[4 Mad. 330]

APPELLATE CIVIL.

The 13th and *16th December, 1881.*

PRESENT:

MR. JUSTICE INNES AND MR. JUSTICE KERNAN.

The Official Assignee of Madras, and as such the Assignee of the Estate of the Insolvent Plaintiff Boologam.....(Appellant)

and

Swornam.....(Defendant), Respondent.*

Hindu Law—Dancing girl—Gains of prostitution impartible.

Property acquired with income derived from prostitution by a Hindu dancing girl who has received the ordinary education in music and dancing is not partible.

THE facts and argument in this case appear from the Judgment of the Court (INNES and KERNAN, JJ.).

Mr. *Grant* for Appellant.

Anundacharlu and *Sundram Sastri* for Respondent.

[331] Judgment:—The parties are sisters and belong to the dancing girl caste. Plaintiff's claim was for an account and partition of the entire joint property of herself and defendant, including valuable moveables. In the course of the original trial her claim to a share in the moveables was abandoned, and the subject matter of the claim now before us in appeal is confined to a house No. 17, Ragunaikulu Street, which plaintiff asserts to have been purchased with the joint funds of herself and defendant, and in which she is entitled to a moiety.

The learned Judge dismissed plaintiff's suit on the ground that he found the property to be the joint family property of plaintiff, defendant, their mother and sister and two brothers, and that no law or custom existed entitling plaintiff to compel partition of the joint family property.

The argument addressed to us at the appeal hearing on behalf of the appellant was upon the point that the learned Judge ought to have held that the house was the separate property of plaintiff and defendant solely, and that each of them is entitled to a half share.

Plaintiff could not of course maintain the position with which she first started that she and defendant constituted a joint family and that she was entitled as a member of such a joint family to claim partition, because she and defendant were only two members of the joint family, and any claim to partition within that family must embrace all its members.

But the substance of the claim must be regarded, which is this, that plaintiff and defendant purchased the house with their own funds, and that each is entitled to a moiety of the purchase.

As it appeared clearly from the evidence that plaintiff and defendant were members of the joint family already referred to, it became necessary for plaintiff, when defendant resisted her claim on the ground that the house was joint family property, to show that the property was so acquired by herself and the defendant that the other members of the family could not claim to share in it.

* Appeal No. 6 of 1881 from the decree of the Original Side of the High Court.

The test which Mr. Justice COLLETT though tought to be generally applied is stated in his judgment in the case of *Chalakonda Alasani* v. *Chalakonda Ratnachalam* delivered when he was Civil [332] Judge of Vizagapatam (2 M. H. C. R. 56). At page 70 he says, "The test is the substantial use of joint property during and for the purpose of the acquisition." The doctrine laid down by the High Court in appeal from this decision went much beyond this, holding that the gains of science which was imparted at the family expense and which was acquired while receiving a family maintenance are not impartible property.

In *Durvasula Gangadharudu* v. *Durvasula Narasammah* (7 M. H. C. R., 47) this doctrine was adhered to by HOLLOWAY, J. who held that "the ordinary gains of science by one who has received a family maintenance are certainly partible."

KINDERSLEY, J., in that case, said "that the question must be upon the facts in each case, how far the common family means were instrumental in enabling the professional man to earn the property which is claimed as subject to partition."

In *Paulien Valoo Chetty* v. *Paulien Soorya Chetty* (I.L.R., 1 Mad., 252, s.c. L. R. 4 I. A., 109), in appeal from the decision of Mr. Justice KERNAN on the Original Side of this Court, the same doctrine as that laid down by the High Court in *Chalakonda Alasani* v. *Chalakonda Ratnachalam* was maintained by the Appellate Court, but it was found on the facts of that case that the estate in question had been acquired without the aid of the joint funds. On appeal to the Privy Council their Lordships took occasion to say that, upon the facts of the case, it became unnecessary to consider whether the somewhat startling proposition of law—that if a member of a joint family receives any education whatever from the joint funds, he becomes for ever incapable of acquiring by his own skill and industry any separate property—is or is not maintainable. They intimated that very strong and clear authorities would be necessary to support such a proposition. They referred to the decision in *Dhunonokdharee Lall* v. *Gunput Lall* (10 W. R., 122) as one which appeared to lay down a more correct doctrine.

In that case a member of a Hindu family claimed to participate in the property possessed by certain other members alleging that it had been acquired from the proceeds of their joint estate [333] and it was found that the family property was not sufficiently large after supporting the members to leave surplus funds for the acquisition, and that the defendants were at the time pursuing lucrative employments, the plaintiff being a minor. It was held that there was no ground for the usual presumption of joint family estate, and the *onus* lay (or rather, we suppose, was shifted) upon plaintiff to prove his allegation. It was also held that the fact of defendant having received his education from the joint estate did not entitle plaintiff to participate in every property acquired by defendant by the aid of such education; and MITTER J., said in that case all that the Hindu Law requires the defendant to prove in such a case is that the property which he claims as his own was acquired without detriment to the paternal estate.

After the expression of opinion of the Judicial Committee in the case just referred to, we should not feel bound to follow the extreme doctrine laid down by the High Court in *Chalakonda Alasani* v. *Chalaconda Ratnachalam*. Indeed, the Court itself—*see* page 78—was of opinion that the question as to gains, of science did not arise in that particular case. The gains, as HOLLOWAY, J., says, were scarcely the gains from music and dancing, but rather those of an unfortunate trade, &c.

The case here is in this respect similar. The girls received the ordinary education in music and dancing, but there can be no question from the evidence that their principal income was from the proceeds of prostitution—a trade which is not the subject of tuition. Plaintiff's income must have been almost entirely from that source, as she does not, according to the evidence of the mother, either dance or sing, and, according to the third, fourth, fifth, and eighth witnesses for defendant, did not attend nautches. Defendant also corroborates this evidence by saying plaintiff did not attend processions.

At the time of the purchase, and, presumably, for some time before, the mother was not earning more than 5 rupees a-month. It is the defendant's case that the whole family were aware of the intended purchase, but the evidence of Munisami Bathan cannot be doubted that it was plaintiff and defendant alone who asked him to negotiate the purchase of the house.

The seventh witness for plaintiff, who is the son-in-law of the person from whom the 200 rupees was borrowed, says that [334] Vaiyapuri (who keeps defendant) and Appadorai one of the two brothers, said that the house was wanted for the two girls—plaintiff and defendant. Then jewels to a large value are sold as their jewels. They together with defendant's paramour execute the promissory note for 200 rupees. The sale-deed is executed in their favour. No one on the part of the family is then present. They occupy the house, and the dispute with Munisami about the keys is between him and them. Munisami, who had been the tenant of Kandasami, the former owner, becomes the tenant of plaintiff and defendant and pays rent to them. The promissory note when paid off is returned to defendant. All this is quite inconsistent with the family generally having an interest in the property at the time of its purchase. The explanation of defendant that the family desired to invest the value of the family jewels in the purchase of the house because plaintiff was making away with jewels is not consistent with the fact that, notwithstanding her misuse of valuable family property, she was allowed to appear in the deed of sale as a co-owner of the house, in the purchase of which the family is said to have invested their property for the purpose of keeping it out of plaintiff's way.

We cannot doubt that the jewels employed to raise the larger portion of the money were the jewels of plaintiff and defendant, and that the 200 rupees was borrowed on their joint credit.

Although there is evidence that the two girls usually paid their earnings over to their mother, it does not follow that they were bound to do so. These earnings, so far as the evidence discloses, were acquired without detriment to the family estate and without any scientific acquirements which had been imparted by the aid of the family funds. All that the girls had had was an ordinary education sufficient to fit them to earn a living.

In these circumstances, it appeas to us that the funds employed for the purchase of the house may be viewed as the self-acquired impartible property of these girls, and that in the house purchased they were co-owners to the exclusion of the rest of the family. Defendant therefore cannot resist plaintiff's claim to her share in the house, and we reverse the decree of the learned Judge and give judgment for plaintiff with costs throughout.

Solicitor for Appellant, *Pedroza.*

NOTES.

[(1890) 14 Mad. 163 is another case where the earnings of a prostitute were held to be separate property. The question in (1888) 11 Mad. 393, related to adoption.]