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Officer are quite inadequate and his suggestion that the Settlement Officer did not understand Hindi is gratuitous. In any case it was a matter which the Settlement Officer should have been able to depose to himself. The learned Sessions Judge has suggested a re-trial, but considering that the subject of the dispute is a single *babul* tree I am of opinion that the matter has gone far enough, and that no good object would be served by having this petty case tried again by another Magistrate. I, therefore, accept the reference and order that the conviction be quashed and the sentence set aside.

Pullan, J.

Reference accepted.

APPELLATE CIVIL.

Before Mr. Justice Gokaran Nath Misra.

MUSAMMAT CHILHA AND OTHERS (DEFENDANT-APPELLANTS) *v.* CHHEDI (PLAINTIFF-RESPONDENTS).*

1928 *December*, 5.

Restitution of conjugal rights, suit for—"Legal cruelty" in suits for restitution of conjugal rights, meaning of—Suit for restitution of conjugal rights may be barred even where legal cruelty is not strictly established—Caste, whether affects the principles applicable in the case.

A course of conduct which, if persisted in, would undermine the health of the wife is a sufficient justification for refusing to the husband a decree for restitution of conjugal rights.

Cruelty in the legal sense need not necessarily be physical violence. A course of conduct which, if persisted in, would undermine the health of the wife is a sufficient justification for refusing to the husband a decree for restitution of conjugal rights. There may be a case in which legal cruelty may not have been strictly established, but circumstances short of that will also bar a suit for restitution.

* Second Civil Appeal No. 363 of 1928, against the decree of S. Ali Hamid, Subordinate Judge of Bara Banki, dated the 28th of August, 1928, reversing the decree of Sheo Charan, Munsif Ramsanehighat, dated the 15th of May, 1928, dismissing the plaintiff's suit.

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Where a woman found her husband living in open adultery with another woman and she found her protests of no avail and the husband executed an agreement to give up his illegal connection but failed to keep it up and the wife had to sue for maintenance and obtained a decree for it *held*, that in those circumstances it would be impossible to believe that she would be able to live peacefully with her husband and it would be a reasonable apprehension on her part that she is not likely to receive proper treatment from her husband and therefore a decree for restitution of conjugal rights could not be given to the husband. *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1), *Russel* v. *Russel* (2), *Swatman* v. *Swatman* (3), *Paigi* v. *Sheo Narain* (4), *Dular Koer* v. *Dwarka Nath Misser* (5), and *Kondal Rayal Reddiar* v. *Ranganayaki Ammal* (6), relied upon.

Mr. *R. S. Ram Prasad Verma*, for the appellants.

Messrs. *S. M. Ahmad* and *Har Narayan Das*, for the respondent.

MISRA, J. :—This is a second appeal in a suit for restitution of conjugal rights. The suit was decreed by the Munsif of Ramsanehighat, district Bara Banki, by his decree dated the 5th of May, 1928, but it has been reversed by the decree of the Subordinate Judge, Bara Banki, dated the 28th of August, 1928.

The facts of the case stated briefly are that the appellant Musammat Chilha is a married wife of the plaintiff-respondent Chhedi. The parties belong to the caste of the *gararyas*. They were married some 11 years ago and the *gauna* ceremony (consummation of marriage) was performed some five years ago. The case of the plaintiff-respondent is that the defendant-appellant Musammat Chilha left his house some two years ago and has not since then returned. A decree for restitution of conjugal rights is, therefore, prayed for in the plaint.

(1) (1867) 11 M. I. A., 551.
(2) (1897) A. C., 395.
(3) (1865) 164 E. R., 1467.
(4) (1886) I. L. R., 8 All., 78.
(5) (1907) I. L. R., 34 Calc., 971
(6) (1923) I. L. R., 46 Mad., 791.

The defence put forward is to the effect that the defendant-appellant was married to the plaintiff-respondent, when she was very young and when she came to her husband's house after the *gauna* ceremony, she found the plaintiff living in open adultery with her elder sister Musammat Gobindi, from whom he has also two children; that she protested against this action of the plaintiff-respondent, upon which the plaintiff-respondent and Musammat Gobindi both beat her and that thereupon she left the house of the plaintiff and has since then been living with her parents. She further stated in her defence that on the advice of certain relations the plaintiff executed an agreement in favour of the appellant on the 21st of February, 1927, in which he agreed to give up his connection with Musammat Gobindi and to keep the appellant with him, promising in case of breach of this arrangement to pay her a maintenance of Rs. 8 per month. It was further alleged that the plaintiff had not kept the terms of the said agreement and consequently was not entitled to claim restitution of conjugal rights, and that the appellant was entitled to maintenance as agreed upon.

Misra, J.

The learned Munsif of Ramsanehighat who tried the case did not believe the story of an actual assault deposed to by the defendant, but he came to the conclusion that there could be no doubt regarding the fact that the plaintiff had ill-treated the appellant. He, however, found that the plaintiff had been living in open adultery with Musammat Gobindi for a long time and from whom he had two children, and that it was impossible under the circumstances for the appellant to live peacefully with the plaintiff without any apprehension as to her own safety. He also found that the plaintiff had not given up his connection with Musammat Govindi even after the execution of the agreement referred to above. In this view of the case he dismissed

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the plaintiff's suit. I may also mention here that after this decree of the learned Munsif the appellant brought a suit for her maintenance against the respondent and obtained a decree in respect thereof on the 9th of August, 1928.

On appeal the learned Subordinate Judge agreed with the finding of the Munsif so far that it was proved that the plaintiff-respondent had illicit connection with Musammat Gobindi and that that connection still continued. He also disbelieved the story of the actual assault deposed to by the appellant. But he held that the marriage-tie was indissoluble under the Hindu law and could not be broken notwithstanding that the husband may have a number of wives or concubines and that the defendant-appellant could not legally refuse to go back to her husband. He also held that there might have been some ill-treatment, but that could not be considered to be sufficient for the court to dismiss the suit for restitution of conjugal rights. He observed in his judgment that in the case of the parties who were *gararyas* beating of the wives was not uncommon amongst them and even though the plaintiff may have on some occasions slapped the appellant it could not be regarded as cruelty. In his opinion as long as there was no danger to the appellant as to her personal safety legal cruelty must not be considered to have been established. Regarding the agreement he found that it was void under section 26 of the Contract Act. In this view of the case he passed a decree for restitution of conjugal rights in favour of the plaintiff-respondent.

The defendant-appellant has now appealed against the said decree of the Subordinate Judge and the main point which has now been argued before me on her behalf is that legal cruelty has been established, and that in any case the facts of the case are such as should not

justify the court in passing a decree for restitution of conjugal rights in this case.

After hearing the parties at great length I have come to the conclusion that the appeal must be allowed and that the suit of the plaintiff-respondent must be dismissed.

Misra, J.

I now proceed to give my reasons for arriving at this conclusion.

Under the Hindu law, there can be no doubt, that it has been enjoined as a duty on a Hindu wife that she must be obedient to the husband and have veneration for his person and that it directs that the husband and the wife should be entitled to the society of each other (*vide* Dr. Gurudas Banerji's Tagore Law Lecture, 1878, pages 114 and 120). We also find that in the laws of Manu and other books it is definitely laid down that married women must be honoured and adorned by their fathers and brethren, by their husbands and by the brethren of their husbands, if they seek abundant prosperity and that kind treatment should be extended to wives (*vide* Manu, chapter 3, verses 55 to 62). It is no doubt also true that no express provision in Hindu law is to be found for a suit for restitution of conjugal rights, nor is any particular reference to be found as to what would constitute a valid defence in such suits.

Their Lordships of the Privy Council, however, have laid down in a case decided so far back as 1877 and reported in *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1), as to what is to be the rule of law which the Indian courts should follow in such suits. Although that was a case dealing with Muhammadans, the principle enunciated by their Lordships has been recognized as the general principle to be followed in all cases whether of Muhammadans or of Hindus. On page 615 of the report

(1) (1867) 11 M. I. A., 551.

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their Lordships have laid down the rule in the following terms :—

> "It seems to them clear, that if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the court might refuse to send her back. *It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the court.* And, as their Lordships have already intimated, there may be cases in which the court would qualify its interference by imposing terms on the husband."

I have italicized a portion of the passage quoted above in order to indicate the principle that although legal cruelty may not be established in a case, yet it would be perfectly open to a court to refuse to pass a decree in that case if the circumstances proved are such that it would be against the principles of justice, equity and good conscience, to award such a relief.

It has now after a series of decisions become a settled rule of law in England that legal cruelty should not be considered as synonymous with acts of physical violence. It was pointed out by the House of Lords in the case of *Russel* v. *Russel* (1) that it was not necessary to prove cruelty in the proper sense of the term as generally understood, but it was enough to show that the conduct complained of was such as to cause a reasonable apprehension in the mind of the wife of danger to life, limb or health, which is obviously far more comprehensive than mere physical violence. It has also been

(1) (1897) A. C., 395.

pointed out in some cases that where the general conduct of a husband towards his wife was of a character which tended to degrade the wife and to subject her to a course of annoyance and indignity injurious to her health, legal cruelty should be considered to have been established (*vide Swatman* v. *Swatman* (1).

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In *Paigi* v. *Sheo Narain* (2) decided by STRAIGHT and TYRRELL, JJ., it was held that where a husband came to the court as plaintiff seeking its assistance for compelling his wife to return to him, the court could not disregard any reasonable objection, which she might raise to such a relief being granted to him on the ground that she had been subjected before to personal injury or cruelty at the hands of her husband, or that she had any fear of one or the other or that the husband was actually living in adultery with another woman.

In *Dular Koer* v. *Dwarka Nath Misser* (3) the question was discussed by MOOKERJEE J., at great length. The learned Judge arrived at the conclusion after discussing the various authorities that there may be a case in which legal cruelty may not have been strictly established, but circumstances short of that will also bar a suit for restitution. I am in entire agreement with this view.

In *Kondal Rayal Reddiar* v. *Ranganayaki Ammal* (4) the same rule of law has been laid down. It has been held in that case that under the Indian law, cruelty in the legal sense need not necessarily be physical violence. A course of conduct which, if persisted in, would undermine the health of the wife, is a sufficient justification for refusing to the husband a decree for restitution of conjugal rights.

(1) (1865) 164 E. R., 1467.
(2) (1886) I. L. R., 8 All., 78.
(3) (1907) I. L. R., 34 Calc., 971.
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I have, therefore, to see whether the rule of law enunciated in the cases quoted by me above and which rule of law is in accordance with the principle enunciated by their Lordships of the Privy Council in 11 M.I.A., 551, would justify me to pass a decree in favour of the plaintiff-respondent in the present case. It has been found in this case that the defendant-appellant was married to the plaintiff while very young, being at the time about 10 years old, that *gauna* ceremony was performed five years after when she became of 15 years of age, that when she came to her husband's place, she found him living in open adultery with her elder sister from whom he has now two children, that she protested against this conduct of her husband, but to no avail, that the husband subsequently executed an agreement in her favour covenanting to give up his connection with the appellant's sister, and that he has not been able to keep up the agreement, which has compelled the wife to sue for maintenance, and for which a decree has been passed in her favour. On these facts it appears to me that it is impossible to believe that the defendant-appellant would be able to live peacefully with the respondent. Any woman living in such an atmosphere is bound to suffer in health and it would be a reasonable apprehension on her part that she is not likely to receive proper treatment from her husband. I regret I am unable to follow the reasoning of the learned Subordinate Judge that in the case of a woman belonging to a *gararya* caste any other rule than the one which has been laid down in the cases quoted above would be applicable, nor am I prepared to hold that it would be open to a *gararya* husband to beat his wife and that she should not be justified in making a complaint if such a treatment is accorded to her. I may observe that whether belonging to a high caste or low caste the principles which should ordinarily be observed by all men to whatever

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caste they may belong must be the same. I am, therefore, of opinion that legal cruelty has been established in the present case, and that apart from that taking all the circumstances into consideration I would not be justified in passing a decree for restitution of conjugal rights in favour of the plaintiff-respondent.

Misra, J.

The appeal is, therefore, allowed, the decree of the learned Subordinate Judge is set aside, and that of the learned Munsif restored with costs in all the three courts.

Appeal allowed.

PRIVY COUNCIL.

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March, 15.

LAL NARSINGH PARTAB (PLAINTIFF) *v.* YAQUB KHAN AND OTHERS (DEFENDANTS).*

(On Appeal from the Chief Court of Oudh.)

Mortgage—Construction of mortgage—Mixed, simple and usufructuary mortgage—Mortgagor failing to give possession—Remedy of mortgagee—Transfer of Property Act (IV of 1882), sections 67, 68 and 98.

A mortgage executed in 1923 to secure an advance of Rs. 30,000 and interest stated by clause 2 that a half share in certain villages had been hypothecated in lieu of the principal and interest, and that in order to pay the interest possession had been delivered to the mortgagee; clause 3 provided that the principal was to be repaid within 35 years; clause 4 that the mortgagors should remain entitled to eject tenants, to enhance rents, to cultivate the land and to issue leases, and that if there should be a surplus after paying the interest it should be applied to paying the principal; clause 5 that if at the appointed time the mortgagors should not repay, the mortgagees should have power to realize the sum due by sale; clause 7 that if the mortgagees were deprived of possession then the liability should rest with the mortgagors. The Rs. 30,000 was duly advanced but the mortgagors failed to

*Present.—Lord SHAW, Lord TOMLIN and Sir LANCELOT SANDERSON.