(29)

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

MADHAVRAV DESHPANDE (ORIGINAL DEFENDANT), APPELLANT, *v.* RAMRAV DESHPANDE (ORIGINAL PLAINTIFF), RESPONDENT.*

1882 *September* 18.

Arbitration—Award—Allowance for maintenance in perpetuity—Effect of award—Enforcing an award beyond lifetime of parties.

The plaintiff and the defendant were members of a *deshpande* family in Khandesh. An arbitration award, dated 1838, which was assented to by the ancestors of the parties, provided that the defendant's father should continue to hold the *deshpande vatan*, and pay a certain allowance to the plaintiff's father and two uncles, unless they should see fit to make a partition. The plaintiff alleged that the allowance, as fixed, was payable in perpetuity, and was paid till 1864-5, when it was stopped, and prayed for a decree declaring him entitled to it and arrears for eleven years.

Held that effect could not be given to the award as a decree, as no Court would pass a decree fixing a grant of maintenance in perpetuity; that an allowance fixed by a decree as maintenance was ordinarily liable to be varied, on the party ordered to pay it showing circumstances rendering it equitable to make the variation; and that there being no reason to suppose that the arbitrators had any idea of fixing the allowance for a longer period than the life-time of the parties, and all those parties being dead, no effect could any longer be given to the award.

THIS was a second appeal from the decision of Rao Bahadur Gopal Govind Phatak, Subordinate Judge (First Class) of Thana at Nasik, amending the decree of Rao Saheb M. S. Kulkarni, Subordinate Judge (Second Class) of Thengoda.

This action was instituted by the plaintiff to enforce an arbitration award, and recover arrears of a cash allowance, alleging that the plaintiff and the defendant were the *vatandar kango deshpandes* of prant Baglan, in the District of Khandesh; that the *vatan* property was undivided; that by an arrangement effected through arbitrators, who made an award assented to by the ancestors of both the plaintiff and the defendant, it was settled that the entire family property, with the exception of the income of a mahal called Warse pertaining to the *vatan*, was to remain in the defendant's possession; that the plaintiff's branch of the family was to retain possession of the Warse Mahal income amounting to Rs. 80 *per annum*, and to receive annually from the defendant's family a cash allowance sufficient with the above sum

* Second Appeal, No. 528 of 1881.

1882

MADHAVRAV DESHPANDE v. RAMRAV DESHPANDE.

to make up the sum of Rs. 401; that the balance of Rs 321 was annually paid to the plaintiff's family up to the end of 1864-65, when it was stopped; and that arrears for eleven years from that year up to the date of Suit 1877 were accordingly due.

The defendant, amongst other things, contended that the amount fixed by the arbitration award was not payable in perpetuity, that the arbitrators had no power to fix a maintenance allowance in perpetuity, and any assent of the parties to the award would not bind their heirs, and the award was, therefore, invalid and incapable of enforcement.

Both the lower Courts held the award to be enforceable and that Rs. 3,531 were due as arrears. The Court of first instance decreed this sum with interest for eleven years; but the Court of appeal refused this part of the claim, and allowed interest from the date of suit to the date of payment only. The defendant appealed to the High Court.

Pandurang Balibhadra for the appellant—A dispute having arisen in the family to which the parties belong, a reference was made to arbitrators, who in 1838 determined that the defendant's father should pay to the plaintiff's father and two uncles an increased allowance in consideration of the increase in the number of members in their branch of the family, and "that thenceforth there should be no further disputes or demands between the parties, unless at any time they should see fit to make a partition." This clearly shows that the parties to the award as well as the arbitrators contemplated partition at a future time, and that the award was not to be of a perpetual nature. The agreement entered into by the defendant's father could not, after his death, bind the defendant. The father of the defendant was not competent to create a charge upon ancestral immoveable property in favour of persons who in reality possessed no title to it, especially as the defendant, who was of full age, gave no assent to his father's agreement. The reason for which the arbitrators gave to the plaintiff's branch of the family an increased allowance was that the members of the branch had increased. That reason no longer holders good now, as the plaintiff's branch consisted of only four members. An amount for maintenance

must always vary according to circumstances, and no Court would decree an invariable sum for maintenance. The plaintiff's suit must, therefore, fail.

Shantaram Narayan for the respondent.—According to the rules of Hindu law, contracts entered into by the father are binding on the son if they are not illegal or immoral. An agreement entered into between co-parceners to avoid litigation was valid and founded on good consideration, even though the person claiming under it was entitled to nothing. The defendant's father was the managing member of the family, and the presumption is that he effected the agreement for the benefit of the family. This presumption is strengthened in the present case by the fact found by the lower Courts that the agreement had been acted upon from 1838 to 1865. The parties contemplated that the disputes between them should be at rest for ever, and that no further demands should be made. Maintenance was only an ostensible object for which the amount was settled. Had it been otherwise, there would have been an express provision in the agreement, stipulating that the allowance should be diminished in proportion to the expenses of the families of the grantees, or that it should totally cease in case of there being no necessity for its continuance. The defendant undoubtedly understood the plaintiff's right to be an absolute right to receive the allowance in perpetuity, or he would not have paid it for twenty-seven years. At any rate, the plaintiff does not lose his right to claim partition. The lower Courts were, therefore, right.

MELVILL, J.—The arbitration award of 1838 (exhibit No. 2), which was assented to by the ancestors of the parties, provided that Narsinh Khanderav should continue to hold the *deshpande vatan*, and should pay an increased allowance to the plaintiff's father and two uncles. The plaintiff's case is that the allowance so fixed is payable in perpetuity, and he accordingly sues to recover it by virtue of the award. Assuming, but by no means deciding, that the ancestor of one of the parties had power to bind his descendants to pay a fixed allowance in perpetuity, and that the ancestors of the other party had power to bind their descendants to be content with such allowance, however their circumstances might alter, yet we do not think that we should be

1882

MADHAVRAV DESHPANDE v. RAMRAV DESHPANDE.

hasty to assume such an intention, and we certainly find no trace of it in the arbitration award. The award shows that there already existed an arrangement, which, as stated in *Shidojirav* v. *Naikojirav*(1), is a common one in *deshpande* families, by which the eldest member takes the whole *vatan*, giving to the other members certain revenues or allowances for their maintenance. A dispute had arisen among the parties in consequence of the increase in the number of members of the plaintiff's branch of the family, and a suit had, consequently, been brought against the defendant's father, the friendly settlement of which suit was the object of the reference to arbitration. As already stated, the arbitrators determined that Narsinh should pay an increased allowance to the three brothers, the father and uncles of the plaintiff, so as to bring up his income to Rs. 401 *per annum*, and that thenceforth there should be no further disputes or demands between the parties, unless at any time they should see fit to make a partition. Whether rightly or wrongly, the arbitrators recognised the existence of a possible right to partition; but the only question which they decided was that Narsinh should pay an increased allowance to his relatives, because their family had become large, and their allowance, which had from time to time varied, had become insufficient. It is contended that effect should be given to this award as a decree; but no Court would pass a decree fixing a grant of maintenance in perpetuity; and an allowance fixed by a decree as maintenance is ordinarily liable to be varied, if the party who is ordered to pay it shows that there are circumstances which render it equitable to vary the amount. There is no reason to suppose that the arbitrators had any idea of fixing the allowance for a longer period than the life-time of the parties; and all the parties to the award being now dead, no effect can any longer be given to the award.

The plaintiff's suit to enforce the award must, consequently, fail. His pleader informs us that the plaintiff still considers himself entitled to demand a partition; but on this point it is unnecessary for us to express any opinion. Nor do we say that the plaintiff might not make out a case for an allowance, independently of the award, if he chose to abandon all claim to a

(1) 10 Bom. H. C. Rep., 228.

partition, and rely upon the custom frequent in *deshpande* families, to which we have alluded. But in the present case he sues solely on the award, and does not abandon his claim to a partition, and we cannot, therefore, in this case consider whether, apart from the award, he is entitled to any and what allowance for his maintenance, in addition to the portion of the *vatan* of which he appears to be already in possession.

We reverse the decrees of the Courts below, and reject the claim. The plaintiff must pay the fees which he would have had to pay if he had not been allowed to sue as a pauper.

Decree reversed.

ORIGINAL CIVIL.

Before Mr. Justice Scott.

DAMODARMADHOWJI AND OTHERS, PLAINTIFFS, *v.* PURMANANDAS JEEWANDAS, DEFENDANT.*

PURMANANDAS JEEWANDAS, PLAINTIFF, *v.* DAMODAR MADHOWJI AND OTHERS, DEFENDANTS.†

1883 *January* 29.

Hindu law—Widow's property in moveable left to her by the will of her husband —Power of widow to dispose of such property by will—Practice—Amendment of plaint—Alternative case—Civil Procedure Code (XIV of 1882), *Sec.* 53.

In Western India a widow takes absolutely all moveable property bequeathed to her by her husband, and may dispose of such property by will.

Where a plaintiff's claim as originally stated in his plaint was based on the allegation of the invalidity of a will, an application at the hearing of the case to amend the plaint by inserting a clause submitting that, even if the will were valid, it did not dispose of the whole of the testator's property, was refused,—the Court holding, under section 53 of the Civil Procedure Code (XIV of 1882), that the case made by the proposed amendment would be inconsistent with the case made in the plaint as originally framed.

THE first (No. 237 of 1877) of the above suits was brought by the executors of the will of Ramkuverbai, widow of one Ranchordas Canjee, to recover from the defendant, Purmanandas Jeewandas, who was the nephew and residuary legatee of Ranchordas Canjee, the sum of Rs. 5,950 alleged by the plaintiffs to be payable to Ramkuverbai under the provisions of the will of Ranchordas Canjee.

* Suit No. 237 of 1877. † Suit No. 556 of 1877.