

APPELLATE CIVIL.

(73)

*Before Sir M. R. Westropp, Kt. Chief Justice, and Mr. Justice
F. D. McNeill.*

1879
June 11.

KASTURBAI (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHIVAJIRAM
DEVKURAN AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Hindu law—Widow—Maintenance—Right of a widow to maintenance although
living apart from her husband's family.*

A Hindu widow does not forfeit her right to maintenance out of family property chargeable therewith by reason of non-residence with the family of her husband, except such non-residence be for unchaste or immoral purposes.

Where there is family property available for maintenances, it lies upon the parties resting the claim to separate maintenance to show that the circumstances are such as to disentitle the widow thereto: *e. g.*, that she resides separately from her husband's family for immoral purposes, or that the family property is so small as not reasonable to admit of an allotment, to her, of a separate maintenance.

Rango Vinayak v. Yamunabai (1) dissented from.

This was a second appeal from the decision of E. Cordeaux Acting Judge of the district of Khandesh, in appeal No. 81 of 1877, reversing the decree of Daji Govind, First Class Subordinate Judge at Dhulia, in original suit No. 57 of 1877.

Kasturbai instituted this suit, on the 6th March 1877, against Shivajiram and Ramdyal, her deceased husband's father and brother, in the Subordinate Judge's Court at Dhulia, and prayed for a declaration that she was entitled to a fixed separate allowance of Rs. 5 a month as maintenance for the remainder of her life; she also claimed arrears of maintenance, at the above rate, from 15th March 1876 to 18th February 1877. The plaintiff alleged that, after the death of her husband ten years previously, she lived with the defendants; that, having quarrelled with their wives, she was turned out, and had since lived in separate lodgings. She had received from the defendants Rs. 10 for two months at the rate of Rs. 5 per mensem, after which the allowance was stopped. Her total claim was for Rs. 657-8-0.

The defendants answered that they neither turned out nor ill-treated the plaintiff; that she left their house of her own accord,

*Second Appeal, No. 351 of 1878.

and was, therefore, not entitled to any separate maintenance ; that they were willing to maintain her if she lived with them, but that they could not afford to give her separate maintenance ; that neither she nor her deceased husband was entitled to any ancestral property.

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The first Court decreed that the defendants should pay the plaintiff Rs. 57 on account of eleven months' arrears of maintenance, and that defendant No. 1 should support her for the rest of her life-time ; that she should live with defendant No. 1, but separately, for the rest of her life ; and that both defendants should pay her Rs. 5 a month in default of supporting her as ordered.

In appeal the District Court raised only one issue, viz., whether or not the plaintiff was entitled to separate maintenance, and found it in the negative.

Both the lower Courts found that the defendants neither ill-treated nor turned the plaintiff out of their house, but that she left it of her own accord, and lived separately.

The plaintiff appealed to the High Court. The appeal was heard, in the first instance, by M. Melvill and Pinhey, JJ.

April 23 and 24.—*Shantarum Narayan* for the appellants.—With the exception of the case of *Rango Vinayak v. Yamunabai* (1) there is no authority for the proposition that a Hindu widow is not entitled to separate maintenance if she does not live with her husband's family. A Hindu widow's right to maintenance does not, in any way, depend upon her co-residence with her husband's family. Her right is absolute, whether she lives with them or apart from them, provided there is ancestral property in the possession of those from whom she claims such maintenance. She is under no binding obligation to live in her husband's family. She forfeits her right to separate maintenance only if she lives apart for unchaste or immoral purposes *Rajah Pirtkee Singh v. Rani Rajkooper*, (2) *Visalatchi v. Annasami*, (3) *Savitribai v. Laksh-mibai*. (4) The view expressed by Mr. Justice West in *Rango Vinayak v. Yamunabai* (5) is, I submit, inconsistent with that taken

(1) I. L. R. 3 Bom. 44.

(3) 5 Mad. H. C. Rep. 150.

(2) 12 Beng. L. I. 238 P. C.

(4) I. L. R. 2 Bom. 573 (F. B.)

(5) I. L. R. 3 Bom. 44.

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by him in a previous case, viz., *Lakshman Ramchandra Joshi v. Satyabhamabai*.(1) The case of *Rango Vinayak v. Yamunaabi* is distinguishable from the present. In that case the conduct of the widow had amounted to an abandonment of her claim. The learned pleader also referred to *Chandrabhagubai v. Kashinath Vithal*,(2) *Trimmabhat v. Parmeshriamma*,(3) *Ramabai v. Trimbak Ganesh Desai*,(4) *Udaram Sitaram v. Sonkbai*,(5) *Sidlingapa v. Sidava*,(6) *Apeji v. Gangabai*,(7) *Gangabai v. Sitaram*,(8) *Rampershad Thewari v. Sheochurn Doss*.(9)

Pandurang Balibhadra, for the respondents, relied on the decision in *Rango Vinayak v. Yamunaabi*.(10)

The learned pleader also referred to Mr. Justice Nanabai Haridas' judgment in *Udaram Sitaram v. Sonkbai*.(11)

The following are the judgments of the Court delivered on the 28th April 1879 :—

M. MELVILL, J.—The plaintiff in this case, a Hindu widow, claims maintenance from her father-in-law and brother-in-law from whom she is voluntarily living apart.

It is admitted by the defendants' pleaded that the plaintiff has no parents with whom she can live ; and it has not been suggested that she is living an unchaste life, or has left her father-in-law's house for any improper purpose.

The defendants rely on the decision of a Division Bench of this Court in *Rango Vinayak v. Yamunabai*.(12) That decision is to the effect that 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. If that decision can be supported in its entirety, the plaintiff in the present case cannot succeed ; for she has not provey any circumstances of a special or exceptional character necessitating her withdrawal from the house of her husband's family.

(1) I. L. R. 2 Bom. 494.

(2) Bom. H. C. Rep. 323, A.C.J.

(3) 5 Bom. H. C. Rep. 130, A.C.J.

(4) 9 Bom. H. C. 233.

(5) 10 Bom. H. R. Rep. 483.

(6) I. L. R. 2 Bom. 624

(7) I. L. R. 2 Bom. 632.

(8) I L. R. 1 All. 170.

(9) 10 Moo. I. A. 490.

(10) I. L. R. 3 Bom. 44.

(11) 10 Bom. H. R. Rep. 465.

(12) I. L. R. 3 Bom. 44.

But it appears to me that the decision in question is opposed to most of the authorities cited on it, as well as to the well-considered decision of the Madras High Court in *Tisalatchi v. Annasamy*. (1) It leaves out of sight the fact that the decision of the Calcutta Full-Bench case, *Khettur Monee Dossee v. Kashinath Doss*, (2) which it treat as establishing the general proposition that a daughter-in-law, who voluntarily withdraws from her father-in-law's house, cannot claim any money payment on account of her maintenance, was really decided on the same ground as our own Full-Bench case, *Savitribai Lakshmbai*, (3) viz., that the plaintiff's husband had left no property. The Privy Council case of *Raju Pirthee Singh v. Rani Rajkooer*, (4) cited by the learned Judges, clearly lays down the general proposition that a Hindu widow is not bound to reside in her deceased husband's family house ; and that she does not forfeit her right to maintenance out of her husband's estate by going to reside elsewhere, unless she leaves her husband's house for the purpose of unchastity, or for some other improper purpose. The learned Judges do not refer to our own Full-Bench decision in the case of *Savitribai v. Lakshmbai*, in which, however, it seems to have been considered as settled by authority that, so long as a widow remains chaste, she is entitled to maintenance, (where there is family property,) whether she continues to live in her husband's family or not. The observations of the Court on this point will be found at page 619 of the report of that case ; and, apart from these observations, it is clear that the Court must have held that voluntary separate residence does not disentitle a widow to maintenance ; for, otherwise, the case might have been decided at once on that ground without any consideration of the other complicated questions determined by the judgment. It seems to me, therefore, that we are bound by the authority, both of the Privy Council and our own Full Bench, to hold that the plaintiff in the present case is entitled to succeed, provided that she establishes that there is ancestral estate, or estate belonging to her husband, in the hands of the defendants, her father-in-law and brother-in-law, who were admittedly united with her husband at the time of his death.

(1) 5 Mad. H. C. Rep. 150.

(2) 10 Calc. W. Rep. 89 (F.B.)

(3) I. L. R. 2 Bom. 573.

(4) 12 Beng. L. R. 233.

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I do not say that in suits of this kind the Court has no discretion ; but I think that the discretion must be exercised, not in granting or refusing maintenance, but in determining the amount to be awarded. The family property may be so small that the family cannot bear the strain of supporting the widow in a separate lodging, though it might be able to provide her with food in the family house. In such cases the Court might well, in its discretion, refuse to allow to the widow, living apart, any larger sum than her maintenance would have cost if she had remained in the family house. But the widow's right to an adequated maintenance out of her husband's estate is, in theory perfect, and does not, I think, in any way depend upon proof of special circumstances necessitating a separate residence. All that can be said is, that the defendant may prove special circumstances which will induce the Court, in its discretion, to refuse to enforce the widow's right to its full legal extent.

In the present case the defendants allege that they have no ancestral estate, nor any property belonging to the plaintiff's husband. This is the real question in the suit, and it has not been decided. I would, therefore, reverse the decree of the District Court, and remand the case, in order that it may be determined, (after taking fresh evidence, if necessary,) whether there is any ancestral property, or any property belonging to the plaintiff's husband, in the hands of the defendants ; and, if so, what amount, having regard to the circumstances of the parties, should be award to the plaintiff for her maintenance.

PINHEY, J.—I am of opinion that the decree of the District Court of Khandesh in this case, rejecting the claim of the plaintiff, should be confirmed.

The suit was brought by the plaintiff, a Hindu widow, against the defendants, who are the father and the brother of her deceased husband, to establish her right to receive from them, for the rest of her life, and allowance in money in respect of her maintenance, and to recover a certain amount as arrears of maintenance.

The claim was resisted by the defendants on several grounds : but, in the view which I take of the case, it is necessary to notice

one only—that on which the judgment of the Court below proceeded—viz., that as the defendants are willing to maintain and desirous of maintaining the plaintiff in their own house as a member of their family, and as there is no reasonable excuse for plaintiff refusing to live with them, the plaintiff is not entitled to claim a separate money allowance by way of maintenance.

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The finding of the District Court conclusive as to the fact of there being no reasonable excuse for plaintiff's refusing to live with the defendants. Not only is there no proof that the defendants ill-treat or even annoy the plaintiff, but it is evident that they desire to give her a happy home. Of one source of discomfort only does plaintiff complain, viz., that she cannot get on with her sister-in-law, the wife of the second defendant. Under these circumstances the District Court found, and in my opinion rightly found, that plaintiff was not entitled to a separate maintenance.

Before us it has been argued that the District Court's decree is wrong according to Hindu law, because a Hindu widow, if entitled maintenance at all, as against her husband's family, is entitled to claim a separate maintenance whenever she pleases. In fact, in reply to a question put by me, Mr. Shantaram Narayan, for the plaintiff, formulated his proposition thus; "Just as a male member of a united Hindu family can claim his separate share of the family property, so any Hindu widow can claim eparate maintenance."

In my opinion, this proposition is unsupported by the rules of Hindu law, and is utterly opposed to the spirit of Hindu law. It is, moreover, wholly inconsistent with what I have learned of Hindu-family life in an experience of twenty-eight years.

In all oriental countries the independence of women is more restricted than in countries like our own, in which women are educated and trained to support themselves by honest industry. The reason, nay, the necessity, for this difference is obvious: for, of course, in considering the question before us, I leave out of consideration women in all countries who either are so low in the social scale as to have to support themselves by ordinary

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manual labour or have no virtue to protect. In no community in the world is a woman less independent than amongst the Hindus. A respectable Hindu woman is never independent, and the dependence of a Hindu widow is specially enjoined by the texts of Hindu law. According to Hindu law, a widow is to remain subject to her husband's family. If there be no elder in the family, she is to be subject to the behests of her own son. She is to wear but one garment. She is to eat but one meal daily. She is to pass the rest of her life in mourning. In this *kaliyug*—this iron age—and with unsympathetic judges it would be, doubtless, difficult to get all the duties of a Hindu widow, according to the precepts contained in the shastras, enforced. It can hardly be expected that the Civil Court will give an injunction against a Hindu widow in respect of her food and raiment; but still, in considering what are her rights as regards other members of her family, I conceive that a Court is bound to be guided by the principles of Hindu law, and not be influenced by considerations which are wholly inconsistent with that law. To affirm the proposition of Mr. Shantaram Narayan would be to declare that a Hindu widow is a perfectly independent person, and to declare that, in every Hindu family of moderate means, a widow, however young, (provided she were of full years,) and, however, incapable of taking care of herself, is entitled to throw off all the restraints which every society in some form or other imposes on its female members, to take house in the bazaar, and do exactly as she pleases at the expense of her husband's relations—subject to the one condition that she was not found out in unchastity and proved to be guilty of it in a court of law. Such a result would be not only contrary to the conservative instinct and paternal despotism of the Hindu system, but also objectionable according to the more civilized theories and advanced ideas of European civilization.

Doubtless, in the long series of years during which the rights for Hindu widows have been considered by English Courts, there have been conflicting decisions; and some decisions are reported which would very nearly, if quite, support the very advanced theory put forward for the plaintiff in this case. On the other hand, however, I am confident that the weight of the decision, as well as the precepts of Hindu law, tend the other way.

All the authorities on the point were fully considered in the last case of the kind in which I sat, that of *Rango Vinayak v. Yamunabai*.⁽¹⁾ In the case that very learned authority in Hindu law, Mr. Justice West, way my colleague, and I think now, as I thought when that case was decided, that, according to Hindu law, 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." This is the latest decision on the point at issue in this case, and I think the decision should govern the present case.

I fortify my opinion by the two other authorities—Mr. Justice Nanabhai Haridas and the learned Chief Justice of this Court. The personal opinion expressed by Nanabhai Haridas, J., in *Unuran Sitaram v. Sonkabai*⁽²⁾ is in these words: "There can be no question but that the widow of a son is a dependent member of her father-in-law's family. She is, therefore, entitled to claim maintenance from the head of that family, her family-in-law. It is true that the Hindu law supposes that as such dependent member she will live with and under the protection of her father-in-law, rendering to him, in return for such maintenance, obedience and domestic services which the same law enjoins upon her. But where he chooses of his own accord to dispense with that obedience and these services, and compels her by ill-treatment to live separate, she does not thereby become less entitled to claim her maintenance from him." And in *Savitribai v. Lakshmi Bai*⁽³⁾ Westropp, C.J., is reported as having said: "In the absence of allegation or proof to the contrary, we think that we should have felt our selves bound to assume the father and son to be undivided in estate, and on that assumption the widow of the latter would have been entitled, at the least, to have food, raiment and residence provided for her by her father-in-law out of the ancestral estate in his hands; and if he ill-treated her and expelled her from the family house, the Civil Court would, we think, have been warranted in awarding to her a residence and a separate maintenance out of the family estate in his hands."

(1) I. L. R. 3 Bom. 44.

(2) 10 Bom. H. C. Rep. 485.

(3) I. L. R. 2 Bom. at 590.

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For these reasons I am opinion that the decree of the District Court in this case should be confirmed.

The learned Judges of the Division Bench having differed in opinion, the appeal was referred, under section 575 of the Civil Procedure Code, for the decision of Westropp, C.J., and F. D. Melvill, J.

June 11.—*Shantaram Narayan* appeared for the appellant (plaintiff).

Pandurany Balibhadra appeared for the respondents (defendants).

WESTROPP, C.J.—In this case, in which Melvill, J., and Pinhey J., differed, and which stands referred to this Court, we concur in the judgment of Melvill, J.

That a Hindu widow does not forfeit her right to maintenance, (out of family property chargeable therewith) by reason of non-residence with the family of her husband, except such non-residence be for unchaste or immoral purposes, is a point, as we think, settled for Bengal by the cases of *Cassinath Bysack v. Hurry Soondry Dossee* (1) and *Seebosoonderee Dossee v. Kisto Kissne Neoghy*; (2) for Madras by *Visalachi Ammal v. Annasamg Sastry*; (3) for the N. W. Provinces by *Raja Pirthee Singh v. Rami Rajkoover*; (4) and for Bombay by H. M.'s Privy Council in its decision so recent as the 18th March last in *Narayanrao Ramchandra Pant v. Ramabai, widow of Ramchandra Pant*, (5) where their Lordships said: "The second point made was that the plaintiff has disentitled herself to maintenance by separating from the son and living apart from him. It is argued that it was made a condition of the will to entitle her to maintenance that she should reside under the same roof and in joint family with him. Their Lordships, however, think that no such condition is to be

(1) 2 Mor. Dig. (East's Notes) 198, mentioned by Percock, C.J., in 12 Bom. L. R. 241, 242.

(2) 2 Taylor & Bell 190.

(3) 5 Mad. H. C. Rep. 150.

(4) 12 Beng. L. R. 238, O. C.

(5) See *infra*. This case was in print before the report (for the Indian Law Reports) of the Privy Council's judgment in *Narayanrao Ramchandra Pant v. Ramabai* was received.

found in the will, and that she was to be left in this respect in the ordinary position of a Hindu widow, in which case separation from the ancestral house would not generally disentitle her to maintenance suitable to her rank and condition." The same point was, in fact, decided in the full-Bench case of *Ravitribai v. Lakshuibai*.(1) Had the Court there supposed that the burden lay upon the plaintiff Savitribai to make out a special case to justify her separate residence, it would have been unnecessary to enter upon and decide the other points there disposed of, inasmuch as she wholly failed to establish any such case. The passage quoted by Mr. Justice Pinhey from *Savitribai v. Lakshuibai* was merely a comment upon *Udaram Sitaram v. Sonkabai*(2) to show that, although the full Bench differed from certain *dicta* in that case, that Bench considered that the decree might be supported on other grounds; and at page 619 of *Savitribai v. Lakshuibai* the authority of the cases, in which it has been held that co-residence with the heirs is non-essential, is briefly recognized. *Savitribai v. Lakshuibai*, though decided in May 1878, did not appear in the Indian Law Reports until some months afterwards, and possibly for that reason was not referred to in *Rango Vinayak v. Yamunabai*,(3) which was decided in September in the same year. In that case we are unable to concur. We think it places the burden of proof on the wrong party, and that where there is family property available for maintenance, it lies upon the parties resisting the claim to separate maintenance to show that the circumstances are such as to disentitle the widow thereto: *ex. gr.* that she resides separately from her husband's family for unchaste or immoral purposes, or that the family property is so small as not reasonably to admit of an allotment to her of a separate maintenance.

It has not been alleged that the late husband of the plaintiff was separate in estate from the defendants, his father and brother, or that he held any estate separately from them, or that she lived apart from them for unchaste or immoral purposes. We reverse the decree of the Acting District Judge, and remand this cause for retrial on the question whether there is, in the hands of the

(1) I. L. R. 2 Bom. 573.

(2) 10 Bom. H. C. Rep. 483.

(3) Ind. L. R. 2 Bom. 634.

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defendants, any family property, and, if so, what amount (if any), having regard to the foregoing observations and to the circumstances of the parties, should be allotted to the plaintiff for her maintenance. Costs of this suit and both appeals should be in the discretion of the retrying Court. We should observe that the case of a wife is differed from that of a widow. The burden lie upon a wife to show such special circumstances as entitle her to a separate maintenance: *Sidlingapa v. Sidava*.(1)

Decrees reversed and case remanded.

(1) I. L. R. 2 Bom. 634.

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Before Mr. Justice M. Melvill and Mr. Justice F. D. Melvill.

June 17.

D. FERNANDEZ (OPPONENT, APPELLATE, v. R. ALVET (APPELLICANT),
RESPONDENT.*

The Indian Succession Act (X of 1865) Sec. 50—Will—Witness—Signature—Mark.

The direction contained in section 50, clause 3, of the Indian Succession Act (No. X of 1865) as to the signature of witnesses attesting an unprivileged will, is not satisfied by the witnesses affixing their marks. It is necessary for the validity of a will that the actual signature, as distinguished from a mere mark, of at least two witnesses should appear on the face of the will.

THIS was an appeal from the order of Rao Bahadur Gopalrao Hari Deshmukh, Joint Judge of Thana, whereby he directed that the will of Francis Fernandez, dated the 29th August 1875, and the will of Gatharina, his widow, dated 22nd January 1878, "should be acted upon".

The circumstances of the case are as follows:—

On the 3rd of January 1878, R. Alves applied for a probate of the will, dated 29th August 1875, of his deceased father-in-law, Francis Fernandez. This will was duly signed by the testator and by one of the attesting witnesses. The attestation of two other witnesses appears in the shape of a mark only.

On the 18th of January 1878, Daniel, the son of the deceased, applied for probate of his (the deceased's) will, dated 8th October 1875, the day of his death. The genuineness of this will was disputed by R. Alves, and the Joint Judge held that it was open to grave suspicion.

* Appeal No. 1 of 1879 under Act X of 1865.