

same section expressly stated to be made for the purposes of that Act, and we do not see how we can extend it. It also seems to us that the provisions of Chapter III. of Act VII. of 1870 must be limited to suits, and cannot be held to apply to probates. The fee payable in respect of the probate of a will is fixed by Act VII. of 1870, Schedule I., Clause 11, at 2 per cent. on the value of the property, and we consider that the value of this annuity for the purpose of determining the amount of probate fees must be taken to be the market value. In the present case, the annuity being mortgaged, the only interest in it passing under the probate is the equity of redemption; therefore the amount of the mortgage incumbrances must be deducted from the market value of the annuity, and the probate fee be charged at the rate of 2 per cent. on the balance (1).

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MATTER OF
THE LAST
WILL AND
TESTAMENT
OF
RA'MCHAN-
DRA
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[APPELLATE CIVIL JURISDICTION.]

NATHUBHAI BHA'ILAL (PLAINTIFF) v. JAVHER RA'IJI AND ANOTHER February 16.
(DEFENDANTS).

Hindu Law—Contract—Married woman—Capacity of a Hindu female to enter into a contract without her husband's consent—When such contract is binding on the husband—Stridhan.

Under the Hindu law a wife who has voluntarily separated from her husband, without any circumstances justifying her separation, is liable for debts contracted by her (even for necessaries), although without her husband's consent; but her liability is limited to the extent of any *stridhan* she may have.

S. A. No. 261 of 1861 decided by Sausse, C.J., and Hebbert and Forbes, JJ., 2nd February 1863, and S. A. No. 461 of 1869, decided by Sargent and Melvill, JJ., 17th January 1870, approved and followed.

This case was referred for the opinion of the High Court by Gopalráv Hari Deshmukh, Judge of the Court of Small Causes at Ahmedabad.

The facts of the case are briefly these:—The plaintiff Nathubháí sued Javher and Bai Hettá, brother and sister, on a promissory note, and alleged that it had been executed by both of them. Javher admitted the execution of the note, but Bai Hettá denied it, and pleaded that she was not liable, because her husband was alive. The Judge of the Small Cause Court found on the evidence that

(1) See *In the goods of Innes*, 8 Beng. L. R. 43, Appx.

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the note had been executed by both Javher and his sister, and that Hettá's husband was alive, and awarded the plaintiff's claim against Javher alone, holding Hettá not liable, because she was under co-verture. Plaintiff then applied for a new trial, and prayed for a decree against Hettá also. The Judge thereon referred to the High Court the question contained in their judgment.

The reference was considered by WESTROPP, C.J., and NA'NA'-BHAI HARIDA'S, J.

No counsel or pleader appeared on either side.

The judgment of the Court was delivered by

NA'NA'BHAI HARIDA'S, J.:—This is a reference made to us by the Judge of the Court of Small Causes at Ahmedabad under Section 22 of Act XI. of 1865. The question he has referred for our opinion is, “whether or not a wife, who is separated from her husband, is liable for debt contracted by her.”

He has not informed us as to the circumstances under which, or as to the purpose for which, the debt was contracted; and the only facts stated to us are that it was contracted jointly by the two defendants, brother and sister, the latter being a married woman living separate from her husband; that “the defendants are of the Rájput caste and are labourers by calling”; and that, in contracting the debt, the female had acted without her husband's consent. There is not any statement that the defendant Hettá has been so ill-treated by her husband or his second wife as to warrant Hettá in leaving him, or to create a liability on his part to pay debts contracted by her for necessaries. The mere circumstance of his marrying a second wife would not justify Hettá in leaving her husband (1).

We may, therefore, assume (and, if we do so erroneously, the Judge of the Small Cause Court should so inform us) that the debt was not contracted under any of the circumstances or for any of the purposes which would render her husband liable for it; and this we do the more readily, as the plaintiff has not sought to obtain a decree against him.

(1) Steele Law and Custom of Hindu Castes (1st edn.), pp. 37-39, pl. 13, 15, 18; 6 Beng. L. R., Appx., 85; 1 Mad. H. C. Rep., 375. See also 1 Borr. Rep. (1st edn. 53, and *Ráhi v. Govind*, ante p. 97.

Such being the case, we have to consider whether the Judge is right in the broad proposition of law laid down by him, that the "contract" which she entered into with the plaintiff is "vitiated" by reason of her having done so without her husband's consent.

A Hindu female is not, on account of her sex, absolutely disqualified from entering into a contract. In the enumerations of persons incompetent to contract given by Manu, Yajnyáalkya, Kátyáyana, and Gotáma (1) a woman as such is not included; and marriage, whatever other effect it may have, does not take away or destroy any capacity possessed by her in that respect (2). She is capable of acquiring and holding property in her own right (3); and when she holds any such, her power over it is absolute. It is expressly laid down by Kátyáyana, in respect of such property, that "the power of women * * * is ever celebrated, both in respect of donation and of sale, according to their pleasure; even in the case of immoveables" (4). It is further laid down by the same authority that "neither the husband, nor the son, nor the father, nor the brothers can assume the power over a woman's property, to take it or bestow it" (5), and by Manu that "such kinsmen as (by any pretence) appropriate the fortunes of women during their lives, a just king must punish with the severity due to thieves" (6). The absence of consent, therefore, on her husband's part, cannot affect her power to deal with such property; and it is impossible to hold, with the Judge of the Court of Small Causes, that a married woman's contract is necessarily void, if her husband has not consented to it.

Where she enters into a contract with the consent or authority of her husband, she acts as his agent, and binds him by her act. So also does she bind him by her contract, if she enters into it under certain circumstances, even though without such consent or authority, the law in that case empowering her to pledge her husband's credit. If, however, she enters into a contract in the absence of such consent or circumstances, she fails to bind her

(1) Coleb. Dig. Bk. II, Ch. IV, Texts 57, 58, 61, and 66.

(2) 1 Str. H. L., 276. (3) Mit. Ch. II, Sec. I, 25; 3 Mad. H. C. Rep. 272.

(4) Vya. May., Ch. IV, Sec. X, 8. (5) *Id.*, Ch. IV, Sec. X, 10.

(6) *Id.*, *ib.*

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husband by her act. But the law does not say that she herself shall not be bound by it. On the contrary, we find it expressly laid down that she shall pay, amongst others, debts contracted by herself. Thus Yājnyavalkya says: "A debt acknowledged * * * or contracted by her jointly with her husband or son (1) or contracted by the woman herself, must be paid by a wife or mother" (2); and Kātyāyana: "A debt contracted jointly with her husband or son, or singly by the woman herself, shall be paid by a wife or mother" (3). Nārada again says that "a childless widow must pay the debt of her sister enjoining payment; or whoever receives the assets left by that sister must pay her debts" (4)—a direction which necessarily presupposes in the sister the legal capacity to borrow money upon her own credit; and upon that text the author of the Ratnākara observes: "On the death of one of two sisters, left as coparceners in the house of their father, who had no male issue, the debt of that sister must be discharged by the surviving sister enjoined to pay it" (5).

Although there is no reported decision on the point referred to us, the subject seems to have engaged the attention of this Court in at least two cases. Both of them were, like this, cases from Ahmedabad. One of them, S. A. No. 261 of 1861, was a suit against a high-caste Native lady, in which the plaintiff sought to recover from her a large sum of money due on a bond executed by her. The principal question raised in that special appeal, that upon which the whole case would appear to have ultimately turned, was, whether she was liable, being under the protection of her husband who had not consented to the transaction; and the Court (Sir M. Sausse, C.J., and Hebbert and Forbes, JJ.) on the 2nd February 1863 upheld the District Judge's decree, awarding with costs the full amount claimed, to be recovered from the defendant's *stridhan*.

(1) The words "or son" do not appear in the original Smṛiti II, 50, as published in Bombay and quoted in the Vyav. May., Ch. V, Sec. IV, 20; nor the words "or mother".

(2) Coleb. Dig., Bk. I, Text 210.

(3) *Id.*, Bk. I, Text 211. Viramīrodāya 353 (Calc. Edn. 1875).

(4) Coleb. Dig. Bk. I, Text. (5) *Id. ib.*

The other case, S. A. No. 467 of 1869, was a suit to recover from one Nathi and another woman a sum of money due upon a bond alleged to have been executed by them jointly to the plaintiff. Nathi's defence was, *first*, that she had not executed the bond, and, *secondly*, that, being a married woman, she was incompetent to execute it and, therefore, not liable. Upon both of these points the Principal Sadar Amin found in her favour, and he accordingly rejected the claim. That decision, however, was reversed, on appeal, by the Assistant Judge, who held the bond proved, and also that Nathi was personally liable upon it, notwithstanding that her husband was alive. In special appeal against that decision she relied upon coverture as absolving her from all liability upon the bond sued on, which point was ruled against her, and the Court (Sir C. Sargent and Melvill, JJ.) on the 17th January 1870 amended the Assistant Judge's decree "by striking out so much of it as makes" her "personally liable, and inserting words limiting" her "liability * * * to the extent of her *stridhan*, including the house mentioned in the bond."

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We are of opinion that those cases were properly decided, and our reply to the Judge of the Court, of Small Causes will accordingly be that a wife who has voluntarily separated from her husband without any circumstances justifying her separation, is liable for a debt contracted by her (even for necessaries), although without her husband's consent; but her liability is limited to the extent of any *stridhan* she may have.

[APPELLATE CIVIL JURISDICTION.]

GUMNA DAMBERSHET (PLAINTIFF AND APPELLANT) v. BHIKU HARIBA
AND ANOTHER (DEFENDANTS AND RESPONDENTS).

February 16.

Limitation Act XIV. of 1859, Section 1, Clause 10—Promissory Note payable by instalments—Waiver of default.

A promissory note, dated 2nd April 1868, stipulated that the principal amount with interest was to be repaid by half-yearly instalments of Rs. 150 each, and that,