

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Kemball.

1884
September 23.

VISHNU SHA'MBHOG (ORIGINAL DEFENDANT), APPELLANT, v.
MANJAMMA, WIDOW OF SUBA'YA SHA'MBHOG (ORIGINAL
PLAINTIFF), RESPONDENT.*

Maintenance—Hindu law—Hindu widow—Decree declaring right to maintenance, and directing payment of arrears—Form of decree—Order for future payments—Maintenance subsequently falling due, and enforced by fresh suit or by execution of decree.

Where the Civil Court, upon the suit of a Hindu widow for maintenance, makes a decree containing an order in express terms to the defendant to pay to the plaintiff the amount claimed by her for maintenance during a past period, but as to the future merely declares her right to receive maintenance at an annual rate from the defendant, the proper way of enforcing the right thus declared is not by executing the decree, but by bringing a fresh suit.

Decrees declaring a right to maintenance and directing payment of arrears should contain an order directing payment of future maintenance.

A decree obtained by a Hindu widow declaring her right to maintenance is liable to be set aside or suspended in its operation on proof of subsequent unchastity given by her husband's relatives either in a suit brought by them expressly for the purpose of setting aside the decree, or in answer to the widow's suit to enforce her right—*Moniram Kolita v. Kerry Kotitany*⁽¹⁾,

This was a second appeal from the decision of Satyendranáth Tagore, District Judge of Kánara, confirming the decree of the Subordinate Judge of Kumta.

The plaintiff Manjamma filed this action to recover from the defendant arrears of maintenance for the years 1880 and 1881 at the rate determined by a decree obtained by the plaintiff against the defendant in 1877. The defendant contended that the action was barred by the former decree, the execution of which should be sought for by the plaintiff, and stated that the plaintiff, by reason of her unchastity and loss of caste, had forfeited her right to recover maintenance. The lower Courts decided that the decree of 1877 determined that "the plaintiff is entitled to receive annually Rs. 37 from the defendant", and in express terms directed the payment of the amount due for the

* Second Appeal, No. 394 of 1883.

(1) L. R., 7 I. A., 115.

year 1876 ; that that decree was no bar to the present action ; and that the defendant's plea in regard to the plaintiff's unchastity was bad in law. The Courts, therefore, passed a decree in favour of the plaintiff. The defendant appealed to the High Court.

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Nárdyan Ganesh Chandavarkar for the appellant.—The plea of *res judicata* is good. The only remedy open to the plaintiff is to enforce, if she can, the decree obtained by her in 1877—*Sinthayee v. Thanakapudayen* ⁽¹⁾ ; *Peareendth Brohmo v. Juggesuree* ⁽²⁾ ; *Sabhánáth Dikshatar v. Subba Lakshmi Ammal* ⁽³⁾. It is not desirable that there should be more than one suit in respect of the maintenance of one widow, unless circumstances occurring after the date of the decree render it necessary. The Subordinate Judge was wrong in not taking evidence offered by the defendant in regard to the plaintiff's unchastity, as that extinguishes her right to maintenance—*Monirám Kolita v. Kerry Kolitany* ⁽⁴⁾.

Shamráv Vithal Vaidya for the respondent.—The suit is not barred. There is no direction in the decree of 1877 in regard to the payment to the plaintiff in future years—*Ruka Báí v. Ganda Báí* ⁽⁵⁾. The action of the plaintiff is based upon an annually recurring right. The necessity to the plaintiff to sue does not arise till the defendant refuses to pay at the end of the year. The plaintiff's right to maintenance having actually began, could not be divested by subsequent misconduct. The Privy Council in *Monirám Kolita v. Kerry Kolitany* ⁽⁶⁾ merely decide that under the Hindu law as prevalent in Bengal a widow who had once inherited the estate of her husband did not forfeit that estate by reason of unchastity.

SARGENT, C. J.—The decree of 1877 contains an order, in express terms, to the defendant to pay the plaintiff Rs. 37 as claimed by her for maintenance during the previous year ; but, as to the future, it is, in words, merely declaratory of her right to receive maintenance at the above annual rate from the defendant,

(1) 4 Mad. H. C. Rep., 183.

(4) L. R., 7 I. A., 115.

(2) 15 Cal. W. R., 128.

(5) I. L. R., 1 All., 594.

(3) I. L. R., 7 Mad., 80.

(6) L. R., 7 I. A., 115.

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and, therefore, strictly, we think, requires that a suit should be brought to enforce it, and so it would hitherto appear to have been thought, as shown by the widow's suit in 1879, to enforce payment of arrears for 1878 and 1879 in which a decree was passed. The defendant's objection, therefore, that the plaintiff's remedy was to recover maintenance by execution of the decree of 1877 is, in our opinion, not sustainable. At the same time we may be allowed to say that we share in the regret expressed by Sir Michael Westropp, C. J., in *Lakshman Rámchandra Joshi v. Satyabhamábbái* ⁽¹⁾, that distinct orders, directing the payment of the future maintenance, should be too frequently, as in this case, omitted from decrees of this nature.

As to the plea of unchastity, no evidence was taken before the Subordinate Judge, because he considered that the plea was bad in law, on the ground that the right to maintenance having once commenced, it could not be extinguished. This view is diametrically opposed to the Hindu authorities, of which it is only necessary to refer to a text of Narada referred to in the *Daya Bhaga*, Chap. XI, s. I, v. 48, which says: "Let them (meaning husband's relations) allow a maintenance to his women for life, provided they keep unsullied the bed of their lord: but if they behave otherwise, the brother may resume that allowance." This text is pointed out by the Privy Council in *Moniram Kolita v. Kerry Kolitany* ⁽²⁾ as clearly showing that the right was one liable to resumption or forfeiture as distinguished from the case of a widow's estate by succession. Such being the nature of the widow's right to maintenance, a decree, declaring her right, must, from its nature, be liable to be set aside or suspended in its operation on proof of such unchastity; and, although the husband's relations might doubtless bring a suit for that purpose, they may properly, we think, meet a suit by a widow to enforce such declaratory decree by a plea that the right so declared has since become extinguished by the widow's misconduct.

We must, therefore, reverse the decree, and remand the case to be tried on the merits. Costs to abide the result.

Decree reversed.

(1) I L. R., 2 Bom., 497.

(2) L. R., 7 I. A., 151.