

that there never had been actual partition of the house property. But it appears to us that even had he held that the house property had been partitioned, and that each brother had thenceforward held his share in severalty, that need not necessarily have precluded him from coming to the decision he did upon the only question he was asked to decide. What, therefore, was not directly and substantially in issue in that suit and was not necessary to be decided, cannot now, we think, fairly be held to be *res judicata* against the plaintiff.

As this was the only point taken in appeal, we must, therefore, dismiss the appeal with all costs and confirm the decree of the Court below.

Decree confirmed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

PARWATIBAI KOM BHAGIRATH (ORIGINAL PLAINTIFF), APPELLANT, v.
CHATRU LIMBAJI (ORIGINAL DEFENDANT 2), RESPONDENT.*

1911.

August 25.

Hindu Law—Widow—Arrears of maintenance—Demand and refusal—Residence in deceased husband's family house—Residence elsewhere for improper purpose.

Arrears of maintenance cannot be refused to a Hindu widow in consequence of failure to prove demand and refusal.

A Hindu widow is not bound to reside in her deceased husband's family house and does not forfeit her right to maintenance by residing elsewhere, unless she leaves the house for an improper purpose.

Ambabai Kom Balaji Vinayak Kale v. Ramchandra Balaji Kale(1), followed.

Girianna Murkundi Naik v. Honama(2), referred to.

SECOND appeal against the decision of C. C. Boyd, District Judge of Ahmednagar, confirming the decree of M. K. Nader-shah, Joint Subordinate Judge.

* Second Appeal No. 323 of 1910.

(1) (1895) P. J., p. 44.

(2) (1890) 15 Bom. 236.

1911.

PARWATIBAI

v.

CHATRU
LIMBAJI.

The plaintiff sued to recover from the defendants maintenance at the rate of Rs. 10 per month together with Rs. 480 for arrears of past four years' maintenance. She prayed that her maintenance should be declared a charge on the property in the hands of the defendants and that she should be allowed a certain portion of a particular house exclusively for her residence during her life-time. The plaintiff alleged that her husband died about six or seven years before suit, that defendant 1 was the brother of her deceased husband and defendant 2 was his son, that they all lived joint and in union and held ancestral property jointly, that the plaintiff lived with the defendants for some time after her husband's death, that the defendants having subsequently driven her away, she went to Poona and lived with her mother who maintained the plaintiff till the year 1903 and was no longer able to do so. The plaintiff, therefore, brought the present suit alleging the accrual of the cause of action on the 22nd October 1901.

Defendant 1 contended that there was no joint ancestral property, that the plaintiff's husband lived separate and carried on his business separately, that the plaintiff had forsaken her husband and lived with her mother at Poona where she carried on some trade and that the plaintiff had no right to claim maintenance.

Defendant 2 concurred in the defences raised by defendant 1 and added that he had acquired some property by his personal exertions without any assistance from the family and that he was willing to keep the plaintiff in his house and to maintain her she being his paternal aunt.

The Subordinate Judge found that the family of plaintiff's husband was separate from the defendants, that the property in suit was not joint family property, that house No. 1754 was the only family house kept joint and that the plaintiff was entitled to claim maintenance from the said house at the rate of one rupee per month, the monthly rent of the house being two rupees only, from the date of the suit. He, therefore, passed a decree as follows :

I direct that plaintiff do recover from the defendants maintenance at the rate of Re. (1) one per month from the date of institution of this suit (the maintenance to be a charge on house No. 1754 in the hands of the defendants), together with costs in proportion to the claim awarded. The rest of the plaintiff's claim is rejected with costs. Defendants should bear their own costs.

1911.

PARWATIBAI
v.
CHATRU
LIMBAJI.

With respect to the plaintiff's conduct and her claim for arrears of maintenance, the Subordinate Judge made the following observations :

Though Re. 1 may seem to be a small amount, it is clear to the Court that plaintiff does not deserve greater amount for her maintenance. Plaintiff had abandoned her husband and had gone to Poona to live. She falsely charges the defendants of having driven her out of their house after her husband's death. Defendant 2 expressed his willingness to maintain her from the very beginning of the suit. There is no evidence whatever that defendants refused to maintain her. The Court had the opportunity of noting the demeanour of both the plaintiff and the defendant 2, and it seemed to the Court that plaintiff would have been well cared for and maintained by defendant 2. Plaintiff appears to be an instrument in the hands of others and she has been set up by them to harass defendant 2 who happens to acquire some property of his own.

Plaintiff had not asked for maintenance from the defendants, nor had she ever served them with a notice claiming maintenance. Defendants besides had never refused to maintain her; they are ever ready to maintain her. Looking to all the circumstances of the case and seeing that plaintiff had left her husband's protection of her own accord (*vide* exhibit 13), I do not think that plaintiff is entitled to the arrears of four years' maintenance prior to the institution of the suit claimed by her. I, therefore, disallow the plaintiff's claim to past maintenance.

On appeal by the plaintiff, the District Judge confirmed the Subordinate Judge's decree having found that excepting house No. 1754 the other property in the hands of the defendants was their separate property.

The plaintiff preferred a second appeal.

K. H. Kelkar for the appellant (plaintiff) :—Both the lower Courts have found that the plaintiff is entitled to maintenance. Her right to maintenance having been established she is entitled to the arrears of maintenance as a matter of law. It was not necessary for her to prove demand and refusal: *Ambabai kom Balaji Vinayak Kale v. Ramchandra Balaji Kale*⁽¹⁾.

(1) (1895) P. J., p. 44.

1911.

PARWATIBAI
v.
CHATRU
LIMBAJI.

G. B. Rele for the respondent (defendant 2) :—Though we hold no property excepting a house which would be liable to the plaintiff's maintenance, still, taking into consideration the plaintiff's relationship, we have always expressed our willingness to maintain her provided she lived with us. There are sufficient indications in the Subordinate Judge's judgment showing that the plaintiff is not entitled to any indulgence. Arrears of maintenance can be granted provided the plaintiff has made out a proper case for maintenance. In the present case maintenance has been awarded to the plaintiff because a particular house was found to be joint property and her maintenance has been charged on the house.

HAYWARD, J. :—The lower Courts have held that the plaintiff is entitled to maintenance at the rate of one rupee a month from the date of suit. They have, however, declined to grant arrears of maintenance for the four years previous to the suit. On second appeal before us the only question argued has been whether the arrears were properly refused in consequence of failure to prove demand and refusal. No doubt such a rule was laid down in certain decisions of the Madras High Court, but a contrary view was taken by Ranade, J., in the case of *Ambabai kom Balaji Vinayak Kale v. Ramchandra Balaji Kale*⁽¹⁾, in this Court. The only ground upon which the arrears might in this case have been refused would appear to be that indicated by Sargent, C. J., in the case of *Girianna Murkundi Naik v. Honama*⁽²⁾ where he stated "it is now well established that a Hindu widow is not bound to reside in her deceased husband's family house, and does not forfeit her right to maintenance by going to reside elsewhere, *unless she leaves the house for an improper purpose.*" No such ground has, however, been made out in this suit.

We must, therefore, modify the decree by granting the plaintiff four years' arrears of maintenance prior to suit at the rate of one rupee a month with proportionate costs of this appeal.

Decree modified.

G. B. R.

(1) (1895) P. J., p. 44.

(2) (1890) 15 Bom. 286.