Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Chotay Lall v. Chunnoo Lall and others, from the High Court of Judicature at Fort William in Bengal; delivered Saturday, 23rd November 1878.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS suit was brought by the Respondents, the Plaintiffs below, to try the right to considerable moveable property which was taken into the hands of the Administrator-General on the death of Luckhy Bibee, the wife of the Appellant, who was the Defendant below. The property in suit was the self-acquired property of Thakoordass Baboo, who died at Calcutta on the 13th February, in the year 1860, without any male issue or widow, but leaving an only daughter, Luckhy Bibee. This daughter was married in November 1863 to the Defendant, and died on the 4th September 1872 without issue, her husband, the Defendant, surviving her.

The Plaintiffs are grandsons of a brother of Thakoordass, and it is admitted that they would have been the heirs of Thakoordass if he had left no issue. The question now is, whether they or the Defendant as the husband of Luckhy Bibee became entitled to the property in question upon her death.

The first question which has been argued relates to the law which governed Thakoordass and his family at the time of his death. Thakoordass was a native of the North-West Provinces,

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and came to reside in Calcutta in 1814, and lived there until his death. It is the common case of both parties that he retained the personal law of the place of his birth. He appears to have belonged to the sect of Jains; and the first contention of the learned Counsel for the Defendant is that the right of succession must be determined by the customs of the Jains,—that those customs have not been ascertained, and that the suit ought to be remanded for the purpose of ascertaining them.

The proceedings in the suit as to an enquiry into these customs certainly assume a somewhat singular shape, and the parties have apparently changed sides with regard to it in the course of the suit. The plaint in the first paragraph thus describes Thakoordass: "One Thakoordass Baboo, " of the race or sect of Jains, and a resident in the " North-West Province of India, in or about the " year of Christ 1814 came to Calcutta, and there " remained until his death, retaining and follow- " ing the usages of his said sect." The written statement of the Defendant in the 9th paragraph contains this passage: "The said Thakoordass " Baboo, deceased, was, and the Plaintiffs and the " Defendant are governed by the Mitakshara " law of inheritance which obtains at Behar in " the North-Western Province of India." That is a distinct and simple assertion that the family was governed by the law of the Mitakshara. There is no allegation that that law was modified by any custom of the Jains. This being the original allegation of the Defendant, now that the right has been decided according to the law of the Mitakshara which he had invoked, he turns round and alleges that this is wrong, and that the succession ought to be determined by the usage and custom of the Jains. Mr. Cowell, who very ably argued the case, has done all that possibly could be done to find a foundation

by the Plaintiffs in the belief that the law of the schools they referred to would be more favourable to them than the law of the Mitakshara; but what is material on the present point, and why attention is now called to these objections, is, that the Defendant did not object to the finding of the Judge upon the ground that the Judge ought to have gone into the evidence as to the laws and customs of the Jains. By the Code of Procedure, section 354, if the Defendant meant to insist that the laws and customs of the Jains had not been ascertained, he ought to have objected at that time. The section is clear: "Either party may, "within a time to be fixed by the Appellate "Court, file a memorandum of any objection to "the finding, and after the expiration of the "period so fixed the Appellate Court shall "proceed to determine the Appeal." The Defendant, having that opportunity of objecting, did not think fit to do so, and accordingly the High Court proceeded to consider the case upon the law of the Mitakshara.

Mr. Cowell ultimately argued the case as if it was to be presumed that all Jains were governed by customs with regard to inheritance differing from the ordinary law, and he suggested that a case, which was recently before this tribunal, supported that view. The case he referred to is *Sheo Singh Rai* v. *Mussumut Dakho and another*, L. R. 5 Indian Appeals, page 87; but their Lordships think that that case does not support it On the contrary, the effect of that case is that the customs of the Jains, where they are relied upon, must be proved by evidence, as other special customs and usages varying the general law should be proved, and that in the absence of proof the ordinary law must prevail. If Mr. Cowell's argument is right it would be only necessary that a man should be

found to be a Jain to establish the conclusion that the ordinary law did not apply to him. The contrary is certainly to be inferred from the decision of this Board.

As this argument was rather strongly pressed by Mr. Cowell it will be well to refer to some passages in the judgment in that case. In page 107, in commenting upon the judgment of the High Court, it is said: "The Judges then "proceed to an elaborate review of the "decisions in India, in which the laws and "customs of the Jains have been considered. "It appears to have been contended before them— "to use the words of the Court—that the applica- "bility to Jains of the laws of the Brahminical "Hindoos, or what is generally termed Hindoo "law, had been established by so many rulings "that the Court was bound to apply it to this case; "and further, that no uniform and consistent "body of customs and usages existed among the "Jains which would enable the Court to affirm "that the general law was modified by them. It "certainly appears that, in most of the decisions "referred to by the Judges, the Courts had held "that there was no sufficient proof of the exist- "ence of special customs among the Jains to "displace or modify the general law, though in "others, where sufficient proof of special customs "appeared, effect had been given to them. Their "review of these previous decisions led the "Judges to the conclusion that they were not "opposed to the view that the Jains might be "governed, as to some matters, by special laws "and usages, and that where these were satis- "factorily proved, effect ought to be given to "them. The learned Counsel for the Appellant "who argued the case at their Lordships' bar felt "himself unable to dispute the correctness of "this conclusion." Their Lordships proceed to say: "It would certainly have been remark-

" able if it had appeared that in India, where, " under the system of laws administered " by the British Government, a large toleration " is, as a rule, allowed to usages and customs " differing from the ordinary law, whether Hindoo " or Mahomedan, the Courts had denied to the " large and wealthy communities existing among " the Jains the privilege of being governed by " their own peculiar laws and customs, when " those laws and customs were by sufficient " evidence capable of being ascertained and " defined, and were not open to objection on " grounds of public policy or otherwise." The result of the decision is stated in the following passage: "In the present case their Lordships con- " sider that the Judges of the High Court were " right in thinking that their decision should be " governed by the evidence taken in this suit." This decision did no more than adopt and affirm the law, to be deduced from a long roll of cases in India, that when the customs of the Jains are set up they must be proved like other customs varying the ordinary law, and that, when so proved, effect should be given to them.

The result of a review of the proceedings in the present case is, that the Defendant cannot now impeach the judgment appealed from on the ground that the customs of the sect of Jains, to which this family belong, have not been ascertained.

The remaining question is, whether the High Court has taken a correct view of the law, which is now assumed to be that of the Mitakshara, in holding that Luckhy Bibee's right was a qualified right only, and not an estate of the nature of stridhun.

The law of inheritance in the case of women has been recently declared in the case of a widow by two decisions of this Board. Both are to be found in the 11 Moore's Indian Appeals. The

first is *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram and others*, page 139 ; and the other is *Bhugwandeen Doobey* v. *Myna Baie*, page 487. After a very full consideration of the authorities, and in two elaborate judgments discussing at length those authorities, this tribunal decided that under the law of the Mitakshara a widow's estate inherited from her husband is a limited and restricted estate only.

After these decisions the question is reduced to the point, whether a daughter inheriting from her father stands in a higher and different position from that of a widow? Reliance has been placed on the often cited text in the Mitakshara relating to woman's property. The words most relied upon are contained, not in the text, but in an interpretation of the text. The 11th section of the 2nd chapter, paragraph 1, defines what is woman's property. The important part of the paragraph is: "The "author now intending to explain fully the dis- "tribution of woman's property, begins by setting "forth the nature of it. 'What was given to a "'woman by the father, the mother, the husband, "'or a brother, or received by her at the nuptial "'fire, or presented to her on her husband's "'marriage to another wife, as also any other "'(separate acquisition), is denominated a woman's "'property.'" It seems that the word in the original text "any other" is "*adi*," and that the proper translation of the word would be "or the "like," so that the passage ought to be read "or "received by her at the nuptial fire, or presented "to her on her husband's marriage to another "wife, *or the like*." The interpretation gives a more specific definition, and instead of "or the like," there are given the words which have been so often cited, and have given occasion to so much discussion. "Also property which she "may have acquired by inheritance, purchase, "partition, seizure, or finding, are denomi-

" nated by Menu, and the rest, woman's pro-
" perty." The orginal text does not afford any foundation for the argument in favour of the right of the widow and daughter to the entire interest in land acquired by inheritance; the interpretation, no doubt, does. No decision of this tribunal has been referred to with regard to the estate taken by the daughter inheriting from her father, but the arguments which were pressed at their Lordships' bar in the present case by Mr. Cowell were presented and fully developed in the former cases before this tribunal relating to widows. The reasons by which these arguments were answered in the judgment of the Court—reasons which it is not necessary to repeat—are, for the most part, applicable to the case of a daughter.

But their Lordships cannot regard the question of the daughter's estate as "*res integra*." It has been the subject of numerous decisions in India. The Indian authorities are carefully collated in the judgment of Mr. Justice Pontifex and of the Judges of the High Court. The result appears to be that the Courts in Bengal and Madras have determined in a series of decisions that the daughter takes a qualified estate only. No doubt, in the Courts of Bombay, there have been rulings and *dicta* in favour of the view that she takes the entire property. Their Lordships do not think it necessary, especially after their own decisions as to widows' estates, to go into an examination of the Indian cases. They agree in the conclusion of the High Court, which affirms that which was stated many years ago to be the law by Sir William Macnaghten in his Treatise on Hindoo Law, page 22, in these terms: "But though the schools differ on these
" points, they concur in opinion as to the manner
" in which such property devolves on the
" daughter's death in default of issue male.

" According to the law, as received in Benares
" and elsewhere, it does not go as stridhun to
" her husband or other heir, and according to
" the law of Bengal also it reverts to her father's
" heirs."

With regard to the case, most relied upon, in the High Court of Bombay, it would seem to have been there admitted, that after the decisions which have taken place, the daughter's estate, according to the Benares school, was only a restricted one. The family of Thakoordess is apparently governed by the law of that school. Certainly it is not governed by the law of the Mayukha, which was held to be the governing law in the Bombay case.

Their Lordships may observe that the authorities are collected and discussed in Mr. Mayne's learned Treatise on Hindoo Law.

Their Lordships think that after the series of decisions which has occurred in Bengal and Madras, it would be unsafe to open them by giving effect to arguments founded on a different interpretation of old and obscure texts; and they agree in the observations which are to be found at the end of the judgment of the High Court, that Courts ought not to unsettle a rule of inheritance affirmed by a long course of decisions, unless, indeed, it is manifestly opposed to law and reason. They do not think this rule is opposed to the spirit and principles of the law of the Mitakshara; on the contrary, it appears to them to be in accordance with them. The result is that they will humbly advise Her Majesty to affirm the decree appealed from, and to dismiss this Appeal with costs.