

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Sankaran-Nair.

SAMOO PATTAR (THIRD DEFENDANT), APPELLANT,

1908.
January 28.

v.

ABDUL SAMMAD SAHEB AND OTHERS* (PLAINTIFFS AND DEFENDANTS NOS. 1 AND 2 AND LEGAL REPRESENTATIVES OF THE FIRST AND THIRD PLAINTIFFS), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, ss. 59, 100—Mortgage-deed not attested as required by s. 59 cannot create a charge under s. 100.

An instrument, which is invalid as a mortgage for want of attestation under section 59 of the Transfer of Property Act, cannot operate to create a charge under section 100 of the Act.

Royzuddi Sheik v. Kali Nath Mukerjee, (I.L.R., 33 Calc., 985), followed.

THE plaintiffs attached certain properties belonging to defendants Nos. 1 and 2 in execution of a decree obtained against them. The third defendant put in a claim to the effect that he had a hypothecation on the properties to the extent of Rs. 10,000. The claim was allowed to the extent of Rs. 4,000 and odd, and the present suit was brought by the plaintiff for a declaration that the properties were liable to be attached and sold free of any encumbrance in favour of third defendant.

The mortgage deed relied on by third defendant was not attested as required by section 59 of the Transfer of Property Act.

The Subordinate Judge passed a decree in favour of the plaintiff.

The third defendant appealed.

C. V. Anantakrishna Ayyar for appellant.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for second respondent.

JUDGMENT.—We are unable to agree with the contention of the appellant that an instrument, which cannot operate as a mortgage for want of due attestation as required by section 59 of the Transfer of Property Act, operates as a charge under section

* Appeal No. 62 of 1904, presented against the decree of P. G. Itteyerah, Esq., Subordinate Judge of South Malabar at Palghat, in Original Suit No. 24 of 1903 (Appeal Suit No. 850 of 1903 on the file of the District Court of South Malabar, transferred to the High Court).

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100 of that Act. In the case of *Neelakantam Iyer v. Madasany Tevan* (1) no one appeared for the respondent, and the passage in *Mithiram Bhat v. Somanatha Naickar* (2) is only a dictum. On the other hand the question is fully considered in *Royzudi Sheik v. Kali Nath Mookerjee* (3), with which we agree, and the same view is taken by the Bombay High Court in *Narayan v. Lakshmandas* (4). This was the only question argued in the appeal which must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr Justice Sankaran-Nair.

1908.
January 22,
28.

SURAMPALLI BANGARAMMA (PLAINTIFF), APPELLANT,

v.

SURAMPALLI BRAMBAZE (DEFENDANT, RESPONDENT.*

Hindu Law—Maintenance—Right of wife who had lived apart from her husband during his life-time to claim maintenance after his death—Father-in-law having ancestral property bound to maintain under such circumstances.

A wife living apart from her husband without any justifying cause, is not entitled to claim maintenance from him, as in so doing she commits a breach of duty to him.

After his death, however, she is entitled, though she lives apart, to claim maintenance from her father-in-law who has taken her husband's estate as there is no duty on her part to live with him, provided she does not live apart for corrupt purposes.

Per WALLIS, J.—A wife living apart from her husband for no improper purpose, may at any time return and claim to be maintained. Her right is not forfeited but only suspended during the time she commits a breach of duty by living apart and is revived when at his death such duty ceases to exist. The Court may under the circumstances be justified in awarding her maintenance on a less liberal scale than it otherwise would.

Per SANKARAN-NAIR, J.—The father-in-law is under a moral obligation to maintain his daughter-in-law, which ripens into a legal obligation against the assets in the hands of his heirs.

(1) 17 M.L.J., 39.

(2) I.L.R., 24 Mad., 397.

(3) I.L.R., 33 Calc., 985.

(4) 7 Bom. L.R., 934.

* Appeal No. 113 of 1904, presented against the decree of J. H. Munro, Esq., District Judge of Vizagapatam, dated 19th April 1904, in Original Suit No. 22 of 1903.