

ORIGINAL CIVIL.

Before Mr. Justice Farran.

ADHIBÁI, (PLAINTIFF), v. CURSANDÁS NATHU, (DEFENDANT).*

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June 14.

Maintenance—Suit by sister-in-law against brother-in-law—Joint family—Death of plaintiff's husband prior to his father's death and therefore before devolution of estate which was self-acquired by his father—Amount of maintenance claimable by a sister-in-law—Separate maintenance—Agreement to refer to arbitration—Refusal to perform such agreement—Specific Relief Act I of 1877, Sec. 21.

The plaintiff was the widow of one Pitámbhar Nathu, who was the son of one Nathu Jádowji. Nathu Jádowji had three sons, viz., Morárji, Pitámbhar, and the defendant, Cursandás, and all lived together as a joint family. The plaintiff was married to Pitámbhar about thirty years previously to this suit, she being then eleven years of age. Pitámbhar died when he was fourteen years old, before the plaintiff had attained puberty, and while she was still living with her parents. After her husband's death she went to the house of her father-in-law, Nathu Jádowji, and was residing there at the time of his death. He died intestate in 1881, leaving moveable and immoveable property of the value of Rs. 1,50,000, all of which was admittedly self-acquired property. His widow (Lálvahu) and two sons, viz., Morárji and the defendant, Cursandás, survived him. Morárji died in 1883. After Nathu's death, the plaintiff continued for a time to reside in the family-house with Cursandás. Disputes, however, arose, and she left the house, and went to reside with her brother. She now sued her brother-in-law, Cursandás, for maintenance, alleging that she had been obliged to leave his house in consequence of ill-treatment. She claimed Rs. 1,000 per month by way of maintenance, and also prayed for the delivery of certain ornaments belonging to her, which she said were in the defendant's possession. The defendant denied possession of the plaintiff's ornaments; and, as to her claim for maintenance, he contended that all the property of his father, Nathu Jádowji, was self-acquired, and that, as such, the plaintiff's husband, Pitámbhar, had never any interest in it, having predeceased Nathu, and that she was, therefore, not entitled to maintenance out of it. He stated, however, that he was willing to maintain her if she would return to his house, and live with his family.

Held, that the plaintiff being, as Pitámbhar's widow, a member of her husband's undivided family, was entitled to maintenance from the defendant. Upon Nathu's death, intestate, his property devolved upon his sons (Morárji and Cursandás) as ancestral property for the benefit of the undivided family, of which he (Nathu) was in his life-time the head; or, in other words, subject to the incidents to which ancestral property is liable. If one of such sons had been disqualified from inheriting, by reason of idiotcy, &c., he, though a member of the undivided family,

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would only be entitled to maintenance. The plaintiff, by reason of her sex was disqualified from inheriting in competition with males, but none the less was she entitled to maintenance out of the ancestral estate which had devolved upon the males, with whom she constituted an undivided family.

Where a widowed sister-in-law claims maintenance from a brother-in-law, the only question for the Court to consider is, whether the brother-in-law has ancestral property in his hands.

Held, also, that the plaintiff being legally entitled to claim maintenance from the defendant, she was entitled to separate maintenance, and that the defendant could not insist upon her living in his house.

The property left by Nathu at his death was of the value of Rs. 1,50,000.

Held, that an allowance of Rs. 40 *per* month should be paid to the plaintiff by the defendant as maintenance. If Pitambar, (the plaintiff's husband), had survived his father Nathu, the share of Nathu's property, (deducting one-fourth for Lalvahu, the widow of Nathu), which would have devolved on him would have been a little less than Rs. 40,000, or Rs. 1,600 *per annum* at 4 *per* cent.,—that is, Rs. 133 *per* month. The plaintiff could not be allowed more than the interest on that sum. By analogy to the case of a deserted wife's claim for maintenance against her husband, the plaintiff ought not to be allowed less than one-third of such interest, her husband having left no sons.

The defendant alleged that, after the plaintiff had left his house, an agreement had been made between them to refer their dispute to arbitration, that the agreement of referencè had been actually signed, but that, on the day fixed by the arbitrators for making their award, the plaintiff had given notice to them not to make an award, and, accordingly, they had not done so. The defendant contended that, by reason of this agreement, the plaintiff's suit was barred by section 21 of the Specific Relief Act I of 1877⁽¹⁾.

The alleged agreement to refer was in the following terms:—

"To Bhai Dossa Morarji and Dwarakadas Damodar. We, the undersigned two persons, give in writing to you as follows:—We used to reside and act in the house together in peace and harmony. Lately, a few days ago, in consequence of a disagreement amongst the women, Vahu Kuvervahu resided separately. Upon persuasion having been used towards her, Vahu Kuvervahu again resides in the house together with the rest: so now all are residing in the house in peace and harmony. If any occasion should arise, and if any disagreement should take place amongst the women, in order to find a remedy for that, we, the undersigned two persons, give in writing to you as follows:—As to whatever award or settlement you, two persons, together will make in accordance therewith, we agree to receive or pay. As to that, we are truly to act on our true religious faith; and we have written and delivered this writing of our free will and pleasure. The same is agreed to and approved of by our heirs and representatives, all; the 11th

(1) "And, save as provided by the Code of Civil Procedure (Act XIV of 1852), no contract to refer a controversy to arbitration shall be specifically enforced; but if any person who has made such a contract, and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit."

Jyeshth Vadya Sameat 1939, the day of the event, Friday, the 1st June, 1883. And, as to this, you are truly to make and deliver a settlement within fifteen days' time."

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Held, that the plaintiff's suit was not barred. The agreement did not indicate what was the subject-matter to be referred, and there was no evidence to show that the plaintiff's claim to maintenance had been laid before the arbitrators, or that the plaintiff had refused to perform her agreement to refer in reference to that claim. Nor was there any evidence to show the time at which the plaintiff withdrew from the arbitration—whether before or after the time allowed to the arbitrators to make and publish their award, viz., fifteen days. If the latter, her withdrawal could not, in any view of the section, be held to be a refusal on her part to perform her agreement to refer. Even if the plaintiff's withdrawal was unjustifiable, it appeared that the defendant had taken no steps, under section 523 of the Civil Procedure Code (Act XIV of 1882), to have the agreement filed in Court, and thus render her withdrawal of no effect. There was nothing to show that the defendant did not acquiesce in it, in which case the ruling of *Tahal v Bisheshar*(1) would apply.

Quære, whether the above agreement was not void by reason of uncertainty.

Quære, whether the actual submission of a subject in dispute to named arbitrators, followed by the attempt of one of the parties to such submission to withdraw from or to prevent an award being made upon the submission, falls within the concluding paragraph of section 21 of the Specific Relief Act I of 1877.

SUIT for maintenance against a brother-in-law.

The plaintiff was the widow of one Pitambar Nathu, to whom she was married about the year 1856, being then about nine years of age.

Pitambar Nathu was the son of one Nathu Jádowji; and the plaintiff alleged that, at the time of her betrothal and marriage and afterwards, the said Nathu Jádowji, (her husband's father), and also her husband's maternal grandmother gave her presents of ornaments of the value of Rs. 10,000.

Pitambar Nathu died about the year 1859 without issue, and leaving him surviving his widow, (the plaintiff), who was then about thirteen years of age.

After Pitambar's death, the plaintiff resided with her father-in-law, Nathu Jádowji, and was maintained by him. The above-mentioned ornaments had been left in charge of Nathu Jádowji, and after Pitambar's death they were kept in an iron

(1) I. L. R., 8 All. 57.

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safe belonging to his family, and the plaintiff used such of them from time to time as she required.

Nathu Jádowji died intestate on the 20th June, 1881, leaving two sons, Morárjí Nathu (since deceased) and the defendant (Cursandás Nathu). The plaintiff alleged that the said Nathu Jádowji died possessed of moveable and immoveable property of the value of about ten lákhs of rupees, all of which came to the defendant's possession. The defendant also took possession of the said ornaments of the plaintiff.

After the death of Nathu Jádowji the plaintiff continued to live in his family house until May, 1882, when, as she alleged, in consequence of her ill-treatment by the defendant, she was obliged to leave the house and live separately. In this suit she claimed from the defendant the monthly sum of Rs. 1,000 as maintenance, and also delivery of the said ornaments.

In his written statement the defendant alleged that the whole value of the ornaments presented to the plaintiff was not more than Rs. 2,200; and that, subsequently to her marriage, the plaintiff had continued to live with her father, Bhagwánji Dwárkádás, who took charge of and remained in possession of her ornaments. He further stated that the plaintiff's husband, Pitámbar, died before the plaintiff attained puberty and while she was still living with her own parents, and that after her husband's death she continued to live with them for some years; that she only came to live with her husband's family after she attained her majority, and that as widows of her caste did not wear ornaments, her ornaments remained with her father, who died in 1873; and the plaintiff did not know what then became of the ornaments. He denied, however, that they had ever come into his possession or that of Nathu Jádowji.

The defendant further alleged that all the property of Nathu Jádowji was self-acquired, and that his son, Pitámbar (the plaintiff's husband), never had any interest in it.

He also stated that, after the plaintiff had left his house, an agreement had been made between them to refer their dispute to arbitration, and an agreement of reference was signed by the

plaintiff and the defendant; but on the day fixed by the arbitrators for making their award, the plaintiff had given notice to the arbitrators not to make an award; and, accordingly, they had not done so. The defendant contended that by reason of the said agreement this suit was barred.

The defendant stated that the plaintiff was maintained by him until she chose to leave his house, and that he was willing still to maintain her if she would return and live with his family.

At the close of the plaintiff's case, Farran, J., stated that he was prepared to hold that it was not proved that the property left by Nathu Jádowji was of greater value than Rs. 1,50,000, as stated in the written statement.

Counsel for the plaintiff admitted that the property of Nathu Jádowji was self-acquired in his hands.

No evidence was offered on behalf of the defendant.

Macpherson and Telang, for the plaintiff, referred to *Sreemutty Nittokissoree Dossee v. Jogendro Nauth Mullick*⁽¹⁾; *Mádhavráv Keshav Tilak v. Gangábái*⁽²⁾; West and Bühler, (3rd ed.), pp. 245, 247-8; *Khetramani Dási v. Káshináth Dás*⁽³⁾; *Sávitribái v. Luximibái*⁽⁴⁾. The defendant here has no self-acquired property. It is all ancestral in his hands, and we claim maintenance out of it. The plaintiff is a parcener's widow—*Gangábái v. Sitáráám*⁽⁵⁾; *Lakshman Rámchandra Joshi v. Satyabhámábái*⁽⁶⁾; *Ganesh Bagaji Vaidya v. Yamunábái*⁽⁷⁾; *Rámchandra Vishnu Bapat v. Sagunábái*⁽⁸⁾.

As to the alleged bar to this suit by reason of the agreement to refer to arbitration—*Randell v. Thompson*⁽⁹⁾; Russell on Arbitration, p. 80; *Fraser v. Ehrensperger*⁽¹⁰⁾; *Piercy v. Young*⁽¹¹⁾.

Inverarity (with *Latham*, Advocate General) for the defendant:—The defendant is willing to maintain the plaintiff, but he is

(1) 5 Ind. App., 55.

(2) I. L. R., 2 Bom., 639.

(3) 2 Beng. L. R. Ap. Jur. at p. 43.

(4) I. L. R., 2 Bom., at p. 619.

(5) I. L. R., 1 All., 170.

(6) I. L. R., 2 Bom., 519.

(7) Printed Judgments for 1878, p. 130.

(8) I. L. R., 4 Bom., 261.

(9) L. R., 1 Q. B. Div., 748.

(10) L. R., 12 Q. B. Div., 310.

(11) L. R., 14 Ch. Div., 200.

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not bound to give her a separate maintenance; she had no reason to leave his house. Nathu Jádowji was not liable, in his lifetime, to give the plaintiff separate maintenance, as his property was self-acquired, and his son Pitámbar, (the plaintiff's husband), never had any interest in it—*Khetramani Dási v. Káshindath Dás*⁽¹⁾. Pitámbar died many years before his father, Nathu Jádowji. On the death of the latter, his property came to the defendant, who took it unencumbered by any charge in favour of the plaintiff. The fact of his succeeding to it, does not create a claim in her favour—*Sávitribái v. Luximibái*⁽²⁾. The liability to maintain a woman out of certain property arises from the fact that her husband had a share in such property. Counsel cited *Kálu v. Káshibái*⁽³⁾; *Pestonjee Nussurwánjee v. Mánockjee*⁽⁴⁾.

June 26. FARRAN, J.:—The plaintiff in this suit is a Hindu widow. She sues the defendant, who is her brother-in-law, to recover from him her ornaments specified in a list annexed to the plaint, and valued by her at the sum of Rs. 10,000; and for separate maintenance at the rate of Rs. 1,000 *per mensem*. The defence put forward by the defendant is that the plaintiff's ornaments never came into his possession, or into the possession of his father; and that he is not legally bound to pay or allow the plaintiff separate maintenance. He also says that the plaintiff and he agreed to refer all the disputes between herself and him to arbitration, and that the plaintiff, on the day fixed by the arbitrators for the giving of their award, gave notice to them not to make their award, and thereby precluded herself from maintaining this suit.

The issues settled were:—

- (1) Whether the plaintiff was presented with ornaments, as her *stridhan*, of the description, amount, and value mentioned in para. 2 of the plaint?
- (2) Whether the defendant is or has been in possession of the said ornaments, or any of them?
- (3) Whether the defendant is possessed of any property out of which the plaintiff is entitled to be maintained?

(1) 2 Beng. L. R., Ap. Jur., 15.

(3) I. L. R., 7 Bom., 127.

(2) I. L. R., 2 Bom., 573, 581.

(4) 12 Moore's Ind. App. at p. 131.

(4) If so, to what amount of maintenance is the plaintiff entitled?

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(5) Whether the suit is not barred under the provisions of the Specific Relief Act I of 1877, sec. 21?

(6) Whether the plaintiff is entitled to any and what relief in this suit?

At the close of the plaintiff's case I held that the plaintiff had not established any claim to relief against the defendant in respect of the ornaments she claimed from him. I did so upon two grounds. First, because what the plaintiff's evidence, if believed, established, was a deposit of ornaments, not with the defendant, but with his mother, Lálvahu, and there was nothing to show that the defendant or his father had incurred any responsibility in reference to them, or that the defendant was in possession of them; and, secondly, because Lálvahu, who was called on behalf of the plaintiff, denied that the plaintiff ever deposited the ornaments with her, and I believed Lálvahu in preference to the plaintiff; the evidence of the latter in reference to the ornaments being inconsistent in itself, contradictory to former evidence given by her, and, in my opinion, wholly unreliable. Plaintiff's counsel did not controvert my view upon this subject; so, without coming to any finding upon the first issue, I decide the second issue in favour of the defendant.

The facts, which give rise to the third and fourth issues, are simple, and are not really in dispute between the parties. The plaintiff was married to Pitámbar Nathu, when about eleven years of age, about thirty years ago. She never went to live with her husband as his wife, as he died a youth of about fourteen years of age before the plaintiff had attained her puberty. Until that event the plaintiff resided with her own father, but after it she went and lived with her husband's father, Nathu Jádowji, and continued to live with him until his death about five years ago. Besides Pitámbar, (the plaintiff's husband,) Nathu Jádowji had two sons, Morárji and the defendant Cursandás. Morárji was the eldest, Pitámbar the second, and the defendant Cursandás, the youngest son. Morárji and Cursandás survived.

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their father, but Morárji died about three years ago. It is not stated that he left either a widow or children. Lálvahu is the widow of Nathu Jádowji. She is still living with the defendant. The plaintiff continued to live in the house of her father-in-law for some eight months after his death. She says that she left it on account of disputes between herself and the defendant and Lálvahu, and went to live in her brother's house, where she has lived ever since. The statement is not quite consistent with the recitals in the arbitration paper (exhibit No. 2) which she has executed, but it is not very material. She now claims a separate maintenance from the defendant; and the question I have to decide is, whether she is legally entitled to it.

Some evidence was elicited in cross-examination of the plaintiff and her witnesses tending to show that the property left by Nathu Jádowji was self-acquired; and, it being a notorious fact that Jádowji, the father of Nathu Jádowji and of his eldest brother, the well-known Kessowji Jádowji, lately deceased, had left no property, Mr. Macpherson, for the plaintiff, admitted that the property left by Nathu Jádowji had been in his hands self-acquired and not ancestral property, without putting the defendant to formal proof of that fact.

The case was then argued upon the footing that the property left by Nathu Jádowji, which was partly moveable and in greater part immoveable, was his self-acquired property, and was fairly estimated at the above sum of Rs. 1,50,000. Nathu Jádowji died intestate.

It was contended for the defendant that the plaintiff was not entitled to a separate maintenance from the defendant, as he had, under the above circumstances, no property in his hands out of which the plaintiff could legally claim maintenance—whatever might be the moral duty on the part of the defendant to maintain her. Pitáambar, the plaintiff's husband, had, it was said, no share or interest in the property of his father Nathu in the life-time of the latter, as all the property of the father was self-acquired; and, as Pitáambar died in the life-time of his father, he took no share in that property upon his father's death, and, consequently, the plaintiff, Pitáambar's widow, had no legal right

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to be maintained out of it. Mr. Inverarity's argument, put briefly, was this:—Nathu Jádowji was not legally liable to allow his daughter-in-law, separate maintenance, as he had no ancestral property in his hands out of which she could claim maintenance—all his property being self-acquired, upon which she had no legal claim. As authority for this proposition, which is undeniable, he relied upon the case of *Khetramani Dási v. Káshináth Dás*⁽¹⁾, approved and followed by a Full Bench of this Court in *Sávitribái v. Luaimibái*⁽²⁾. Upon the death of Nathu Jádowji his property devolved upon his sons, Morárji and the defendant, and after the death of Morárji upon the defendant alone, and that property in the hands of the defendant was not subject to any further or greater burden than it had been subject to in the hands of the father of the defendant. Pitáambar never had any interest in that property, as he predeceased Nathu, and, therefore, his widow now cannot claim maintenance out of it. For the latter part of this argument, no authority was cited. The argument is ingenious; but it is not, in my opinion, well-founded. Nathu Jádowji in his life-time with his sons and his daughter-in-law formed a joint and undivided Hindu family. The family was not, however, possessed of any ancestral property, and he alone possessed property in his own right, as any member of an undivided family may, of course, do. If Nathu Jádowji had made a will in favour of the defendant, and thereby left his property to the defendant, the defendant, according to the recent decision of this Court in the case of *Sir Mangaldás Nathubháí*⁽³⁾, would have taken such property as his self-acquired property; and probably in that case Mr. Inverarity's argument would have prevailed. But Nathu did not make a will, and his property upon his death intestate devolved upon his sons as ancestral property for the benefit of the undivided family, of which the intestate was in his life-time the head; or, in other words, subject to the incidents to which ancestral property is liable. If one of such sons had been disqualified from inheriting by reason of idiocy, &c., he, though a member of the undivided family, would only be entitled to maintenance. The plaintiff by reason of her

(1) 2 Beng. L. R., p. 15., A. C. J.

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

(3) I. L. R., 10 Bom., 528.

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sex is disqualified from inheriting in competition with males, but none the less is she entitled to maintenance out of the ancestral estate, which has devolved upon the males, with whom she constitutes an undivided family.

In considering whether a widowed sister-in-law is entitled to claim maintenance from her brother-in-law, with whom her husband was in his life-time joint, the only question the Courts ask is, has such brother-in-law ancestral property in his hands? If yes, the widow is entitled to be maintained out of it. In *Sávitribái v. Laximibái*⁽¹⁾, the leading case upon this subject, Westropp, C. J., delivering the judgment of the Full Bench, says: "We think we may assume it to be well-settled Hindu law in this Presidency, that * * * the widow of one undivided, at his death, in estate from his brothers * * * * * would, * * * if there be sufficient ancestral estate in the hands of the surviving brothers, * * * be entitled to a reasonable maintenance out of such estate." The following passage is from the judgment of Norman, C.J., in *Rajjomoney Dossee v. Shibchunder Mullick*⁽²⁾:—"A son's widow cannot have larger legal rights against her father-in-law than her husband would have had if alive, and such husband could not have compelled his father to give him any share of his property * * * *. The present case is wholly distinguishable from those where an heir takes property, subject to the obligation of maintaining persons excluded from inheritance, out of the estate of the deceased proprietor, *or whom the deceased proprietor was morally bound to maintain*. In such cases, Hindu law seems to annex the duty as a burden on the inheritance in the hands of the heir, and the right of the party claiming maintenance appears to be a legal right, analogous to a right of property." That passage was strongly relied upon by Mr. Macpherson for the plaintiff; it is cited by Westropp, C. J., apparently with approval in his judgment above referred to, and is treated by Peacock, C.J., in the case of *Khetramani Dási v. Káshináth Dás*⁽³⁾ as sound Hindu law. He says: "The obligation of an heir to provide, out of the estate which descends to him, maintenance for certain persons whom the

(1) I. L. R., 2 Bom., at p. 581.

(2) 2 Hyde, 103, at p. 104.

(3) 2 Beng. L. R., A. C. J., 15, at p. 34.

ancestor was legally or morally bound to maintain, is a legal as well as a moral obligation, for the estate is inherited subject to the obligation of providing such maintenance." The authorities justify me, I consider, in holding, as I do, that the defendant in this case is legally bound to provide the plaintiff with maintenance out of the property which he has inherited from his father, Nathu Jádowji.

If the plaintiff is legally entitled to claim maintenance from the defendant, the authorities show that she is entitled to a separate maintenance; and that he cannot insist upon her living in his house: see *Kasturbái v. Shivájirám Devkurna* (1) and *Rámchandra Vishnu v. Sagunábái* (2). This point, indeed, was not contested.

It remains for me to determine the amount. This is by no means an easy task. The Privy Council in *Sreemutty Dossee v. Jogendro Mullick* (3) lay down that, in addition to the value of the estate, another element to be considered is the position and *status* of the deceased husband and of the widow. The main subject of inquiry should be the value of the estate, and the Court should consider what would be the due proportion which should be given to the widow out of it for her proper maintenance, including not only the ordinary expenses of living, but that which she might reasonably expend for religious and other duties incident to the station in life which she might occupy. Their Lordships were then speaking of a widow claiming maintenance out of the estate of her deceased husband. If we deduct from the whole estate of the intestate a fourth share for the maintenance of Lálvahu, his widow, which is in accordance with the authorities, and seems reasonable, the share of the intestate's property, which would have devolved upon Pitambar had he survived the intestate, would have been a little less than Rs. 40,000, or Rs. 1,600 *per annum* at 4 *per cent.*—that is, Rs. 133 *per mensem*. The plaintiff cannot be allowed more than the interest on that share—*Mádhavráv v. Gangábái* (4). As a rule in general, I think, by analogy to a deserted wife's claim for

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(1) I. L. R., 3 Bom., 372.

(3) 5 Ind. App. at p. 57.

(2) I. L. R., 4 Bom., 261.

(4) I. L. R., 2 Bom., 639.

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maintenance against her husband, that she ought not to be awarded much less than one-third of such interest (*Rámábái v. Trimbak*⁽¹⁾)—at any rate when there are no sons. I have no evidence before me to show what sum will enable the plaintiff to live suitably to the *status* and position in life of her husband. The husband belonged to a family of traders and to a trading caste, deriving greater enjoyment from the accumulation of wealth than the spending of it; he would not probably, if he had lived, have run counter to the traditions of his ancestors, but would have lived unostentatiously, if not penuriously. Several instances have been cited to me in which larger and smaller sums, in proportion to the estate in the hands of the heir, have been awarded by this Court for the maintenance of widows. I have taken them into consideration. I think, judging from what I have learned in many cases relating to wills and maintenance, that the plaintiff will be able to live unostentatiously, but comfortably, upon a sum of Rs. 40 *per mensem*. This is less than the sum suggested by Mr. Macpherson, namely Rs. 50, but greater than that offered by Mr. Inverarity on behalf of the defendant, on the footing that the plaintiff is not entitled to a separate maintenance, namely, Rs. 25. I have given weight to that offer in arriving at the amount I have allowed.

It remains for me to consider whether the plaintiff is debarred from obtaining a decree for her maintenance by the provisions of section 21 of the Specific Relief Act I of 1877. The concluding paragraph of that section is this: "And save as provided by the Code of Civil Procedure (XIV of 1882), no contract to refer a controversy to arbitration shall be specifically enforced; but if any person, who has made such a contract, and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit."

In order to consider whether the plaintiff has brought herself within the purview of that section, I extract all the evidence given before me upon this part of the case. No evidence was called by the defendant in support of it. He was contented

(1) 9 Bom. H. C. Rep., 283.

to rest his case on that elicited from the plaintiff and her witnesses.

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The plaintiff in examination-in-chief said: "I asked for leave to sue as a pauper. That was refused. There was a reference to arbitration. I withdrew from it, and brought this suit." "I gave the list" (a list of the ornaments she claimed) "to Dwárkádás, the arbitrator."

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In cross-examination she said: "The list I gave the arbitrator I got from my father's house: * * * *. Some females were present when I gave the list to the arbitrator—no one else" (shown a paper). "This is my mark. My brother was with me when I put my mark and also my uncle. My brother was then present. The paper was explained to me." The paper is put in as exhibit No. II. "The arbitration proceeded. When the arbitrators were about to make their award, I gave them notice not to make it, and that I withdrew from the arbitration."

Dwárkádás Dámodar in examination-in-chief said: "I was one of the arbitrators appointed in this matter. Plaintiff did not give me a list of the ornaments she claimed. I do not remember that she delivered any list to me."

Exhibit No. II runs as follows:—

"To Bhái Dossa Morárji and Dwárkádás Dámodar. We, the undersigned two persons, give in writing to you as follows:— We used to reside and act in the house together in peace and harmony. Lately, a few days ago, in consequence of a disagreement amongst the women, Vahu Kuvervahu resided separately. Upon persuasion having been used towards her, Vahu Kuvervahu again resides in the house together with the rest; so now all are residing in the house in peace and harmony. If an occasion should arise, and if a disagreement should take place amongst the women, in order to find a remedy for that, we, the undersigned two persons, give in writing to you as follows:—As to whatever award or settlement you, two persons, together will make in accordance therewith, we agree to receive or pay. As to that, we are truly to act on our true religious faith; and we have written and delivered this writing of our free will and pleasure. The same is agreed to and approved of by our heirs.

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and representatives, all; the 11th *Jyeshth Vadya Samvat* 1939; the day of the week, Friday, the 1st June, 1883. And, as to this, you are truly to make and deliver a settlement within fifteen days' time." This document is signed by the defendant, and bears the mark of the plaintiff.

Until the translation of the agreement, which I have just read, was put in evidence at the close of the case, it was assumed that the agreement contained an *actual submission of the points* in issue in this case to the judgment of the arbitrators named in it; and, consequently, the question, whether the actual submission of a subject in dispute to named arbitrators, followed by the attempt of one of the parties to such submission to withdraw from, or to prevent an award from being made upon, the submission, fell within the concluding paragraph of the section as above set out, appeared to call, of necessity, for a decision in this case. The question is one of great importance and of some nicety. It may fairly be argued that such a submission does not fall within the scope of the section, which contemplates a general agreement to refer an existing or possible future dispute to arbitration; while the actual submission of an existing controversy to named arbitrators is left to be dealt with by the provisions contained in the Code of Civil Procedure (Act XIV of 1882), sec. 523 *et seq.* Mr. Inverarity contended that every actual submission to arbitration presupposes an agreement to refer; and that a refusal to proceed with the submission of reference is tantamount to a refusal to perform such presupposed agreement or contract to refer. It may be conceded that the first portion of this contention is correct, but the latter portion of it seems certainly open to objection. It would rather seem as if the presupposed contract to refer was spent of its force, or performed in its entirety, as soon as the parties to it had actually submitted the subject-matter of such agreement to arbitration. If of such an agreement a Court could enforce specific performance, would not the functions of the Court be ended as soon as it had decreed the defendant to refer the controversy to arbitration; and had enforced its decree, if necessary, by attachment? Would not such a decree be fully obeyed by the defendant as soon as he had actually submitted to arbitration? The object of the section is

to compel parties, who have agreed to refer a matter to arbitration, so to refer it before having recourse to a Court of law. Exception I to section 28 of the Contract Act IX of 1872 provided the remedy of a suit for specific performance for a limited class of contracts to refer to arbitration. That was opposed to the English authorities, which have decided that the Courts should not grant specific performance of agreements to refer—Fry on Specific Performance, p. 417. That portion of section 28 of the Contract Act IX of 1872 has, probably for that reason, been repealed, and the section under consideration has provided a new means of compelling parties to agreements to refer to carry them out by an actual reference, namely, by placing them under a severe disability, if they refuse to do so. The mischief to be suppressed was the refusal of parties, who had *agreed to refer* disputes to arbitration, to carry out such engagements in *specie*. The object aimed at, was to induce parties to such agreements to have recourse to arbitration before proceeding by suit. In respect of an *actual submission* to arbitration there was no such mischief to be suppressed. Where a specific dispute had been referred to the arbitration of named arbitrators, the Civil Procedure Code (XIV of 1882) made ample provision for compelling the parties to the submission to abide by, and carry out, its terms, unless they could show sufficient cause to the contrary: see section 523. The Privy Council have held that the parties to such a submission are not at liberty, unless for good cause, to withdraw from it before it is filed in Court—*Pestonjee Nusurwanjee v. Manockjee*⁽¹⁾. That was a decision under section 326 of Act VIII of 1859, but the provisions of the present Code are almost identical with it. If the withdrawal of a party from an *actual submission* to arbitration were a refusal to perform a contract to refer within the meaning of section 21 of the Specific Relief Act I of 1877, the result would be that a withdrawal, for good cause, from a submission would preclude the party so withdrawing from suing in respect of the same matter; otherwise, it would be necessary to read into the section, after the words “has refused to perform it,” the words “unless for good cause shown;” but their Lordships intimated in the above

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case that a withdrawal from a submission to arbitration would be in many cases justifiable. The distinction between an agreement to refer and an actual submission to arbitration is pointed out by the Judges in *Randell v. Thompson*⁽¹⁾. Passages in the judgment of some of the Judges who decided that case in appeal are, however, opposed to the view above suggested, and I do not decide this case upon that construction of the section.

If the withdrawal of a party from a submission to arbitration (without or with cause) be a refusal to perform a contract to refer a controversy to arbitration within the meaning of section 21 of the Specific Relief Act I of 1877, it is clear that the section is one of almost a penal character, and that a defendant relying upon it as a ground of defence must by clear and unambiguous evidence bring his case within the wording of the section. The contract to refer in this case is of the most general character. Indeed, it may be doubted whether for that reason it is not void under section 29 of the Contract Act IX of 1872. "If an occasion should arise, and if a disagreement should take place amongst the women, in order to find a remedy for that, we" (the plaintiff and defendant) * * "give in writing to you as follows:—As to whatever award or settlement you" (the arbitrators) * * * will make, we agree to receive or pay." The subject-matter to be referred is not indicated or expressed. Some occasion for calling in the aid of the arbitrators, however, arose; for we know the parties laid something before the arbitrators, but what they laid before them there is no evidence to show. The evidence rather points to a claim for ornaments. I cannot, therefore, hold that it is proved that the subject of the plaintiff's claim to maintenance was laid before them; and that the plaintiff refused to perform her agreement to refer in reference to that claim. There must be a refusal to refer before the section comes into operation—*Koomud v. Chunder*⁽²⁾; *Tahal v. Bisheshar*⁽³⁾. Again, there is no evidence to show the time at which the plaintiff withdrew from the arbitration, whether it was before or after the time allowed to the arbitrators to make and publish their award, namely, fifteen days. In the latter

(1) L. R., 1 Q. B. Div., 748.

(2) I. L. R., 5 Calcs, 498.

(3) I. L. R., 8 All., 57.

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case, it could, in no view of the section, I am of opinion, be held to be a refusal on her part to perform her agreement to refer. The affirmative part of the issue in this respect lay, I think, on the defendant. It is not shown whether the plaintiff's withdrawal was justifiable or not; but it appears that the defendant took no steps, under section 523 of the Civil Procedure Code, to have the agreement to refer filed in Court, and thus render the plaintiff's attempt to withdraw from the arbitration nugatory, if it was in fact unjustifiable. This, under the ruling in *Pestonjee v. Manockji*⁽¹⁾, it appears, he might have done. There is nothing to show he did not acquiesce in it, in which case the ruling in *Tahal v. Bishesar*⁽²⁾ would apply. On the whole, I am of opinion that the fifth issue has not been proved by the defendant, and I entertain great doubt whether, if the facts intended to be relied upon in support of it had been proved, they would have afforded a defence to this suit.

The plaintiff's suit, therefore, for ornaments will stand dismissed; and there will be a decree that the defendant do pay her for her maintenance the monthly sum of Rs. 40 during the term of her natural life, the first of such monthly payments to be made on the 1st July *proximo* for that month in advance.

As to costs, the defendant, though kind and considerate in his conduct towards the plaintiff, has denied her the legal right which by my judgment she has established. He must, therefore, pay the plaintiff's general costs of the suit and her costs of the first day's hearing. The necessity for a second day's hearing arose from the time occupied in investigating the plaintiff's claim to ornaments. The plaintiff must, therefore, be ordered to pay the defendant's costs of the second day of hearing. Of this day's costs each party will bear his or her own. This division of costs, I believe, to be in accordance with the strict rights of the parties. I might have taken a less strict view of the plaintiff's liability to costs in reference to her claim to ornaments; seeing that it is, in most cases, an inveterate feeling in the Hindu female mind to consider herself aggrieved in the matter of her ornaments, and a widely spread practice, amounting

(1) 12 Moore's Ind. App., 112.

(24) I. L. R., 8 All., 57.

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almost to a custom, to bring forward unfounded or at least unprovable claims for ornaments against her husband's relatives; but the course she has adopted in compelling the attendance, in Court, of the ladies Lálvahu and Shámvahu has determined me not to do so. I cannot but think that their attendance in Court was not really required by the plaintiff in her own interest; and that the process of the Court has been made use of to annoy the defendant through the ladies of his family or to annoy the ladies themselves. This is an abuse of the process of the Court, and calls for its censure. I am afraid that some solicitors are not sufficiently urgent in impressing upon their clients the impropriety of such conduct.

The suit, as regards the plaintiff's ornaments, will stand dismissed; and there will be a decree directing the defendant to pay to the plaintiff, for her separate maintenance, the sum of Rs. 40 *per mensem* on the first day of each month in advance for the term of her natural life. The first payment to be made on the 1st day of July *proximo*. The order for costs will be as stated in my judgment.

Attorneys for the plaintiff:—Messrs. *Tobin and Roughton*.

Attorneys for the defendant:—Messrs. *Little, Smith, Frere, and Nicholson*.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

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RA'MCHANDRA NA'RA'YAN, (ORIGINAL DEFENDANT), APPELLANT, v. NA'RA'YAN MAHA'DEV AND ANOTHER, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Limitation Act XV of 1877, Art. 127—Hindu law—Joint family—Joint estate—Partition—Portion of estate reserved undivided—Possession of reserved portion by one member of family—Adverse possession—Possession, inference arising from—Burden of proof—Res judicata as between defendant.

The plaintiffs sued for part of a house as a portion of family property left undivided on the occasion of a general partition which had taken place about thirty-five years before the suit. The defendant had since then been in sole possession

* Appeal from order, No. 12 of 1886.