolita v. Keri Kolutani, (12) ILR 5 Cal. 776 at 785-6: 7 I.A. 115, 154; Cossinath By sack v. Hurrosundory Dosee, (16) 2 Morley's Digest 198; Uma Debt v. Kishanmani Dasi (17) Sel. S.D.A. Rep: Vol. VII pp. 270-2; Amrit Kumari v. Kedarnath Ghose, (18) Agra Report Vol. III, page 182, Vyavastha Darpana. 3rd Edition, Vol. II, pages 41-9, 51. In the instant case the widow took her husband's properties as a devisee under the will of her husband. The bequest was made on the condition that she would continue to reside in her husband's family dwelling house. According to orthodox Hindu notions such a

condition indicates a widow's estate rather than a life estate in the strict sense. The husband had otherwise also shown his intention to create a widow's estate. The widow therefore took a widow's estate under the will. She duly complied with the condition during her life time. The further question whether a breach of the condition involves a forfeiture of the widow's estate created by the will does not arise in this case and need not be decided.

28. It follows that Jaladbarani took a widow's estate in the schedule ka properties as a devisee under her husband's will. She died in 1946 and on her death the properties which were not disposed of by her for legal necessity passed to her husband's heirs. Her husband must be regarded as dying intestate at the moment of her death and the properties must then be regarded as undisposed of by his will. The Hindu Law of Inheritance (Amendment) Act II of 1929 was then in force. The Act should be read as part of the general law of inheritance, see *Mt. Sahodra v. Ram Babu*, (19) 69 I.A. 145. Consequently her husband's sisters who were then his legal heirs succeeded to these properties.

29. In case it be assumed that Jaladbarani took under her husband's will a life estate and not a widow's estate in the schedule ka properties, a question will arise whether on that assumption succession to those properties opened on her death. This question is not material having regard to our finding that she took a widow's estate. Elaborate arguments however were advanced on this point and it is desirable to notice them. On the assumption that Jaladbarani took a life estate under the will three alternative contentions were advanced before us, viz: (i) the remainder expectant on the termination of the life estate passed to Dulal's heirs immediately on his death, that Jaladbarani and Taramoni as such heirs took a vested widow's estate in the remainder, that on the re-marriage of Taramoni the entire widow's estate in the remainder passed to Jaladbarani so that Jaladbarani then acquired both the life estate as also the widow's estate in the entire remainder; (2) the remainder passed immediately on Dulal's death to Taramoni as his heir and upon the re-marriage of Taramoni devolved upon his next heirs other than Jaladbarani; (3) due to the interposition of the life estate the remainder remained in abeyance and the succession to it opened for the first time on its termination.

30. I may say at once that the second contention is not tenable and must be rejected. If the remainder passed to Dulal's heirs immediately on his death it could not pass to Taramoni alone; it must then devolve on both Jaladbarani and Taramoni; upon the re-marriage of Taramoni it would devolve on Jaladbarani alone so that the life estate as also the widow's estate in the remainder would then become vested in Jaladbarani and on her death the properties would pass to Dulal's sisters.

31. In support of the first contention the following arguments were advanced: (a) The heir-at-law will take by descent and by his right of inheritance whatever is not validly disposed of by the will and given to some other person, see *Jnanendra Mohan Tagore v. Upendra Mohan Tagore*, (20) 4 Bengal L.R. O.C.J.

103 at 187. The undisposed of remainder therefore passed to Dulal's heirs immediately on his death, (b) The same person may well have both a life estate as also a widow's estate in a moiety of the remainder expectant on the termination of the life estate, see *Sreemutty Kristoromoney Dossee v. Maharaja Naiendra Krishna Bahadur*, (21) 16 I.A. 29. (c) The interposition of the life estate does not prevent succession to the remainder expectant on the termination of the life estate. In *Amulya Charan Seal v. Kali Das Sen*, (22) ILR 32 Cal. 861, 869, inspite of the provision for the payment of the entire income of the property to Mati Dasi, half of which was to be appropriated for her own maintenance and the maintenance of his son to be adopted by her, it was held that the undisposed of corpus vested in Mati Dasi who was the legal heir, and as soon as she adopted a son, the corpus became vested in him though he was not entitled to possession until the death of Mati Dasi or until he would arrive at the age of 20 years and that on his death the corpus vested in his widow. The will in question in that case appointed executors and trustees who under the law then in force were merely managers and had no estate but this fact makes no difference, for in the instant case the will did not appoint any executor at all. In the *Tagore case* (20) 4 Bengal L.R. O.C.J. 103, 203, 230, it was held that inspite of the valid disposition of the life estate in favour of Jatindra Mohon the son and heir of the testator acquired a vested right in the remainder immediately on the death of the testator, otherwise he could not get a declaration of his title during the life time of Jatindra simply because all interested persons were before the Court, (d) The decisions in (21) 16 I.A. 29 and (24) 67 I.A. 129 relied upon in support of the third contention were sought to be thus distinguished. In *Sreemutty Kristoromoney Dossee v. Maharajan Norendra Krishna Bahadur*, (21) 16 I.A. 20, the plaintiff had a life estate and Nreependra had a moiety in the remainder expectant on her death and it was held that on the death of Nreependra she became entitled to possession of his moiety of the remainder expectant on her death but the point whether before his death she had a vested interest in the remainder expectant on his death was not in issue in that case. The case of *Gadadhar Mallick v. Official Trustee of Bengal*, (24) 67 I A. 129 decided that the bequest of a moiety of the estate to Roopchand Dhar Trust which was to take effect in the event of the testator's son Rishikesh dying without male issue was valid, though the prior interest in respect of the moiety was not taken under the will by any ascertained person at the time of the testator's death; but the case also decided that Rishikesh took the prior interest in the moiety as the heir-at-law of the testator, such interest not having been disposed of by the will, see pages 135, 140, 154 and 157 of the Report. The third contention has been dealt with by my learned brother in his judgment. In this case it is not necessary to pronounce on the question as to which of these contentions is correct. Whether the first or the third contention be accepted in either view of the matter the succession in respect of schedule ka properties would open on the death of Jaladbarani and the properties would then descend to Dulal's sisters. I should say however that if the first contention be accepted the widow's estate would be vested in Jaladbarani and she would have the power to alienate the properties for legal necessities,

whereas if the third contention be accepted, she as holder of a mere life estate would not possess such power. I need not decide which of these contentions should be accepted. In view of the finding that Jaladbarani got a widow's estate under the will she had the power to alienate the schedule ka properties for legal necessity.

32. On the death of Jaladbarani both Nirodebarani and Kulamandalini succeeded to the schedule ka and schedule kha properties except those which had been disposed of by Jaladbarani for legal necessity. The question then arises whether on the death of Kulamandalini the properties became vested in Nirodebarani alone. In my opinion the question must be answered in the negative. Section 3(b) of the Hindu Law of Inheritance (Amendment) Act II of 1929 shows that Kulamandalini as one of the sisters and heirs of Dulal took an estate which is "possessed by a female" in the property inherited by her from a male according to the School of Mitakshara Law by which the male was governed. Under both the Benaras and the Mithila Schools of the Mitakshara Law a female who succeeds as an heir to a male takes a limited estate in the property inherited by her and on her death the property passes not to her heirs but to the next heir of the last full owner. Consequently on the death of Kulamandalini her interest in the property inherited by her passed to Nirodebarani who was the next heir of Dulal. In effect, therefore, Nirodebarani and Kulamandalini succeeded as joint tenants with rights of survivorship. It was contended that this conclusion was opposed to the basic principle of Hindu Law that amongst female heirs only two or more widows or two or more daughters succeeding as co-heirs took as joint tenants with rights of survivorship. In my opinion this contention is not tenable. Before Act II of 1929 came into force the Benaras and the Mithila Schools of Mitakshara Law recognized only five female heirs, viz: (1) the widow, (2) the daughter, (3) the mother, (4) the father's mother and (5) the father's father's mother. In default of son, grandson and great-grandson the widow inherits. If there are two or more widows they take together as co-heirs. If one of them dies later, the surviving widows take the entire estate as the husband's next heirs. For this reason, in effect two or more widows succeeding together as co-heirs take as joint tenants with rights of survivorship, see Macnaughten's Hindu Law, Vol. 2, case XV and note pages 37-8, Bhagwan Deen Doobey v. Myna Baee, (11) 11 M.I A. 487, 5156. For the same reason two or more daughters succeeding together as co-heirs also take as joint tenants with rights of survivorship. The cases of two or more mothers, two or more mothers of the father and two or more mothers of the father's father inheriting together as co-heirs are not possible. There is no blood relationship between the step-mother and the step-son and it has been held that the step-mother is not an heir to her stepson. Assuming that the step-mother is an heir to her step-son, she cannot share the inheritance with the mother. Similarly the step-mother and the mother of the father cannot take jointly as co-heirs nor can the mother and the step-mother of the father's father take jointly as co-heirs. For these reasons it was held before Act II of 1929 that amongst female heirs only two or more widows or two or

more daughters succeeding as co-heirs take as joint tenants with rights of survivorship. By reason of Act II of 1929 other female heirs can now succeed together as co-heirs. Thus two sisters may take together as co-heirs and on the death of one of them the entire estate passes to the surviving sister as the nearest heir of the last full owner. Consequently it must be held that two or more sisters succeeding as co-heirs take as joint tenants with rights of survivorship. The result is that on the death of Kulamandalini the entire estate of Dulal became vested in Nirodebarani.

33. The next question is whether Jaladbarani had alienated the properties in suit for legal necessity. The Trial Judge has found that the alienations of dag Nos. 578, 2752, 2917 of lot No. 2 of schedule ka to the plaint by kobala Ext. A(2) dated the 31st August 1942 and of dag No. 1261 of lot No. 6 of schedule kha to the plaint by kobala, Ext. A(8) dated the 15th April 1934 were made by her for legal necessity and that the alienations of the rest of the properties in schedules ka and kha to the plaint were not made for legal necessity. These findings were not challenged before us. We agree with these findings. Nirodebarani and the plaintiffs claiming through her had no title to the properties which had been alienated by Jaladbarani for legal necessity and the suit so far as it relates to those properties must be dismissed. The suit must succeed with respect to the rest of the properties.

34. On the death of Nirodebarani a question may arise between the plaintiffs and the next heirs of Dulal whether the sale by Nirodebarani to the plaintiffs was for legal necessity and whether the corpus of those properties effectively passed to the plaintiff. That point is not being decided in this appeal and is left open.

35. The appeal be and is hereby allowed in part. The dismissal of the suit in so far as it relates to dag Nos. 578, 2752 and 2917 of khatian No. 574 mentioned under lot No. 2 of schedule ka to the plaint and dag No. 1261 of khatian No. 59 mentioned in lot No. 6 of schedule kha to the plaint be and is hereby affirmed. The dismissal of the suit with regard to the rest of the properties be and is hereby set aside. It is hereby declared that the plaintiffs are entitled to the rest of the properties mentioned in schedules ka and kha to the plaint and it is hereby decreed that the plaintiffs do recover khas possession of those properties. In the circumstances of the case each party will pay his or her own costs throughout both in this Court and in the Trial Court.

Chatterjee, J.

36. The first point taken by Mr. Hari Prosanna Mukherjee on behalf of the purchasers from Niroda, the sister of Dulal, is that Dulal granted a life estate to Jalad Barani, his elder widow, and made no further provision in the will. The result is that on the death of Dulal, Jalad Barani got a life estate in terms of the will and Taramani, the second widow, got a vested remainder as an heir on intestacy. It is not disputed by the parties that so far as there was no provision in the will, the heir would get as on intestacy. Mr. Hari Prosanna Mukherjee adds

that Taramani having got the vested remainder as on intestacy, remarried and deprived herself of her rights to the vested remainder. This happened immediately after the death of Dulal i.e., in 1923-24. The Hindu Inheritance Act II of 1929 did not at that time come in force. Niroda, Dulal's sister, had, therefore, no claim to the property in 1923-24. The vested remainder, which Taramani got, must, therefore, have gone to somebody other than Niroda and once it goes to some other person, Niroda cannot get it because of the subsequent enactment in 1929. He, therefore, says that the plaintiffs purchased nothing with regard to items 1, 2 and 3 as they were the subject matter of the will.

37. Mr. Chandra Nath Mukherjee appearing on behalf of the defendants, the purchasers from Jaladbarani, says that on the death of Dulal the life estate granted by the will went to Jalad Barani. But as the will provided nothing for the remainder, there was intestacy with regard to that. The heirs would get it immediately on the death of Dulal and these heirs were Jalad Barani and Taramani. Mr. Chandra Nath Mukherjee says that the proposition is proved by a decision of a Division Bench reported in (22) ILR 32 Cal 861-a decision of Pratt and Mitra, JJ. (*Amulya Charan v. Kalidas*).

38. Coming now to the said case of *Amulya Charan v. Kalidas* it is contended by Mr. Chandra Nath Mukherjee that the widow Mati Dasi was one of the trustees and an executrix. There was a specific provision in the will that the other trustees would hand over half share of the income to the widow, Mati Dasi, and she was to appropriate that half share of such income for her maintenance. Therefore, according to Mr. Chandra Nath Mukherjee, Mati Dasi, the widow, got a provision by the will as a legatee. Even then it was held that she would also inherit the property as an heir. Under the terms of the will, the corpus of the will was not to vest until the happening of certain events. It would, therefore, in the meantime vest in the heir as on intestacy; it would thus devolve on his heir, Mati Dasi. It was, according to Mr. Chandra Nath Mukherjee, held in the aforesaid case that in spite of the provision for one half of the income for her maintenance, the widow inherited before the corpus of the estate vested under the will. He, therefore, says that this case supports his theory completely that a widow can succeed as a legatee under the will as also inherit as on intestacy. Mr. Chandra Nath Mukherjee says that Jalad Barani got a life estate under the will but none the less she got a widow's estate with respect to the remainder and on Taramani's death Jalad Barani became the sole heir and therefore got the remainder as an heir on intestacy.

39. I am afraid, I cannot agree. As Dulal made a will and granted a life estate to the widow, Jalad Barani, it is clear, that Dulal wanted to deprive the other widow, Taramani, of her widow's estate and to grant to Jalad Barani a life estate with respect to the properties governed by the will. The very fact that there was a legacy by a will overrules her right to get the remainder on the death of Dulal as on intestacy. The decision in (21) 32 Cal 861, is, in my opinion, distinguishable.

It is indeed true that the widow, Mati Dasi, in that case got half of the income of the properties for her maintenance; but she was an executrix and a trustee and their Lordships make it clear in their judgment "We need hardly state that the settled rule of law here is that as regards will executed before the Hindu Wills Act came into operation, viz., the 1st September, 1870, the property of a Hindu did not vest in the trustees who were considered to be merely managers. This was definitely held in *Sarat Chandra Banerjee v. Bhupendra Nath Basu* (25) 25 Calcutta, 103." They make it further clear that "the executors and trustees under Raj Ballav's will had, therefore, no state under the will of Raj Ballav and there was thus an intestacy as regards the corpus." It is quite clear, Mati Dasi, according to the law, as it then was, had no estate under the will or, in other words, she was not a legatee at all and therefore she inherited as on intestacy. In the present case there is no dispute that the widow, Jalad Barani, had an estate under the will and I, therefore, hold that she could not also have inherited as on intestacy because that would be a negation of the will. I would say that the decision in *Tagore v. Tagore* (supra) in Indian Appeals, Supplementary Vol, page 47, would support the proposition. It was contended that the person, who got the property by way of life estate, would also get it absolutely and their Lordships observed at page 77 that "it would give the father a right of inheritance and power of disposition when the will says that he would only hold for life." I am, therefore, of opinion that, if a definite estate is granted to a person by a will, it is only that estate that the legatee would get and that means that she would not at the death of the testator get as an heir on intestacy.

40. I now refer to the case between *Sreemutty Kristoromoney Dassee v. Maharajah Norendro Krishna Bahadoor* (21) reported in 16 Indian Appeals, 29. Under the will as interpreted by the Judicial Committee, the plaintiff, the daughter of the testator, got a life estate, after her, the nephews Nripendra and Norendro got life estates. The rest of the will was void, so inheritance would then open. Norendro died before he could get anything under the will. When he died, Norendro did not get the life estate as the daughter, the plaintiff, was still alive. He (Norendro) had merely the expectation of a life estate on the death of the plaintiff. By his death, the expectant remainder of Norendro was gone. So, the plaintiff inherited because the expectant remainder with regard to a moiety vanished and after that there was intestacy. At page 43 Lord Hobhouse held that "on the death of Rajah Nripendra Krishna Bahadoor, the inheritance of his moiety devolved on the plaintiff as her father's heir in remainder immediately expectant on her own life estate under the will and she, therefore, became entitled in possession to one moiety of the residue." It was held that the remainder after the life estate as provided in the will was void and therefore the plaintiff inherited that moiety as the heir of her father. This inheritance is with regard to the "remainder immediately expectant on the death of Norendro". This shows that the daughter did not become heir on the death of the testator but that she became an heir on the cessation of life estate.

41. Mr. Chandra Nath Mukherjee has further referred to the decision in *Tagore v.*

Tagore (supra) reported in Supplemental Indian Appeals, page 47. Mr. Mukherjee submitted that in Tagore v. Tagore the life estate of Juttendro Mohun Tagore was declared; but it was further declared "that upon the failure or determination of the life interest of the said Juttendromohun Tagore, the plaintiff, subject to the provisions in the said will not hereby declared to be void, is entitled, as heir-at-law of the said testator, to the real and personal property in respect of the receipt and enjoyment of which the said life interest is declared "(page 85). But this was done because of the reasons stated in the judgment itself. At page 83 their Lordships observed "Upon the question whether or not there ought to be made a declaration beyond a mere expression of opinion, as to the rights of the parties after the life interest of Juttendromohun Tagore, their Lordships are of opinion that such a declaration ought to be made..... because all the existing parties interested are in Court, and it is impossible to decide the case without considering the whole scope of the will, and arriving at judicial conclusions as to the rights of each of the parties there under, which judicial conclusions, so far as they dispose, or may dispose of the rights of those parties, ought to be incorporated in the decree."

42. In a subsequent case between Gadadhur Mullick v. Official Trustee of Bengal reported in (24) 67 Indian Appeals, 129, the position was considered. Their Lordships at page 158 observed, "He (the heir) with take by descent and by his right of inheritance "whatever is not validly disposed of by the will and given to "some other person." Their Lordships further observed, "Their Lordships are in full agreement with Fletcher, J. and Jenkins, C. J. in rejecting the contention that a testator's directions to regulate the devolution of his property, though within the limits laid down by the law, will fail if the heir takes in interest immediately upon the death of the testator. This contention is not warranted by anything in the Board's judgment in the Tagore case and, as Jenkins, C. J. noticed, is founded on a fallacy; for it assumes that the complete interest in the property has devolved on the heir which is the very point in dispute." At the death of the testator, no interest in respect of that moiety (Roop Chand Dhur moiety) vested under the will in any ascertained person at the time of the testator's death. Even then, it was held that the trustee would get the property. The result is that vesting of the remainder was kept in abeyance till the expiry of the life estate.

43. I, therefore, cannot accept the argument of Mr. Chandra Nath Mukherjee that Jalad Barani got a life estate under the will and further got on the testator's death a widow's estate of the remainder jointly with Taramani. In my opinion, Jalad Barani got only the life estate as provided in the will. But the second branch of argument of Mr. Chandra Nath Mukherjee is that, as Jalad Barani had a life estate after the cessation of her life estate, the heir as on intestacy as on that date would succeed to the estate. Mr. Hari Prosanna Mukherjee's reply is that on the death of Dulal, Jalad Barani got a life estate and Taramani a vested remainder and on Taramani's re-marriage after the death of Dulal, the vested remainder passed to the then heir of Dulal and, as the Act of 1929 had not then come in force, that vested remainder could not go to his sisters Niroda and Kulo

and, therefore, Niroda, a sister, could have no right. I am afraid, I cannot accept this argument of Mr. Hari Prosanna Mukherjee. The reason is that there was no vested remainder. There was a remainder undoubtedly but that under the terms of the will did not vest in anybody at the death of Dulal. On the death of Dulal, Jalad Barani succeeded to the estate of Dulal because of the will. That succession was of a limited nature,- limited to the life of Jalad Barani. All that Taramani had, was not a vested remainder but she was an expectant of the remainder and had a mere "spes succession"s". She had the chance to get the remainder provided she survived Jalad Barani. In law, she did not. So, her chance was lost on her remarriage and that did not affect the legal position at all. When Jalad Barani died, the Inheritance Act had come into force. The intestacy occurred on the death of Jalad Barani. Till then the testamentary succession continued and after her death the heirs at that time got the remainder and the heirs at that time were Niroda and Kulo. Hence, Niroda got it as an heir on intestacy under Act II of 1929. The result, therefore, is that the testamentary succession opened on the death of Dulal and that continued till the death of Jalad Barani and on her death testamentary succession closed and intestacy occurred and Niroda and Kulo, the heirs, got it.

44. With regard to the first question viz. whether Dulal was governed by the Mitakshara School of Hindu Law, I agree with the observations of my Lord and find little to add. What impresses me most is that Dhanukas always took the help of a priest, who is admittedly governed by the Mitakshara School of Hindu Law. It appears from the depositions that the priests are Brahmins, who are governed by the Mitakshara School of Hindu Law. In the district of Murshidabad Brahmins governed by the Dayabhaga School of Hindu Law are available in abundance to perform all religious rites. But the Dhanukas never preferred to go to Brahmins governed by the Dayabhaga School of Hindu Law; Brahmins governed by the Mitakshara School of Hindu Law are their priests. That means that in cases of Sradh and inheritance they take the advice of Brahmins governed by the Mitakshara School of Hindu Law. Naturally, their advice is in accordance with Vijnaneswar rather than in accordance with Jimutabahana. I would, therefore, for this reason together with other reasons discussed in detail by my Lord, agree that the parties to the suit are governed by the Mitakshara School of Hindu Law.

45. With regard to the question what was the nature of the interest which Jalad Barani got by the will, I have already stated that the purpose of the will was to deprive the other widow, Taramoni, from inheritance. There was no intention to deprive Jalad Barani of her widow's estate. In that circumstance of this case, I would respectfully follow the decision of the Judicial Committee (26) Mahomed Shumsool Hooda v. Shewukrain, 2 I.A. 7 that when a Hindu grants an estate to a widow, he generally intends to grant a widow's estate. The circumstance that there was another widow, who was intended to be disinherited, is a circumstance which shows that Dulal intended that Taramani would not get the widow's estate but Jalad Barani would. Hence, I agree with my Lord that in the circumstances of this case, by the will of Dulal, Jalad Barani got a widow's estate and, therefore, a

question of legal necessity arises and the alienations for Sradh and Shiba temple are alienations for pious religious purpose and are good.

46. Finally comes the question as to what share in the properties of Dulal, Niroda inherited. It is stated that the doctrine of survivorship prevails between the two sisters. When Kulo died, it is stated that Niroda got the entirety by survivorship. When Kulo died, she being a female heir, the next heir on her death would be not her heir but the heir of the last male owner and the heir of the last male owner is again Niroda and, therefore, Niroda would inherit the other half of Dulal's property after the death of Kulo. Mr. Hari Prosanna Mukherjee stated that after the death of Kulo, Kulo's sons would inherit Kulo's share and not Niroda. I could have understood his argument if the Privy Council decisions were otherwise. Under the Mitakshara School of Hindu Law when a widow or a female heir inherits, the property becomes her Stridhan. But the Judicial Committee has never accepted that to be the law and the law has always been understood to be otherwise. Further, the Hindu Inheritance Act II of 1929 did not state that the interest of the female heir would be the same as in Stridhan. I cannot, therefore, accept the argument of Mr. Hari Prosanna Mukherjee. His argument that no survivorship was granted by the Act is of no avail because Niroda gets as an heir of the last male owner. The result is, after the death of Kulo, Niroda got the entire property and her interest in the property is the same as that of a female heir under the Mitakshara School of Hindu Law. It is true that the Hindu Inheritance Act II of 1929 has subsequently been repealed; but the repeal does not affect the right which Niroda already got before the repeal. The result, therefore, is that I agree to the order proposed by my Lord.