

The motive for valuation attributed to the respondents by Mr. J. N. Aggarwal does not, therefore, appear to be justified. I would, therefore, uphold the order as to costs but the respondents will pay the appellants' costs of this appeal.

JOHNSTONE J.—I agree.

JOHNSTONE J.

A. N. C.

Appeal accepted.

APPELLATE CIVIL.

Before Addison and Coldstream JJ.

JAMIAT RAI (DEFENDANT) Appellant

versus

MST. MALAN (PLAINTIFF)

JAGGU SHAH AND ANOTHER

(DEFENDANTS)

} Respondents.

1931

May 14.

Civil Appeal No. 140 of 1928.

Hindu Law—Widow's right of maintenance and residence—whether takes precedence to debts of her husband—if not already charged on the property—difference in case of debts incurred by co-parcener.

Held, that where the deceased husband of a widow claiming a right of maintenance or residence, has made an alienation of his property or incurred a debt, his widow is not entitled to claim maintenance out of the property transferred or attached in execution of a decree, unless such property has been charged with her maintenance. Similarly she is not entitled to residence in such property. The maintenance of a wife by her husband is a matter of personal obligation and his debts take precedence of her claim to maintenance and so do debts of his father or grandfather or debts incurred for the benefit of the undivided family. The case is, however, different if the debts are those of another co-parcener, such as a son or a brother of the widow's deceased husband. In that case the widow would be entitled to enforce her right of residence against property sold to pay off those debts, unless it were proved that they had been incurred for family necessity.

1931

JAMIAT RAI
v.
MST. MALAN.

Lakshman Ramchandra v. Satyabhamabai (1), *Jayanti Subbiah v. Alamelu Mangamma* (2), *Ramzan v. Ram Daiya* (3), *Gangabai v. Jankibai* (4), *Sunder Singh v. Ram Nath* (5), and *Mussammata Tara Devi v. Sarup Narain* (6), followed.

Beli Ram v. Prem Kaur (7), explained.

Second appeal from the decree of Malik Ahmad Yar Khan, District Judge, Sialkot, dated the 1st December 1927, modifying that of Khawaja Mahmud Hussain, Subordinate Judge, 3rd Class, Sialkot, dated the 2nd May 1927, by declaring that the plaintiff has a right of residence in the property in dispute, etc.

BADRI DAS and DES RAJ MAHAJAN, for Appellant.

MOOL CHAND and MEHR CHAND MAHAJAN, for Respondents.

ADDISON J.

ADDISON J.—On the 26th May, 1916, Bura Mal mortgaged a certain property in favour of Jaggu Shah, defendant No. 2, for Rs. 2,300, and on the 27th November, 1922, he effected a second mortgage in favour of Jamiat Rai, defendant No. 1, for Rs. 1,800. He then died and Jamiat Rai, the second mortgagee, obtained a decree on 17th December, 1925, against the mortgagor's son Diwan Chand, defendant No. 3, for a certain sum due on the mortgage with costs, it being directed that if the sum was not paid by a certain time the property would be sold, subject to the first mortgage, in order to satisfy the decree. Jamiat Rai was in process of getting the property sold by the Court when *Mussammata Malan*, widow of the deceased mortgagor Bura Mal, objected to the sale on the ground that she had a right of residence in the house

(1) (1878) I. L. R. 2 Bom. 494.

(4) (1921) I. L. R. 45 Bom. 337.

(2) (1904) I. L. R. 27 Mad. 45.

(5) (1926) I. L. R. 7 Lah. 12.

(3) (1918) I. L. R. 40 All. 96.

(6) (1929) I. L. R. 10 Lah. 706.

(7) 1927 A. I. R. (Lah.) 218.

in question and was entitled to maintenance which should be made a charge upon it. This objection was dismissed and she then lodged a suit for a declaration to the effect, that the house was only liable to sale after reserving her right of residence in it and that further it should be charged with her maintenance to the extent of Rs. 15 a month. The trial Judge found the property to be ancestral and held that the mortgage debt in question was not incurred for immoral purposes by Bura Mal. On these findings he dismissed the suit. On appeal the learned District Judge agreed with the trial Judge as regards the dismissal of that portion of the suit in which it was claimed that Rs. 15 should be charged on the house in question for the widow's maintenance, but he accepted the appeal to the extent that he held that the widow had a right of residence in the house. He, accordingly, directed that the sale should take place subject to that right. It was left to the executing Court to decide how much of the property should be set aside for the widow's residence. Against this decision the mortgagee, Jamiat Rai, and the widow have preferred separate appeals.

The law seems not to be in doubt. Where the deceased husband of a widow, claiming a right of maintenance or residence, has made an alienation of his property or incurred a debt, his widow is not entitled to claim maintenance out of the property, transferred or attached in execution of a decree, unless such property has already been charged with her maintenance. Similarly, she is not entitled to residence in such property. The principle is that debts contracted by a *Hindu* take precedence over the maintenance of his widow as a charge on the estate. Therefore, a purchaser of property sold to discharge debts of a husband.

1931

JAMIAT RAI

v.

MST. MALAN.

ADDISON J.

1931

JAMIAT RAI
v.
MST. MALAN.
ADDISON J.

has a good title against a widow who seeks to charge the estate with her maintenance (unless this has been already done) or who claims a right of residence therein. The case is, however, different if the debts are those of another co-parcener such as a son or a brother of the widow's deceased husband. In that case the widow would be entitled to enforce her right of residence against property sold to pay off those debts unless it were proved that they had been incurred for family necessity.

One of the first cases dealing with this matter is *Lakshman Ramchandra v. Satyabhamabai* (1), where it was held that if property was sold in order to pay debts (not incurred for immoral purposes) of the widow's husband, or his father, or grandfather, or for the benefit of the undivided family, such sale would be valid against her, whether or not the purchasers had notice of her claim. The debts of the deceased owner take precedence of the maintenance of the widow. The estate is property applied, in the first instance, by the sons as managers in payment of such debts though by selling the property the sons cannot evade their personal liability to provide for the widow, their mother. It follows from this decision that the widow can have no claim if property is sold to pay debts of her husband or his father or his grandfather or to pay debts for the benefit of the undivided family.

In *Jayanti Subbiah v. Alamelu Mangamma* (2), it was said that under the Hindu Law, the maintenance of a wife by her husband was a matter of personal obligation arising from the very existence of the relationship and quite independent of the possession by the husband of any property, ancestral or acquired,

(1) (1878) I. L. R. 2 Bom. 494. (2) (1904) I. L. R. 27 Mad. 45.

and his debts took precedence of her claim for maintenance. In that case the deceased husband of the defendant executed a promissory note as a surety, and after his death a decree was obtained against his widow as his legal representative. In execution of that decree a house which had belonged to the deceased husband was attached and sold. When the purchaser endeavoured to obtain possession the widow, who was residing in it, resisted on the ground that she had a right of residence in that house. It was held that the decree holder was entitled to be given possession of the house and that the widow had no right of residence therein, the debt having been incurred by her husband and his debt taking precedence of any claim by the widow. That authority places this question beyond any doubt.

1931

JAMNAT RAI
v.
MST. MALAN.
ADDISON J.

Ramzan v. Ram Daiya (1) is equally clear. It is said there that when a right of residence or maintenance comes into existence in favour of the widow of a man who was lately a member of a joint *Hindu* family, she takes that right in the property as it stands at the time of her husband's death. She cannot set up her right of maintenance or residence as against alienations effected during the life-time of her husband.

Gangabai v. Jankibai (2) is also in point. It was held there that a widow cannot assert her right of residence in a house which has been sold by her husband during his life-time, unless there was a prior charge in her favour, because the right which a *Hindu* wife has during her husband's life-time is a matter of personal obligation arising from the very existence of the relationship and quite independent of the posses-

(1) (1918) I. L. R. 40 All. 96. (2) (1921) I. L. R. 45 Bom. 337.

1931

JAMIAT RAI
v.
MST. MALAN.
ADDISON J.

sion by the husband of any property, ancestral or self-acquired.

Another authority which may be referred to is *Sunder Singh v. Ram Nath* (1). In that case a *Hindu* had gifted to his wife and infant son a shop and land in lieu of maintenance. Three years later he was adjudicated an insolvent and the creditors then sued to set aside the gift mentioned above. It was set aside on the ground that though the donor was, under his personal law, bound to maintain his wife and infant son, that obligation was a personal one, and the payment of debts took precedence over a right of maintenance.

Mussammatt Tara Devi v. Sarup Narain (2), is a case where a house was sold in execution of a money decree against the son. His mother was held not to be entitled to reside in it or to have her maintenance charged upon it, as the debt was incurred for family necessity. It was properly held in this case that family necessity had to be established as the widow in question was not the widow of the person who incurred the debt but of his father.

The learned District Judge has in fact been misled by the head-note to *Beli Ram v. Prem Kaur* (3). That was a case also where the widow was the mother of the mortgagor, and not the widow of the mortgagor, whereas the head-note reads as if she was the widow of the mortgagor. The learned District Judge was, therefore, wrong in holding that it was for the mortgagee to establish by evidence that the debt was incurred for family necessity in the present case.

For the reasons given I hold that the widow is not entitled to residence in the house in question or to have

(1) (1926) I. L. R. 7 Lah. 12. (2) (1929) I. L. R. 10 Lah. 708.

(3) 1927 A. I. R. (Lah.) 218.

whatever sum is decreed as maintenance charged upon it. I would, therefore, accept appeal No. 140 of 1928 and, setting aside the order of the District Judge, would dismiss the suit with costs throughout to the appellant defendant No. 1. I would dismiss appeal No. 626 of 1928 brought by *Mussammât Malan*, the plaintiff, with costs.

COLDSTREAM J.—I CONCUR.

N. F. E.

COLDSTREAM J.

Appeal No. 140, accepted.

MATRIMONIAL REFERENCE.

Before Addison, Johnstone and Abdul Qadir JJ.

BINGE—Petitioner

versus

BINGE AND ANOTHER—Respondents.

Matrimonial Reference No. 19 of 1927.

Indian Divorce Act, IV of 1869, sections 16, 17—Application for confirmation of decree of District Judge—withdrawn by petitioner—Court thereon ordering stay of proceedings—whether subsequent application for confirmation can be entertained.

In 1928 the petitioner applied to the High Court for confirmation of the decree passed by the District Judge in 1927 for dissolution of marriage; but at the hearing in October 1928 the petitioner put in an application to the effect that his wife had agreed to come back to him, and he accordingly prayed that the case should be consigned to the record room. The order passed was that as the parties had settled their differences and counsel for petitioner withdrew the application for confirmation, all further proceedings in the suit "were stayed." On the 12th March 1931 the petitioner applied again to the High Court to confirm the decree of the District Judge on the ground that his wife had not come back to him and that the proceedings which had been stayed should be revived and the decree of the District Judge confirmed.

1931

JAMIAT RAI
v.
MST. MALAN.

ADDISON J.

1931

May 15.