1880
DECEMBER.

ORIGINAL CIVIL.

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[99] ORIGINAL CIVIL.

Before the Honourable Mr. Justice West.

NARBADABAI (*Plaintiff*) *v.* MAHADEO NARAYAN, KASHINATH NARAYAN AND SHAMABAI (*Defendants*).*

[December, 1880.]

Hindu Law—Maintenance—Widow's right to maintenance—Gift of his property by a husband in fraud of his widow's right to maintenance—Nature of wife's interest in her husband's property—Transfer by her of her interest—Release to her husband—Arrears and future maintenance a charge on property of deceased husband.

A Hindu husband cannot alienate, by a deed of gift to his undivided sons by his first and second wives, the whole of his immoveable property, though self-acquired, without making for his third wife, who is destitute and has not forfeited her right to maintenance, a suitable provision to take effect after his death. After the husband's death she is entitled to follow such property in the hands of her step-sons to recover her maintenance, her right to which is not affected by any agreement made by her with her husband in his life-time.

A Hindu wife has no property or co-ownership in her husband's estate in the ordinary sense, which involves independent and co-equal powers of disposition and exclusive enjoyment. Her right is merely an inchoate right to partition, which she cannot transfer or assign away by her own individual act; and unless such right has been defined by partition or otherwise, it cannot be released by her to her husband.

Arrears of maintenance as well as prospective allowance during the widow's life awarded in the same decree and held to be a charge on the property in the possession of the donees of her deceased husband.

[R., 34 M. 7 (9)=6 Ind. Cas. 439=20 M.L.J. 785=8 M.L.T. 103; 14 C.P.L.R. 114; 13 Ind. Cas. 136.]

SUIT for maintenance.—The plaintiff was a widow of one Narayan Ransord Mistri, who died on the 26th September 1879. The first two defendants were his ons by another wife, Shamabai, who was the third defendant in this suit. The plaintiff claimed arrears of past maintenance and a provision for her future maintenance, and prayed for a declaration that the immoveable property of her deceased husband, then in the hands of the first and second defendants, was charged with the payment thereof.

The immoveable property consisted of a house in Bombay which was self-acquired by the deceased. Shortly before his death he had quarrelled with the plaintiff, and the matters in dispute between them were referred to the arbitration of the caste. In pursuance of the award made by the caste, the deceased entered into an agreement with the plaintiff, dated the 3rd April 1879, whereby he allotted to the plaintiff (1) the free use of a room in [100] the said house for her residence, (2) the free use of the utensils and furniture therein, and (3) a separate allowance for maintenance at the rate of Rs. 7 a month. The counterpart of this agreement, produced by the plaintiff and marked No. 1, contained the following passage:—"I (Narayan) will continue to pay at the said rate, and my heir Kashinath Narayan (*i.e.*, defendant No. 2 on my behalf will continue to pay these rupees so long as *I am* alive." The plaintiff alleged that the words "*I am*" at the close of the sentence, had been inserted by the defendants after the execution of the agreement. No other evidence, however, on this point was adduced.

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The counterpart of the agreement, produced by the defendants and marked No. 2, was signed by the plaintiff, and in lieu of the above passage it contained the following clause :—" I (*i.e.*, the plaintiff) will behave and conduct myself according to the separate agreement which has been given to me * * * there remains no claim of mine to the house."

By an English deed of indenture, dated the 17th July 1879, the deceased conveyed the house in fee to the first and second defendants *as a gift*.

The first and second defendants contended (1) that the gift of the house to them was an absolute gift, and was not made subject to any charge on account of the plaintiff's maintenance; (2) that the plaintiff had received ornaments and other property of the deceased, and that she had, therefore, no right to maintenance. They also alleged that, subsequently to the death of the deceased, the plaintiff had brought an action against them on the agreement of the 3rd April 1879, and had been nonsuited.

The following issues were raised at the hearing :—

1. Was the suit barred as *res judicata* against all or any of the defendants ?

2. Is the alleged deed of gift made by Narayan Ransord Mistri, deceased, in favour of his sons, genuine and valid ?

3. Does the said deed of gift bar or affect the plaintiff's claim for maintenance as against the defendants, or any of them, and, if so, how and to what extent ?

[101] 4. Has the plaintiff taken possession of Narayan Ransord's property so as to deprive her of any right she may have to maintenance, and what is the value of such property ?

5. What relief, if any, is the plaintiff entitled to ?

Vicajee and *Dhairyavan*, for the plaintiff.—The main question is, whether a Hindu can alienate the whole of his self-acquired property by way of gift so as to defeat his wife's right to maintenance after his death ? There is no direct authority on the point on this side of India. In *Bai Lakshmi* v. *Lakhmidas Gopaldas* (1) the widow's right to maintenance is said to be absolute and indefeasible. This case was disapproved in *Savitribai* v. *Luximibai* (2), but not upon this point. In this case texts are cited as to the imperative obligation of maintaining *parents* as distinguished from other relatives, and the term mother includes step-mother(3). *Jamna* v. *Machul Sahu* (4) is the only case which bears directly on the point. The ruling of the Court there is based on the analogy suggested by Mr. Mayne(5) between a devise by will and a gift *inter vivos*, and also on the doctrine, not fully recognized in Bombay, of a widow being considered " in a subordinate sense a co-owner with her husband in his property." As to separate maintenance, see *Udaram Sitaram* v. *Sonkabai* (6) ; and as to arrears of maintenance being allowed in a decree for future maintenance, *Rajah Prithee Singh* v. *Ranu Bai Kower* (7).

The second defendant appeared in person.

The third defendant did not appear, and was dismissed from the suit on the application of the plaintiff's counsel.

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(1) 1 B.H.C.R. 13. (2) 2. B. 573; and see pp. 597 and 583.
(3) West and Buhler (2nd ed.), p. 90) Q. 5. 188 (*a*) 392 (*a*) Mayukh. ch. iv. s. 4, pl. 18, 19.
(4) 2 A. 315. (5) Mayne's Hindu Law (2nd ed.), s. 389.
(6) 10 B.H.C.R. 483. See also *Sidlingapa* v. *Sidova*, 2 B. 634.
(7) I. A. 1872-73. Sup. Vol. 203.

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JUDGMENT.

16th December. WEST, J. On the issue of *res judicata* the defendant, Kashinath, conducting the case for himself and his co-defendants, has failed to produce anything more than a summons from the Court of Small Causes. How the suit was disposed [102] of, and on what grounds, I have no means of forming an opinion. I must, therefore, find the first issue for the plaintiff.

The genuineness and validity of the deed of gift by the deceased Narayan in favour of his sons, the defendants Mahadeo and Kashinath, has been admitted in the course of the hearing, and on the second issue I find accordingly.

The third and principal issue is, as to the effect of his deed of gift on the plaintiff Narbadabai's claim to maintenance as against the male defendants, and the property held by them. At the request of the plaintiff's counsel, her co-widow, Shamabai, has been dismissed from the suit.

Narbadabai was the third wife of Narayan. They seem, after some time, to have agreed very ill, and eventually the documents Nos. 1 and 2 were executed between them. By the one, Narayan engages to provide Narbadabai with an apartment and Rs. 7 a month during his life; by the other she renounces all claim upon his property. In Narayan's agreement, the Marathi word "*mi*" seems to have been interpolated, and the effect of this is to make the document an engagement during Narayan's life, which would otherwise be more properly construed as one for his wife Narbadabai's life. How the word was introduced does not, however, appear, and it was for the plaintiff, who held the document, to account for it. The grantor makes his heirs and representatives liable, as well as himself, for the fulfilment of his engagement, and this is hardly consistent with its having been originally intended to limit the operation of the deed to his life; but, still, the effect of the words "so long as I live" cannot be got rid of by the addition that the maintenance must be provided by the donor's heirs and representatives as well as by himself. As it stands, it makes no provision for Narbadabai should she become, as now she has become, a widow through the death of Narayan.

If a wife's right to maintenance rests on a joint ownership in her husband's property (1), and she is capable of dealing with her joint interest as if it were a separate estate, the release or counter contract entered into by Narbadabai, it might be contended, was [103] effectual to deprive her of all claims against Narayan's estate, and he might then deal with it free from any rights originally vested in Narbadabai by her marriage. His subsequent gift of the property to his sons would be unincumbered by Narbadabai's claim to maintenance or a share, which otherwise would have accompanied it into the hands of Mahadeo and Kashinath. But the co-ownership of the wife in her husband's property, if that can properly be called ownership at all, which involves no independent or co-equal powers of disposition or exclusive enjoyment (2), is not of a kind that accepts the rules applicable to an ownership in the ordinary sense. Her right to maintenance does not depend on it, for the husband is bound to support her, though he should have no property at all. It is rather a latent right coming into operation only when natural affection, which

(1) Smriti Chandrika, ch. ix, s. ii, par. 14; ch. ix, s. i, par. 4, 19; Cole. Dig. Bk. V. t. 87, 88, Comm.

(2) Viramitrodaya, p. 165.

usually prompts the mutual acts of members of families, fails of its proper effect, and law has to step in with its rigid rules and imperfect remedies (1). Unless she be deserted, or the family be divided, the wife is strictly dependent as to her so-called property (2). In these events a right to a share of the estate springs up, but till then she has only a right which is completely subordinate (3). It is not one that she can transfer by her individual act, as this is opposed to the theory even of joint ownership (4), and no substitution is possible of another for herself in the supposed co-ownership with her husband in the common estate. No other could take her place in the joint celebration of the family sacrifices, which the family estate or some interest in it must accompany and support (5). Her right to maintenance is connected with the right called co-ownership with her husband, and rests on the same conception of a moral identity arising from the marriage relations (6), but the two are rather co-ordinate rights than one the basis of the other(7). The husband's duty of maintaining [104] his wife is one which he cannot owe to another. Her right as aginst him is one that she cannot transfer to another. Even a widow's right to maintenance against the heirs taking her husband's property cannot be assigned (8). Ordinarily, therefore, a Hindu wife has no property in her husband's estate that she can part with as a consideration for a contract to her, and a right in her maintenance by way of contract cannot rest on such a consideration.

In the present case the release was to her husband, and a release may stand on a different footing from an alienation according to the analogy of the English law of dower (9); but even if she could act independently as to her property in general, which she cannot, except as to her *saudayakam*, a wife's contract with her husband is not to be admitted except under special safeguards. According to the Mayukha (10) indeed, as commonly translated, a document executed by any woman is invalid, but perhaps '*strimatta*" may there be rendered "under female" or "aphrodi siac influence." Narada,however, says(11) that an instrument executed by a woman ranks only with one executed by a child, thus drawing a logical deduction from her recognized state of perpetual pupillage(12). This same condition of entire subordination, however, prevents her having anything in her husband's estate. which she can effectually convey or release to him. She has but an inchoate right to a share on partition, should there be a partition; to maintenance, should right in the legal sense have to be asserted against a refusal of sustenance (13). In either case it is not one that can be dealt with in the way of sale or abandonment while it is still unrealized and undefined. A wife's release of al rights to her husband's property when her husband is still alive and undivided from his sons, releases nothing, because it can apply to no

(1) Vyav. May. IV, X.
(2) Cole. Dig., Bk. IV, t. 72, Manu. IX. sec. viii, 416, Steele on Castes, p. 177, Narada, pl. i, ch. iii, para. 27; Viramitrodaya, p. 165.
(3) Colt. Dig., Bk. V, t. 414-15; Comm.
(4) See 11 M.I. A. 515; West and Buhler 289.
(5) Smriti Chandrika, ch. xi, s. i, para. 17; Cole. Dig., Bk. VI, t. 414; West and Buhler, 289.
(6) See West and Buhler (2nd ed.), p. 118 ss. (7) Cole. Dig., Bk. IV, t. 114.
(8) West and Buhler (2nd ed.) 449: *Bhyrub Chunder* v. *Nubo Chunder*, 5. W. R., 111.
(9) See *Colston* and *Cane*, 1 Rolle's Abr. 30. (10) Ch. i, s. i, pl. 10.
(11 Ch. iv, s. 61 (Jolly's translation).
(12) *Per* Grant J. Fulton's Reports 200; Cole. Dig. Bk. I, t. 8.
(13) See Ellis quoted 2 Strange's H. L. 307; and 2 B. at p. 511.

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definable interest. The engagement to give and to accept a monthly payment for maintenance, defines the right which subsists without any consideration beyond that of the matrimonial [105] relation, and, if entered into fairly, may be effectual without any other consideration to support it.

If, then, the supposed co-ownership of Narbadabai in her husband's property was really an estate which she could transfer or release, the engagement to furnish her with maintenance was not a valuable consideration for her parting with it. To maintenance she was entitled without any bargain at all (1). It is not pretended that the small sum of Rs. 7 a month, allotted to her, was more than the minimum that she required for her subsistence, and thus her release of claims upon the property of her husband was gratuitous as not gaining any advantage for her to which she was not already fully entitled. What was really intended can best be understood from a consideration of the attendant circumstances. Narbadabai having induced her husband to make a will devising his property to her, and having got hold of the title-deeds, had tried to sell the estate. She would thus, she prabably hoped, appropriate what must otherwise be distributed amongst the whole family. Narayan was, not without reason, exasperated at such an attempt. The deeds were recovered with some difficulty, and the release was intended to impose a palpable bar on any further pretensions of Narbadabai to deal with the property as her own. It might be of some use as a declaration, but could not operate as a contract.

It is not made out on the fourth issue that the plaintiff has taken any property of her late husband so as to deprive her of a right to maintenance which she would otherwise have. The engagements between her and her husband are indeed subsequent in date to any misappropriation that has been imputed to her. If there had been any previous misconduct on her part of the kind alleged, it was then condoned; but, apart from that, there is not evidence before me that would sustain the allegation.

The deceased Narayan having given his property to his sons, they contend that it did not descend to them as ancesteal property. He who had himself acquired it having made a present of it to them, they took it free from any accompanying obligations and still hold it on the same terms. Their step-mother, [106] Narbadabai's rights, they say, ended, under the agreement, with their father's life. As to the latter contention, it is plain that if Narbadabai could not part with her inchoate interest in her husband's estate by the contract, which I have already considered, that interest subsisted at his death and attained a certain completeness by his death. As against his sons she could require that her maintenance should be defined and secured. This would be equally the case on the theory that her right first came into existence at all at her husband's death. The only difference in the latter case would be that before that event she could have had absolutely nothing vested in her which she could release to her husband during his life.

A gift to a son by a Hindu parent must ordinarily be sustained (2). But as amongst the sons having a birth-right in the estate, it is not to be grossly unfair (3). Even as to self-acquired property, it is prescribed that the acquirer shall not part with it so as to leave his family destitute (4). These rules do not interfere with the usual dealings of mankind. A father supporting his family may deal with his estate, and

(1) Cole. Dig. Bk. IV, ch. i, t. 42, 43.
(2) Viramitrodaya, p. 250
(3) 2 West and Buhler (2nd ed.), 377.
(4) West and Buhler (2nd ed.), 366.

if he incumbers or sells it to meet his engagements, no one can impeach the transaction (1). It is disposed of to meet family debts, supposing those debts to have arisen in the ordinary pursuit of his calling or the administration of his estate (2). Beyond these limits the interests of the family must not be sacrificed (3), and the right of a wife to a maintenance and possibly to a share on partition, though it may not amount to more than an equity to a settlement, and is not the subject of contract until ripened and defined by events (4), yet is not to be evaded by any arrangement purposely made in fraud of it (5). The matter is one analogous to that discussed in *Lakshman* v. *Satyabhamabai* (6), and similar considerations, I think, apply to it. In a remark in Strange's Hindu Law, Vol. II, p. 7, Colebrooke says: A man may give away ancestral property without the assent of his wife. **[107]** This agrees with what Jaggannatha says: see Cole. Dig., Bk. V, t. 414, Comm.; and if a man is wholly unfettered by the existence of a wife in the disposal of ancestral property, he should, *a fortiori* be free to dispose of his own acquisitions. But Ellis, another high authority, especially on the practical working of the Hindu law, says (see Strange's Hindu Law, Vol. II, p. 427), that the wife's consent, as well as the consent of the sons (7), is necessary to validate a disposal by a man of his estate. The apparent contradiction repeated substantially at p. 15 of Vol. II of Strange's Hindu Law is to be reconciled by supposing that the two authorities had different circumstances in view. An alienation is not generally subject to the control of the wife (8) whose acquisitions are gained for her husband, and whose own special property the husband may take in case of absolute necessity (9); but, supposing that her co-ownership in her husband's estate is really anything more than a right to maintenance taking the form of an allotment of a share when the property by division is placed in danger of being dissipated (10) her recognized, though subordinate, interest (11) makes her free assent necessary in transactions by which that interest would be unfairly extinguished or affected. All transactions in which Hindu women take part to the apparent advantage of their male relatives, call even more than those of English women (12) for close scrutiny (13), and the right of a Hindu female to maintenance is one peculiarly needing protection (14). This does not deprive a woman of the capacity to contract (15), and she is answerable for her dealings along with her husband (16), so that she might apparently on a proper occasion deal with any property strictly her own; but usage as well as the law of the Sastras (17) prescribes her submissive dependence; and a release to her husband, in return for a bare maintenance to which **[108]** she was already entitled, of something going far beyond that maintenance fails to satisfy the essential conditions. Mutual contracts are, indeed, incompatible according to Hindu notions with a true joint ownership (18), and there is no partition between a husband and

(1) 1 B.H.C.R. App. 71; 1 M.H.C. R. 398.
(2) West and Buhler (2nd ed.) 342; 2 B. 666.
(3) West and Buhler (2nd ed.) 370; 1 B.H.C.R. App. 71.
(4) See 2 B. 508, 509.
(5) See 1 B H.C.R. 194 (198).
(6) 2 B. 494, (499, 524).
(7) West and Buhler (2nd ed.) xxxix, 441.
(8) Viramitrodaya, p. 165.
(9) Vyav. May., Bk. IV, 10, 10.
(10) Viramitrodaya, p. 226; 2 B. 511.
(11) Smriti Chandrika, ch. ix, sec. 2, p. i.
(12) See notes to *Huguenin* v. *Basely*, 2 White and Tudor's L. C.
(13) See 13 M I. A., 431, as to a Purdanisheen.
(14) *Per* Seton, J. Fulton's Rep., p. 203; 2 B. at p 505.
(15) 1 B. at p. 123.
(16) Vyav. May., ch. v, pl. 20.
(17) Cole. Dig., Bk. IV, t. 3—6.
(18) West and Buhler (2nd ed.) 312, 313.

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wife (1). Narbadabai's position would thus remain after her release what it was before it. Her right to maintenance might be and had been defined, and that was all. The gift to the sons in this case followed promptly on the release, and was obviously intended to shut out any future claim of the wife. It cannot be regarded as an exercise, in good faith, of the husband's general authority and discretion, but was distinctly an endeavour to place the wife, should she survive her husband, in a state of destitution. She had behaved badly in trying to dispose of the property, but not in such a way as to extinguish her right as a wife to maintenance (2), and the gift made to the sons was subject to that burden. A gift of his estate by a man to his nephews was pronounced defective because of the absence of a provision for his widow and his daughter-in-law (3), a gift by a man leaving his family destitute being strictly forbidden (4). A gift by a *bairagi* of his whole property without reserve of a provision to his wife was pronounced invalid by the Poona Shastri: MS. 707, dated 11th February 1859; and in the recent case of *Jamna* v. *Machul Sahu* (5), at Allahabad, the High Court held that an adopted son taking by donation was subject to the maintenance of the donor's widow not otherwise provided for. The right of Narbadabai is not affected by the agreement made by her with her husband, and she is entitled to maintenance out of the estate which he gave to his sons equally as if he made a partition with them, though it is not to be realized in exactly the same way (6). Either the gift was abortive for want of an essential provision, or it passed, along with the right of the donor, the obligation that he was bound to satisfy. **[109]** In the one case as well as in the other the sons as donees are liable. The widow's claim ranks next to the family debts (7).

The property being substantially the same as in the father's life, and the maintenance of the plaintiff having then been estimated on the most frugal scale, it is reasonable that she should now receive the same allowance with arrears from the time of her husband's death. Her husband provided her further with an apartment which she has ever since occupied in the family-house. It is not to be expected, however, that the plaintiff in this case can possibly live on terms of amity with her co-widow and step-sons. The defendants have not offered to support her and provide her with maintenance as a member of their family. The defendants Mahadeo and Keshinath must, therefore, give her a reasonable sum for lodging, which I fix at Rs. 2 a month, from the time of her quitting the family-house within one month of the payment to her of the arrears of maintenance awarded to her by this judgment.

The allowance is, with the arrears awarded, to be a charge on the house during Narbadabai's life. The decree should be registered to afford notice of this to any intending purchaser or mortgagee. The costs of the plaintiff are to be paid by the defendants Mahadeo and Kashinath, the Court-fee being credited to the Government to the amount that the plaintiff would have had to pay if not permitted to sue as a pauper.

Decree for plaintiff.

Attorneys for the plaintiff.—Messrs. *Balcrishna and Bhugwandas.*

(1) West and Buhler (2nd ed.) 119; 1 Vramitrodaya, p. 165; 2 B. at p 503.
(2) West and Buhler (2nd ed.), 283, 292, 503, 504; Vyav. May., ch. iv, sec. xi, par. 12.
(3) Strange's H. L. 16. (4) *Per* Sausse, C.J., 1 B.H.C.R. App. 84.
(5) 2 A. 315.
(6) West and Buhler (2nd ed.), 354; Smriti Chandrika, p. 160.
(7) Vyav. May., ch. i, sec. xi; 6 M.H. C. R. 93; 2 M. 126; 1 C. 365 (377); 2 B. at p. 505.