[APPELLATE CIVIL JURISDICTION.]

1876.
March 22.

Special Appeal No. 464 of 1874.

YAMUNA'BA'I, WIFE OF NA'RA'YAN MORESHVAR PENDSE, AND NA'RA'YAN JAGANA'TH BHIDE (ORIGINAL DEFENDANTS) SPECIAL APPELLANT *v.* NA'RA'YA'N MORESHVAR PENDSE (ORIGINAL PLAINTIFF) SPECIAL RESPONDENT.

Husband and Wife—Restitution of conjugal rights—Cruelty.

In a suit by a Hindu husband against his wife for the restitution of conjugal rights, the criterion of legal cruelty, justifying the wife's desertion, is the same in this country as in England, viz., whether there has been actual violence of such a character as to endanger personal health or safety, or whether there is the reasonable apprehension of it.

Every person who receives a married woman into his house, and suffers her to continue there after he has received notice from the husband not to harbour her, is liable to an action for damages or injunction, unless the husband has, by his cruelty or misconduct, forfeited his marital rights, or has turned his wife out of doors, or has by some insult, or ill-treatment, compelled her to leave him.

Semble that a decree for restitution of conjugal rights between Muhammadans or Hindus may be enforced under Section 200 of Act VIII. of 1859.

THIS was a special appeal from the decision of Edward Cordeaux, Assistant Judge of the District of Poona, confirming, except as regards the award of costs, the decree of Rámchandra Janárdan, Joint Subordinate Judge at Poona.

The plaintiff sued for the restitution of conjugal rights and to recover possession of his wife, the first defendant, from the second defendant, alleging that the first defendant was living at the second defendant's house, and that, when the plaintiff on the morning of the 28th of February 1873 demanded his wife, the first defendant refused to return to him, and the second defendant refused to give her up.

The written statement of the first defendant was to the effect that the plaintiff was a man of unsound mind, unable to earn a livelihood, and incapable of taking care of her or his property; that after the death of her father the first defendant, with the consent of her mother-in-law, went to live at the house of the second defendant, who was a relative of the plaintiff, and that the plaintiff and his mother were also to have afterwards come to reside in the second defend-

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ant's house, but before they did so the
the first defendant was willing to live wi
his house, as he was unable to protect he
his relatives living in the same house, Ra
with whom she could not live with hon
should be made parties to the suit; and t
to go with her husband on the day menti

The second defendant answered nearly
he did not object to the first defendant goi
but merely prevented force being used to

The Subordinate Judge gave the pla
the second defendant to deliver up the fir
band, and to bear all the costs of the suit.

The Appellate Court affirmed that de
as to costs.

The special appeal was heard by MELVI

Branson, with him *Máhádev Chimnáji*
—No suit for possession of a wife will lie.
possession cannot be enforced: *Gatha Ram* v.
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force being used: *Philp* v. *Squire* (2); in
case, the second defendant acted solely from
See also *Marchmont* v. *Marchmont* (3).

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cruelty: *Bray* v. *Bray* (4). Here a false c
tantamount to cruelty. *Milner* v. *Milner* (5).
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L and WEST, JJ.

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(1) 14 Beng. L. R. 298.

(2) Peake's N. P. Cases, 114. In that case, however, as in t
Berthon v. *Cartwright* (2 Esp. 480), the wife took refuge with
account of ill-treatment by the plaintiff.
e similar case of
the defendant on

(3) MacQueen on Divorce, 317. (4) 1 Hagg. Eccl., 163. (5) 4 Swab.

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lty. See also *Kelly* v. *Kelly* (1). and aintiff in his examination states that he r from his wife. This is a threat that is wife. This also is cruelty.

considered ... *Stace* v. *Stace* (2), will not take food or ... he will not treat her as ... plaintiff:—The second defendant is clear- out the proceedings aided and abetted notice that the plaintiff wanted his wife, p her in his house. Addison on Torts, w of the Court below is quite correct on

Shámráv Vithal for the ... ly liable. He has throug... the first defendant. Afte... he had no business to kee... pp. 802 and 876. The vi... this point.

ielty, and to show that the law on the India as in England, he cited *Milford* *Cursetjee* v. *Perozebaye* (4), *Moonshee* *soomissa Begum* (5). This case is quite nas not been such cruelty as to justify show the Hindu custom on the subject he 70, and 172 of Steele's Law and Custom

On the question of c... subject was the same in... v. *Milford* (3), *Ardaseer* ... *Buzloor Ruheem* v. *Shu...* conclusive to show there... the wife's desertion. To ... referred to pages 31, 32, ... of Hindu Castes.

ourt was delivered by

The judgment of the (s... case the plaintiff asks that his wife, the

MELVILL, J. :—In thi... compelled to return to him, and that the first defendant, may be ... ose house she has been living and who has second defendant, in wh... be ordered to deliver her up. opposed her return, may...

gued at the bar that a suit for the restitu- It h...n faintly ar... will not lie in our Courts, or, at all events, tion of ...gal rights ... such restitution cannot be enforced; and, in that a dec... ordering ... we have been referred to a judgment of support of this argu... orted 14 Beng. L. R., 298. That judg- Mr. Justice Markby ... d the decision of the Privy Council in ment does not den... *em* v. *Shumsoonissa Begum* (6) conclusive- *Moonshee Buzloor*... a suit may be maintained. The question ly establishes that ... ing the Court's decree is at present pre- of the mode of ... allude to it as affecting the question of the mature, and we ... suit. If it were admitted that a Court could admissibility of ...

(1) ...59 L. J. 9 Mat. Ca. (2) 37 L. J. 51 Mat. Ca.
(3) ...L. R., 295 (Pr. and Div.) (4) 6 Moore I. A., 348.
(5) ... 11 Moore I. A., 551. (6) 11 Moore I. A., 551.

not enforce its decree, that would be ... that the Court could not entertain the ... referred to, the Privy Council has expres... plaintiff's mother-in Mr. Justice Markby does not notice) that diso...th her hus...he order of a Court directing the wife to return to col...r a...on would seem to fall within the 200th Section of the Civil Procedure Code, and to be enforceable by imprisonment or attachment of property, or both. The Bengal High Court [6 Calc. W. R. 105 Civ. Rul.] had previously come to the same conclusion; and in *Ardasar Jahánghir Frámji* v. *Avábái* (1) I have treated the question as settled by authority. We see no reason to entertain any doubt on the subject now. We are unable to agree with Mr. Justice Markby that a decree, which orders a wife to return to her husband's protection, amounts to nothing more than a declaration that the relation of husband and wife exists between the parties. In nine cases out of ten there is no dispute as to the existence of that relation; and a declaratory decree to that effect is not what the plaintiff asks, nor what the Court professes to give him. The policy of entertaining and enforcing such claims may be open to question: but, so long as their jurisdiction is not barred by legislation, our Courts have no discretion in the matter. In the case of Pársis the Legislature has, by Act XV. of 1865, made express provision for such suits and for the enforcement of the decree [Section 36]; and the cases to which we have referred are, we think, sufficient authority to support the action of our Courts in similar suits between Hindus and Muhammadans.

The question which we have to decide, as between the plaintiff and his wife, is whether the latter has proved a legal justification for the admitted refusal to return to her husband's house.

The written statement of the first defendant Yamunábái, in answer to the plaint, is as follows:—

"1. I have been observing my husband to be an idiot ever since the day on which my marriage took place. He has not sense enough to manage his own property, or to protect me, or to gain his livelihood by any acquirement, skill, or ingenuity.

(1) 9 Bom. H. C. Rep., 290.

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"2. My father-in-law died about 10 months ago; [and my] mother-in-law died about 5 months ago. Now I have no one [left] on the side of [my] father-in-law except [my] idiotic husband. After the death of my father-in-law I was living even with my mother-in-law, who was a very old [woman]. There being [residing] in the dwelling-house of my father-in-law and mother-in-law and husband, Rámchandra Mahádev and many other persons of young age, it came to pass that I could not live in that house with respectability [decency]. As the husband of my aged mother-in-law was dead, there was a difficulty in the way of [her] going out [of her house] owing to the custom of Brahman caste. On this account, and as my husband was an idiot, they could not restrain Rámchandra Mahádev and others of [his] kinsmen. Therefore my mother-in-law with the consent of Sowbhágyavati (an epithet of respect prefixed to the names of women whose husbands are living), Godávaribái Nátu, the granddaughter of my mother-in-law, sent me, on account of the [aforesaid] difficulty, to reside in the house of the defendant No. 2, Náráyan Jagannáth Bhide, son-in-law to my mother-in-law. My mother-in-law was to come there after with my husband to reside at [the said] Bhide's; [but in the meantime] she died at Bhade.

"3. I do not believe that the present suit is instituted against me by my husband of his own sense. He has not sense enough to do this. Rámchandra Mahádev Pendse has got my idiotic husband under his hand (influence), and has put forth his [my husband's] name, and caused this suit to be instituted. Therefore [I pray that] the Court will be so gracious as to make him [Rámchandra Mahádev Pendse] another plaintiff or defendant [in this case], that is to say, enter his name as one of the parties opposed to me.

"4. As said above, I came from the house of [my] husband to the house of the defendant No. 2 in or about the month of last Bhádrapad [September 1872]; since that day I have never at all been invited by [my] husband. [My] mother-in-law had directed [me] not to go to the house of the Pendses, unless I was invited by [my said] mother-in-law herself. Accordingly I never went [thither].

"5. On the day of the [institution of this] suit, my husband and Rámchandra Mahádev Pendse came to [the said] Bhide's

house, and [my] husband remained standing near the *gattar* [outside the house]. As he [my husband] could not say anything Rámchandra Mahádev came inside and asked me to go to [my] father-in-law's [*i.e.*, my husband's] house. Then I said that my husband was an idiot, that he (Rámchandra) should not allure him with a bait and deceive him, that he should not ruin him and me, but that he should make over [my] husband to me. I said this on that day, and I had sent messages [to the same effect] once or twice before. But Rámchandra did not attend to it. And on the aforesaid day he took away [my] husband. At present I am feeding and maintaining myself with respectability (decency) in the said Bhide's house, by assisting his daughter-in-law at her toilette, and doing other light work, and at times of inconvenience by cooking and winnowing grain, &c., and doing other light work.

"6. So long as my husband is 'in the hands' (*i.e.* 'under the control') of Rámchandra Mahádev and other kinsmen [of my husband], that is to say, those who are entitled to be heirs [to my husband] after his [my husband's] [death], I am not willing to go to my husband at the house of the Pendses, and under [their] control. For [my] husband is an idiot, and if they should impute to me adultery and various other crimes, I shall be defeated of my right of succession to my husband's property and of [my] right of [getting] food [and] clothes [maintenance] [from that property after his death], and the right will be gone to Rámchandra Mahádev and others. I am [therefore] unwilling to go under the control of such persons, without any protection. And from their former conduct I entertain the greatest apprehensions that they will do so.

"7. [I pray that] the Court will [be pleased to] consider whether my aforesaid statements are proper or not, and to enter the name of Rámchandra Mahádev as one of the parties opposed [to me], and to reject my husband's claim and to award all my costs against the said Rámchandra Mahádev."

It has hardly been attempted to maintain that any of the allegations contained in this statement would, if proved, constitute a sufficient justification for the defendant's refusal to live with her husband. The plaintiff, as the Assistant Judge says, is admittedly a man of very low mental capacity, on the border line of idiocy.

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But Yamunábái has not alleged that she entertains any apprehensions to her safety on this account, nor indeed that she is unwilling to live with her husband on this account. On the contrary, on the same day on which the present suit was filed, she filed a counter suit to obtain possession of her husband, alleging that he was of unsound mind, and that she was the proper person to have charge of him, but that his cousin, Rámchandra, refused to give him up. Her objection was not to living with her husband, but with her husband's relatives. Now it is easy to conceive that the annoyances of married life must be often much aggravated by the necessity which a Hindu wife is under of living in the same house with the whole of her husband's family; and ill-treatment at the hands of her husband's relations, from which he was powerless to protect her, might reasonably be urged as a ground for refusing to live with him. But no such ill-treatment has been alleged in the defendant's written statement. It has, indeed, been suggested to us by the learned counsel for the special appellants that that statement implies much more than it expresses; that the first defendant left her husband's house in consequence of an attempt made upon her virtue by her husband's cousin Krishnáji; and we are asked to order the examination of certain witnesses, whose evidence, it is said, would establish this fact. Undoubtedly no Court would order a wife to return to her husband's house if she were liable to be exposed to an outrage of this description. But it is impossible to pay any attention to a mere verbal allegation made at this late period of the proceedings. If the defendant had so good a defence, she should have made it distinctly, and have raised an issue regarding it. She should, at least, have come forward to give evidence. She was summoned as a witness, and her pleader twice obtained an adjournment in order to produce her. But she remained absent, and her absence has never been accounted for. It is out of the question that the Court should now order an inquiry into the truth of an allegation which does not even appear on any part of the record, and which the person making it does not venture to substantiate upon oath.

There is one circumstance in this case, and one only, which raises any doubt as to the right of the plaintiff to the relief which he seeks. Soon after this suit was instituted, the plaintiff lodged

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In *Moonshee Buzloor Ruheem* v. *Shumsoonissa Begum* Lordships of the Privy Council say:—"It seems to t
that, if cruelty in a degree rendering it unsafe for the wife t
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" (2). In the present case we are only concerned with the question of cruelty; and on that point their Lordships, in another part of the same judgment, say:—"The Mahomedan law, on a question of what is legal cruelty between man and wife, would probably not differ materially from our own, of which

(1) 11 Moore I. A. 551. (2) *I. Ib.* 615.

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(1) Moore I. A. 611. (2) 1 L. R. I

(3) 39 L. J. 59 Mat. Ca

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P. and D.) 295.

whether, in this country, we ought to extend those limits, and to enlarge the definition of legal cruelty so as to allow a wife to justify her desertion of her husband upon grounds which in England would not amount to a justification. After a careful consideration of this question we have come to the conclusion that we ought not to do so. Native law and custom is, at least, as stringent as English law in regard to the duty of a wife to live with her husband. As the Judicial Committee say of the Mahomedan law, so we would say of the Hindu law, that, on a question of what is legal cruelty between man and wife, it would probably not differ materially from our own. Any difference there might be, would be in the direction of greater strictness, not of greater laxity,—at least in regard to the treatment of the wife by the husband. A Hindu wife cannot, any more than an English wife, claim a divorce on account of merely her husband's inconstancy; but she may demand a separate maintenance if her husband ill-treat her on account of a favourite wife or mistress (1). She may abandon a husband who communicates anything noxious (2). In the case of any undue chastisement, in the exercise of marital rights, our Courts would probably adopt the views expressed by Sir Thomas Strange (3), though in the Presidency towns they might possibly be somewhat hampered by the provisions of 21 Geo. III., C. 70, S. 18, and 37 Geo. III., C. 142, S. 12. But we do not think that we should be justified under Hindu law, any more than under English law, in holding that an unfounded imputation upon a wife's chastity, however gross an outrage, is by itself sufficient to constitute legal cruelty. An American writer (4) refers to an old case in Scotland (*Le Nac v. Moir*, A. D. 1750) where a husband publicly and perseveringly reproached his wife falsely with lascivious behaviour and immoderate lust, and in which the Commissaries of the Court of Session held this a sufficient ground for a judicial separation; but the House of Lords reversed the decision. The observations of this writer on this subject are worth quoting. "The proposition", he says, "seems to be, on the whole, well established in England and in most of our States, that the harm to be apprehended must be bodily harm, in distinction from mental suffering. For, while it is admitted that pain of mind may be even

(1) Steele 170. (2) 2 Colebrooke 180. (3) 1 Stra. H. L. 49.
(4) 1 Bishop on Marr. and Div. 724.

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more severe than bodily pain, and a husband disposed to evil may create more misery in a sensitive and affectionate wife by a course of conduct addressed only to the mind, than if, in fits of anger, he were to inflict occasional blows upon her person; still it is said that in such a case 'the Court has no scale of sensibilities by which it can gauge the quantum of injury done and felt.' The rule, therefore, seems to have arisen, not from any notion of its inherent justice, but from the difficulty of practically administering the opposite rule, of regarding the mind the same as the body." In this country generally, and particularly in the present case, in which imputations of lascivious behaviour are cast by both sides with equal recklessness, it would certainly be impossible to gauge by any scale of sensibilities the quantum of injury done and felt.

As to the statement of his intentions contained in the plaintiff's deposition before the Magistrate, to which reference has been made, it is sufficient to say that, even if it be regarded as a menace seriously intended, it falls short of a justification of the first defendant's refusal to return to her husband.

It follows that the first defendant has not, in our opinion, proved legal cruelty on the part of her husband or his relations. In a suit between Hindus we consider that the only safe and practical criterion of cruelty is that contained in the definition which guides the English Courts, namely, that there must be actual violence of such a character as to endanger personal health or safety; or there must be the reasonable apprehension of it. In a suit between Muhammadans the Privy Council has expressed its opinion that the same definition is applicable; and in the Pársi Chief Matrimonial Court of Bombay, over which I now preside, a similar definition was adopted at an early period of the Court's existence (*Fardunji* v. *Kursetji Dinbái*, 23rd November 1869).

The next question is whether the plaintiff, having established his right to compel his wife to return to his protection, is entitled also to a decree against the second defendant, Náráyan Bhide. The law on this subject is correctly stated by the Assistant Judge. Every person who receives a married woman into his house, and suffers her to continue there after he has received notice from the husband not to harbour her, is liable to an action for damages, unless the hus-

band has, by his cruelty or misconduct, forfeited his marital rights, or has turned his wife out of doors, or has, by some insult or ill-treatment, compelled her to leave him (1). The present plaintiff asks, not for damages, but for an injunction; and he is entitled to an injunction if he has proved his case, and if the conduct of the second defendant still continues to show a necessity for it. The Assistant Judge has found that the second defendant did harbour the first defendant after notice from her husband; and, looking to the conduct of the second defendant throughout the proceedings in the suit, we cannot entertain any doubt that he has been, and is, actively, aiding and abetting the first defendant in her opposition to her husband's wishes.

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Our decree must be that the plaintiff is entitled to his conjugal rights, and that the first defendant, Yamunábái, be ordered to return to his protection, and that the second defendant, Náráyan Bhide, do abstain from harbouring the first defendant, and from offering any obstruction to the return of the first defendant to her husband's protection.

Having regard to the conduct of the parties, and to all the circumstances of the case, we think that each party should bear his and her costs throughout.

We amend the decree of the Court below accordingly.

[APPELLATE CRIMINAL JURISDICTION.]

Criminal Review No. 5 of 1876.

IN RE KESHAV LAKSHMAN.

Award of Compensation—The Code of Criminal Procedure (Act X. of 1872), *Section* 209—*Complainant.*

1876. March 23.

A *kárkun* on the establishment of a Civil Court, entrusted with the execution of a writ, reported to the Court that a particular person obstructed him in attaching property as commanded by the writ; and a report was thereupon made by the Court to a Magistrate, with a view to proceedings being taken against the obstructor. The Magistrate acquitted the accused and ordered the *kárkun* to pay the accused compensation under Section 209 of the Criminal Procedure Code.

(1) Addison on Torts 802.