1889
AUG. 26.
ORIGINAL CIVIL.
14 B. 482.

create an estate to which on the death of the last surviving widow the heir of the testator, whoever he might be at that time, would be entitled, then during the lives of the widows there can be no such thing as possession adverse to that heir. The law allows the heir twelve years from the death of the widow within which to bring his suit for possession, and it is not in the power either of the widow or of the executor or of any person claiming either through or against them to abbreviate that period or substitute another period or starting-point of time.

I find, therefore, that no part of the suit is barred by limitation and that the bequests to *dharm* in the will of the testator contained are void and inoperative.

[490] The further hearing of the suit stands adjourned to the 16th September next, to allow of the disposal of an application for inspection to be made in Chambers.

Attorneys for the plaintiff: —Messrs. *Crawford and Buckland.*

Attorney for the defendant:—Mr. *Mulji Bhavanidas Bharbhiya.*

Attorneys for the Advocate-General :—Messrs. *Little, Smith, Frere and Nicholson.*

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14 B. 490.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

GOKIBAI (*Plaintiff*) *v.* LAKHMIDAS KHIMJI (*Defendant*).*

[17th April, 1890.]

Hindu law—Maintenance of widow—Suit against father-in-law—Defence that plaintiff was provided for by her husband's will—Effect of direction in husband's will that widow should reside in family house.

The plaintiff, after the death of her husband M., sued her father-in-law for maintenance. M. although not adopted had always been treated by his maternal grandfather N. as his son. They lived together, and after N.'s death, in 1873, M. and his wife, (the plaintiff), continued to live occasionally with N.'s widow, Mankorbai. M. died in 1876 without issue, leaving the plaintiff, his widow, who was then a minor of the age of fourteen. M. left a will and appointed Mankorbai his executrix. In his will he spoke of himself as the adopted son of N., (which he was not), and he purported by it to dispose of N.'s property. He bequeathed ornaments of the value of Rs. 2,000 to his wife, and he directed that if she resided in the house of his father (the defendant), or in the house of Mankorbai, she should be paid Rs. 10 a month as maintenance by Mankorbai, but if she went to live elsewhere, that only Rs. 7 a month should be paid to her. Mankorbai proved the will. In 1879 the plaintiff left Mankorbai's house and went to live with her mother, and in 1889 she filed this suit against her father-in-law, the defendant, for maintenance. The defendant pleaded that the plaintiff was provided for by her husband's will, and, further, that the plaintiff had failed to obey her husband's direction to reside either in Mankorbai's house or the defendant's house, and that, therefore, she was not entitled to a separate maintenance.

Held, that the plaintiff was not bound to enforce her claim under her husband's will in lieu of claiming maintenance from her father-in-law. In answer to plaintiff's claim the defendant was bound to show that she was possessed of property out of which she could maintain herself, and he did not discharge that *onus* by showing that by suing Mankorbai she might possibly recover the maintenance provided for her by the will.

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* Suit No. 53 of 1889.

1890
APRIL 17.

ORIGINAL CIVIL.

14 B. 490.

[491] *Held*, also, that the plaintiff was entitled to separate maintenance from the defendant. The general rule of law is that a Hindu widow is not bound to reside in her deceased husband's family house and does not forfeit her right to maintenance out of her husband's estate by going to reside elsewhere, unless she goes elsewhere for an improper purpose.

Quære—Whether that rule applies if she goes to reside elsewhere notwithstanding a direction in her husband's will that she should reside in the family house.

[Diss., 38 B. 120 (121)=15 Bom. L.R. 684=20 Ind. Cas. 533; F., 5 C.W.N. 549; R., 4 C.L.J. 74 (78); 13 Ind. Cas. 136.]

SUIT for maintenance. The plaintiff was the daughter-in-law of the defendant, being the widow of his eldest son Mathuradas.

The plaint stated that the said Mathuradas was usually called Mathuradas Narottamdas, instead of Mathuradas Lakhmidas, out of respect for his maternal grandfather Narottamdas, but he had not been adopted by him. The plaintiff was married to Mathuradas in the year 1872.

Mathuradas died in 1876 without issue. Subsequently to his death the plaintiff lived with the defendant, and was maintained by him, but after 1879 she lived with and was maintained by her mother.

The plaint stated that the plaintiff, having no means of her own, had applied to the defendant to supply her with separate maintenance, but he had not done so.

The plaint further stated that the plaintiff had been presented at the time of her betrothal and marriage and subsequently thereto with ornaments and clothes which were her *stridhan*; that these had been deposited with the defendant for safe custody, and that in spite of her request he had failed to deliver them up to the plaintiff. She prayed that the defendant might be ordered to pay her maintenance, and to deliver up the ornaments and clothes, or their value, *viz.*, Rs. 21,512.

The defendant denied his liability to maintain the plaintiff. He alleged that the plaintiff's husband Mathuradas had left a will under which the plaintiff was sufficiently provided for. He further submitted that the plaintiff could not sue for maintenance and for her ornaments and clothes in the same suit.

The following is a copy of the will of Mathuradas referred to by the defendant:—

"I, Mathuradas Narottamdas, by caste a Halai Bhatia, make known as follows: This day I make this my last will, that is, testamentary writing.

[492] "First, as follows: As to my immoveable or (and) moveable property which exists, which I possess as the adopted son of the worshipful Narottamdas Narandas or in which I have a right or claim, I appoint my respected mother Mankorbai the heir of all that property and the rights which I have over the same. And I give my said respected mother Mankorbai the whole right in that property, and I direct as follows:

"My said respected mother Mankorbai may make use of all the said property according as she may please, or she may give away the same to any one by will or by a gift paper as she may choose. No dispute or objection in respect thereof shall prevail.

"Second, as follows: My wife Goki has with her ornaments of the value of Rs.—namely—thousand. Of those ornaments there shall be given to her to wear ornaments of the value of Rs. 2,000, namely, two thousand

only. And all the remainder of the ornaments shall remain with my respected father, the worshipful Lukhmidas Khimji; and according to the respectability of my family should my wife Goki live in the house of my respected mo her Mankorbai or my worshipful respected father Lakmidas Khimji, and should she act agreeably to their directions then my respected mother Mankorbai shall pay her Rs. 10, namely, ten, a month for her expenses. But should my wife live apart from my respected mother and my respected father Lakhmidas Khimji, then Rs. 7, namely, seven, a month only shall be paid to her.

"Should my wife Goki not live with my respected mother and my respected father, then, except those of the value of Rs.—, she has no right whatever to the other ornaments; and giving authority to my respected father to give those ornaments to such of my brothers as he may choose, I depart.

"I appoint my respected mother Mankorbai the executrix of this my will.

"The 13th of *Shravan Sud* of *Samvat* 1932, the day of the month Thursday, the 3rd August, 1876."

The case came on before Scott, J., on the 27th January, 1890. On behalf of the defendant an issue was raised as to whether the plaintiff had not improperly joined her claim for maintenance and her claim for ornaments and clothes in this suit and was not bound to elect which claim she would prosecute. The learned Judge held that under s. 44 of the Civil Procedure Code (Act XIV of 1882), there was a misjoinder of causes of action, the claim for maintenance being against the estate of the deceased, and the claim for ornaments and clothes being against the defendant personally.

The Court ordered that the plaintiff should elect and might proceed with either claim, subject to her paying any costs specially caused to the defendant by the misjoinder.

The plaintiff elected to proceed with the claim for maintenance.

[493] Scott, J., having gone on leave, the case now came on before Farran, J.

Macpherson and *Russell*, for the plaintiff.—The plaintiff is clearly entitled to maintenance. Her husband Mathuradas and his father the defendant were undivided, and there is ancestral property. The only question is as to the amount of maintenance to be ordered; Mayne's Hindu law, paras. 408, 411, 415 (4th ed.); *Sreemutty Nittokissoree Doossee* v. *Jogendro Nauth Mullick* (1).

Starling and *Anderson*, for the defendant.—The plaintiff is sufficiently provided for by her husband's will, and does not need maintenance from the defendant—*Chandrabhagabai* v. *Kashinath Vithal* (2). The will directs her to reside with the defendant or with Mankorbai. She has chosen to disobey. No doubt if she had been turned out by them she would be entitled to maintenance from the defendant, but not otherwise—*Raja Pirthee Singh* v. *Rani Rajkooer* (3); Mayne's Hindu law, para. 415, (4th ed.): *Bamasoonderee Debia* v. *Puddomonee* (4); Macnaghten's Hindu Law, p. 62. *Narainrao Ramchandra Pant* v. *Ramabai* (5) was also referred to.

(1) 5 I.A. 55. (2) 2 B.H.C.R. 323. (3) 12 B.L.R. 238 (247), P.C.
(4) S.D. Rep. Calc. 1859, 457. (5) 6 I.A. 114=3 B. 415.

1890

APRIL 17.

ORIGINAL CIVIL.

14 B. 490.

JUDGMENT.

FARRAN, J.—When Mr. Justice Scott found the first issue in this suit in favour of the defendant, and made an order in pursuance of that finding, the suit became one for maintenance simply. For the reasons which I have already given, I decided that it was not competent for me either to disregard, by commencing the case *de novo*, or to review or reconsider that finding and order. The only question which remains to be determined is whether the plaintiff is entitled to a decree for separate maintenance from the defendant.

The facts under which the plaintiff's claim arises are not really in dispute. Mathuradas, the defendant's eldest son, and the plaintiff were betrothed and subsequently married when both were still young. The marriage took place in 1872. Mathuradas had been treated by his maternal grandfather, Narottamdas as a son, and out of respect to Narottamdas was called Mathuradas [494] Narottamdas instead of Mathuradas Lakhmidas; but it is admitted by the defendant that Mathuradas was not in fact, as he could not in law have been, adopted by his maternal grandfather. Narottamdas died in 1873 intestate, leaving him surviving his widow Mankorbai, and his brother's son Jamnadas Devidas, from whom he was separate, and the sons of the latter. Mankorbai, the widow of Narottamdas, thus on the death of her husband became entitled to his property, taking the moveables absolutely, and a widow's estate in the immoveables. The bulk of the property was immoveable. Mathuradas, after the death of Narottamdas, continued to be called Mathuradas Narottamdas, and he and his wife Gokibai lived sometimes with Mankorbai and sometimes with his father Lakhmidas. The fiction that he was the son of Narottamdas was kept up, and to such an extent was this done, that he and Mankorbai *alias* Devkorbai, as the legal representative and widow of Narottamdas Narrondas, were by amendment made co-plaintiffs in suit No. 1132 of 1865 in which suit Narrottamdas had been co-plaintiff with Jamnadas Devidas and one Hurgovan Chuttur. By decretal order in that suit made on the 20th April, 1874, it was declared that the plaintiff Mathuradas Narottamdas, as the adopted son and heir of the deceased plaintiff Narottamdas Narrondas, was entitled to the share in certain property left by one Vullu Annundji to which Narottamdas Narrondas had, by the same decretal order, been declared to have been entitled. Mathuradas did not in his life-time receive anything under this decree; but Mankorbai received the share of Narottamdas after the death of Mathuradas. There is no evidence in the case to show the amount of that share or of what it consisted.

Mathuradas died on the 3rd August, 1876, at the age of eighteen or nineteen, without issue, leaving his widow, the plaintiff Gokibai, then a minor of fourteen years or thereabouts. Previously to his death, he executed a will on the 3rd day of August, 1876, the contents of which will be presently referred to. The funeral ceremonies of Mathuradas were performed by his brother Nensi in the house of his father Lakhmidas. After the death of Mathuradas, Gokibai continued to live with her father-in-law Lakhmidas. Her mother Navibai, soon after the death of Mathuradas, [495] applied by *habeas corpus* to the High Court for the custody of Gokibai, alleging that Mathuradas had been adopted by Narottamdas, and that, therefore, Lakhmidas was not entitled to the custody of the infant. On that occasion Lakhmidas positively and unequivocally denied that Mathuradas had been adopted by Narottamdas, though he

1890
APRIL 17.
ORIGINAL CIVIL.
14 B. 490.

stated that as Narottamdas had no issue except one daughter Lakhmivahu, the mother of Mathuradas, Narottamdas had treated and brought up Mathuradas as if he were his son. In the result Gokibai was left in the house of Lakhmidas, with a direction that she should be allowed to visit Navivahu after the usual twelve months of mourning should have expired. After this Gokibai lived with Lakhmidas until 1879, occasionally visiting her mother Navibai. Since 1879 she has lived with Navibai. On the 16th January, 1889, she through her solicitors demanded separate maintenance from Lakhmidas, and receiving no reply, filed this suit on the 4th February, 1889. It is admitted that the defendant Lakhmidas is possessed of ancestral property, though it is said to be mortgaged, and it is not alleged that there was any partition between Lakhmidas and Mathuradas in the life-time of the latter.

From this *resume* of facts it follows that the plaintiff is entitled to be maintained by the defendant, unless the latter can establish some grounds depriving her of that right. He relies upon the will of Mathuradas as affording a defence to her claim. It becomes necessary, therefore, to examine the contents of the will and its legal effect. The will runs as follows :—(His Lordship read the will and continued :)—The will appoints Mankorbai executrix. Mankorbai proved it on the 21st August, 1877. The obligation to do so was, no doubt, forced upon her by the terms of the decretal order of the 20th April, 1874, which I have already alluded to. As Mathuradas was not the adopted son of Narottamdas, he had no right to dispose of the property left by the latter, or to enlarge, as he purports to do, the estate of Narottamdas's widow, Mankorbai, in it. Except in so far as it does away with the effect of the decretal order of the 20th February, 1874, which declares Mathuradas, as adopted son of Narottamdas, to be entitled to the share of the latter in Vullu Anundji's estate, the will confers no benefit on Mankorbai. [496] Except in so far as the effect of that decretal order was to give a right to Mathuradas to impose a burden on the estate of Narottamdas in the hands of Mankorbai, Mathuradas had no right to impose the burden of maintaining his wife Gokibai upon Mankorbai out of that estate. Whether such a right was given by the effect of the decretal order cannot be determined in the absence of Mankorbai. The latter, however, proved the will. This fact may estop her from resisting Gokibai's claim to the benefit, if benefit it can be called, which is conferred upon Gokibai by the will. But is Gokibai bound to enforce her claim under the will in lieu of claiming maintenance from the estate in the hands of her father-in-law! I am unable to hold that she is bound to take that course. Mankorbai has never paid any maintenance to Gokibai, and there is no evidence to show whether she admits any liability to do so. If she does not, the law of limitation would seem to throw difficulties in the way of Gokibai establishing a claim under the will. At the utmost, when living with Navibai, she could only claim Rs. 7 per month from Mankorbai, and that would cease after the death of Mankorbai. I think that the defendant was bound to show that the plaintiff is possessed of property out of which the plaintiff can maintain herself; and that he does not discharge that *onus* by showing that, by suing Mankorbai, she might possibly recover maintenance at the rate of Rs. 7 per month for a limited time by force of the law relating to estoppel.

It is also contended for the defendant that the plaintiff has been directed by her husband's will to live in the house of Lakhmidas Khimji or of Mankorbai, and that she is therefore not entitled to demand a separate

1890
APRIL 17.
ORIGINAL CIVIL.
14 B. 490.

maintenance from the defendant. (See Mayne's Hindu Law, para. 415. (4th ed.)). The general rule of law is that a Hindu widow is not bound to reside in her deceased husband's family house, and does not forfeit her right to maintenance out of her husband's estate by going to reside elsewhere, unless she leaves her husband's house for the purpose of unchastity or for any other improper purpose—*Raja Prithee Singh* v. *Rani Rajkooer* (1). It may be an exception to that general [497] rule that when a widow is directed by her husband's will to reside in his family house, or in that of her father, she is not entitled to separate maintenance if she lives elsewhere. Upon that it is not necessary for me to come to a decision. I think that if such a direction is relied upon, it must be a plain and unambiguous direction, and not one to be gathered by inference from words which do not necessarily imply such a direction as is the case in the will relied upon by the defendant.

I must decide, therefore, that the plaintiff is entitled to a separate maintenance from the defendant. The evidence and materials before the Court are insufficient to enable it to determine judicially the proper amount of maintenance to be allowed to the plaintiff. The ancestral property is said to be in value about one *lakh* of rupees. This might be expected to produce Rs. 350 or thereabouts per month. The defendant has three sons living, three unmarried daughters, and the widow of a deceased son maintained by him. To the latter he allows Rs. 10 for expenses. The property is not large and is said to be mortgaged, but the mortgage may have been effected to assist the defendant in his business, which is considerable, and brings him in Rs. 4,000 or Rs. 5,000 per month. The only guide I have to go by is the allowance made by defendant to Nursi's widow, Rs. 10 per month, a separate room, and her boarding as a member of the family. Rupees 20 per month would obtain similar lodging and food for the plaintiff. I, therefore, award her Rs. 20, *plus* Rs. 10 per month, or in the aggregate Rs. 30. If the parties are not willing to accept that sum, it must be referred to the Commissioner to ascertain the proper sum to be allowed to the plaintiff for her separate maintenance. The award of maintenance will run from the date of suit filed. Defendant to pay costs of suit.

Attorneys for the plaintiff :—Messrs. *Hore, Conroy and Brown.*

Attorneys for the defendant :—Messrs. *Jefferson, Bhaishankar, Dinsha and Kanga.*

(1) 12 B. L. R. P. C. 238.