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induced the plaintiff to make this appeal, we direct that the parties, respectively, should bear their own costs.

Attorney for the appellant:—*Mr. L. Fletcher.*

Attorneys for the respondents:—*Messrs. Craigie, Lynch, and Owen.*

[APPELLATE CIVIL.]

(FULL BENCH.)

Before Sir M. R. Westropp, Knt., Chief Justice, Mr. Justice Kemball, and Mr. Justice West.

May 1.

SIDLINGA'PA', SON OF BASA'PA' (ORIGINAL DEFENDANT), APPELLANT, *v.* SIDA'VA' KOM SIDLINGA'PA' (ORIGINAL PLAINTIFF), RESPONDENT.*

Jurisdiction—Small Cause Courts in Mofussal—Suit for maintenance.

In the absence of any special bond or other contract for the payment of maintenance, a suit for maintenance is not cognizable in a Court of Small Causes in the Mufussal.

Ordinarily, the right to maintenance does not rest upon contract. It is a liability created by the Hindu law, and arises out of the jural relation of the Hindu family. It is enforceable in numerous instances in which there is no connexion with contract.

Nobin Kálee Debeá v. *Bindoobáshinee Debeá* (5 Calc. W. R. 5 [Sm. C. C. Ref.]) followed.

THIS was a special appeal from the decision of N. Daniell, District Judge of Dharwar, reversing the decree of the Subordinate Judge of Háveri.

The case was referred to a Full Bench by Nánábhái Haridás and Larpent, JJ., on the preliminary objection raised by the respondents, that the case was one cognizable by a Court of Small Causes, and, therefore, not the subject of a special appeal.

Dhirajlál Mathurádás, for the defendants, in support of the objection:—The words "or other contract" in section 6 of Act XI. of 1865 includes an implied contract for maintenance which would spring out of the contract of marriage: *Ratanshankar* v. *Gulábshankar*,(1) *Ammalla Ammul* v. *Subbu Vadiyar*.(2) There being an

* Special Appeal No. 10 of 1874.

(1) 4 Bom. H. C. Rep. 173, A.C J.

(2) 2 Mad. H. C. Rep. 184.

implied contract for maintenance, there is a debt due by the husband to the wife, and the amount claimed being under Rs. 500, the suit should be in the Court of Small Causes.

Shamráv Vithal, contra :—The right to maintenance of the wife or of any other member of a Hindu family depends on the family relation, and not upon contract. Amongst Hindus, marriage is a religious ceremony and a sacrament, not a contract. An idiot or a lunatic may, therefore, marry: *Dabychurn Mitter* v. *Rádáchurn Mitter*;(1) 1 Norton's L. C., pp. 8, 9; 1 West and Bühler, p. 280, Q. 6. Mutual consent is necessary to a contract, and there is none between infants.

The suit was not cognizable in a Small Cause Court: *Nobin Kálee Debeá* v. *Bindoobáshinee*,(2) *Bhugwan Chunder Bose* v. *Bindoo Bashinee Dossee*,(3) *Káminee Dossee* v. *Bishonáth Sháhá*,(4) *Rámbux Chittangeo* v. *Modoosoodhun*,(5) *Sripátty Roy* v. *Lohárám Roy*,(6) *Sháboo Majee* v. *Noorai Mollah*.(7)

Dhirajlál Mathurádás in reply:—The pandits give no authority for the case of *Dabychurn Mitter* v. *Rádáchurn Mitter*.(8) The marriage was not disputed in the life-time of the lunatic, nor for thirty years afterwards. During his life-time it was voidable, but not void. After his death the Court would not avoid it. He also referred to the case of *Mayná Bái* v. *Uttárám*.(9)

WESTROPP, C.J.—The plaintiff, alleging herself to be the wife of the defendant, by her plaint states that, three days previously to the filing of it, he turned her out of doors with her children (of whom there are said to be two), and refused to support her. She, accordingly, sues him for maintenance at the rate of Rs. 4 *per mensem*.

The defendant, in reply, denied that, at the time mentioned by the plaintiff, he turned her out of his house, and he alleged that, about fourteen years previously, she had eloped with another man, and that her suit is barred by the law of limitation. The defend-

(1) 2 Morley's Dig. 99.
(2) 5 Calc. W. R. 5 (Sm. C. Court Ref.).
(3) 6 Calc. W. R. 286 Civ Rul.
(4) 9 Calc. W. R. 214 Civ. Rul.
(5) Beng, L. Rep.—Full Bench Rul. (1862-1868), p. 675.
(6) *Ibid.* p. 687.
(7) *Ibid.* p. 691.
(8) 2 Mor. Dig. 99.
(9) 2 Mad H. C. Rep 196.

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ant further asserted that, about twelve years before he filed his written statement, he had divorced the plaintiff, on the occasion of a dispute between them, before the magisterial authorities, and that she had given birth to two illegitimate children.

The Subordinate Judge of Háveri made a decree, with costs for the defendant, on the ground that, about ten or twelve years previously to the suit, the plaintiff tore off from her neck the nuptial token, and gave it to the defendant, that she thenceforward resided with her own parents, and, subsequently to the giving of the nuptial token to the defendant, became the mother of two illegitimate children.

The plaintiff appealed to the District Judge of Dharwar, who reversed the decree of the Subordinate Judge, and awarded to her maintenance, at the rate she claimed, and costs. The reasoning by which the District Judge arrived at his decree seems to be that, while he believed the parties to have been separated for a much longer time than the plaintiff admitted, he did not regard the circumstance, that they lived apart by mutual consent, as amounting to desertion; that, assuming the fact to be that the plaintiff divested herself of her nuptial token, and that there had been a quarrel between her and her husband, and that she refused to return to him, those circumstances did not relieve her of her conjugal duties or position, or amount to a sufficient ground for a divorce, as the defendant might legally have compelled her to return to him, and that no proof had been given of an alleged caste custom of divorce by mutual consent; that it was still a question whether a divorced woman among the upper castes is not entitled to maintenance, that the illegitimacy of the two children was not proved, and that the divorce, if it occurred at all, was unlawful.

The defendant filed a special appeal against that decree. It is unnecessary now to state the grounds of special appeal, as the question submitted to the Full Bench by the Division Court, which entertained that appeal, was only that contained in a preliminary objection, made on behalf of the plaintiff, to the hearing of it, namely, that the suit, being for maintenance, and valued at Rs. 480, was cognizable by a Court of Small Causes under Act XI of

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1865, and, therefore, no special appeal lay. The question, then, for our determination is, whether this suit for maintenance was cognizable by a Court of Small Causes under that Act?

The sixth section of Act XI. of 1865 enacts that "the following are the suits which shall be cognizable by Courts of Small Causes, namely, claims for money due on bond or other contract, or for rent, or for personal property, or for the value of such property, or for damages, when the debt, damage, or demand does not exceed in amount or value the sum of Rs. 500, whether on balance of account or otherwise." Then follows a proviso, not material to the present question. It is not pretended that there is in this case any bond[1] in respect of which the maintenance is claimed; and, in the argument in support of the jurisdiction, it was admitted that the words "or other contract" formed the only basis upon which it could be contended that the Small Cause Courts might entertain a suit for maintenance brought by a widow or other person where the maintenance was not secured by bond.

It was on both sides assumed in the argument that, at the time of the marriage, the plaintiff and defendant were in a state of infancy, as is usual amongst Hindus when marrying. It cannot be said that they were contracting parties. Hindu *patres familiarum* are on these occasions the contracting parties. They have the right to dispose of their children (while minors) in marriage, and to do so without consulting them. And it would be difficult to affirm that there is any subsequent ratification of the contract by the children, inasmuch as they have no power, on attaining majority, to ignore the marriage when complete, or subsequently to rescind or dissolve it, except under such special circumstances or usages as admit of divorce. If there be a suit for breach of the contract to marry, *i. e.*, of the betrothal, the person held liable to pay damages has, in the cases reported in Borradaile's Reports[2] and in *Umed Kiká* v. *Nagindás Narotamdás*,[3] been the father or

(1) See the case of *Soobama kom Rámráv* v. *Nánáráv bin Krishnáráv*, 2 Morris S. D. Rep. 170.

(2) *Atmárám Kesoor* v. *Sheokál Mulookchand*, 1 Borr. 397, (2nd edn.); *Khooshál* v. *Bhugwan Motee*, 1 *Ibid.* 155; *Kasirám* v. *Bhugwan*, 2 *Ibid.* 528; *Deochand* v. *Javehar*, *Ibid.* 576; *Mt. Raliyat* v. *Madhowji Pánáchand*, *Ibid.* 739.

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other adult relative who made the promise that the marriage should take place, and not the intended husband or wife.

Minors, idiots, and lunatics are by Hindu law unable to contract (1 Stra. H. L. 271); yet not only are the marriages of infants upheld, but it has been distinctly laid down that the marriage of a Hindu lunatic is valid (*Dabychurn* v. *Rádáchurn*;[1] 1 West and Bühler, p. 288, Q. 6).

But, further, we should take too narrow a view of the nature of maintenance, if we were to limit it to the case of husband and wife. In numerous instances maintenance is recoverable, in which there is not the most remote connexion with contract: *e. g.*, where a Hindu, personally disqualified from inheritance by congenital blindness, or deafness, or dumbness, or insanity, or idiotcy, or sanious leprosy, or illegitimacy, is entitled to be maintained out of the family estate by the next heir who takes it. So, too, a continuous concubine of the deceased proprietor is entitled to maintenance.[2] It cannot be said that her title to it rests upon contract. The proper view seems to us to be to regard maintenance, in its general aspect, as a liability created by the Hindu law in respect of the jural relations of the Hindu family, and this would be so even in the case of the continuous concubine just mentioned. For she is the *dási* or *sudri* or *serva* of the *pater familias*. The liability of the husband to maintain his wife, is an obligation, arising out of the *status* of marriage amongst Hindus, expressly imposed by their law.[3] And, generally, in such other instances in which maintenance is prescribed by the same law, we hold that the right depends on the *status* to which the law appends it. Even in England and other Christian countries, marriage creates a special *status* from which, and not, except mediately, from the volition of the parties, spring the rights and duties of married people as such. In *Mordaunt* v. *Mordaunt*[4] Lord Penzance says: "But, is it true

(1) 2 Morley's Dig. 99.

(2) See *Khemkor* v. *Umiáshankar*, 10 Bom. H. C. Rep. 381; *Vrándavandás* v. *Yamunábái*, 12 *Ibid.* 229.

(3) See as to obligations arising out of the *status* of marriage and other family relations, Savigny, *Traité de droit Romain*, vol. I., liv. II, ch. I, pp. 335, 336—Fr. trans. by M. Guenoux, Paris edn., 1840; 2 Austin Jur. pp. 422, 424, edn. of 1863.

(4) L. R. 2 Pro. and Div. 103 at p. 126.

that marriage is an ordinary contract ? Surely, it is something more. I may be excused if I dwell somewhat on this matter, because I conceive it lies at the very root of the question in discussion. Marriage is an institution. It confers a *status* on the parties to it, and upon the children that issue from it. Though entered into by individuals, it has a public character. It is the basis upon which the framework of civilized society is built, and, as such, is subject in all countries to general laws which dictate and control its obligations and incidents, independently of the volition of those who enter upon it." We have not overlooked *Govindá* v. *Bápoo*,(1) a case not turning upon the married *status*. The foregoing considerations show that the reasoning, which prevailed there, does not apply here.

There are conflicting decisions as to the jurisdiction of Courts of Small Causes in the Mofussal.

In *Rámchandra Dixit* v. *Savitribái*,(2) Couch, C.J., and Newton, J., held that no special appeal lay in a suit by a widow against her step-son for arrears of maintenance under Rs. 500, because they were of opinion that such a suit was cognizable by a Court of Small Causes ; but they gave neither reason nor authority for that opinion. They followed that decision in *Judal* v. *Hirá* (3) (*Ibid.* p. 75), but gave no reasons. Those cases seem to have been doubted by Sargent, C.J., (Acting) and Melvill, J., in *Rámabáiv. Trimbak*.(4) In *Bhagvan Chunder Bose and others* v. *Bindoo Bashinee Dossee* (5) Shumbhunáth Pandit and Bayley, JJ., ruled that a Small Cause Court has jurisdiction only as regards arrears of fixed maintenance, but not to determine the right to maintenance, if in dispute. They did not refer to, and do not appear to have been acquainted with the earlier decision which we next proceed to mention.

In *Nobin Kálee Debeá* v. *Bindoobáshinee Debeá*,(6) decided in 1866, Peacock, C.J., and L. Jackson, J., held that a suit for maintenance is not cognizable by a Small Cause Court, as maintenance "is not a claim for money due upon contract, and does not fall within the definition of any of the claims made cognizable by Act

(1) 5 Mad. H. C. Rep. 200. (2) 4 Bom. H. C. Rep. 73, A.C.J.
(3) *Ibid.* 75. (4) 9 Bom. H. C. Rep. 283. (5) 6 Calc. W. R. 286 Civ. Rul.
(6) 5 Calc. W. R. (Sm. C. C. Ref.) p. 5.

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XI. of 1865, section 6." They added:—"If a case of the sort is not cognizable, it makes no difference that a particular case does not involve intricate questions of law or fact." In that case it appeared that the plaintiff had previously obtained a decree of a civil Court fixing her maintenance at Rs. 7 *per mensem*, and subsequently another decree for arrears of that maintenance, and brought the suit (the subject of the reference to the High Court) in a Small Cause Court for further and other arrears.

In a later case (*Káminee Dossee, widow of Chunder Mohun Sháhá* v. *Bishonáth Sháhá*[1]) Peacock, C.J., and Bayley, J., held that a suit by a widow for arrears of maintenance fixed by Munsiff's decree (in which suit the defendant disputed his liability, on the ground that the property of the plaintiff's husband, which had come to his hands, was exhausted, and stated that the defendant had brought a suit to be relieved from his liability under the Munsiff's decree,) was not cognizable by a Small Cause Court in the Mofussal.

With reference to the two last-mentioned cases, it may be well to draw attention to the remark in the recent case of *Lakshman Rámchandra* v. *Satyábhámábái*[2] censuring the unnecessary multiplication of suits for the maintenance of one and the same widow. If the first suit were properly framed, and a continuing decree for the payment of her maintenance at a fixed monthly, annual, or quarterly rate were made, any further decree would be unnecessary, unless either party, by suit or otherwise, brought to the notice of the Court that circumstances rendered it equitable that the rate should be enhanced or reduced. Many circumstances might be suggested which would do so: *e. g.* a marked increase or diminution in the value of the estate or of its annual yield, the destruction of a portion of the estate (out of which the maintenance is payable), or an addition to it, by, say, the shifting of the course of a river, or other cause—(see *Shrirám Buttacharji and another* v. *Puddomookhee Debiá*.[3]).

The very possible necessity of varying the maintenance from time to time and of enquiring into the circumstances of the claimant, or of the family estate, or the family itself, show how unsuit-

(1) 9 Calc. W. R. 214 Civ. Rul.

(2) *Supra*, p. 494.

(3) 9 Calc. W. R. 152 Civ. Rul.

able maintenance suits are for the Small Cause Courts.[1] We say the family itself: because additional burdens may, from time to time, be cast upon the family estate. Other widows, besides the previous claimant, may be thrown upon it for support by the death of their husbands, or the number of sons and daughters of the male co-parceners may have increased. With respect to suits brought upon continuing decrees in the ordinary civil Courts for present and prospective maintenance, merely for the purpose of enforcing payment of that maintenance, we must say that they not only are unnecessary but unsustainable. If, indeed, they were brought to evade the operation of the law of limitation, they ought, upon that ground alone, to be discountenanced (see on these points *Manchárám* v. *Bakshi Sâheb*,[2] *Sandes* v. *Jomir Sheikh*[3]). The excuse does not in such cases exist that has been relied upon in actions in the High Court upon a decree of a Presidency town Small Cause Court, that execution can, by such action, be obtained against a species of property which the latter Court cannot take in execution.

The last case which we shall mention (*Ningangavdá* v. *Baslingavdá*,[4]) is unreported. It was a suit by a daughter-in-law against her father-in-law for maintenance. She had obtained decrees in the Courts below, and he (who contested her right) having made a special appeal to the High Court, it was objected on her behalf that the suit was cognizable in a Court of Small Causes, and, therefore, a special appeal would not lie; a Court, however, consisting of Westropp, C.J., and Kemball and Nánábhái, JJ., held that such a suit was not within the jurisdiction of a Small Cause Court, and overruled the objection; but on the merits affirmed the decrees of the Courts below.

We are prepared fully to adopt the decision of Peacock, C.J., and L. Jackson, J., in the case of *Nobin Kálee Debeá* v. *Bindoobáshinee* above cited from 5 Calc. W. R., Sm. C. Ct. Ref., p. 5.

(1) That under such circumstances the Court will not struggle with the language of the Statute in order to amplify the jurisdiction of Small Cause Courts, see per Peacock, C.J., in *Rámbux* v. *Mudhusoodhun*, Beng. L. R. (F. B. Vol.), 675 at page 681.

(2) 6 Bom. H. C. Rep. 231. (3) 9 Calc. W. R. 399 Civ. Rul.

(4) Sp. Ap. 101 of 1870, decided on the 20th July 1870.

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We think that (in the absence of any special bond or other contract for the payment of maintenance), the question referred to us, viz., 'whether a suit for maintenance is cognizable in a Court of Small Causes in the Mofussal,' must be answered in the negative.

[APPELLATE CIVIL.]

(FULL BENCH.)

Before Sir M. R. Westropp, Knt., Chief Justice, Mr. Justice Kemball, and Mr. Justice West.

May 1.

APA'JI CHINTA'MAN DEVDHAR (ORIGINAL DEFENDANT), APPELLANT, *v.* GANGA'BA'I KOM DA'JI CHINTA'MAN (ORIGINAL PLAINTIFF), RESPONDENT.*

Jurisdiction—Small Cause Court—Act XI. of 1865—*Suit for maintenance—Brother's widow.*

In a suit by a Hindu widow against her husband's brother for an allowance as maintenance and for the expenses of a pilgrimage,

Held (following *Sidlingápá* v. *Sidává kom Sidlingápá*(1)) that the suit, although for a sum under Rs. 500, was not cognizable by a Court of Small Causes under Act XI. of 1865, there being no allegation that the maintenance claimed was secured by bond or other special contract.

Held also (following the case of *Savitribái* v. *Luximibai*(2)) that the defendant was not liable, inasmuch as he was not in possession of any ancestral property, and had not received any property from the plaintiff's husband.

THIS case was referred to a Full Bench by Kemball and Náná-bhái Haridás, JJ. The facts are sufficiently stated in the following judgments:—

WESTROPP, C.J.—This is a suit by a Hindu widow against the brother of her late husband for a pecuniary allowance as maintenance and the expenses of a pilgrimage to Benares. The defendant denied that he had any ancestral property, or that his deceased brother, the husband of the plaintiff, left any property. He further said that the plaintiff had, from the time of her husband's death, sixteen or seventeen years ago, resided with her mother, who allowed her 2 *bighas* of land, and that he (the defendant) was willing to allow her to live in his house, and that he gives her two '*lugdas*' per annum. He denied any responsibility in respect of her pilgrimage. The Subordinate Judge of Kalyán

(1) *Supra*, p. 624. (2) *Supra*, p. 573.