



LAW COMMISSION OF INDIA

EIGHTY FIRST REPORT

Hindu Widows Re-marriage Act, 1856

GOVERNMENT OF INDIA MINISTRY OF LAW

Justice P. V. Dixit.

CHAIRMAN
LAW COMMISSION
GOVERNMENT OF INDIA
New Delhi.

Dated, the 20th December, 1979.

My dear Minister,

I am herewith forwarding the Eighty-first Report of the Law Commission recommending the repeal of the Hindu Widows Remarriage Act, 1856.

2. The subject matter of the Act of 1856 is fully covered by four Acts enacted nearly a hundred years later. They are : (1) The Hindu Marriage Act, 1955; (2) The Hindu Succession Act, 1956; (3) The Hindu Minority and Guardianship Act, 1956; and (4) The Hindu Adoption and Maintenance Act, 1956. These Acts override all the rules of Hindu Law, custom and usage having the force of law in respect of the matters dealt with in those Acts; they also supersede any other law contained in any Central or State Legislature which is inconsistent with the provisions of those Acts.

3. After a careful consideration of all the provisions of the Act of 1856, the Commission has reached the conclusion that after the enactment of the four Acts just referred to, the Hindu Widows Remarriage Act, 1856 has become obsolete and is no longer of practical utility, and should therefore be repealed. The reasons in support of this conclusion, as well as a detailed analysis of the Act of 1856 have been given elaborately in the Report.

4. Appendix 'A' to the Report gives the historical back-ground in the context of which the Hindu Widows Remarriage Act came to be enacted in 1836.

5. The Commission wishes to place on record its high appreciation for the assistance rendered by Shri P. M. Bakshi in the preparation of the Report. The Commission's obligation to Shri V. V. Vazo, Additional Secretary, who prepared the interesting and useful Appendix, cannot easily be exaggerated.

With kind regards.

Yours sincerely,

Sd/
(P. V. DIXIT)

Shri S. N. Kacker,
Minister of Law, Justice &
Company Affairs,
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CHAPTER I

INTRODUCTORY

1.1. This Report is concerned with the Hindu Widows Re-marriage Act, 1856.¹ Consideration of the Act has been taken up by the Law Commission in pursuance of its terms of reference, which, *inter alia*, empower the Commission to make recommendations for the removal of anomalies and ambiguities in the law. The Act of 1856 is a Central Act of general importance and application; several of its provisions may create in the minds of many persons anomalies and ambiguities, as will be evident from the succeeding paragraphs of this Report. In the interests of simplification of the law² and also on broader considerations of the removal of iniquities³, a review of the Act appears to be badly needed.

1.2. As to the aspect of simplification of the law mentioned above⁴, it may be noted that the Hindu Widows Re-marriage Act deals with diverse branches of Hindu law in the context of re-marriage of widows, such as marriage, maintenance, succession and guardianship, seeking to consolidate the law on the subject.

1.3. The Act was enacted in 1856. Nearly a hundred years later, four Acts were enacted, namely, the Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Minority & Guardianship Act, 1956 and the Hindu Adoptions and Maintenance Act, 1956—making fundamental and radical changes in the personal law of Hindus relating to marriage, succession, guardianship, adoption and maintenance. Notwithstanding the enactment of those Acts, the Hindu Widows Re-marriage Act, 1856 still continues to be on the statute book. The four Acts referred to above override all the rules of Hindu law, custom or usage having the force of law, in respect of matters dealt with in those Acts; they also supersede any other law contained in any central or state legislation which is inconsistent with the provisions of those Acts. Each section of the Act of 1856 therefore needs to be examined in order to ascertain how far the provisions of the Act have become either inconsistent or redundant and, therefore, need to be repealed.

1.4. Apart from this purely legal approach, there is also another broad consideration of a social character which is relevant. The provisions of the Act purport to impose certain disabilities (e.g. in relation to the right of inheritance of a childless widow)⁵, that can hardly be allowed to continue in the present structure of our society. It is, therefore, imperative that the Act should be reviewed and the law made harmonious and in consonance with social justice.

The broad question to be dealt with, then, is whether, having regard to the considerations set out above, the Act of 1856 should be repealed or whether its continuance in any form is necessary. We propose to examine the position in this regard with reference to each topic dealt with in the Act.

1.5. The following are the main topics dealt with by the Act :—

Main topics

Section	Topic
1. Marriage of Hindu widows legalised.
2. The right of widows in the deceased husband's property to cease on her re-marriage.
3. Guardianship of children of the deceased husband on the re-marriage of the widow.
4. Nothing in this Act to render any childless widow capable of inheriting.

¹Briefly, "the Act of 1856."

²Paras 1.2 and 1.3, *infra*.

³Para 1.4, *infra*.

⁴Para 1.1, *supra*.

⁵Chapter 4, *infra*.

<i>Section</i>		<i>Topic</i>
5.	..	Saving of right of widow marrying, except as provided in sections 2 to 4.
6.	..	Ceremonies constituting valid marriage to have effect on widow's marriage.
7, first para.	..	Consent to marriage of minor widow.
7, second para	..	Punishment for abetting marriage made contrary to this section.
7, third para (proviso)		Effect of such marriage.
7, fourth para	..	Consent to re-marriage of major widow.

CHAPTER 2

RE-MARRIAGE, MAINTENANCE AND SUCCESSION

2.1. The Act of 1856 is an Act removing all legal obstacles to the marriage of Hindu widows¹. It was enacted because, as the first paragraph of the preamble to the Act stated in 1856, Hindu widows, with certain exceptions were, by reason of their having once married, held to be incapable of contracting a second valid marriage and the offsprings of such widows by any second marriage were held to be illegitimate and incapable of inheriting property. The object of the Act, as narrated in the third paragraph of the preamble to the Act, was to "relieve all such Hindus from this legal incapacity of which they complained"² and the removal of all legal obstacles to the marriage of Hindu widows".

2.2. The Act, therefore, first removed the disability under which Hindu widows had been suffering and allowed them to re-marry by providing in section 1, "no marriage contracted between Hindus shall be invalid and the issue of no such marriage shall be illegitimate, by reason of the woman having been "previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu law to the contrary notwithstanding".

2.3. This section renders the re-marriage of a widow valid and secures the legitimacy of children. But in view of section 5(i) of the Hindu Marriage Act, 1955 which provides that a marriage may be solemnised between³ any two Hindus if neither party has a spouse living at the time of the marriage, the special provision contained in section 1 of the Act of 1856 is not now necessary. Clause (i) of section 5 permits a widow to re-marry, as her spouse is not living at the time of marriage. Under this clause, all that is necessary is that the woman intending to marry or re-marry must not have a spouse living at the time of the marriage; it makes no difference whatsoever whether she was or she was not betrothed to another person at the time of the marriage. Section 1 of the Act of 1856 has thus become *otiose* and should be repealed.

2.4. Indeed, it has been impliedly repealed by section 4 of the Hindu Marriage Act, 1955 which runs thus :—

"4. Save as otherwise expressly provided in this Act, —

- (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
- (b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act."

This section gives overriding application to the provisions of the Hindu Marriage Act and in respect of any of the matters dealt with in the said Act, it makes ineffective all existing laws whether in the shape of an enactment or otherwise which are inconsistent with the Act. The necessary implication of section 4 of the Hindu Marriage Act is that in effect Section 1 of the Act of 1856 has been repealed. An express repeal of the provision is, however, desirable.

2.5. Next, turning to section 2 of the Act of 1856, it is as follows :—

"2. All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same".

2.6. This section deals with (a) maintenance, (b) intestate succession, and (c) testamen-tary succession.

Section 2—
Maintenance,
intestate suc-
cession and testate
succession.

¹Cf. Peacock C. J. in *Akora Suth v. Boreani*, (1868) 2 B.L.R. 199, 205.

²See Appendix for historical background.

³Section 5(i), Hindu Marriage Act, 1955.

As to maintenance, the widow on re-marriage loses all rights and interests she may have in her deceased husband's property by way of maintenance. The forfeiture of the widow's right to be maintained out of the estate of her first husband follows also from sections 19 and 22 of the Hindu Adoptions and Maintenance Act, 1956, which, in chapter 3, contains the law of maintenance applicable to Hindus¹. Under section 19, a widow can claim maintenance from her father-in-law, but this obligation of the father-in-law ceases if the widow re-marries. Section 21 of that Act includes, in the definition of the word "dependants", a widow so long as she does not re-marry. Section 22 of that Act lays down rules relating to the right of dependants to be maintained, by the heirs of a deceased Hindu and others, who have inherited the estate of such deceased person. That Act also contains a provision, namely, section 4, giving overriding application to the provisions of the Act. The effect of section 4 is that it renders ineffective all existing laws in respect of any of the matters dealt with in the Hindu Adoptions and Maintenance Act, 1956. That being so, section 2 of the Act of 1856, in so far as it deals with the forfeiture of the rights and interests which a widow may have in her deceased husband's property by way of maintenance, must give way to sections 19, 21 and 22 of the Maintenance Act, 1956. It now serves no useful purpose.

Effect of section 2 on absolute interest inherited by widow.

Construction of section 2 as confined to limited estate.

Views of Mulla and Gupte.

2.7. Section 2 of the Act of 1856 speaks also of the forfeiture, on the re-marriage of a widow, of her rights and interests in her husband's estate. A widow who succeeds to the property of her deceased husband under section 8 of the Hindu Succession Act, 1956, is under section 14 of that Act, full owner thereof². There is no provision in the Hindu Succession Act enacting that on re-marriage a widow is divested of the estate inherited from her husband. If, therefore, section 2 of the Act of 1856 is read as applying to a widow having an absolute estate, it would be repugnant to the Hindu Succession Act³.

2.8. Several High Courts⁴ have taken the view that section 2 of the Act of 1856 has no application to an absolute estate.

Further, it has been held⁵ that once a widow succeeds to the property and acquires an absolute right under the Act of 1956, she cannot be divested of that right on her re-marriage.

2.9. Some differences have arisen amongst writers on the subject. The matter has been put thus in Mulla⁶.

"Re-marriage of a widow, is not now under the Act a ground for divesting the estate inherited by her from her husband. The Hindu Widows Re-marriage Act, 1856, though it legalised the re-marriage of a Hindu widow, had the effect of divesting the estate inherited by her as a widow. By her second marriage she forfeited the interest taken by her in her husband's estate, and it passed to the next heirs of her husband as if she were dead (s. 2 of that Act). The rule laid down in that enactment cannot apply to a case covered by the present Act and a widow becomes *full owner of the share*⁷ or interest in her husband's property that may devolve on her by succession under the present section. Her re-marriage, which would evidently be after the "vesting in her of her share or interest on the death of the husband, would not operate to divest such share or interest. The Hindu Widows Re-marriage Act, 1856 is not repealed but section 4 of the present Act in effect abrogates the operation of that Act in the case of a widow who succeeds to the property of her husband under the present section and section 14 has the effect of vesting in her that interest or share in her husband's property as full owner of the same."

¹Sections 4, 19, 21 and 22, Hindu Adoptions and Maintenance Act, 1956.

²(a) *Punithavalli Ammal v. Ramalingam*, A.I.R. 1970 S.C. 1730.

(b) *Kasturi Devi v. Dy. Director of Consolidation*, A.I.R. 1976 S.C. 2595.

³*Pandurang Narayan v. Sindhu*, A.I.R. 1971 Bom. 413 (Chandrachud & Malvankar JJ.)

⁴(a) *Ram Piari v. Board of Revenue*, A.I.R. 1972 All. 492.

(b) *Pandurang Narayan v. Sindhu*, A.I.R. 1971 Bom. 413, 415, para 10.

(c) *Sasanka Bhowmick v. Amiya*, (1973) 78 C.W.N. 1011, 1020.

(d) *Sankaribala v. Asita Barani*, A.I.R. 1977 Cal. 289, 292.

(e) *Lakshmi Ammal v. Thangaavel Asari*, A.I.R. 1957 Mad. 534.

(f) *Jagdish Mahton v. Mohammad Elahi*, A.I.R. 1973 Pat. 170.

(g) *Smt. Bhuri Bai v. Smt. Champi Bai*, A.I.R. 1968 Raj. 139.

⁵*Jagdish Mahton v. Mohammad Elahi*, A.I.R. 1973 Pat. 170 (D.B.).

⁶Mulla's Hindu Law (14th edition, 1974) page 869.

⁷Emphasis added.

A different view has, however, been expressed by Gupte¹. According to the learned author, section 2 of the Hindu Widows Re-marriage Act, 1856 has not been abrogated by section⁴ of the Hindu Succession Act, 1956; that "although section 2 of the Hindu Widows Re-marriage Act, 1856 was drafted at a time when a widow succeeding to her husband's or to his lineal successor took only a limited estate, the language of that section is capable of applying to a widow having an absolute estate". He further states "it is however still possible to urge as a matter of construction of section 2 of the Hindu Widows Re-marriage Act that she would forfeit her estate, "though full, especially, as that Act has not been repealed². If an estate is liable to forfeiture, it should make no difference whether the estate is converted into a full estate by section 14 or not. Any estate either absolute or limited may in law still be liable to forfeiture in certain circumstances and situations by an independent rule such as the rule in section 2 of the Hindu Widows Re-marriage Act which has not been repealed."

2.10. It is not necessary to enter into a controversy whether section 2 of the Act of 1856 Need for has been abrogated by the Hindu Succession Act³, or whether section 2 applies to a widow repeal of section 2 having an absolute estate. If section 2 has not been abrogated and applies to a widow having as regards an absolute estate, then a *fortiori* it must be expressly repealed. It cannot be allowed to stand rights of inheritance. so as to give the anachronic result of the divestiture, on the re-marriage of a widow, of the estate devolving on her by succession under the Hindu Succession Act, 1956. The repeal of the section would set at rest whatever conflict of opinion has arisen⁴ on the construction of the section and its applicability to a widow having an absolute estate.

2.11. It may be noted that the repeal of section 2 as recommended above⁵ will in no way affect the operation of section 24 of the Hindu Succession Act⁶ which disqualifies the widow of a predeceased son or the widow of a predeceased son of a predeceased son or the widow of a brother, from succeeding to the property of an intestate as such a widow, if, on the date the succession opens, she has remarried. That provision will continue to apply to cases falling within its scope.

2.12. In regard to the application of section 2 to testamentary dispositions, we may note that section 30 of the Hindu Succession Act provides that any Hindu may dispose of, by will or other testamentary disposition, any property in accordance with the provisions of the Indian Succession Act, 1925 or any other law for the time being in force applicable to Hindus. Disabilities in regard to such dispositions would therefore be governed by the Indian Succession Act⁷, or other law where applicable and unless a will specifically provides for forfeiture of a bequest on re-marriage, there would be no statutory forfeiture of the bequest. This part of section 2 of 1856 Act is, therefore, not in keeping with the Indian Succession Act and should be scrapped.

2.13. The foregoing discussion makes it clear that the whole of section 2 of the Hindu Widows Re-marriage Act should be repealed.

¹Gupte, Hindu Law of Succession (1972), pages 457-458.

²Emphasis added.

³Para 2.8, *supra*, See also *Harabati v. Sasadhar*, A.I.R. 1977 Orissa 142.

⁴See para 2.9, *supra*.

⁵Para 2.10 *supra*.

⁶Section 24, Hindu Succession Act, 1956.

⁷Cf Section 74, Indian Succession Act, 1925.

CHAPTER 3

GUARDIANSHIP

Section 3—
Guardianship
of children.

3.1. This takes us to section 3 of the Act of 1856 which deals with guardianship of the children of the deceased husband of a Hindu widow who re-marries. The section reads :—

“3. *Guardianship of children of deceased husband on the re-marriage of the widow*—On the re-marriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the deceased husband the guardian of his children the father or the mother or paternal grandmother, paternal grandfather of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death for the appointment of some proper person to be guardian of the said children, and thereupon, it shall be lawful for the said Court, if it shall think fit, to appoint such guardian who when appointed shall be entitled to have the care and custody of the said children, or of any of them during their minority, in the place of their mother :—

“and in making such appointment the court shall be guided, so far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother :—

“Provided that, when the said children have no property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.”

Effect of
section 3
and the Act
of 1956.

3.2. In effect, section 3 empowers¹ the specified relatives to apply to the court for guardianship of the children of the deceased husband—not expressly confined to the *children of the marriage*—unless a testamentary guardian has been appointed. In this connection, it is necessary to point out that the matter is now fairly amply covered by the Hindu Minority and Guardianship Act². Re-marriage of a female as such is no disqualification for guardianship under that Act.

No termination
of widow's
right.

3.3. According to judicial decisions, section 3 of the Act of 1856 does not expressly terminate the guardianship of the re-marrying widow³. It merely terminates her preferential right⁴. The court has a discretion in relation to the appointment of the guardian of the children, though ordinarily, the court may appoint a person other than the widow⁵.

Incidentally, section 3 provides for the appointment of a guardian of the *person of* the minor children, but not of the property.⁶

Overlapping
and confusion
created by
section 3—
Repeal.

3.4. Having regard to the fact that the law has been codified in the Hindu Minority and Guardianship Act, 1956, sections 5(a) and 6, the continued existence of section 3 of the Act of 1856 on the statute book creates confusion, which should be eliminated by deleting the section^{7—8}.

¹Para 3.1, *supra*.

²Cf. section 6(2), Hindu Minority and Guardianship Act, 1956.

³Ganga v. Jhalo, (1911) I.L.R. 36 Cal. 862.

⁴Prem Kaur v. Harnam Singh, A.I.R. 1939 Lah. 125.

⁵Ganga v. Jhalo, (1911) I.L.R. 36 Cal. 862, 872 873 (Mookerjee J.).

⁶Rup Raut v. Basu Deb Raut, A.I.R. 1962 Pat. 436, 437, para 4.

⁷Bakshi Ram Ladha Ram v. Shilla Devi, A.I.R. 1960 Punj. 304 (D.K. Mahajan J.).

⁸Kusa Parida v. Vaishnav, A.I.R. 1966 Orissa 60, 61, para 5 (G.K. Misra J.).

CHAPTER 4

THE CHILDLESS WIDOW

4.1. In section 4, the Act contains a provision which seeks to continue the assumed disability of a childless widow, as to the right of inheritance. Such a provision appears strange today. The section reads as follows :—

“4. *Nothing in this Act to render any childless widow capable of inheriting*—Nothing in this Act contained shall be construed to render any widow who, at the time of the death of any person leaving any property, is a childless widow, capable of inheriting the whole or any share of such property, if before the passing of this Act, she would have been incapable of inheriting the same by reason of her being a childless widow.”

4.2. This provision is also likely to create misunderstanding as to the legal position of a childless widow. Even if any such disability was inforce under any school of uncodified or unamended Hindu law,¹ the position under the Hindu Succession Act, 1956 is now different. That Act recognises no such disability in relation to the right of inheritance. Where it confers such a right on a widow, that right is conferred without any distinction between childless widows and others. If a widow is, under that Act, entitled to succeed to the estate of any person—whether male or female—and is not barred from doing so by reason of a disability specifically laid down in that Act², then no other disability can be super-imposed, in view of the avowed object of that Act, namely, to “amend and codify” the law. On this ground alone, section 4 of the Act of 1856 requires to be repealed as inconsistent with the present law.

4.3. The position on the subject before the Hindu Succession Act may be briefly dealt with, as a matter of interest. By the Bengal School of Hindu law, the daughter’s right of succession to property right being founded on her offering funeral oblations through her son, a daughter who is a sonless widow was not entitled to inherit to her father.³ Presumably, section 4 of the Act of 1856 has this disability in mind.

4.4. There are early Calcutta rulings^{4–5} debarring barren daughters or widowed daughters without male issue from succeeding to their father⁶. This rule seem to have been recognised even in an Allahabad case⁷ (case relating to parties governed by the Dayabhaga), where the sons of a deceased daughter were preferred to a widowed childless daughter.

4.5. Even in a caste in which widow re-marriage is allowed by custom, a childless widowed daughter of a child-bearing age is not entitled in the Bengal school to succeed to her father’s property along with the married daughter having a son, in the absence of any proof of custom entitling her to succeed under such circumstances⁸.

4.6. The view of text book writers⁹ also appears to be that the disability in the Dayabhaga law extends to a barren daughter or one who is not likely to have a male issue, or who is already a childless widow. Any argument that the widow might re-marry and have male issue is anticipated by section 4 (of the Act of 1856), which prevents her from claiming the right of inheritance¹⁰. But if the widow marries (after widowhood), before her father’s death, section 5 would take away the disability.¹¹

¹Para 4.4 and 4.5, *infra*.

²E.g. section 25, Hindu Succession Act, 1956.

³Dayabhaga, Chapter 11, section II, verses 3 and 15; Banerjee, Marriage and Stridhana (1923), pages 314, 315.

⁴Benod Kumar Debee v. Purdhan Gopal Sabee, (1865) 2 W.R.C.R. 176 (Calcutta).

⁵Radha Kishen v. Rajah Ram, (1866) 6 W.R.C.R. 147 (Calcutta).

⁶See also Mukunda v. Manmohini, (1920), 19 C.W.N. 472.

⁷Smt. Pramila v. Chandrasekhar, (1921) I.L.R. 43 All. 460 (Case under Dayabhaga system).

⁸Binodini v. Sustha, (1920) I.L.R. 48 Cal. 300, 302.

⁹Gour, Hindu Code (1938), page 940, para 2252, citing Mukunda v. Manmohini, (1920) 19 C. W. N. 472.

¹⁰Banerjee, Marriage and Stridhana (1923), pages 314-315.

¹¹For section 5, see Chapter 5, *infra*.

**Position of
childless
daughter in
Mitakshara.**

**Recommendation
to repeal
section 4.**

4.7. While this was the position under the Dayabhaga, the Mitakshara law was different. According to Gour,¹ no such distinction (between various classes of daughters) exists in the Mitakshara.

4.8. The rule debarring a childless widow under the Dayabhaga law, to which we have made a reference above², and which, as already stated³, section 4 has presumably in mind, has obviously been superseded by the Hindu Succession Act, 1956, which no longer recognises any disability based on childlessness, as discussed earlier⁴. In this situation section 4 of the Act of 1856 creates confusion⁵. Accordingly, we recommend that section 4 should be repealed.

¹Gour, Hindu Code (1938), page 940, para 2252.

²Para 4.3, *supra*.

³Para 4.2, *supra*.

⁴Para 4.2, *supra*.

⁵Para 4.2, *supra*.

CHAPTER 5

OTHER RIGHTS, INCLUDING ADOPTION

5.1. Having dealt with the disabilities which should arise or continue on re-marriage, Section 5, the Act of 1856, in section 5, saves certain rights, in these terms :—

“5. Saving of rights of widow marrying, except as provided in sections 2 to 4. Except as in three preceding sections is provided, a widow shall not by reason of her re-marriage forfeit any property or any right to which she would otherwise be entitled : and every widow who has re-married shall have the same rights of inheritance as she would have had, had such marriage been her first marriage.”

5.2. It is really this section which reflects in direct terms the central theme of the Act¹— Analysis of “to remove all legal obstacles to re-marriage”. The section can be divided into two parts. The earlier half, which ends with the words “to which she would otherwise be entitled”, is expressed in general terms, so as to bar the forfeiture of “any property or any right”, except as otherwise provided in sections 2—4. By way of illustration of a right which remains unaffected by sections 2—4, we may refer to the position of the widow vis-a-vis her right to inherit to the estate of a son by her first marriage who died after the widow’s re-marriage. By her re-marriage, the widow does not lose her rights to succeed thereafter to her son or other lineal successor of her husband². It was not the intention of the legislature to deprive a Hindu widow, upon her re-marriage, of any right or interest which she had not at the time of her re-marriage. The argument that the widow (mother) on her re-marriage was “civilly dead” has also been specifically rejected in one of the Bombay cases³ on the subject⁴. At the time of re-marriage, she had no interest in her husband’s property.

5.3. With reference to this part of section 5, it may be stated that legislation amending Effect of and codifying the law on various topics of Hindu law would seem to cover a large number of subsequent rights in relation to property (such as, rights to inheritance and maintenance) and other rights legislation. (such as, rights of adoption and guardianship). In regard to matters governed by such legislation section 5 serves no useful purpose.

The question then arises whether there is any “right or property” which falls outside the ambit of such legislation—in other words, whether there is any “right or property” which is still governed by the earlier half of section 5 of the Act of 1856. If so, it becomes legitimate, as a second step, to consider whether, but for section 5 the widow would (by re-marriage) forfeit that property or that right.

5.4. It appears to us that the subsequent codifying legislation on various topics of personal law governing Hindus—namely, succession⁵, maintenance⁶, marriage⁷, guardianship⁸ and adoption⁹—covers all the conceivable “property or right” relevant in the context of personal law. Section 5, earlier half, seeks to ensure that there shall be no forfeiture of “any property or any right” by reason of re-marriage except as provided by sections 2, 3 and 4. On a scrutiny of the various topics falling within the field of personal law, we have not been able to find any uncodified topic of Hindu law in regard to which such a rule as is contemplated by section 5 (i.e. a rule of forfeiture of “any property or right” on the re-marriage of a widow) can be said to survive at the present day. In view of this position, the earlier half of section 5 should be repealed as redundant.

¹Para 2.1 *supra*.

²(a) *Akora Suth v. Boreani*, (1868) 2 Bengal Law Reports 199 205 206 (Peacock¹C.J. & JacksonJ.).

(b) *Chamar Haru Dalmal v. Kashi*, (1902) I.L.R. 26 Bom. 388.

(c) *Basappa v. Ragava*, (1904) I.L.R. 29 Bom. 91.

(d) *Lakshmana Sasamallo v. Siva Sasanallavani*, (1905) I.L.R. 28 Mad. 425, 427.

³*Basappa v. Ragava*, (1904) I.L.R. 29 Bom. 91 93.

⁴See also *Mantorabai v. Paretanbai*, A.I.R. 1972 M.P. 145.

⁵Chapter 2, *supra*.

⁶Chapter 2, *supra*.

⁷Chapter 2, *supra*.

⁸Chapter 3, *supra*.

⁹See sections 7, 8, 9 and 14(c), Hindu Adoptions and Maintenance Act, 1955 and para 5.5, *infra*.

Adoption.

5.5. In order to complete our survey, it would be appropriate to deal in brief with the position regarding adoption. Section 5 of the Act of 1856 does not specifically mention adoption nor is it referred to in sections 2, 3 and 4. However, it is proper to point out that the right of a Hindu widow to give or to take in adoption is now exclusively governed by the Hindu Adoptions and Maintenance Act¹, and there can, at the present day, be no question of relying on section 5 of the Act of 1856 for determining questions as to that right in the context of re-marriage.

**Section 5,
latter half
also redundant.**

5.6. This disposes of the earlier half of section 5. The latter half of section 5 relates more specifically to the rights of inheritance of a widow. It equates her re-marriage to a first marriage for the purpose. As the section stands at present, the proposition that "every widow who has remarried shall have the same rights of inheritance as she would have had, had such marriage been her first marriage" no longer requires express enunciation. The law of intestate succession, as codified in the Hindu Succession Act, implicitly recognises this proposition² and recognises no distinction as regards the rights of inheritance of a wife (widow), whether it is her first marriage or not. Thus, section 5, latter half is also now redundant. Even if the words "every widow who *has remarried*" can aptly apply to post-1856 remarriage, this part of the section has now lost all its utility.

**Section 5 to
be repealed.**

5.7. In this position, the whole of section 5 needs to be repealed.

¹Sections 7, 8, 9 and 14(c), Hindu Adoptions and Maintenance Act, 1956.

²Chapter 2, *supra*.

CHAPTER 6

CEREMONIES FOR AND GUARDIANSHIP IN, MARRIAGE

I. Ceremonies.

6.1. Section 6 of the Act of 1856, in substance, provides that if the ceremonies performed Section 6—
would have constituted a valid marriage for a Hindu woman, had she been a virgin, those same Ceremonies.
ceremonies would constitute a valid marriage if the woman is a widow. The importance of the
section is illustrated by an Oudh case¹. A widow was married in the traditional Brahma form,
but without the religious rites and ceremonies and the re-marriage was held not to have been
established. There can be no valid marriage in any form even under this Act without a sub-
stantial performance of the requisite religious ceremonies.

6.2. The subject of ceremonies for marriage is now covered by the Hindu Marriage Act² Position
Section 7 of the Hindu Marriage Act reads :— under Hindu
Marriage Act.

“7. *Ceremonies for a Hindu Marriage* :—

(1) A Hindu marriage may be solemnised in accordance with the customary
rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the saptapadi (that is, the taking
of seven steps by the bridegroom and the bride jointly before the sacred fire), the mar-
riage becomes complete and binding when the seventh step is taken.”

6.3. In view of the above position, section 6 of the Act of 1856 is superfluous, and according- Repeal of
ly, we recommend its repeal. section 6
recommended.

II. Guardianship in marriage under section 7 and the Hindu law.

6.4. This takes us to section 7 of the Act of 1856. The section reads—

Section 7—
Consent to
marriage of
minor widow.

“7. *Consent to marriage of minor widow*—If the widow re-marrying is a minor whose
marriage has not been consummated, she shall not re-marry without the consent of her
father, or if she has no father, of her paternal grand-father or if she has no such grand-
father, of her mother or failing all these, of her elder brother, or failing also brothers, of her
next male relative.

Punishment for abetting marriage made contrary to this section : All persons know-
ingly “abetting a marriage made contrary to the provisions of this section shall be liable
to imprisonment for any term not exceeding one year or to fine or to both.

Effect of such marriages : proviso : And all marriages made contrary to the provi-
sions of this section may be declared void by a Court of law; Provided, that in any question
regarding the validity of a marriage made contrary to the provisions of this section, such
consent as is aforesaid shall be presumed until the contrary is proved, and that no such
marriage shall be declared void after it has been consummated.

Consent to re-marriage of major widow : In the case of a widow who is of full age
or whose marriage has been consummated, her own consent shall be sufficient to constitute
her re-marriage lawful and valid.”

6.5. The position resulting from section 7 of the Act of 1856³ can be thus analysed—

Section 7
analysed.

(a) A widow who is a minor and whose marriage has not been consummated can
re-marry only with the consent of her guardian. This is enacted expressly in the first para-
graph of the section.

¹Ram Pearay v. Mst. Kailasha, A.I.R. 1930 Oudh 426, 428.

²Section 7, Hindu Marriage Act, 1955.

³Para 6.4, *supra*.

(b) A widow who has attained majority can re-marry without the guardian's consent, irrespective of the fact whether the marriage has been consummated or not. This seems to follow by implication from section 7, there being no prohibition expressly enacted in this regard.

(c) A widow whose marriage has been consummated is also competent to re-marry without such consent, even if a minor. This also seems to follow by implication from section 7. We shall deal later¹ with "minority" in the context of marriage.

6.6. So much as regards the circumstances in which a consent is, or is not, required for the marriage of the widow. Where a guardian's consent is required, the guardians (in order of preference) under section 7 of the Act of 1856 are² :—

1. Father,
2. Father's father,
3. Mother,
4. Elder brother,
5. Other male relatives.

6.7. The five persons mentioned in section 7 of the Act of 1856³ are the same as those enumerated by Yajnavalkya⁴. In Yajnavalkya, however, the mother is placed at the end of the list, while, in section 7, she appears in the middle. Yajnavalkya⁵, whose text is adopted in the Mitakshara, and is followed in all the schools⁶ except the Gauriya, declares⁷: "The father, paternal-grandfather, brother, kinsmen (Sakulya) and mother, being of sound mind, are the persons to give away a damsel—the latter respectively on failure of the preceding".

Guardians according to Yajnavalkya.

Position in Bengal school.

Effect of marriage without consent of guardian.

6.8. As to the Bengal School, Raghunandana⁸, the leading authority of that School on the subject of marriage, has by a comparison of the above text of Yajnavalkya with the texts of two other sages, Vishnu and Narada, deduced the order of guardianship, which is the law in Bengal, and which may be stated thus⁹:

"The father, paternal-grand father, brother, sakulya, maternal grandfather, maternal uncle, and mother, if of sound mind, are entitled in succession to give a girl in marriage."

6.9. It should be pointed out, however, that a marriage performed without the consent of the guardian may yet be valid on the doctrine of *factum valet*. The following observations in a Bombay case by Sargent C.J. are pertinent¹⁰ :—

"The consent of parents and guardians as a condition precedent of the validity of marriage before the parties have arrived at a certain age is required by the law of most European countries. But the intention has been always expressed in the clearest language so as to admit of no doubt. The invalidity of the marriage of a male under twenty-five without consent of parents is, by French law, provided for by express words declaring that such a male is 'incapable of marrying' without consent: see Code Napoleonic. And, again, again, Lord Hardwicke's Act in England, which was passed in a great measure to prevent the marriage of minors without the consent of parents or guardians, declares that the marriage of persons wilfully inter-married without the license from a person having authority to, grant the same (the grant of which is forbidden to minors without such consent of parents and guardians), is null and void. No such language, (as we have already pointed out), is to be found in the Hindu texts, and without it both authority and reason require that the marriage should be supported on the principle of *factum valet*."

¹para 6.10, *infra*.

²para 6.4, *supra*.

³Para 6.6, *supra*.

⁴Yajnavalkya—(Father, Father's father, Brother, other male relatives, mother).

⁵Yajnavalkya, I, 63 : 28 e.

⁶Banerjee, Marriage and Stridhana (1923), pages 48-49.

⁷See also Gour, Hindu Code (1938), page 117, para 357.

⁸Udvahataitwa, Institutes, Vol. 2, page 70.

⁹Banerjee, Marriage and Stridhana (1923), pages 48-49.

¹⁰*Khushal Chand Lal Chand v. Bai Mani*, (1886), I.L.R. 11 Bom. 247, 256.

6.10. The position as to 'minority' in the context of marriage may be briefly stated with reference to the period before the passing of the Hindu Marriage Act, 1955. ^{Age of marriage under Hindu} The Indian Majority Act,¹ did not "affect the capacity of any person to act in the matter of marriage, dower, divorce law and adoption".² The matter had, therefore, to be considered with reference to the principles of Hindu law.

In Hindu law, the age of majority is attained on completion of the 16th year (15th year in the Bengal school)³ and persons below that age cannot be married, except through their guardians whose right rests upon the text of Yajnavalkya already quoted.⁴ Thus, under Hindu law, a girl could not marry without the guardian's consent before attaining the age of 16.

III. Position under the Hindu Marriage Act, 1955.

6.11. This position survived upto 1955. Under the Hindu Marriage Act, 1955 (as enacted originally),⁵ where the bride has not completed the age of eighteen years, the consent of her guardian in marriage, if any, was provided for. The list of guardians was given in the Act. ^{Position under the Act of 1955 as originally enacted.}

6.12. Some questions had arisen as to the position of the father-in-law, vis-a-vis re-marriage of the widowed daughter-in-law. In an Allahabad case,⁶ the father-in-law was regarded as competent to give the widow in marriage.⁷ In view of the present position under the Hindu Marriage Act as amended,⁸ it is unnecessary to enter upon any close examination of this view. ^{Position of father-in-law and mother-in-law.}

It may, however, be stated that even before the passing of the Act of 1955, the Lahore High Court⁹ had held that neither under the Hindu law nor under the Act of 1856 does the mother-in-law possess the right to give away in marriage her widowed daughter-in-law (the widowed daughter-in-law in that case was below 16). It was observed in that case that section 7 of the Act of 1856 (even if applicable to the case) did not mention the mother-in-law. The texts on the subject¹⁰⁻¹² of Hindu law were noted, as also the English law¹³, but these texts also did not mention the mother-in-law as one of the guardians for the marriage of a widow.

6.13. While this was the position under the Hindu Marriage Act, 1955 as originally enacted, it may be pointed out that under that Act as amended in 1978,¹⁴ only a girl above the age of eighteen can legally marry and the question of obtaining the consent of the guardian for her marriage cannot now arise, whether the girl is unmarried or a widow. ^{Position under the Hindu Marriage Act as amended in 1978.}

By the Schedule to the Child Marriage Restraint (Amendment) Act, 1978,¹⁵ section 5(iii) of the Hindu Marriage Act was amended to substitute for "eighteen years" (for the bridegroom) and "fifteen years" (for the bride), the words "twenty-one years" and "eighteen years" respectively. As a consequential change, section 5 (vi) and section 6, which were concerned with guardianship in marriage, were omitted by the same amending Act.

6.14. In this position, section 7 of the Act of 1856 has become completely obsolete and Section 7 to be repealed.

¹Gour, Hindu Code (1938), page 117, para 357.

²Section 2(a), Indian Majority Act 1873.

³Mulla Hindu Law (1974), page 511, para 433.

⁴Para 6.5 *supra*.

⁵Section 5(vi) Hindu Marriage Act, 1955, read with section 6 (as originally enacted).

⁶Paras Ram v. The State, A.I.R. 1960 All. 749.

⁷See criticism by Derrett in (1961) 63 Bom. L.R. Journal, pages 1 to 4 and article by Laxman Prasad in A.I.R. 1960 Journal pages 92 to 94.

⁸Para 6.13, *infra*.

⁹Sant Ram v. The Crown, (1929) I.L.R. 11 Lahore 178 (Tekchand & Agha Hyder JJ.)

¹⁰Yajnavalkya I,63-64.

¹¹Vishnu XXIV, 38-39.

¹²Narada XII, 20-21.

¹³Section 16, Re-marriage Act, 1823 (Eng.).

¹⁴Central Act 2 of 1978.

¹⁵Central Act 2 of 1978.

CHAPTER 7

CONCLUSION

**Recommendation
to repeal.**

In the light of the preceding paragraphs, we recommend repeal of the entire Hindu Widows Re-marriage Act, 1856 (15 of 1856). It is needless to add that section 6 of the General Clauses Act,¹ 1897 will apply to such repeal so as to save rights already vested and to regulate the position on other matters dealt with in that section.

Sd./

P.V. Dixit	Chairman
S.N. Shankar	Member
Gangeshwar Prasad	Member
P.M. Bakshi	Member-Secretary

14th December, 1979.

¹Section 6, General Clauses Act, 1897.

APPENDIX

Historical background of the Hindu Widows Re-marriage Act, 1856.¹

I. Introductory.

The subject of removing legal obstacles to the performance of marriage of Hindu widows Indian Law came to be noticed—though in a peripheral way—by the Indian Law Commissioners who with Commissioners Lord Maculay in the lead were primarily seized of the problem of codifying the penal laws of India. The Sudder Nizamut Adawlut court in the north-western provinces informed the Law Commissioners that child murder was a prevalent crime in the provinces under their jurisdiction and had recommended that the endeavour of a woman to conceal the birth of her dead child by secretly disposing of its body should be made a misdemeanour.

The court wanted the law which was in force under the jurisdiction of the Supreme Court of each Presidency and the Recorders' court in the Straits to be made applicable to the possessions of the East Indian Company.

II. Indian Law Commissioners.

Discovering the casual connection between the prohibition against widow re-marriage and infanticide, the Indian Law Commissioners by their letter dated 4th July, 1837 apprised the Government of India that much of this crime may be due to the cruel law which prevented Hindu widows from contracting a second legal marriage. The Commissioners were sensible that a mere alteration in the law would immediately and directly have little effect towards remedying the evil, but were not without expectation that an alteration of the law would induce an alteration of thinking in this matter. They felt that such a law would do more towards repressing child murder than could be done by the most severe penal laws.

The Indian Law Commissioners, by their letter dated 30th June, 1837, had sought² the Opinions of Sudder courts. opinions of the Sudder courts of Calcutta, Allahabad, Madras and Bombay as to whether there would be any objections to a law which would authorise the re-marriage of Hindu widows. In reply, the Calcutta Sudder Court (consisting of two judges, one temporary judge, two official judges and one officiating temporary judge), had no hesitation in stating it as its unqualified opinion that a law of the nature contemplated could not be passed without a direct and open violation of the pledged faith of the Government. The court felt that "the Hindus did not regard marriage as a mere civil contract, and in all its stages from the betrothal in infancy to its final consummation, the ceremonies consisted of a series of observances altogether religious; and it was distinctly clear by their shastras, and universally believed by them, that the re-marriage of a widow involved guilt and disgrace on earth and exclusion from heaven. The court referred to Mr. Colebrook's Digest of the Hindu Law in support of its views and regretted that what was so desirable should be so difficult of attainment. The Sudder Diwani Adawlut of North-west Provinces (consisting of four judges) also opposed the proposed measure on similar grounds and added that it was likely to be misunderstood and perverted and might give to a very great and general dissatisfaction without being attended with any counter-balancing or commensurate advantage.

The judges of the Madras Sudder and Faujdaree courts followed suit, on the ground that the Hindus of the regenerate classes would look upon such a measure as an attempt to confound them with the inferior and outcaste tribes, (who admitted of second marriages by widows). They warned that such an Act would not only prove a dead letter, but would also unite the whole of the superior classes in maintaining with increased bigotry the established custom against which the proposed measure would be levelled and thus strengthen their jealousy in keeping, up, unimpaired, the distinctions which separated them from the lower orders.

¹Based on National Archives File relating to Act 15 of 1856, Vol. 1 and 2.

²Indian Law Commissioners letter dated 30th June, 1837.

III. Petitions for reform and draft Bill.

18 years thereafter, Eshwarchundra Sharum, who later on came to be known as Ishwar-Ishwarchandra's chandra Vidyasagar, signed a petition on 4th October, 1855 from the Sanscrit College, Calcutta petition and along with a thousand others, deplored the evil of the custom by which the marriage of widows draft Bill. amongst Hindus was prohibited by law and urged the removal of the legal obstacles as the custom had been judicially recognised by the courts of Her Majesty and East Indian Company. Eshwarchundra Sharum also appended a draft bill 'to remove all legal obstacles to the marriage of Hindu widows'.

The reaction to Eshwarchandra's proposal holds a mirror to the sociological conditions of the Hindu society of that period.

Some inhabitants of Barasot and its neighbourhood referred to Srijoot Ishwarchundra Reactions to Vidyasagar as one "the most patriotic and the learned-in-Hindu law". While certain inhabitants of Zillah Tippra in their petition dated 5th April, 1856 after re-iterating the assurances of Government regulation of 1793 asserted that the number of Hindus who have asked Government to bring into force the proposed law "belonged to some tribe" who preferred to follow their own opinion to the dictates of religious law.

The Brahmins of Poona by their petition dated 27th February, 1856 opposed the measure and expressed their opinion that those who are in favour of the measure must not be Hindus.

The Poona petition throws light on the manner in which signatures were collected to the memorials to be presented to Government. It appears that one "Aba Bhusari" (a grocer) went round to collect the signatures and in token of having effected the collection, wrote his name at the left-hand top corner. Some of the overly circumspect signatories superscribed an endorsement, "signed as being against re-marriage" just below their signature, to ensure that the signature pages were not attached to a memorial on some other subject. It is remarkable that the signature of collector "Aba Bhusari" has not appended his signature in the general catena of signatures, probably because, not being a Brahmin, he had no need of any such law. Though the signatures are mainly in Devanagari and modi script, an occasional Telugu signature appears and the use of the Persian word "Bin" for "son of" was also common. The signatures on petitions emanating from Bengal were mostly in English or in Bengali, but an occasional "Shri Ram Dayal Tark Vachaspati" in Devnagari also appears.

The inhabitants of Zillah Maimansingh characterized Vidyasagar's move as one from a "very thoughtless and improvident youngman who would suffer unlimited troubles which God knows well only".

784 petitioners, being residents of Upper country sojourning in Calcutta, referred to the Residents of reign of the late Nawab when their legal usages were being destroyed and thanked the Kingdom Upper country. of the Honourable Company whereunder they were enjoying great safety. The petitioners expressed the apprehension that if the proposed Bill became law, it would bring back the same state of affairs as under the Nawab, namely, "whosoever may wish will run away with any one's wife" . . . Same was the grievance of certain inhabitants of Chittagong who were afraid that women would run away with their paramours (for whom they used the word 'gallant') while the inhabitants of Zillah Chattayram in their petition dated 18th July, 1856 predicted that "it will never be an uncommon thing for a youthful handsome woman of a wicked mind to agree with the allurements of youthful wealthy debauchees and accordingly attempt the lives of their poor and ugly husbands".

991 persons calling themselves "professors of the Hindu law, inhabitants of Nuddea Tre-Pandits. bani Bhatparrah, Bansbarrah and other places", "being apprised that one Eshwarchandra Vidyasagar, a modern Pandit, has lately in conjunction with a few young men of the rising class, had sought legislation to legalise re-marriage of Hindu widows", petitioned on 29th February 1856 to the Legislative Council, drawing attention of the Council to the injunctions of the shastras against such marriages. They quoted the Veda, the Code of Manu, Mahabharata first book, Aditya Purana, Ratnakura, Niranya Shindhoo, Hemadri and Madan Parijata. The last three authorities contained similar edicts: "the marriage of widow, the gift of a larger portion to the eldest brother, the sacrifice of a bull, the appointment of a man to beget a son on the widow of his brother and the carrying of an earthen pot as the token of ascetic, these five are prohibited in the Kaliyuga".

The piece de resistance came as a petition on a coriaceous parchment paper of the size 3" X 2 $\frac{1}{2}$ " - signed by Raja Radhakant Bahadoor, Raja Kalikrishna Bahadoor, Raja Apurva Krishna Bahadoor, Raja Kamal Krishna Bahadoor, Raja Narendra Krishna Bahadoor and others opposing the Bill.

IV. Publication of the Bill

After the Bill "to remove all legal obstacles to the marriage of Hindu widows" was published to elicit public opinion, 51 petitions were presented in relation to the Bill; of which, 23, signed by 5191 persons were in favour of the principle of the proposed measure and 28 signed by 51,746 persons were against the measure. One petition in support of the measure was presented by the members of the Calcutta Missionary Conference.

Publication
of the Bill
for public
opinion.

With an opposition in the proportion of ten to one, the Bill would never have secured a place on the statute book in a democratic legislative process. But the statement of objects and reasons prepared by Mr. Grant on 17th November, 1854 underscored the fact that the object of the Bill was to give the petitioners and all who agreed with them and all who thereafter may agree with them, the relief prayed for, without interfering with any other people. Mr. Grant referred to a well-known Hindu doctrine that a Hindu widow who does not turn as a *suttee* (which act no longer could be committed in India) was bound to a life of the most painful bodily mortification. Those who agreed with the petitioners allowed the reputable alternative of re-marriage. Those who did not, allowed of no reputable alternative nor did the law as administered by the courts allow a reputable alternative to either class. Mr. Grant argued that if the learning, reason and conscience of single Hindu father directed him to save his little child from life-long misery or vice, the law of the country should not stand in his way. This marks the beginning of recognition of the right to freedom of conscience, the matrix, the indispensable condition of other manifestations of freedom of an individual.

Recognition
of the right
of freedom of
conscience—
Statement of
Objects and
Reasons.

The original Bill, as prepared and brought in by Mr. Grant in the Legislative Council,¹ which was read a first time on the 17th November, 1855 contained only the first two sections of the Act. The first section saved the validity of re-marriage. The second section ran as under :

Legislative
history—
The Second
section.

All rights and interests which any widow may by law have in her deceased husband's estate, either by way of maintenance or by inheritance, shall, upon her second marriage cease and determined as if she had then died; and the next heirs of such deceased husband then living, shall thereupon succeed to such estate.

Provided that nothing in this section shall affect the rights and interests of any widow in any estate or other property to which she may have succeeded by inheritance otherwise than through her deceased husband, or to which she may have become entitled under the will of her deceased husband, or in any estate or other property which she may possess as *Stridhun*, or which she may have herself acquired either during the lifetime of her deceased husband, or after his death".

V. Select Committee

The Select Committee to which the Bill was referred, thought it right to provide for those cases in which the husband's estate, having first descended to the sons or grandsons, afterwards vested in the widow as heiress of the first taker. In these cases, the Committee thought, the second section² of the Bill might also apply, and they altered it accordingly. The Committee struck out the proviso to that section and secured the widow's rights in the property which she was not to forfeit on a second marriage more clearly by a separate section³.

Select
Committee.

Another objection raised was that Hindu rights of inheritance were closely connected with *Inheritance*. religious obligations and it was impossible that those inheriting under the proposed law could be recognised by a family holding to the contrary doctrine, they were incapable of performing religious obligations and it would be unjust to allow them to have rights of inheritance.

The protagonists of the Bill⁴ advanced two arguments in support of the measure. The first *Conversion*, was that when a Hindu widow became a Christian or a Mahomedan and then married, her civil rights under the *lex loci* Act remained the same as before her conversion, but if, continuing to be a Hindu, she re-married, her rights would be curtailed. They argued that this was a grievous hardship inflicted on her for a conscientious adherence to her own religion.

¹National Archives File, pages 55—58 (Mr. Grant).

²For the second section, see *supra*.

³National Archives File, page 1119 *et seq.*

⁴Petition dated 15th January, 1856 (National Archives File, page 187).

Unchastity.

Secondly, they quoted the case of *Doe Dem Saummoney Doses v. Nemvohurn Doss*,¹ (decided under the Caste Disabilities Removal Act, 1850), for the proposition that if a Hindu widow led an immoral life, her rights in the property were not affected. Further, they proposed that instead of the usual Hindu form of marriage with vedic rites, a simple agreement and declaration before a Registrar should be sufficient to constitute a valid marriage².

The Select Committee dealt with this objection on the principle that the greater ought not to involve the lesser privilege. If a Hindu widow turned a Mahomedan and so repudiated the whole Hindu Code, it was admitted that by the law of the land she could contract a valid marriage and that her children by such marriage would be legitimate and would inherit the property of her Hindu ancestors. Nevertheless, if the same widow remained a Hindu, but adopted an interpretation of Hindu law which (though not the interpretation of the majority of Hindus) represented such interpretation of a very respectable minority (a minority which in point of principle alone was not inconsiderable), it was contended that the law of the land ought to make her incapable of contracting a valid marriage. This the Committee did not consider to be a tenable doctrine.

Incidentally, it may be noted that even though in the year 1856 the learned Members of the Select Committee were clear in their minds that conversion from Hinduism did not operate as an exclusionary factor against the convert in the matter of inheritance, half a century later a Full Bench of the Madras High Court in *Vitta Tayaramma v. Sivayya and others*,³ by a majority (Wallis C.J. and Oldfield J.) held that a Hindu widow who becomes a Mahomedan and marries a Mahomedan forfeits by the re-marriage her interest in her first husband's estate under the general principles of Hindu law. Wallis C.J. further held that the forfeiture is entailed by reason of section 2 of the Hindu Widows Re-marriage Act, 1856. Seshagiri Aiyar J. dissented and was of the view that the rule of Hindu law that a widow who remarries and was thus not true to the bed of her deceased husband, could not inherit to his estate can be applied only when she is within the of Hindu law. Her remarriage after apostacy could not divest her of her right to inherit which subsisted in her favour at the date of her conversion to another religion.

Giving of a minor widow in re-marriage.

To revert to the Select Committee, the Committee thought it necessary to provide specially for the giving away of a minor widow. In the case of a bride who was a minor, the giving away by a male relative or by a male of the same caste was understood to be a necessary part of the ceremony of the marriage, but as a widow was considered to have left her father's family and to have become a member of the deceased husband's family doubt might be felt that as to the right of her relative to give her away, unless special provision on the subject was made; and a similar doubt might be felt as to the right of her deceased husband's family to give her away. Her own rights too, both whilst a minor and after coming of age, might be rather doubtful. One clause provided specially for all these points. The Committee proposed that where a widow was a minor, her own male relatives shall be the persons to give her away exactly as if she were unmarried and their consent shall be necessary to the validity of her marriage, and that if she be of age, her own consent shall be sufficient to constitute the marriage whether she be given away by any male relative or not. As her husband's family may have an interest in inducing a widow to remarry, the Committee thought it right, in the manner stated above, to render the consent of her own family necessary in the case of a minor widow. Under the Hindu law then obtaining, an unmarried girl of full age could give herself away and hence the Committee felt that a widow of full age should have the same power.

Forfeiture of rights upon re-marriage.

Sir Robert Hamilton, the Agent of the Governor General for Central India, suggested that a widow ought not to be allowed to retain property left by her deceased husband for life, by will made before the passing of the Act with remainder to the offspring of the testator. The Select Committee felt that the principle of the second section of the Bill was that a widow on her re-marriage should forfeit all that the law gives her of the right in her deceased husband's estate, but that she should retain whatever she has acquired by way of gift whether the gift were testamentary or by act *inter vivos*. The reason for this distinction was that the very peculiar interest which the Hindu law of inheritance gave to a widow in her deceased husband's estate was really, if the texts were examined, intended to be no more than an interest *durante viduitate* that the conditions on which it is given to her were inconsistent with a second marriage and though she was entitled to the unrestricted possession of the estate, she could not, except in certain exceptional cases, alienate any part of it. Any absolute interest which she took by gift stood on a different footing. If the donor has attached no conditions to the gift—the Committee felt—they were not to speculate on his motives or to ask whether he would or would not have made the gift conditional if he had foreseen the alteration of the law.

¹*Doe Dem Saummoney Doses v. Nemvohurn Doss*, Bell & Tayler's Reports, Vol. 2, page 300 (Peel C.J.) National Archives File, page 188.

²Petition dated 15th January, 1856 (National Archives File, page 188).

³*Vitta Tayaramma v. Sivayya and others*, A.I.R. 1919 Mad. 854, 858, 859, 860.

In no case was the forfeiture intended to be a penalty or to operate as a restriction on a second marriage. It was imposed in the one case because it was a consequence of a condition which the law annexes to the estate. It was imposed in the other, because the legislature was under no obligation to create conditions on a gift which the donor has made unconditionally, but it often happened that by will a testator gave to his wife very much the same kind of interest as that which, if his heiress at law, she would take on an intestacy. He might sometimes vary the legal incidence of her estate, but still have it so as to be limited in duration and enjoyment and to give her no power of alienation. It seemed to the Committee that all these gifts which more or less partook of the nature of Hindu widow's estate of inheritance should be put on the same footing as the latter.

One of the objections raised was that widows after re-marriage would be incapable of adopting sons though enjoined to do so by their deceased husbands. The Committee observed that if a widow was duly authorised to adopt, she could do so before her second marriage and the power of re-marriage could not operate in the way of an inducement not to adopt an heir to her deceased husband because she cuts herself off from all such inheritance by re-marriage.

Another objection to the proposed bill was as follows :—

Childless widow.

"If a Hindu dies leaving two daughters both of whom are widows, but the one has a son and the other no children, by the law of inheritance the son will be the sole heir of his maternal grandfather, but if the childless widow contracts a second marriage and has issue by her second husband, by the proposed law they would be entitled to equal shares of the property of their mother's father with the son of the widow who has not remarried".

The Select Committee characterised the objection as ill-founded, because, if a Hindu died leaving neither male issue, nor a widow, but daughters, an unmarried daughter was entitled to take to the exclusion of the other daughters who had been married, whether they were childless widows or had or were capable of having issue. In default of an unmarried daughter, daughters who had or were capable of having issue, should take. A daughter who was barren or a childless widow was altogether excluded.

Even though the petitioner's objection was thus overruled, the Select Committee found that the argument of the petitioners suggested a difficulty, namely, that being incapable of having lawful issue, a childless widowed daughter could not continue her father's line and was excluded from inheritance. If the Act were to remain silent on the subject, it might thereafter be contended that *cassante ratione cessat lex*. (The maxim as given in 'Latin for lawyers' reads : *Cessante ratione legis, cessat ipsa lex*. The reason of the law ceasing, the law itself ceases).

Though the Select Committee saw no positive injustice in such a conclusion, yet to avoid confusion thought it desirable to provide that no person who, by reason of her being a childless widowed daughter on the death of any other person only, according to the existing law, be excluded from a share in property inheritable on the death of such other person, shall take any share in that property, because she might thereafter avail herself of the provisions of this law and shall become capable of having issue.

The Committee intended to exclude the case of a widowed daughter who had re-married during her father's lifetime, and felt that she should be allowed to stand on the same footing as any other married daughter.

The Judges of the Madras Court of Sudder Adawlut observed that the Hindu law did not recognise in Hindus the right to make bequest by will and that the law of inheritance obtaining amongst Hindus offered impediments to the recognition of titles under wills. For this reason, the judges thought that (whatever the practice of the courts may have been with regard to wills by Hindus) it was advisable that the provision of the Bill preserving to the widow who re-marries the right and interest in any estate or other property to which she might have become entitled under the will of her deceased husband should be omitted. The Select Committee felt that it was quite necessary to retain the provision, for, although Hindu wills were not valid in other parts of India, they were, beyond question, valid and of daily recurrence in Bengal. For Bengal, therefore, the provision was indispensable and elsewhere it would have no operation as a widow could not become entitled to any property under the will unless that will was recognised by the law as valid.

VI. General Marriage Act

Proposal for General Marriage Act.

It is interesting to note that some more progressive social reformers by a petition dated 9th February, 1856 submitted a draft of a General Marriage Act by which men and women of any religious persuasion, not being minors or christians, could solemnise their marriage by subscribing to a declaration in presence of witnesses without any religious ceremony.

View of Select Committee on General Marriage Act.

The Select Committee, however, felt that a General Marriage Act of the proposed nature would be quite different from, and generally very much larger than, the scope of the Bill.

Further, the classes for whose relief the Bill was intended to provide were sincere and in their own view orthodox Hindus. They would consider no marriage as made in accordance with their own law and as therefore moral which was not made according to their own rites. They considered these rites as perfectly applicable and perfectly sufficient for the case. There was no ground for presuming otherwise. It would be casting a slur upon the class for whose relief the Bill was intended and would be, in fact, to some extent, to side with their adversaries—if the municipal law pronounced that these rites were not sufficient for the case. That this Bill did not give relief to those whom a General Marriage Act might afford relief was no objection to this Bill. The Committee expressed a fervent hope that those who on their own account really wished such an Act (i.e. a general marriage law) to be passed should petition for what they want, without complicating either that subject or the subject of the present Bill by unnecessarily confounding them together.

VII. Assent to the Bill

Assent to the Bill on 25th July, 1856.

The Bill was passed in the Legislative Council on 19th July, 1856¹. On 24th July, 1856, residents of the District of Dacca urged their support to the Bill, as it was “by no means against their Hindu Shastras what is shown by Pt. Ishwarchundra Bidyasagur in his two discourses on the re-marriage of Hindu widows”.

The next day, on 25th July, 1856, the Bill was assented to by the Governor General².

¹National Archives File, pag. 1233.

²National Archives File, page 1242.