APPELLATE CIVIL.

Before Wort and Kulwant Sahay, JJ.

BAHURIA SARASWATI KUER

v.

BAHURIA SHEORATAN KUER.*

1933.

August, 24, 25, 26.

Hindu Law—maintenance—wife living apart from the husband, whether entitled to separate maintenance—Limitation Act, 1908 (*Act IX of* 1908), *Schedule* 1, *Articles* 128 *and* 132—*claim for maintenance, whether a charge on immoveable property within the meaning of Article* 132—*widow's claim for a certain sum as maintenance for the period during which her husband was living, whether governed by Article* 128—*interest, whether payable on a claim for maintenance.*

Article 132, Schedule 1, Limitation Act, 1908, prescribes a period of 12 years for the enforcement of the payment of money charged upon immoveable property.

Held, that a widow's claim for maintenance under the general Hindu Law cannot, in any sense of the word, be said to be a charge upon immoveable property within the meaning of Article 132.

The mere fact that a Hindu wife is living apart from her husband does not entitle her to separate maintenance during the life-time of her husband, unless indeed she is turned out of the house by the husband.

A claim by the widow for a certain sum as maintenance for the period during which her husband was living is not, strictly speaking, a claim for maintenance, and is not, therefore, governed by Article 128 of the Limitation Act but by the general Article applicable to an ordinary claim for money.

A widow is not entitled to claim interest on the sum which she claims as maintenance under the general Hindu Law. She is, however, entitled to interest under the Code of Civil Procedure, 1908, from the date of the suit until the date of payment at 6 per cent. per annum.

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* Appeal from Original Decree no. 191 of 1929, from a decision of Babu Jatindra Nath Ghosh, Subordinate Judge of Muzaffarpur, dated the 10th July, 1929.

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Pattinson v. *Srimati Bindhya Debi*(1), followed.

Hamira Bibi v. *Zubaida Bibi*(2), distinguished.

Appeal by the defendant.

The facts of the case material to this report are stated in the judgment of Wort, J.

Sir Sultan Ahmad, Government Advocate, for the appellant.

Khurshed Husnain and *G. P. Sahi,* for the respondent.

WORT, J.—This is an appeal by the defendant in an action by the plaintiff for maintenance. The only substantial question which we have to determine is the amount to which the plaintiff is entitled.

The plaintiff is the first wife (now a widow) of one Ganesh Prasad Narain Sahi; the defendant is the second wife, who in circumstances which I shall mention, is in possession of the estate of her late husband.

In July of 1914 Ganesh Prasad executed a tamliknama dedicating a large number of properties, more specifically stated in the deed, for religious purposes and made a gift of the remainder to the defendant, the second wife, subject to payment of certain allowances to various persons including himself and the plaintiff. To himself there was an allowance to be paid of Rs. 1,800 per annum and the same to the plaintiff. In 1916 the estate apparently being in debt, it was taken over by the Court of Wards. In 1920 Ganesh Prasad died having in the meantime married a third wife and having had a son by her. In those circumstances the plaintiff claimed in this action the sum of Rs. 150 per mensem from the 20th March, 1916, to the 20th March, 1928.

(1) (1932) I. L. R. 12 Pat. 216.
(2) (1916) I. L. R. 38 All. 581, P. C.

The learned Judge in the court below has granted the plaintiff a decree up to the year 1926 at the amount claimed, but having decided that the value of the estate had diminished by one-third from 1926 owing to the sale of certain portions of the estate to pay off debts to which I shall presently refer, reduced the amount to which, in his judgment, the plaintiff was entitled from that date to Rs. 100 a month which is of course two-thirds of the amount claimed. He has given a decree for those sums plus interest.

Now at the very outset of the case it comes to be determined as to whether the plaintiff was suing under the tamliknama of July, 1914, or whether, as the Judge in the court below states, she was suing under the Hindu law: in other words, suing as a Hindu widow entitled to maintenance by the general Hindu law.

Before us Mr. Khurshed Husnain, who appears on behalf of the plaintiff respondent, incidentally has a cross-appeal on the question of reduction of the allowance after 1926. He states that his client was suing under the general Hindu law and also under the tamliknama. It becomes necessary in the circumstances and by reason of certain points which arise in the appeal to determine this matter. It seems to me, if I may say so with great respect to Mr. Khurshed Husnain's argument, that the answer which is given is plainly insufficient. Either the plaintiff was suing under the tamliknama or she was not. In one sense it may be that, although suing under the general Hindu law, reliance was placed on the tamliknama as evidence of the amount to which she would be ordinarily entitled. But the learned Judge in the court below has stated, as I have already indicated, that the plaintiff was suing under the Hindu law and, as he expressed it, not under the contract. His words are these:

"Plaintiff is a Hindu widow and the right to maintenance is not based on the contract but upon Hindu law".

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By the word "contract" I assume he means the tamliknama. In the circumstances it seems to me that we must accept the statement of the learned Judge which gives a proper description on the basis of the plaintiff's claim. This statement, I have no doubt, was made by the Subordinate Judge either with the approval of the plaintiff's advocate and on his authority or at his instigation.

The short points in the case are these.

On behalf of the defendant appellant it is contended that the plaintiff's maintenance must be reduced in accordance with the financial state of the property and that the allowance fixed under the tamliknama was in complete disregard of the estate's ability to pay. It is in this connection that Mr. Khurshed Husnain's alternative argument, based on the tamliknama, arises. He meets the point of Sir Sultan Ahmad's argument by contending that as the tamliknama created a charge on the estate the amount was fixed and not subject to reduction for any reason.

In 1916, when the Court of Wards took over the estate, the position was this. A mortgage had been executed by Ganesh Prasad in 1913 and from the record of this case and the evidence it would appear that the interest on that mortgage had not been paid, and as a result, towards the end of 1920 or the beginning of 1921, the mortgage debt amounted to a sum of Rs. 84,000. Up to that period and even for some time afterwards, it would appear that the income of the estate was approximately Rs. 16,000 per annum, but, as a result of the discharge of the mortgage debt in the manner I shall presently describe, the value of the estate diminished, upon which fact the Subordinate Judge reduced the amount of the maintenance after the year 1926.

What happened was this. On the 28th January, 1921, although no action had been brought or any

decree obtained, the Manager of the Court of Wards proceeded to pay off this mortgage debt of Rs. 84,000. For the purpose of paying off an agreed first instalment of Rs. 40,000 on the date I have mentioned a loan of Rs. 60,000 was obtained. Then in 1926 certain sales were effected of portions of the estate and the sale deeds are represented by Exhibits *A*, *A—1*, *A—2*, *A—3*, *A—4*, *A—5* and *A—8* in this case. The sales realised the sum of Rs. 22,870. In addition to that a sum of Rs. 16,100 was effected by Exhibit *A—6* by the sale of a house at Benares. There is no evidence as to the manner in which the balance of Rs. 40,000 of the instalment for that year was obtained. It is clear, however, that that second instalment of Rs. 40,000 was paid off on the 1st April, 1926.

A loan had been got of Rs. 60,000 to pay off the first instalment of Rs. 40,000. For the purpose of paying off that loan of Rs. 60,000 which, by May of 1926, had reached with principal and interest the sum of Rs. 81,000, a further property was sold, the sale deed of which is Exhibit *A—7*. From the facts to which I have just referred and in the absence of evidence of any other debts other than the mortgage it would appear that the total indebtedness of the estate had been paid off. In 1916 or soon after 1916 when the Court of Wards went into possession, a scheme of expenditure was prepared. By that scheme of expenditure there were a number of payments to be made, which I may describe as fixed charges on the estate, including Government revenue, rent to the superior landlord and so on, and in addition to that the allowances which were provided for by the tamliknama. But under the scheme of expenditure these were reduced and the plaintiff's claim incidentally was also reduced by 50 per cent., that is to say, to Rs. 75 per mensem. Under the scheme of expenditure there appears to have been a net surplus of Rs. 7,313. The document, being the scheme of expenditure, was put in on the admission

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of the defendant. The point that Sir Sultan Ahmad raised was this, that the surplus of Rs. 7,313 was for the payment of various debts of the estate. Mr. Khurshed Husnain points out that, apart from the mortgage which was paid off in the manner which I have just described, there appears to have been no other debts, and as far as the evidence in the case goes there is no indication that this surplus of Rs. 7,313 was either used to keep down the interest on the mortgage in the meantime or to discharge any other legal liability of the estate.

Now this much is clear in favour of the defendant's case that as a result of the sales of 1926—and this is not disputed—the income of the estate was reduced from Rs. 16,000 to Rs. 10,000 per annum and it is on that basis that the claim of the plaintiff has been allowed; in other words, there being a reduction of something like 1/3rd in the income of the estate, the plaintiff's claim has been reduced in proportion. It seems to me that in any event the argument put forward on behalf of the respondent cannot be supported, namely, that the estate is burdened with this payment to the plaintiff, whatever the condition of its finances. The argument put forward amounted to this, that whether the income was Rs. 10,000 or Rs. 300, as Ganesh Prasad had allowed her Rs. 150 per mensem under the tamliknama that amount and no less was her due. The point really is somewhat academic, having come to the conclusion, as I have done, that the plaintiff's claim was based under the general Hindu law, and that being so, the amount to which she is entitled would be a sum in accordance with her position in life and, as the Privy Council has pointed out, in accordance with the condition of the estate.

As to the tamliknama being evidence of the proper amount to be allowed to the plaintiff, the question does not arise for reasons which will be seen. But I think it must be assumed that the income of

the estate being Rs. 16,000 a year it was in the contemplation of Ganesh Prasad that a sum of Rs. 150 per mensem was a proper and appropriate amount to be paid to the plaintiff, and we must also assume, although there is no evidence on the point, that he took the circumstances of the estate into consideration in fixing that amount; and it is in that sense, in my judgment, that the plaintiff can rely upon the tamliknama.

The fact that the plaintiff claims under the general Hindu law is an answer to the point that the allowance is not subject to reduction, and also an answer to the argument that as the reduction in the income of the estate was due to mismanagement by Ganesh Prasad and by defendant no reduction can be supported.

There is one point with which I wish to deal here and that is the question of the Rs. 250 allowance which appears to have been paid by the brother of the plaintiff to the plaintiff. Sir Sultan Ahmad contended that this matter had to be taken into consideration in fixing the amount. There is no doubt that under the general Hindu law a widow claiming maintenance claims it on the basis, as I have said, of her position in life and the position of the estate having regard also to her means. But, in my judgment, a voluntary payment of this sum of Rs. 250 quite clearly cannot be taken into consideration in fixing the amount which she is entitled to from her husband's estate. A sum which is paid voluntarily cannot strictly be described as her " means " by which term I apprehend is meant the sum to which she is either legally entitled or can lay claim to or the income of her stridhan estate. The sum payable by her brother was a voluntary payment for which he was not liable and which could be stopped at any moment. It is impossible in those circumstances to consider this amount in fixing the amount to which the plaintiff lays claim.

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The question whether the plaintiff sues under the tamliknama or under the general law is relevant on the question of limitation. The learned Judge in the court below decided that Article 128 or Article 132 of the Limitation Act applies. Article 132 provides for the enforcement of the payment of money charged upon immoveable property. It would be incorrect to say that the widow's maintenance claim under the general Hindu law can in any sense of the word be said to be a charge upon the property in the hands, as in this case, of the defendant. But the charge may be created when a decree is made for that maintenance. Before such a decree is pronounced there can in no sense of the word be a charge on the estate.

It was argued that the claim is based on the tamliknama and on the charge which was created thereby. In this connection even if we did assume that the claim is based on the tamliknama there are no words in it appropriate to create a charge in any sense of the term. That the property was taken by the defendant with the condition to pay these sums is true, but I should still have some doubt on the point whether any charge could properly be said to have been created by the tamliknama. But the point is disposed of, in my judgment, by the decision given in the judgment of the court below that the claim is based on the general Hindu law. That being so, it brings us back to Article 128 of the Limitation Act which provides for a claim by a Hindu for arrears of maintenance. That immediately raises another question. Before going into that, I should state that *prima facie* the claim which the plaintiff has laid in the plaint is not barred by limitation but that she is entitled to the whole amount but subject to this point with which I am about to deal.

Towards the end of the argument it was contended by Sir Sultan Ahmad that the plaintiff had not proved her case; there was no proof, in other

words, that she had not been paid. It is a technical point; it was a point which was not raised in the court below, and it seems to me to be without substance. A plain reading of the plaint would, in my judgment, sufficiently indicate this, especially having regard to the manner in which the case was conducted in the court below, that the plaintiff had not been paid for the years for which she is claiming; and as I have just said the point was not raised by the defendant. There is no plea in the written statement and the point was not gone into. That, in my judgment, is a sufficient answer to the point raised.

But a further question does arise in connexion with that point. Ganesh Prasad died in the year 1920. Until his death as a matter of law and in no way dependent on the facts of the case, except those recited in the tamliknama itself, the plaintiff, the then wife of Ganesh Prasad, would not be entitled to separate maintenance. The deed recites first of all that Srimati Babui Bhagwati Kuer mostly lives in her father's house, and then later, referring to Srimati Sheo Ratan Kuer, it recites:

> "According to the old usual practice, after sometimes (sic) called Babu Bansi Singh her relation from her father's side, through private letter (sic) and went to her father's house at Amawan with great effort and up till now she (first wife) is at father's place and does not like to come to my place, rather Srimati Kuer my daughter from the womb of the said wife lives with her contrary to my wishes."

It is sufficiently clear from the document itself that the absence of the wife from her husband's house was against the husband's wishes, and indeed there is no evidence in the case, nor has it been suggested from start to finish, that she was in any way forced to live away from her husband. I mention this fact because it might be said that the point which was raised at the end of the case depended upon evidence. In my judgment it did not, and if it did depend upon evidence it is evidence which the plaintiff should have given in support of her case, because it must

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be assumed that she knew her position not only as to whether she was suing under the tamliknama or under the general Hindu law but her position generally under the law. It is quite clear that living apart from her husband, unless indeed she was turned out of the house by her husband, she was not entitled to separate maintenance. That raises a very serious question, for a part of the amount which is claimed by the plaintiff is the amount up to the time of the death of her husband Ganesh Prasad in October 1920. The only suggested answer to the point seems to be that the defendant in this case took possession of the estate subject to the payment of this sum of money, that is, assuming the plaintiff is suing under the tamliknama which she is not. It is a claim made by the plaintiff in circumstances in which the husband was not during his lifetime legally liable to pay any amount to the plaintiff. Therefore in no sense of the word could it be described as maintenance. Assuming, however, that this claim was made under the tamliknama, the estate was taken by the defendant subject to a money payment by her to the plaintiff and other persons. It was not maintenance of the plaintiff up to the year 1920 and as it was a money claim it is hopelessly barred by limitation. In my judgment, therefore, the plaintiff is entitled only to maintenance as such from the 12th October, 1920, the date of her husband's death, up to the date of suit.

There is a further question and that is the question of interest. The learned Judge in the Court below has allowed interest on the whole claim. In a recent decision of this Court to which I was a party it was decided that interest is not payable. The claim for interest, having regard to my observations regarding the nature of the plaintiff's case, cannot be brought under the Interest Act of 1839. It is not a claim under the tamliknama but it is a claim under the general Hindu law. No demand

has been made for interest and the only way that Mr. Khurshed Husnain could put his case for interest is on the authority of the case of *Hamira Bibi* v. *Zubaida Bibi*(1), a decision which was quoted in the judgment in the case of this Court to which I have just referred, namely, the case of *Pattinson* v. *Srimati Bindhya Debi*(2). The contention of Mr. Husnain based on the decision of the Privy Council is that the plaintiff is entitled to interest by reason of her deferring the enforcement of her claim. The authority of the case before the Privy Council, in my judgment, in no way bears out that proposition. The argument is that the case cited is an authority for the principle that interest was payable on equitable considerations. There the question arose as to whether a Muhammadan widow was entitled to dower, she being allowed to take possession of her husband's estate in order to satisfy her dower debt. In that case there was no agreement, express or implied, that she should be entitled to claim any sum in excess of her actual dower. The question there was not that she was entitled to interest on her claim but that it was held on equitable considerations that she was entitled to some reasonable compensation not only for the labour and responsibility imposed upon her for the proper preservation and management of the estate but also for forbearing on her insistence to enforce her legal rights, and therefore the fixing of a sum as compensation in the form of interest was not an unreasonable method to adopt. We know of no authority for the view that the plaintiff in this case is entitled to interest on the amount which she claims and, having regard to the decision, to which I have just referred, of this Court, in my judgment the claim for interest must fail.

There is one other point which I should have mentioned before and that is in regard to the plaintiff's cross-appeal. I have disposed of it by stating

(1) (1916) I. L. R. 38 All. 581, P. C.
(2) (1932) I. L. R. 12 Pat. 216.

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that the widow was entitled to her maintenance according to her position in life but especially having regard to the condition of the estate and its income. That disposes of the cross-appeal. In my judgment the learned Judge was right in reducing the claim proportionately for the years after 1926.

WORT, J.

In these circumstances the appeal succeeds to this extent, that the decree of the learned Subordinate Judge will be varied by disallowing the claim of the plaintiff prior to the 12th October, 1920, and disallowing the claim for interest on the remainder. The plaintiff will of course be entitled to interest under the Civil Procedure Code from the date of the suit until the date of payment at 6 per cent. per annum.

In the circumstances there will be no costs to either party in this Court. As regards the costs in the court below the parties will be entitled to them in proportion to their success in this Court.

The plaintiff will be entitled to the payment of her decretal amount from the money in the Court deposited in pursuance of the decree of the Subordinate Judge.

KULWANT SAHAY, J.—I agree.

Appeal allowed in part.

BOGP (ILR) 6—2,500—1-12-1933—HCDG & others.