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appeal; and an examination of the authorities is sufficient to show that a father is competent to deal with ancestral property, not only for the especial exigencies mentioned by the Judge, but also to make "pious and reverential gifts to Brahmans, as Brahmutra Krishnarpana," also "gifts from affection towards Vishnu and other divinities"—*Gopal Chand Pande v. Babu Kunwar Singh* (1). The finding of the Judge on this point therefore cannot stand; and we are not informed on what materials he based his finding that the value of the estate is Rs. 4,000 only. The Judge has also omitted to decide the important plea as to the real motive underlying the gift—that is to say, the question of the good faith of the donor.

We have not materials on the record to enable us to dispose of these questions. We therefore refer the following issues for trial under s. 566 of the Civil Procedure Code:—

1. What is the value of the entire ancestral property of the parties to the suit?
2. Has the endowment been made *bona fide* for the satisfaction of the idem and the benefit of the donor's soul, or from motives of spite against the plaintiff-respondent, as pleaded ^{at} and ⁱⁿ in his fifth plea before the Judge?

On receipt of the findings, ten days will be allowed for objections.

Issues remitted.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

PAIGI AND ANOTHER (DEFENDANTS) v. SHEONARAIN (PLAINTIFF).*

Husband and wife—Hindu law—Restitution of conjugal rights—Suit by Hindu husband out of caste at time of suit—Decree for restitution conditional on plaintiff's obtaining restoration to caste.

In a suit by a Hindu, a *sunar* by caste, against his wife for restitution of conjugal rights, it was found that the plaintiff, in consequence of having left his wife and cohabited with a Muhammadan woman (whom, however, he had left at the time of suit), had been turned out of caste, but that the misconduct of which he had been guilty was not of such a character as to render him liable to perpetual

* Second Appeal No. 256 of 1885, from a decree of W. R. Barry, Esq., Judge of the Court of Small Causes at Allahabad, exercising the powers of a Subordinate Judge, dated the 13th January, 1885, affirming a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 17th April, 1884.

(1) S. D. A. L. P., 1843, vol. 5, p. 24.

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excommunication, and, upon making certain amends, he could obtain restoration to his caste.

Held that, while the plaintiff was entitled to come into Court for the relief prayed, unless, in the circumstances above stated, the marriage had, under the Hindu law, been dissolved, the Court was bound, when asked to employ coercive process to compel a wife to return to her husband, not to disregard any reasonable objection she might raise to such process being granted, either on the ground that she had been subjected before to personal injury or cruelty at the hands of her husband, or that she went in fear of one or the other, or that the husband was actually living in adultery with another woman, or that, if she resumed cohabitation or association with him, he being outcasted, she would herself incur the risk of being put out of caste.

Held, therefore, that in decreeing a claim of this description, a Court was entitled, if it saw good reason to do so, while recognizing the civil rights of a husband to his wife, to put such conditions upon the enforcement of his rights by legal process as the circumstances of the case might fairly demand; and that, applying this principle to the present case, the defendant might reasonably ask the Court, before compelling her return to her husband, to make it a condition that he should first obtain his restoration to caste.

Held also that, under the Hindu law, the fact that a husband had had adulterous intercourse with another woman, which had ceased at the time of the suit, was not an answer to a claim by him for restitution of conjugal rights.

The facts of this case are stated in the judgment of Mr. Straight, J.

Babu Baroda Prasad Ghose, for the appellant.

Mr. Abdul Majid, for the respondent.

STRAIGHT, J.—This is a suit brought by the plaintiff, Sheonara, a *sunar* by caste, against Musammad Paigi, his wife, and Musammad Sarasuti, his mother-in-law, for restitution of conjugal rights.

His allegations are, that he was married to the defendant Musammad Paigi eight years ago; that she now refuses to cohabit with him, and that she is kept from doing so by the second defendant, her mother.

The defendants pleaded two matters in reply. In the first place, it was pleaded that, under an agreement of the 1st June, 1876, the plaintiff had, prior to his marriage to the defendant No. 1, undertaken to live in the house of his mother-in-law, defendant No. 2, with his wife after marriage; that defendant No. 1 was married to him on that condition; that he has left the house and refuses to live in it, and is therefore not entitled to enforce

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his marital rights, and that the defendant No. 1 can consequently withdraw herself from him. In the second place, it was pleaded that the plaintiff, having taken a Muhammadan woman as his mistress, and having lived and eaten food with her, has been put out of caste; and that, under these circumstances, defendant No. 1 cannot be called upon to go back to him, as, if she did, she would be excluded from caste herself. As to the first of these defences, I need scarcely say it is absurd, and of course could not be seriously entertained in a Court of law, and need not be noticed further.

Both the Courts below have given the plaintiff a decree, and the defendants are appellants before us from the decision of the Subordinate Judge.

The pleas in appeal are in substance as follows:—

1. That as the plaintiff is still out of caste, the defendant, his wife, is not bound to return to him.

2. ~~Until he has been restored to caste~~ until he has been restored to caste no cause of action can ~~be~~ be brought to him.

Now it has ~~been~~ found by both the Courts that the plaintiff did leave his wife and cohabit with another woman, whom now, however, he has given up, and was consequently turned out of caste; but that the impropriety and breach of caste rules and regulations of which he was guilty was of such a character and description as did not render him liable to perpetual excommunication; but that, upon his making certain amends, by feeding his caste-fellows, he can obtain restoration to his caste that of a *sunar*. This is now admitted to be so on both sides.

Now I need scarcely say that unless we can hold that by being excluded from caste under the circumstances I have mentioned, the plaintiff had extinguished his ordinary civil rights as a husband to require his wife to live with him, or that, in other words, the marriage had, under the Hindu law, thereby been dissolved, he is entitled to come into court to seek the relief he asks, if he is not otherwise disqualified from obtaining it. But while entertaining this view, we are, I think, bound, when asked to employ coercive process to compel a wife to return to her husband, not to disregard any reasonable objection she may raise to

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its directions, her obedience will be enforced in manner provided by s. 260 of the Civil Procedure Code.

The costs of this appeal will be paid by the respondent, who will also pay the costs of Musammat Sarasuti throughout the litigation.

The defendant No. 1 will pay her own costs in the Court below.

TYRRELL, J.—I concur.

Appeal allowed.

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Before Mr. Justice Straight and Mr. Justice Tyrrell.

GANGA RAM AND ANOTHER (DEFENDANTS) v. DATA RAM AND ANOTHER
(PLAINTIFFS.)*

*Appellate Court, powers of—Withdrawal of suit—“Decree”—Appeal—Civil
Procedure Code, ss. 373, 582.*

Where, on appeal from a decree dismissing a suit, the appellate Court, being of opinion that the plaint was informally drawn and its allegations regarding the action not sufficiently specific, gave the plaintiff permission, under s. 373 of the Civil Procedure Code, to withdraw the suit, with leave to institute a fresh suit, the order of the appellate Court was a “decree” within the meaning of the Code, and afforded a proper ground of appeal. The fact that the plaintiff has had a previous wife, and another woman, who has ceased at the time of suit, is an answer to a claim by him for restitution of conjugal rights.

Before stating what the decree here should be in terms, I have to observe, with reference to Musammat Sarasuti, that no case whatever has been made out by the plaintiff for making her a party to the proceedings, and the suit as against her must be dismissed. It only remains for me to direct that the decree be framed in the following terms:—

It is ordered and decreed that this appeal be decreed; that the suit in respect of Musammat Sarasuti do stand dismissed; and that it be declared that the plaintiff is entitled to his conjugal rights as to Musammat Paigi; and that, upon his obtaining his restoration to his caste, the defendant Musammat Paigi, his lawful wife, do and is hereby ordered to return to his protection within one month of such restoration to caste and of request by him to her to return thereto.

In the event of the plaintiff satisfying the condition of this decree, and the defendant Musammat Paigi wilfully failing to obey