APPELLATE CIVIL.

(14)

1878
September 9.

Before Mr. Justice West and Mr. Justice Pinhey.

RANGO VINAYAK DEV AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* YAMUNABAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu Law—Maintenance—Separate Residence.

The widow of a co-parcener in a Hindu family is not entitled to separate maintenance in the absence of special circumstances necessitating her withdrawal from the family and separate residence.

Authorities on the subject reviewed.

The widow of a co-parcener is not, in Bombay, entitled, as in Bengal, to her husband's share to use at her discretion for life. All she can strictly demand is a suitable maintenance when necessary, and whatever is required to take such a demand effectual.

THIS was a second appeal from the decision of S. H. Phillpotts, Judge of Puna, amending the decree of the Subordinate Judge, First Class, Puna.

The plaintiff Yamunabai sued the defendants, her deceased husband's brother and cousins, for arrears of separate maintenance. The Subordinate Judge awarded Rs. 648, and the Judge Rs. 456 to the plaintiff.

Ghanasham Nilkanth Nadkarni for the appellants.

Shamrav Vithal Vaidya for the respondent.

The material facts, as well as the arguments and authorities cited, fully appear from the judgment of the Court delivered by

WEST, J.—Yamunabai's husband having died in 1867, she immediately went to reside with her parents. It does not appear that any demand of maintenance was made by her on her husband's family until 1876, when she sued for nine years' arrears of money, alleged to have accrued due each year, for her maintenance. The defendants contend that, under these circumstances, they are not liable. They are the brother and the second cousins of her deceased husband, who, during his life, formed wtih them a joint family, and they urge that Yamunabai having voluntarily withdrawn from association with them, in order to

*Second Appeal, No. 215 of 1878.

reside with her own family of birth, not having been harshly used, and not having been forced to incur any debts, has no claim upon them for a money allowance at all, much less for several years' arrears demanded without previous notice in a lump sum.

In the case of *Udaram Sitaram* v. *Sonkabai* (1) it is said that the ordinary duty of a Hindu widow is to reside with her husband's family, who, in return, are charged with the duty of maintaining and protecting her.(2) This latter duty is set forth very explicitly by Narada, as translated in West and Bühler, pp. 555-6 (2nd ed.), and the correlative duty of the widow to reside with the family of her husband, and thus receive at their hands the food and clothing to which she is entitled, has been consistently maintained by the native authorities at this side of India. Opinions to this effect are to be found in the cases of *Kumla Buhoo* v. *Munishunkar Icchashunkar*(3) and in West and Bühler, pp. 81 and 90 (2nd ed.). In the other Presidencies this view has been departed from by the Courts in many cases, which, however, are met by an almost equal number of an opposite tendency, such as the one in *Wooma Churun Chowdry* v. *Nitumbinee Debia.*(4) In the case of *Khettur Monee Dossee* v. *Kashinath Dass*,(5) in which many of the previous decisions were reviewed, the decision of a Full Bench of the High Court of Calcutta was that a daughter-in-law, who, on her husband's death, chooses to withdraw from her father-in-law's to her own father's house, cannot claim from the father-in-law any money payment on account of her maintenance. In that case the son's right to a share in the family estate had not arisen, according to the Bengal law, through his not having survived his father. Where, on the other hand, the deceased husband was entitled to property, or a share of property, the decisions, as in *Raja Pirthee Singh* v. *Rani Raj Kooer*,(6) have favoured the widow's right to a separate maintenance, and reduced the duty of residence with her husband's family to one of merely moral obligation (see *Gangabai* v. *Sitaram*).(7) Where the right to maintenance subsists in

(1) 10 Bom. H. C. Rep. 483.
(2) Vyav. May., c. IV, s. viii, p. 17.
(3) 2 Borr, 746.
(4) 10 Calc. W. R., 359, Civ. Rul.
(5) 10 Calc. W. R., 89, Full Bench Rulings.
(6) 12 Beng. L. R., 238.
(7) I. L. R., 1 All., 170

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Bengal or in the North-West Provinces, it would seem that it may be enforced by compelling the husband's family to supply funds for a separate subsistence.

The same view appears in one or two cases to have been taken by the late Sadr Court and by the High Court of Bombay. In *Kishandás* v. *Bai Krishna*, decided on 24th January 1873,(1) a widow sued her brother-in-law for a separate maintenance, which was granted, against the opinion of the shástri, who said she ought to reside with her husband's family, on the authority of *Fakirbhai* v. *Bai Dhankor*, decided on the 26th March 1858.(2) This was a case in which a step-mother sued her step-son for separate maintenance and for money to purchase a separate house. The Senior Assistant Judge's decree in favour of the claim, on the ground that the parties were not likely to agree as co-residents, was upheld, except in so far as it awarded two years' arrears. This part of the claim was rejected by the Sadr Court on the strength of the shastris, opinions in two other cases. A similar decision against the grant of maintenance in arrears, is to be found in the case of *Saraswatibai* v. *Keshavbhat.*(3)

A somewhat similar case was that of *Bhana Jivan* v. *Bai Kuwar*, decided 28th February 1859,(4) in which a widow sued her brother-in-law for separate maintenance and arrears for three years. The defence was that she lived with her father, and could support herself. The Sadr Court, allowing separate maintenance, disallowed the claim for arrears, except for one year. There was in this case, however, no allegation, so far as appears, on the part of the defendants that they were ready and willing to support the plaintiff as a member of their family. A similar remark applies to the ill-reported case of *Chandrabhagabâi* v. *Kashinath Vithal.*(5)

In *Rama Kishan Bapuji* v. *Bai Maka Lukshmi*(6) the suit was brought by a step-mother against her step-son for a separate maintenance for one year in arrears, and for the purchase-money of a separate residence. The defence was that the plaintiff being

(1) Sp. Ap. 5 of 1862, unreported.
(2) Sp. Ap. 3896, unreported.
(3) 2 Morris, 247.
(4) Sp. Ap. 4038.
(5) 2 Bom. H. C. Rep. 323.
(6) Sp. Ap. 313 of 1863.

entitled only to food and raiment, and there being no unwillingness on the defendant's part to maintain and protect her, a separate maintenance could not be claimed. The District Judge held, however, that reference being made to *Fakirbhai* v. *Bai Dhankor* and *Bhana Jivan* v. *Bai Kuvar*,(1) the tender of accommodation by the step-son was no bar to a suit for separate maintenance; and his decree in favour of the plaintiff was affirmed in appeal by this Court (Forbes and Tucker, JJ.,) on the authority, as it would seem, of the Bengal case of *Cossinaut Bysack* v. *Hurroosoondry Dossee*,(2) relating not to maintenance but to succession.

In the case of *Timappa Bhat* v. *Parmeshriamma*(3) separate maintenance was awarded by the District Judge to a sister-in-law and daughter-in-law of the defendant for reasons drawn from the Madras cases, which are not set forth in the report. In this Court the judgment was affirmed, Gibbs, J., referring to the judgment in the case of *Mula* v. *Girdharlal*(4) as authority for the proposition that the Court might, at its discretion, award to a widow a separate maintenance as against the members of her husband's family responsible for her support. In *Nidgangavda bin Ramgavda* v. *Baslingavda*(5) (Warden and Gibbs, JJ.) this discretion was exercised by awarding separate maintenance and two years' arrears to a widow who had withdrawn from her husband's family to reside with her father without any reason except her own pleasure.

These cases make it plain that a separate maintenance may be awarded to the widow of a Hindu deceased as against the members of his family. Two of them seem to support the proposition that a separate maintenance may be claimed, although the husband's family may be willing to support the widow as a member of the household, and although there may be no particular reasons for her withdrawing from it. The others would leave a discretion to the Courts, which should be exercised so as not to throw on the deceased husband's family a needless or oppressive burden at

(1) Sp. Ap. 3896 & 4038.
[2] 2 Morl. Dig. 198.
[3] 5 Bom. H. C. Rep. 130.
(4) Sp. Ap. No. 3937 decided on 6th July 1858.
[5] Sp. Ap. 101 of 1876.

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the caprice of the widow or her family. None of them goes so far as to deprive the Court of a discretion as to awarding or refusing arrears, while several of them support the exercise of such a discretion. In the case of *Jadu Mani Dasi* v. *Khetia Mohan Shil*(1) Sir. L. Peel says: "We shall award Rs. 10 a month, and the back maintenance must date only from the date of the demand. We might in a proper case say there shall be no back maintenance, and future maintenance shall be enjoined only on the condition of residence with the late husband's family." The true principle of the Hindu law bearing on this matter we believe to be that stated by Colebrooke :(2) "She does not lose her right of maintenance by visiting her own relations ; but a widow is not entirely her own mistress, being subject to the control of her husband's family, who might require her to return to live in her husband's house." The *dictum* of the Privy Council in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*(3) is in the same spirit. The Viv. Chint., pp. 261, 265, provides for the sustenance of a widow in every case, but for a separate maintenance only when proper support is withheld. It is, we think, probable that a close examination of the replies of the pundits in the earlier cases would show that they did not intend, in denying that withdrawal from the husband's family involved forfeiture of proprietorship, to widen a dependent widows liberty beyond the range defined by the Madras and Bombay shastris, or to impose a heavier burden on her husband's family. In a case like the present, where the widow has taken up her residence permanently with her own family, and never even asked for anything on account of maintenance for many years, so as to create an impression that she had abandoned any claim that she might have, where her own family seem to be in comfortable circumstances, and the defendants people of rather straitened means, we think that it will be a right exercise of our discretion to reject the claim to a money annuity. The widow of a co-parcener is not, in Bombay, entitled to her husband's share, as in Bengal, to use at her discretion during her life. All she can strictly demand, is a suitable subsistence when neces-

[1] Vyav. Darp., 384. [2] 2 Str. H. L. 401.

[3] I. L. R. 1 Mad. 69. see page 81.

sary, and whatever is required to make such a demand effectual. There seems to be no necessity in the present case, and the defendants are petty traders on whom the burden of a fixed payment might bear oppressively. If the plaintiff chooses to take up her residence with her husband's family, they must support her in such comfort as their means allow; but in the absence of any special circumstances necessitating her withdrawal and separate residence, we do not think she can claim cash payments from them, to enable her to add to her luxuries while living apart.

We must, therefore, reverse the decrees of the lower Courts, but under the circumstances the parties severally are to bear their own costs throughout.

Order accordingly.

APPELLATE CIVIL.

(15)

Before Mr. Justice West and Mr. Justice Pinhey.

BHAGVANDAS KISHORDAS (ORIGINAL PLAINTIFF), APPELLANT, *v.* ABDUL HUSEIN MAHOMED ALI (ORIGINAL) DEFENDANT), RESPONDENT.* *September* 10.

Assignment—General Power of Attorney—Surety—Principal—Payment—Attachment.

An instrument authorizing a person to receive on behalf of another such sums as should become due in the course of the execution of a certain work, is not an assignment of money but a power of attorney, and is covered by a stamp of Rs. 8, whatever may be the amount recoverable under it. [General Stamp Act XVIII of 1869, sch. II, art. 32.]

The plaintiff was nominally surety, though really the principal, in the case of two contracts entered into by one Rehmu with the Executive Engineer, Ahmednagar. On completion of the works, the Executive Engineer handed over to the plaintiff a cheque on the Government treasury for the amount due on the first contract. Before the cheque was presented by the plaintiff for payment, the defendant, who was the judgment-creditor of Rehmu, served the Executive Engineer with a notice attaching any monies in his hands due by him to Rehmu. The Executive Engineer thereupon stopped payment of the cheque, the amount of which was eventually paid to the defendant;

Held that, at the date of the attachment, the cheque had become the property of the plaintiff, and that the defendant should refund the amount received by him.

The second contract was sold to the plaintiff by Rehmu, and the account in the Executive Engineer's Office, relating to it, was closed, showing a sum of money to Rehmu's credit at the date of the defendant's attachment;

* Second Appeal, No. 247 of 1878.