APPELLATE CIVIL.

Before Mr. Justice Krishnan Pandalai.

1933, April 7.

RANGAPPAYA AITHALA AND TWO OTHERS (PLAINTIFFS), APPELLANTS,

v.

SHIVA AITHALA AND TWO OTHERS (DEFENDANTS), (RESPONDENTS).*

Hindu Law—Widow—Maintenance—Right of—Nature of—Apportionment—English Common Law doctrine of—Applicability of.

The right of a Hindu widow to maintenance is traceable to the property out of which in her husband's lifetime she would be maintained and on which her maintenance was and remained a charge. In its origin the right is one which accrues from day to day during her lifetime, and she is entitled to be paid her necessary expenses as and when they arise. It is not a right depending on any contract for whose performance a due date is previously agreed upon.

The fixing of a date for the annual payment of maintenance cannot have the effect of altering the nature of the right by cutting it down to an annual payment for every completed year of existence.

Where the surviving coparceners in a joint Hindu family executed an agreement charging specific family property to pay to the widow of a deceased member maintenance at a certain rate on a particular date in each year for the previous year, and the widow died on an intermediate date,

Held, that the widow's heirs were entitled to recover the proportionate amount due after the last payment till the date of her death and that the English Common Law doctrine as to apportionment was inapplicable to the case.

APPEAL against the decree of the Court of the Subordinate Judge of South Kanara in Appeal

* Second Appeal No. 837 of 1931.

Suit No. 106 of 1930 (Appeal Suit No. 293 of 1929, District Court of South Kanara) preferred against the decree of the Court of the District Munsif of Mangalore in Original Suit No. 10 of 1929.

K. Y. Adiga for appellants.

B. Sitarama Rao for respondents.

Cur. adv. vult.

JUDGMENT.

The question in the case is whether the heirs of a Hindu widow in whose favour the head of her husband's family has executed an agreement charging specific family property to pay her maintenance at a certain rate on a particular date in each year for the previous year can, if she dies on an intermediate date, recover the proportionate amount due after the last payment till the date of her death.

The facts are not in dispute. The plaintiffs and defendants 2 and 3 represent one brother and the first defendant another brother, and the father-in-law of Mahalaxmi Hengsa was the third (eldest) brother in a joint Hindu family. On 2nd June 1870 after the death of Mahalaxmi's husband and father-in-law, the father of plaintiffs as the eldest surviving brother and head of the family executed in her favour a registered agreement, Exhibit B, charging some of the family properties agreeing to pay her for each year from 1*st Chaitra Sudha* (about 25th March) of 1870 maintenance at Rs. 68 and 21 *muras* of rice per year, the payments to begin on 1*st Chaitra Sudha* (about 25th March) 1871 and on default of punctual payment to pay interest at 12 per cent on the money and customary interest in kind on

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the rice. In 1875 the plaintiffs' and first defendant's branches partitioned the family property including the properties charged for Mahalaxmi's maintenance and the deed stipulated that the first defendant's branch would pay their half share of the maintenance to the plaintiffs' father who was to pay the whole maintenance over to Mahalaxmi. Mahalaxmi died on 2nd March 1917, the due date as per the agreement for payment of that year's maintenance being 23rd March 1917. Her heirs on her death were the plaintiffs and t' father of defendants 2 and 3 who are nearer by one degree to her husband than the first defendant. The suit was brought by plaintiffs as her heirs for recovery for themselves and defendants 2 and 3 from the properties charged in the possession of first defendant one half of the proportionate amount of maintenance due for the year ending 23rd March 1917 less the 21 days before Mahalaxmi's death. The lower Courts have held that the whole year's maintenance fell due after Mahalaxmi's death, that the claim is not apportionable from day to day and that the plaintiffs have no cause of action. The suit was accordingly dismissed. Hence this appeal by the plaintiffs.

No Indian authority applicable either way has been referred to in the judgment of the Courts below or in the arguments before me. Apparently the lower Courts rely, as the respondents' learned Advocate wants me to rely, on the old Common Law doctrine that except in the case of interest on money lent an entire contract is not apportionable either as to time or partial performance. (Story on Equity, sections 470 to 475, third English edition.) In England this doctrine was all but entirely

abolished by the Apportionment Act, 1870, 33 and 34 Vic. c. 35 (Chitty's Statutes, 6th edition, Vol. I, page 393). In India the statutory provision contained in section 36 of the Transfer of Property Act is applicable only as between transferor and transferee of the benefit of the payment and not as between the person liable for and the person entitled to the payment. Section 340 (2) of the Succession Act applies to wills only. There is no statutory provision in India applicable to the case and the question is whether the old Common Law rule is to be applied to maintenance due under the Hindu Law and, even if generally not to be so applied, whether there being an express contract, Exhibit B, making the maintenance payable on a certain date in the year, the rule should be applied to this case.

My first observation is that primarily the law to be applied to the case is not the English Common Law but the Hindu Law, and if there is no specific rule in that law on the question, the rule of justice, equity and good conscience; section 16, Civil Courts Act, 1873. According to Hindu Law, the obligation to maintain widows is dependent on taking the property of the deceased by inheritance or survivorship; see Mayne's Hindu Law, section 451, citing the Smriti Chandrika XI-I, section 34. Mahalaxmi, being the widow of a coparcener whose share was taken on his death by the other branches, was entitled to be maintained by them after his death and this right was enforceable, as indeed Exhibit B recognizes, against the whole family and not only against the branch which took by survivorship his undivided share; vide *Subbarayulu Chetti* v.

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Kamalavallithayaramma(1). The right is traceable to the property out of which in her husband's lifetime she would be maintained and on which her maintenance was and remained a charge. In its origin therefore the right is one which accrues from day to day during the lifetime of the wife or widow who is entitled to be paid her necessary expenses as and when they arise. It is not one depending on any contract for whose performance a due date is previously agreed on. That being so, it is clear to me that, if there were no such express contract as is found in Exhibit B fixing a particular date for the payment of each year's maintenance, the respondents' contention that Mahalaxmi could not demand maintenance for the incomplete period of eleven and odd months during which she lived after receiving the last payment would be unfounded.

This being the nature of the right, I think, the fixing of a date for the annual payment had not, and was not intended to have, the effect of altering the nature of the right by cutting it down to an annual payment for every completed year of existence. The date was fixed for convenience both for those who paid and for the widow who was to receive.

I therefore think that the view of the lower Courts was erroneous and that the appellants as heirs of Mahalaxmi are entitled to the arrears till her death and interest thereon as per Exhibit B till date of plaint and interest at 6 per cent from date of plaint. The decree of the lower Courts is set aside. Though it was agreed by the parties that second-class Gazette rates should be adopted

(1) (1911) I.L.R. 35 Mad. 147.

for valuing the rice the District Munsif has not recorded a finding what that rate is. It is therefore impossible now to pass a decree. The case will be sent back to the District Munsif with the direction to pass a decree for sale in accordance with the above. The appellants will have their costs in this Court and in the lower appellate Court. The District Munsif will provide for the costs hitherto incurred and hereafter to be incurred in his Court in the revised decree.

K.W.R.

APPELLATE CIVIL.

Before Mr. Justice Curgenven and Mr. Justice Sundaram Chetti.

KALEPALLI RAJITAGIRIPATHI (PLAINTIFF), APPELLANT,

1933, May 11.

v.

JANNAVULA PEDAKOTAYYA AND THREE OTHERS (DEFENDANTS), RESPONDENTS.*

Madras Estates Land Act (I of 1908), sec. 112—Lawful ryot —Sale without proper notice to—Nullity of—Affixture— Service of notice by—When to be resorted to.

A sale held under section 112 of the Madras Estates Land Act without proper notice to the lawful ryot is a nullity. *Kootoorlingam Pillai* v. *Sennappa Reddiar*, (1931) 61 M.L.J. 203, approved.

Service of notice by affixture should be resorted to only if personal service cannot be effected.

APPEAL against the decree of the District Court of Kistna at Masulipatam in Original Suit No. 19 of 1927.

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* Appeal No. 234 of 1928.