APPELLATE CIVIL.

Before Mr. Justice Krishnan Pandalai and
Mr. Justice Sundaram Chetti.

GODAVARTI SOBHANADRAMMA (PLAINTIFF), APPELLANT,

1933, December 19.

v.

GODAVARTI VARAHA LAKSHMI NARASIMHASWAMI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu Law—Widow—Maintenance—Principles underlying the grant of—Significance of—Non-payment of maintenance—Effect of—Abandonment, waiver or estoppel—Absence of plea of—Power of Court to limit the period for which arrears of maintenance should be awarded.

The claim of a Hindu widow for arrears of maintenance which arises when it is unlawfully withheld is a legal right. A demand and refusal is not necessary to create the right. They are only of evidentiary value to show that afterwards the withholding must have been wrongful or that there could not be any support for the theory of abandonment or waiver. In the same way mere non-payment of maintenance, though by itself it does not constitute the withholding unlawful, is still evidence to show that the withholding was wrongful. The only legal answer to a claim by a widow for arrears of maintenance is either abandonment or waiver or such conduct on her part as may have misled the other party into thinking that such a claim would not be made, thereby inducing him not to make any provision for it, especially as maintenance is a provision to be made out of the current income of the estate or of the person liable. The Court has no discretion, irrespective of proof of circumstances which might prove abandonment, waiver or estoppel, to limit the period for which arrears of maintenance could be awarded.

The considerations that should guide the Courts in fixing the rate of maintenance to be awarded as laid down by the Privy Council in *Ekradeshwari Bahuasin* v. *Homeshwar Singh and others*, (1929) I.L.R. 8 Pat. 840 (P.C.), followed.

* Appeal No. 257 of 1929.

SOBHANADRAMMA v. NARASIMHASWAMI.

APPEAL against the decree of the Court of the Subordinate Judge of Rajahmundry, dated 26th November 1928 in Original Suit No. 15 of 1928.

K. Bhimasankaran for appellant.

Ch. Raghava Rao for first respondent.

G. Lakshmanna and *G. Chandrasekhara Sastri* for second respondent.

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The JUDGMENT of the Court was delivered by KRISHNAN PANDALAI J.—The plaintiff appeals from a decree in a suit for maintenance brought by her against the first respondent, her husband, and the second respondent, her husband's elder brother by birth. Her suit was based upon the allegation that both the respondents form members of an undivided family, that she had been deserted by her husband and that therefore she was entitled to future maintenance and arrears of maintenance for twelve years before suit at the rate of Rs. 50 a month. The learned Subordinate Judge of Rajahmundry found that the defendants, though brothers by birth no longer belonged to the same family, because the first defendant had been adopted away by the widow of his paternal uncle, Raghavacharyulu, and that therefore the plaintiff had no claim for maintenance against the second defendant whose father had himself been adopted away to another family. As against the first defendant the learned Judge found on the first issue that the plaintiff was the second wife of the first defendant, the first wife having pre-deceased the second marriage, that soon after the plaintiff came of age quarrels arose, as a result of which the plaintiff was taken away by her father to his own house in or about 1909, that in

1914 the plaintiff and her father made attempts to bring her back to the protection of the first defendant as they learnt that he was preparing to marry for a third time, that this attempt did not succeed because the first defendant and his elder brother, the second defendant, who was living with him were not serious and put conditions upon the proposals, that thereafter the plaintiff had all along lived with her father, and that the first defendant had at any rate after 1914 abandoned the plaintiff. He therefore held that the plaintiff was entitled to separate maintenance. He awarded her future maintenance from the date of suit at the rate of Rs. 100 a year and three years' arrears at the same rate. He declined to give arrears for any longer period.

In this appeal the first question argued is that the Judge's finding as to the adoption of the first respondent (first defendant) is not supported by sufficient evidence. We have been taken through the evidence and it is sufficient to say that it fully supports the Judge's finding that the first defendant was taken in adoption by Venkatamma, the widow of Raghavacharyulu, the brother of defendants' natural father, Sobhanadracharyulu, who had himself been adopted away. As a result of these adoptions, the family of the first defendant and that of the second defendant have become entirely distinct and therefore the second respondent (second defendant) and the properties of his family are not liable for the plaintiff's claim. To that extent the appeal fails and must be dismissed.

The appeal as against the first defendant comprises two parts, first, as to the rate of maintenance

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if any to be awarded after the suit, secondly, for what period before suit the appellant is entitled to arrears and at what rate.

As to the plaintiff's right to separate maintenance we agree with the learned Judge who has dealt with all the relevant facts in an exhaustive manner without condoning any of the faults of the plaintiff or her father.

[His Lordship discussed the evidence and proceeded:]

We agree with the learned Judge that the only conclusion to be arrived at on the facts is that after she came and offered to live with him (first defendant) and he refused the request, he has reconciled himself to the position that he could no longer live with the plaintiff as his wife and both parties have acted accordingly. This is sufficient to entitle a wife to demand separate maintenance from her husband. There is no doubt an offer in the written statement of the first defendant that he is willing to take back the plaintiff. This, in the circumstances stated, was in our opinion merely tactical, for after all that has happened we cannot believe that the first defendant seriously desires that the plaintiff should go back to live with him and, in raising the plea as stated, was only anxious to avoid the legal consequences of abandoning his wife.

The next question is whether the plaintiff's appeal as to the rate of maintenance awarded is justified. The plaintiff claimed Rs. 50 a month in the plaint on the footing that the property of the family of the second defendant was also liable to her claim. This being now negatived, the only person against whom she has a claim is her own

husband, the first defendant, who had no family property at the date of the suit, as he had sold what remained of it in 1914 for Rs. 2,000 to finance his third marriage and to pay advance made for his education by his elder brother. The first defendant began life as a teacher on Rs. 60 and on the date of suit was drawing Rs. 108 a month. The Judge has awarded Rs. 100 a year to the plaintiff which works out Rs. 8-5-4 a month. We consider this award as inadequate in all the circumstances. The plaintiff is the senior wife of the first defendant and is entitled, having regard to the circumstances of the family, to treatment as such. The considerations which determine the rate of maintenance to be awarded have lately been summarised by the Privy Council in *Ekradeshwari Bahuasin* v. *Homeshwar Singh and others*(1) in these terms :

" Maintenance depends upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families, a survey of the condition and necessities and rights of the members, on a reasonable view of change of circumstances possibly required in the future, regard being, of course, had to the scale and the mode of living, and to the age, habits, wants and class of life of the parties. In short, it is out of a great category of circumstances, small in themselves, that a safe and reasonable induction is to be made by a Court of Law in arriving at a fixed sum."

That case was in respect of a widow, and their Lordships adopted with slight additions, not now material, the following measure adopted by the Subordinate Judge in that case:

" This sum (of maintenance) would enable the lady to live as far as may be consistently with the position of a widow (wife) in something like the same degree of comfort and with

(1) (1929) I.L.R. 8 Pat. 840 (P.C.).

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the same reasonable luxury of life as she had (should have) in her husband's lifetime (household)."

We have added the words in brackets to suit the proposition to the case of a wife. It is obvious that the plaintiff cannot live in anything like the position of the first defendant's wife on four annas a day. No misconduct of any character has been imputed to the plaintiff. Whatever faults may have been attributed to her father when she was still a minor, it has been found that, when she came of mature years and offered to live with her husband and requested to be taken into his household, he declined to do so. The position of a young Brahmin wife reduced by no fault of hers to the condition of a widow in her husband's lifetime needs no elaboration and it must not be made profitable for husbands deserting their wives and marrying again, so to say, in revenge in order to spite their former wives, to do so. At the same time we have to remember that the first defendant has to live by his profession and that he had at the time of the trial three children by his third wife and may have more. Taking all these things into consideration, including, *inter alia*, the present state of the economic depression through which the whole country is passing, we think we should be doing substantial justice to both parties by increasing the award to Rs. 15 a month from the date of suit.

We next come to the question of arrears. The learned Judge has awarded arrears for three years, 1923 to 1926. In 1923 there was a written lawyer's demand for maintenance and as we shall show presently from the authorities the plaintiff was clearly entitled to arrears at least as from that date. But it has been argued that the plaintiff is

entitled to arrears for the whole period of twelve years for which the suit was brought. In this connection numerous authorities have been cited on both sides. For the respondent the contention has been that in awarding arrears of maintenance the Court has a discretion to limit the period and the lower Court having so limited it to three years, this Court will not interfere with that discretion. For the appellant the argument was that the Court has no such absolute discretion irrespective of circumstances which might prove abandonment, waiver, or estoppel, to limit the period of arrears of maintenance, but can only, if so satisfied, reduce the rate. We have been referred to numerous authorities in this discussion. The respondent's argument has been supported by the decision in *Karbasappa* v. *Kallava*(1), followed by RAMESAM J. in *Lakshmamma* v. *Venkatasubbiah*(2) and to a certain extent by the Allahabad High Court in *Mt. Jamvati* v. *Mt. Maharani*(3), and the unreported decision of this Court in Appeal No. 75 of 1922. On the other hand the appellant's argument is sought to be supported by the decision of the Privy Council in *Raja Yarlagadda Mallikarjuna Prasada Nayadu* v. *Raja Yarlagadda Durga Prasada Nayadu*(4), *Panchakshara* v. *Pattammal*(5) to which one of us was a party, *Srinivasa Ayyar* v. *Lakshmi Ammal*(6) a decision of another Bench of this Court, *Pushpavalli Thoyarammal* v. *Raghaviah Chetty*(7) a decision of WALLIS J. (as he then was) now a member of the

(1) (1918) I.L.R. 43 Bom. 66.
(2) (1924) 48 M.L.J. 766.
(3) A.I.R. 1931 All. 227.
(4) (1909) I.L.R. 24 Mad. 147 (P.C.).
(5) A.I.R. 1927 Mad. 865.
(6) A.I.R. 1928 Mad. 216.
(7) (1913) 15 M.L.T. 95.

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Privy Council, *Subramania* v. *Muthammal*(1), *Rangathayi Ammal* v. *Munuswami Chetty*(2) and *Krishnamachariar* v. *Chellammal*(3). We think the better view is that to be deduced from the latter catena of cases. In the leading case of the Privy Council, *Raja Yarlagadda Mallikarjuna Prasada Nayadu* v. *Raja Yerlagadda Durga Prasada Nayadu*(4), it was held that

> "although the withholding maintenance did not necessarily give a right to sue for the arrears there was therein *prima facie* evidence of wrongful withholding, and that such evidence, supported as it was in this case by evidence of the Zamindar's unwillingness to pay for their maintenance and his denial of their rights, led to the conclusion that the withholding was proved to be wrongful. The arrears, for the period within limitation, were accordingly claimable, and were decreed."

No question of abandonment or waiver arose in the case. But at page 157 their Lordships state that

> "it may well be that, if he (the zamindar) had been misled into the belief that the claim for maintenance was abandoned and had in consequence not set aside any portion of his annual income to meet such a claim, he would have had a good defence to the present action."

The principle of this and the subsequent decisions appears to be that the claim to maintenance which arises when it is unlawfully withheld is a legal right. A demand and refusal is not necessary to create the right. They are only of evidentiary value to show that afterwards the withholding must have been wrongful or that there could not be any support for the theory of abandonment or waiver. In the same way mere non-payment of maintenance, though by itself it does not constitute the withholding wrongful, is

(1) (1911) 21 M.L.J. 482.
(2) (1911) 21 M.L.J. 706.
(3) A.I.R. 1928 Mad. 561.
(4) (1909) I.L.R. 24 Mad. 147 (P.C.).

still evidence to show that the withholding was wrongful. The only legal answer to such a claim is either abandonment or waiver or such conduct on the part of the plaintiff as may have misled the defendant into thinking that such a claim would not be made, thereby inducing him not to make any provision for it, especially as maintenance is a provision to be made out of the current income of the estate or of the person liable. For the rest the discretion of the Court when applied to the grant of arrears of maintenance will be found to have either been exercised in adjusting the rate at which the arrears have been awarded or in limiting the period by inference from facts of an implied waiver or abandonment or conduct such as above mentioned. The language of the authorities is not in all cases careful to make this distinction clear. But the judgments read as a whole can be reconciled on the principle suggested. In *Panchakshara* v. *Pattammal*(1) the principle of the Privy Council decision was followed and repeated, where it is stated that

> there is no doubt that the plaintiff's claim for past maintenance is a legal right, and unless adequate grounds are shown for inferring that she has waived or abandoned that claim the defendants cannot escape liability."

To the same effect is *Srinivasa Ayyar* v. *Lakshmi Ammal*(2). At page 541 it is stated that the authorities are clear that, unless there was any waiver or abandonment of her right to maintenance by the widow, she is entitled to maintenance from the death of her husband and also that the waiver cannot necessarily be inferred from the circumstance that she is living in her paternal

(1) A.I.R. 1927 Mad. 865, 867. (2) (1927) 54 M.L.J. 530.

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home. In *Pushpavalli Thoyarammal* v. *Raghaviah Chetty*(1) WALLIS J. said:

"Arrears will be refused only in cases where the person liable to make the payment had justifiable grounds for inferring that the claim was abandoned."

He cites *Rangathayi Ammal* v. *Munuswami Chetty*(2). To the same effect is the decision of another Bench in *Krishnamachariar* v. *Chellammal*(3).

As against this course of decisions which lays down a principle which is logical and easy to follow, there are two decisions of this Court following the decision in *Karbasappa* v. *Kallava*(4) which seem to hold that there is some other and paramount discretion in awarding or refusing arrears of maintenance. The decision in *Karbasappa* v. *Kallava*(4) opens with the remark that on the point of arrears of maintenance the case-law yields no definite principle upon which all cases of this kind can be decided. In the next paragraph the Court affirms the award of the three years' maintenance instead of six years which had been demanded on a ground which is described as

"the balance of the most general and shifting considerations, arrived at on what must be called rather common sense than any other conclusion upon the point before us".

We must observe that, as that judgment itself says, we fail to find any definite principle on which it is founded. It is possible to uphold the actual decision upon the ground that by the widow having been actually maintained in her father's house and not making any demand during that period, the Court drew the inference as a fact that

(1) (1913) 15 M.L.T. 95.
(2) (1911) 21 M.L.J. 706.
(3) A.I.R. 1928 Mad. 561.
(4) (1918) I.L.R. 43 Bom. 66.

the widow abandoned her claim. If so, the principle is quite intelligible although whether the inference was justified on the facts or not is a matter of opinion. This case was followed by RAMESAM J. in *Lakshmamma* v. *Venkatasubbiah*(1). That decision is also intelligible and explicable upon the facts stated by the learned Judge. The facts were that a widow whose husband had died twenty-seven years ago had made a demand for maintenance only three years prior to the suit.

"In these circumstances",

said the learned Judge,

"I think a discretion remains with the Courts, while not disallowing totally the arrears claimed by the plaintiff, to cut down the period for which arrears may be granted."

All the exception we can raise to this language is that, although the facts may have been sufficient from which a Court might infer abandonment of arrears for a period before a formal demand, even as to which there is considerable room for doubt in view of the decision of the Privy Council already referred to, yet the authorities do not establish the foundation for any discretion in the Court, in the absence of proof of abandonment or waiver or conduct estopping the plaintiff, to cut down, in other words to deny, relief to a plaintiff who is entitled to it. Reference is made in this decision to the unreported case, Appeal Suit No. 75 of 1922. We have examined that decision in which no authorities are referred to but the facts were that the plaintiff went away from the family about nine years prior to the suit. But there was no satisfactory evidence that she ever made a demand for this maintenance

(1) (1924) 48 M.L.J. 266.

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until she filed the suit and then the Court said that, considering the long time that she kept silent and the fact that she was being adequately maintained in her parent's house, she should not be allowed the whole of the arrears claimed although they added that that was not a sufficient reason for disallowing her claim *in toto*. Another ground stated in that judgment is that if a demand is made for arrears for a very long period the claim may be refused on the ground that the payment would be a very heavy burden on a family which has not made any provision for the expenditure. We beg respectfully to differ from this, because the family might have omitted to make any provision for maintenance although it had been demanded, and hardship to the defendant in meeting a lawful claim can hardly by itself be made a ground for refusing a right. But the decision itself is to be explained and was probably intended to be founded upon the inference that by the silence and omission to demand, the Court was in a position to infer implied waiver or abandonment. These are all the cases which have been cited on this point and on the best consideration we can give to the subject we are of opinion that the principle as to arrears is as we have stated in the earlier part of this judgment and as laid down in the several cases to which we have referred.

The really important point in the case is how to apply the principle to this case. It is the case that the defendant, upon whom lies the burden of alleging and proving waiver or abandonment or such conduct on the part of the plaintiff as to lead to estoppel, did not raise the point in explicit

terms, nor for that matter is there any decision upon the point by the learned Judge. But the facts are undisputed that the plaintiff, no doubt under the advice of her father, who is described as a person in affluent circumstances by the lower Court, has lived away from her husband, practically during all her married life without making any claim for maintenance against him, who has no property which can be charged with the maintenance and whose only income is his salary earned by his profession. It is not unreasonable in these circumstances to infer, though we are not prepared to say that such an inference is necessary in other such cases, that the plaintiff has either impliedly abandoned or waived the claim for the greater part of the period for which arrears are now claimed or at least that her conduct has been such as to lead the first defendant to believe that he would not be called upon to meet suddenly a claim for a large sum of money which he would not reasonably be able to pay and which ordinarily he ought to have found from the current income and the enforcement of which would only lead to the result, disastrous alike to him and to his wife, of making him a pauper. We have therefore come to the conclusion that, although the principle for which the appellant has contended is sound, the application of it to the facts leaves us in the position that the learned Judge arrived at a substantially just conclusion when he awarded the plaintiff only arrears of maintenance from the date of the demand, that is 1923. But having regard to what we have said as to the rate of future maintenance the arrears will also be at the rate of Rs. 15 a month.

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In the result the decree of the learned Judge is modified to the extent stated above, the date of payment to remain as ordered by the lower Court, 1st June 1929. The appellant must pay the second respondent's (second defendant's) costs. The relationship between the appellant and the first respondent being wife and husband they will suffer their respective costs of the appeal.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

1934, January 25.

V. M. MEERKANNI ROWTHER ((PLAINTIFF), APPELLANT,

v.

A. V. PERIYAKARUPPAN (DEFENDANT), RESPONDENT.*

Burden of proof—Vendor and purchaser—Covenant for title—Breach of—Cause of action.

In a suit by a purchaser against his vendor for damages for breach of covenant for title, *held*, the purchaser is not bound to wait till he is evicted or his possession is disturbed before filing the suit inasmuch as the covenant, if broken, is necessarily broken immediately upon the execution of the assurance which contains it. In such a suit the burden lies upon the plaintiff to allege and prove a breach of the covenant.

APPEAL against the decree of the Court of the Subordinate Judge of Madura in Appeal Suit No. 70 of 1928 preferred against the decree of the Court of the District Munsif of Melur in Original Suit No. 803 of 1925.

G. Krishnaswami Ayyar for appellant.

T. P. Gopalakrishna Ayyar for *Watrap S. Subramania Ayyar* for respondent.

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* Second Appeal No. 1074 of 1929.