1888
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APPEL-
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CIVIL.

13 B. 101.

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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

BAI DEVKORE (*Original Defendant*), *Appellant v.* SANMUKHRAM (*Original Plaintiff*), *Respondent.** [18th June, 1888.]

Hindu law—Co-parcener's widow—Right of co-parcener's widow to live in the dwelling-house—Disagreement between widows no ground for the eviction of either.

Under the general rule of Hindu law prevailing in the Bombay Presidency, a co-parcener's widow is, in the absence of any special circumstances, entitled to reside in the family dwelling-house.

The plaintiff sued to recover possession of a portion of the family dwelling-house in the actual possession and enjoyment of the defendant, who was the childless widow of his undivided brother. The plaintiff had offered her a residence in another house on condition of her vacating the part of the house in dispute. Pending the suit the plaintiff died, and was subsequently represented by his widow. Both the lower Courts awarded the plaintff's claim, on the ground of disputes between the two widows and also on the ground of the inconvenience and unhealthiness of the part of the house in the defendant's possession. The plaintiff had not suggested these points in his plaint, nor had the defendant complained of the unhealthiness of the premises. On appeal by the defendant to the High Court,

Held, reversing the decrees of the lower Courts, that the defendant had a right, as a co-parcener's widow, to live in the family house, and that there were no special circumstances exempting the case from the general rule of Hindu law—the mere fact of disputes existing between the defendant and the plaintiff's widow not justifying the eviction of the defendant.

THIS was a second appeal from a decision of W. H. Horsley, Acting Assistant Judge (F.B.) of Surat at Broach.

[102] One Narsidas and his two sons, Kasandas and Sanmukhram, were members of a joint Hindu family. Sanmukhram lived at Bombay, while Kasandas lived with his father. Kasandas died in 1879, leaving his widow, the defendant Devkore, him surviving, and after his death Sanmukhram induced his father to execute a deed of settlement excluding Devkore from any claim to inherit the family property. Subsequently Narsidas came under the influence of the defendant, and he set aside the former deed of settlement and made a will by which he directed that his *desai hak* which was his self-acquired property, was to be enjoyed by the defendant, and that she was, in addition, to have the lower part of the dwelling-house.

In 1883 Narsidas died, and his son, the plaintiff, filed this suit against the defendant to recover possession of the part of the dwelling-house in the possession of the defendant, offering to make over to her a portion of another house for her residence. During the pendency of the suit the plaintiff died, leaving him surviving a childless widow.

The defendant contended (*inter alia*) that, even irrespective of Narsidas's will, she was entitled by Hindu law to live in the family house, and that Narsidas having by his will expressly set apart for her the portion of the house in dispute, she was entitled to retain possession of it.

The Court of first instance held the will invalid, and passed a decree for the plaintiff, directing that the defendant should deliver over possession of the property in dispute on the plaintiff's putting her in

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possession of a portion of another house. The decree also ordered that maintenance should be paid to the defendant.

The following is a portion of his judgment:—

"I cannot deny her (defendant's) right to claim a house or a portion of a house for residence from the plaintiff, but I cannot at the same time admit that such residence should invariably be in the family house. She should, as a rule, be lodged in the family house; but when this is either impossible or extremely inconvenient, there can be no objection to her being given a residence in a separate house. * * * The family house in this case [103] is not sufficiently large and convenient to accommodate two families. I have myself visited it, and I think that the ground-floor of it is not only small and inconvenient, but is absolutely unhealthy. If the defendant insists on retaining it, she does so, not for any tangible advantage, but simply out of respect for her own opinion. But be that as it might, it would, in my opinion, be extremely inconvenient to both parties in their present state of disagreement to lodge the defendant in the house in dispute. * * * * I direct * * * that she (defendant) should also recover from him (plaintiff) such proper and sufficient maintenance from the date of her vacating the house in question as might be determined in the execution of the decree. * * * "

The defendant appealed to the Assistant Judge, who amended the decree of the lower Court by setting aside the award of maintenance.

The defendant preferred a second appeal to the High Court.

Goverdhanram Madhavram Tripati,, for the appellant:—A widow of a co-parcener has a right to live in the family house, and she can insist on it. He cited West and Buhler, pp. 79, 252 and 734; *Gauri* v. *Chandramani*(1); *Talemand Singh* v. *Rukmina*(2). The only ground on which the Court will decree her residence in another house is that of inconveninence. Here there are only two widows—the plaintiff having died during the pendency of the suit, and the ground of inconvenience cannot be pleaded.

Manekshah Jehangirshah, for the respondent, contended that a separate residence would prevent quarrels between the widows, and tend to the peaceful enjoyment of property.

JUDGMENT.

NANABHAI HARIDAS, J.:—The suit in this case was brought by one Sanmukhram Narsidas against Bai Devkore, his elder brother Kasandas Narsidas's widow to eject her from the ground-floor of the family dwelling-house, where she had lived during her husband's life-time and since his death in 1879. He based his claim on a deed of settlement made by his father in 1879, and, failing that, on his general right of inheritance, his father having died in 1883. He offered her a separate house to live in, in a different part of the town.

[104] The defendant denied all knowledge of the deed of settlement, and rested her defence on two wills made by her father-in-law in 1873 and 1879 respectively, and, failing them, on her right as a Hindu widow to live in the family dwelling-house during her life-time. She also pleaded limitation; but no issue was raised, and we may take it the plea was afterwards abandoned.

The deed of settlement as well as the two wills were held proved by the Subordinate Judge, but he considered them to be invalid—a decision

(1) 1 A. 262. (2) 3 A. 353.

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in which the lower appellate Court has concurred with him. Neither the plaintiff nor the defendant has questioned before us the correctness of this decision. We have, therefore, to determine the case irrespective of those documents.

The Subordinate Judge awarded the claim on a ground not made by either party, *viz.*, the ground of inconvenience. He also awarded her maintenance, which she had not claimed. On appeal, the Assistant Judge disallowed the maintenance, leaving her at liberty to claim it in a separate suit, and confirmed the decree in other respects. The defendant has appealed to us against this decision, and we are called upon to decide whether, under the circumstances mentioned above, the lower Courts were right in allowing the claim. We may mention here that the plaintiff died pending the suit, and is now represented by his widow. But it makes no difference in the case, for the widow stands in no better position than the plaintiff did.

The general rule of Hindu Law, that a co-parcener's widow is entitled to reside in the family dwelling-house, is well settled in this Presidency: see *Prankoonwur* v. *Devkoonwur* (1); *Kumla Buhoo* v. *Muneeshunkar* (2); *Parvati* v. *Kisansing* (3); *Dalsukhram* v. *Lallubhai* (4), and West and Buhler, 252, 734. The same rule appears to prevail also in Bengal (*Mangala Debi* v. *Dinanath Bose* (5)) and Allahabad (*Gauri* v. *Chandramani* (6) and *Talemand Singh* v. *Rukmina* (7)). Unless, therefore, any special circumstances creating an exception to such rule can be **[105]** made out, the defendant is entitled to succeed. The Subordinate Judge admits the rule, but gets rid of it in this way: "The family house in this case," he says, "is not sufficiently large and convenient to accommodate two families. I have myself visited it, and I think that the ground-floor of it is not only small and inconvenient, but is also unhealthy. If the defendant insists upon retaining it, she does so not for any tangible advantage, but simply out of respect for her own opinion. But be that as it might, it would, in my opinion, be extremely inconvenient to both parties in their present state of disagreement to lodge the defendant in the house in dispute." This view is concurred in by the Assistant Judge.

This mode of dealing with the case calls for one or two remarks from us. The plaintiff does not at all rest his case on the ground of the house being too small and inconvenient. The defendant does not complain that the ground-floor in her occupation is either inconvenient or unhealthy. On the contrary she is perfectly satisfied with it, and implores to be allowed to continue undisturbed where she is. The lower Courts were, therefore, wrong in making this point for the plaintiff. Besides, the family is now admittedly reduced to the two surviving widows. If the house was considered large and commodious enough for the wants of the family when it consisted of at least three more members, their husbands and father-in-law—it does not appear when the mother-in-law died—it is difficult to understand how it has become less so now. As to the ground-floor being unhealthy, opinions may differ. The defendant, who is the only person affected by it, evidently prefers that to any other locality; and she is not to be deprived of her residence merely because the Subordinate Judge entertains a different opinion as to its healthiness. As regards the last observation by the Subordinate Judge, we cannot allow it to go forth as good

(1) 1 Borr. 364. (2) 2 Borr. 687. (3) 6 B. 567. (4) 7 B. 282.
(5) 4 B. L. R. O. C. J. 72. (6) 1 A. 262. (7) 3 A. 353.

law that any "disagreement" between two widows of a family can justify the eviction of one of them from the family residence. We are not shown any authority to support such a proposition. Besides, it would always enable one of them, by picking up a quarrel, to eject the other; and occasions for doing so are by no means rare even in a well-governed family. It [106] may also be noticed that the defendant (appellant) is the senior widow; and, according to Hindu notions, the respondent, who is junior in rank, is bound, morally at all events, to respect and obey her.

We must, therefore, reverse the decrees of both the lower Courts, and reject the claim, with costs throughout.

Decrees reversed.

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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

MAHANT ISHWARGAR (*Original Defendant*), *Appellant v.* CHUDASAMAMANABHAI AND OTHERS (*Original Plaintiffs*), *Respondents.** [20th June, 1888.]

Mortgage—Redemption—Decree for redemption within specified time—Appeal against decree—Power of Court in execution to extend time for redemption allowed by decree—Fact of appeal pending, no special ground for enlarging time.

The plaintiffs sued for the redemption of certain mortgaged property. On the 1st March, 1886, a decree was passed declaring the plaintiffs entitled to redeem on payment by them to the defendants of Rs. 649-11-0 within three months from the date of the decree. Against this decree the defendants (the mortgagees) appealed, on the ground that a much larger sum than Rs. 649-11-0 was due to to them on the mortgage. The plaintiffs also filed objections to this decree under s. 561 of the Civil Procedure Code (XIV of 1882), on the ground that the mortgage-debt had been long ago paid off, and that now a large sum was due to them from the mortgagees who had been in receipt of the profits of the property. Under these circumstances the plaintiffs did not pay the Rs. 649-11-0 within three months as ordered by the decree. On the 12th October, 1886, they presented an application for execution, and paid into Court the Rs. 649-11-0. The lower Court granted their application, and ordered possession of the property to be given to them. The defendant appealed to the High Court.

Held, reversing the order of the Court below, that the Court in executing the decree had no power to alter the language of the decree, which it would virtually do if it enlarged the time mentioned in it by accepting the Rs. 649-11-0 paid into court by the plaintiffs on the 12th October, 1886.

Held, also, that even if the Court had power to enlarge time in the course of execution, the mere fact that the plaintiff had lodged an appeal, would afford no special ground for enlarging the time.

[F., 15 B. 370 (375); 17 B. 547 (554); 19 M. 40 (45); L.B.R. (1893—1900) 174 (176); R., 16 C.L.J. 520=16 C.W.N. 1090=15 Ind. Cas. 689; 17 C.L.J. 120=17 C.W.N 457=18 Ind. Cas. 747; 15 B. 644 (646); 16 B. 249; 22 B. 221 (224); 22 B. 500; L.B.R. (1893—1900) 420; D., 16 B. 263 (265).]

[107] THIS was an appeal from a decision of Khan Bahadur B. E. Modi, First Class Subordinate Judge of Ahmedabad.

The plaintiffs (respondents) in this suit obtained a decree on the 1st March, 1886, for the redemption of certain mortgaged property on payment by them of Rs. 649-11-0 to the defendants within three months from the date of the decree.

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* Appeal, No. 20 of 1887.