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[327] APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

KESHAVLAL GIRDHARLAL (*Original Plaintiff*), *Appellant v.* BAI PARVATI (*Original Defendant*), *Respondent.**

[20th April, 1893.]

Husband and wife—Restitution of conjugal rights—Decree—Decree not executed—Subsequent voluntary co-habitation followed again by desertion—Satisfaction of decree—Second suit for restitution of conjugal rights—Res judicata—*Cause of action—Civil Procedure Code (Act XIV of* 1882), *ss.* 13 *and* 244.

Plaintiff obtained a decree against his wife for restitution of conjugal rights in 1885 which was never executed. In 1887, however, she returned to his house, and stayed with him for two months. She afterwards deserted him again. Thereupon the plaintiff filed a second suit for restitution of conjugal rights.

Held, that the suit was not barred either under s. 13 or 244 of the Code of Civil Procedure (Act XIV of 1882). A second withdrawal from cohabitation constitutes a fresh cause of action.

THIS was a second appeal from the decision of T. Hart-Davies, Joint Judge of Ahmedabad, in appeal No. 75 of 1891 of the district file.

In 1885 the plaintiff obtained a decree against his wife for restitution of conjugal rights. He made several attempts to execute the decree, but failed. In June, 1887, however, his wife returned and lived with him for about two months. She applied to the Court to enter satisfaction of the decree in accordance with s. 258 of the Code of Civil Procedure (XIV of 1882). But this application was rejected on the ground that it was not made within twenty days.

Subsequently she again deserted the plaintiff, and in 1890 he filed this suit for restitution of conjugal rights.

This suit was dismissed by the Subordinate Judge on the ground that the matter was *res judicata*.

This decision was confirmed, on appeal, by the Joint Judge, who held that the plaintiff's only relief was by way of execution of the decree already obtained, but that that remedy was barred.

The plaintiff thereupon preferred a second appeal to the High Court.

[328] *Ganpat Sadashiv Rao*, for appellant.—The present suit is not barred under s. 13 of the Code of Civil Procedure. It is not based on the same cause of action as the former suit. The decree in the former suit was satisfied when the wife returned and stayed with her husband for some time. Her subsequent desertion gave a fresh cause of action. A wife's desertion of her husband constitutes a continuing wrong giving rise to constantly recurring causes of action, on demand and refusal. See *Bai Sari* v. *Sankla Hirachand* (1). The present suit is not, therefore, barred.

Rao Saheb *Vasudev Jagannath Kirtikar*, for respondent.—The plaintiff, having already obtained a decree for restitution of conjugal rights, his only remedy was to execute that decree, and not to bring a fresh suit for asserting the same rights. If a fresh suit, like the present, were permitted, there would be no end to litigation ; it would be in the power of the husband to detain his wife in jail for an indefinite period. Such a

* Second Appeal No. 7 of 1892.

(1) 16 B. 714.

result could not have been contemplated by the Legislature. Section 260 of the Code of Civil Procedure (XIV of 1882) clearly shows that, if the wife has once undergone imprisonment for six months for disobeying a decree for restitution of conjugal rights, the matter is at an end. She cannot be imprisoned again in execution of the decree. See *Ardesar Jahangir* v. *Avabai* (1). If further proceedings in execution are barred, *a fortiori* a fresh suit in respect of the same matter is equally barred, whether we take into consideration s. 13 or s. 244 of the Code of Civil Procedure.

JUDGMENT.

CANDY, J.—The facts in this case are simple. Plaintiff obtained in 1885 a decree for restitution of conjugal rights. He made some attempts to execute the decree, which apparently failed owing to his being unable to serve notice on defendant. Then defendant applied to the Magistrate for an order of maintenance against her husband. The Magistrate told her that she must go and live with her husband. She did so twice. It is clear that in 1887 she lived with him for two months. And she applied to the Subordinate Judge to enter up satisfaction of her husband's decree, but the Subordinate Judge replied that he could not do so under s. 258, as she had not applied within twenty days. **[329]** Then, in 1890, the present suit was filed by the husband, the Subordinate Judge at the same time deciding a suit filed by the wife for maintenance, holding that the husband had not turned the wife out of his house, and that she was not entitled to separate maintenance. The Subordinate Judge and the Joint Judge, in appeal, held that the husband's claim for restitution of conjugal rights must also be rejected. The Joint Judge was of opinion that as the wife's living with her husband in 1887 was not in execution of the decree, the husband's only relief was by way of executing his former decree, and that was now barred. I am unable to adopt that view, according to which, if the wife, after decree, went to live with her husband for three years and a day, though not in execution of the decree, and she then left her husband, he would be for ever barred from obtaining a fresh restitution of conjugal rights. Whether a husband, who has obtained a decree for restitution of conjugal rights, which can, in no sense, be said to have been satisfied, can at any time file a fresh suit for restitution, is not the question before us. Nor, indeed, is the question put by the Joint Judge, whether the husband having executed his decree by imprisoning the wife for six months can bring a fresh suit after a fresh demand and refusal. Here the wife returned to her husband and *bona fide* lived with him for two months. Then she left him. She may have a good defence of her conduct. Circumstances may have arisen entitling her to leave him. These, if existing, should be pleaded in a fresh suit if brought, rather than on an application for execution of the former decree. Therefore, I think that the lower Courts were wrong in holding that the present action is barred by the former suit of 1885. I would reverse the decision of the District Court, and remand the case for re-hearing. Costs to abide the result.

FULTON, J.—The Joint Judge having found that subsequently to the first decree for restitution of conjugal rights the defendant did return and live with her husband for a short time, I am unable to see on what principle it can be held that the present claim is barred by the previous suit. As pointed out in *Dadaji Bhikaji* v. *Rukmabai* (2), "the gist of the action for restitution **[330]** of conjugal rights is, that married persons are bound

(1) 9 B.H.C.R. 290.

(2) 10 B. 301 (311).

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to live together, and that one or other has withdrawn himself or herself without lawful cause," and it does not seem possible to argue that a second withdrawal of a wife from cohabitation does not constitute a cause of action just as much as a first withdrawal. Consequently, it follows that, unless it can be shown that a second suit for restitution of conjugal rights is barred by some section of the Civil Procedure Code, such suit will lie. Now, if the Subordinate Judge's view were correct, that the decree in a suit for restitution of conjugal rights directed the defendant to live permanently with the plaintiff, there would be a great deal of force in the argument that either s. 13 or s. 244 would be a bar to a second suit; but I am unable to agree with him as to the real nature of the decree. No form is prescribed by the schedule to the Code, but the reported cases referred to in Woodman's Digest, columns 5100 and 5101, show that the proper form is simply that the wife do return and live with her husband. The learned Subordinate Judge has argued that such a decree is not limited as to time, and that, therefore, any subsequent desertion by the wife is a disobedience of the decree, and not a fresh cause of action. But it appears to me that the Court cannot direct a wife to live with her husband for the rest of her life, as many things may occur entitling her to leave him. Gross cruelty would justify her departure, and it would be very anomalous if the decree should direct permanent cohabitation without regard to the possibility of occurrences which might render it dangerous. All, then, that the decree appears to order, is that the wife do return to her husband's house in order to live with him, and when she has once done so with the *bona fide* intention of cohabitation, it seems that the decree is satisfied and incapable of further execution. In the case of *Motiram Harkisan* v. *Bai Mancha* (1), an application for execution was made by a husband on the desertion of his wife after her return to him for three days under a decree for restitution of conjugal rights, but the application was rejected on other grounds, and the question whether the wife's return for three days satisfied the decree, was not considered. The answer to such a question, however, would [331] appear to depend on the intention of the wife returning to her husband's house. If she did so with the *bona fide* intention of living with him, her return would, I think, constitute a complete satisfaction of the decree; but if she had not such intention, and meant to run away again after a merely nominal compliance, the Court would probably hold that the decree was not satisfied. The intention could only be determined by reference to the circumstances of her return and subsequent withdrawal.

In the present case, it appears that the wife applied to the Court, under s. 258, to enter satisfaction of the decree, but that her application was refused, as the time for making it had expired. It may well be doubted whether s. 258 has any application to a decree for restitution of conjugal rights; but the fact that she made such application, shows that she intended to live with her husband when she returned to his house, and that the decree has, in fact, been satisfied.

Under these circumstances, I think that the subsequent withdrawal of the wife gave a fresh cause of action; but I abstain from deciding whether, whilst a decree for restitution remains unsatisfied, a husband can file a second suit based on the continued absence of his reluctant wife, and thereby, as feared by the Subordinate Judge, succeed in detaining her permanently in jail, or whether such second suit to obtain a result already

(1) P.J., (1876), p. 129.

directed by the first decree will not be barred by s. 244, Civil Procedure Code.

I concur in reversing the decree of the Courts below, and remanding the case to the Court of the District Judge for disposal on the other issues arising between the parties, and in directing that the costs of this appeal do abide the result.

Decree reversed.

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[332] APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

TRIKAM MADHAV SHET (*Original Plaintiff*), *Appellant v.* HIRJI HARJIVAN SHET (*Original Defendant*), *Respondent.** [12th June, 1893.]

Registration—Mortgage—Priority—Unregistered mortgage with possession and without notice not entitled to priority as against a mortgage earlier in date, but subsequently registered—Bombay Regulation IX of 1827—*Act XIX of* 1843—*Possession—Hindu law.*

The plaintiff sued to enforce a mortgage dated 8th June, 1863, which was registered on 15th September, 1864, but was unaccompanied with possession. The defendant relied on a mortgage of the same property dated 9th May, 1864. This mortgage was unregistered, but was accompanied with possession.

Held, that, apart from any special peculiarities of Hindu law, the plaintiff's mortgage of the 8th June, 1863, which was registered on the 15th September, 1864, was entitled to priority over the unregistered mortgage of the 9th May, 1864, although the latter was without notice of the earlier mortgage and was accompanied with possession,

Held, also, that plaintiff's mortgage was not invalid under Hindu law owing to its not being accompanied with possession.

[R., 27 B. 452 (472).]

SECOND appeal from the decision of C. E. G. Crawford, District Judge of Thana, in Appeal No. 225 of 1890.

The plaintiff sued to enforce his mortgage lien by sale of a portion of the property mortgaged.

He claimed under three following mortgage-deeds executed by the defendant Bhagu and his father Chimnia, each being a renewal of the one preceding it, *viz.*—

(1). 11th January, 1860, not registered or accompanied with possession.

(2). 8th June, 1863 registered on the 15th September, 1864, but not accompanied with possession.

(3). 4th August, 1867, registered, but not accompanied with possession.

The present suit was filed in 1889. Defendants Nos. 1 to 4 did not contest the claim.

Defendant No. 5 pleaded that he was in possession, and he relied upon a mortgage executed by Bhagu and Chimnia to one Mahadaji Ravji, dated 9th May, 1864, which was not registered [333] but which was accompanied with possession. He contended that he was entitled to the benefit of this mortgage, he having, in 1878, advanced

* Second Appeal No. 955 of 1891.