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rejected the plaintiff's claim, first, because it thought notice was necessary; and, secondly, because it thought that the defendant's title was better on the evidence than the plaintiff's.

SARGENT, C.J.—The Assistant Judge has disposed of this case in favour of the defendant on two grounds: (1), that, assuming defendant to have been plaintiff's tenant, he could not be ejected without notice.

(2). That the evidence was, in his opinion, strongly in favour of defendant's proprietary right.

As the defendant has throughout denied the plaintiff's title, the plaintiff would be under no obligation to prove notice, supposing it to be established that defendant was his tenant. See Woodfall on Landlord and Tenant, (11th ed.), p. 325; *Doe d. Trustees of the Bedford Charity* v. *Payne*(1); *Vivian* v. *Moat*(2).

As to the opinion expressed by the Assistant Judge in favour of defendant's proprietary title, it is accompanied by no reasons, and cannot be accepted as a conclusive finding—*Krishnaráv Yashvant* v. *Vásudev Apáji Ghotikar*(3). We must, therefore, reverse the decree, and send the case back for a fresh decision. Costs of appeal to abide the result.

Decree reversed and case remanded.

(1) 7 Q. B., 287. (2) 16 Ch. Div., 730. (3) I. L. R., 8 Bom., 371.

ORIGINAL CIVIL.

Before Mr. Justice Pinhey.

DA'DA'JI BHIKA'JI, PLAINTIFF, *v.* RUKHMA'BA'I, DEFENDANT.*

1885. *September* 19 & 21.

Husband and wife—Restitution of conjugal rights—Suit by a husband—Marriage during wife's infancy—Non-consummation of marriage—Specific performance of contract of marriage made in infancy—Hindu law—Poverty of husband.

A, a Hindu aged nineteen years, was married by one of the approved forms of marriage to B, then of the age of eleven years, with the consent of B's guardians. After the marriage B lived at the house of her step-father, where A visited from time to time. The marriage was not consummated. Eleven years after the marriage, *viz.*, in 1884, the husband called upon the wife to go to his house and live

* Suit No. 139 of 1884.

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with him, and she refused. He thereupon brought the present suit, praying for restitution of conjugal rights, and that the defendant might be ordered to take up her residence with him.

Held that the suit was not maintainable.

SUIT by a husband for restitution of conjugal rights.

The plaintiff, who was a Hindu of the *Suttár* or carpenter caste, alleged that he had been lawfully married to the defendant about ten years before the suit, he being then nineteen years of age and the defendant thirteen. The marriage was celebrated according to an approved form.

Subsequently to the marriage the defendant continued to live with her step-father, Dr. Sakhárám Árjún, and for the first year after the marriage occasionally visited the plaintiff's house. Since that time she did not visit the plaintiff's house; but the plaintiff had been a constant visitor at the house of Dr. Sakhárám Árjún. The marriage had never been consummated, though the plaintiff had long since attained puberty, as Dr. Sakhárám Árjún was averse to an early consummation thereof.

Early in 1884 the plaintiff wrote to Dr. Sakhárám Árjún, requesting him to send the defendant to his (the plaintiff's) house. In his reply Dr. Sakhárám Árjún stated that he was willing that the plaintiff should take the defendant to his house, and that her stay at his (Dr. Sakhárám Árjún's) house had been by consent of the relations on both sides, because of the unfortunate circumstances of the plaintiff. On the 24th of March, 1884, the plaintiff sent his mother's brother, Náráyan Dharmáji, with whom he was living, and his elder brother to bring the defendant to his house, but she refused to go. The plaintiff thereupon caused his solicitors to write a letter to her on the 25th of March, 1884, requesting her to join him forthwith, he undertaking to give her suitable maintenance and lodging according to his rank and position. The defendant wrote in reply again refusing to live with him. The plaintiff thereupon filed this suit, in which he prayed (*a*) for the institution or restitution of conjugal rights from the defendant Rukhmábái; (*b*) that the defendant might be restrained by injunction from continuing to live in the house of the said Dr. Sakhárám Árjún; and that the defendant might be ordered to take up her residence with the plaintiff.

The defendant in her written statement admitted the marriage, but stated that at the time of the marriage she was only about eleven years of age, and had not arrived at years of discretion. She alleged that the plaintiff used to visit at her step-father's house for purposes of medical treatment, and that the plaintiff had filed the suit at the suggestion of certain evil-minded persons, who had instigated him for their own purposes. Her reasons for refusing to live with him were fully set forth in the third paragraph of her written statement, as follows, namely,—"(1) The entire inability of the plaintiff to provide for the proper residence and maintenance of himself and his wife, the defendant; (2) the state of the plaintiff's health in consequence of his suffering frequently from asthma and other symptoms of consumption; and (3) the character of the person under whose protection he was living in the house in which he called on the defendant to join him."

The following issues were raised for the defendant:—

1. Whether the plaintiff was entitled to maintain the suit?

2. Whether the plaintiff was in a position to provide for the lodging and maintenance of the defendant?

3. Whether the plaintiff was entitled to the relief claimed, or any part thereof?

Latham (Advocate General) (with him *Inverarity* and *Telang*) stated that under the first issue he would raise the question as to the effect of the defendant having given no personal consent to her marriage with the plaintiff. Although he raised a specific issue as to the plaintiff's means, he declined to raise any issue on the other allegations contained in paragraph 3 of the written statement; but he expressed his intention to avail himself of those allegations (if proved) under the general issue. The following additional issue was thereupon raised by the counsel for the plaintiff:—

4. Whether the allegations contained in paragraph 3 of the defendant's written statement are correct; and, if so, whether they amount to a sufficient justification, in Hindu law, on the part of the defendant to refuse to the plaintiff his conjugal rights?

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Vicáji and *Mánkar* for the plaintiff.—The marriage of the parties being admitted, the *onus* is on the defendant to prove that she is legally justified in resisting the husband's suit for enforcing his marriage rights. Marriage among Hindus is not a contract strictly so called, but a religious duty; and want of personal consent through infancy is immaterial—Mayne's Hindu Law, sec. 84 (3rd ed.) The suit is laid, in the alternative, for a *restitution* or *institution* of conjugal rights. If regard is had merely to cohabitation or consummation of the marriage, the present suit would, strictly speaking, be one for the *institution* of conjugal rights. This marriage, like most Hindu marriages, was solemnised at an age when the wife had not attained puberty. If, on the other hand, regard is had to the plaintiff's consent to allow his wife to stay with her step-father after she had attained her maturity, the suit is one for the *restitution* of his conjugal rights, which were never disputed since the marriage until within a month before the suit. From the moment of marriage the Hindu husband is his wife's legal guardian, even though she be an infant, and he has an immediate right to require her to live with him in the same house as soon as she has attained puberty: her home is necessarily her husband's house[1]. In this case Dr. Sakhárám's house, where the plaintiff frequently visited her, was constructively the husband's place of abode, or, at least, it was a place appointed by him for the purposes of her residence. But, independently of this view, we have the authority of law texts and the decisions of Courts for holding that a suit for restitution of conjugal rights does lie among Hindus[2]. The contention that it does not lie, was not taken in the written statement when it was filed in July, 1884, and it is now taken for the first time at the hearing. The poverty of the husband does not constitute a matrimonial offence so as to operate as a legal bar to the husband's right to seek his wife's society and assistance. I submit that the *onus* of the proof rests upon the defendant.

[PINHEY, J.—I don't agree with Mr. Mayne's position, which seems to me to be too broadly laid down by him, and to go much

(1) Mayne's Hindu Law (3rd. ed.), s. 380.

Mayne's Hindu Law (3rd. ed.). s. 89.

beyond the decisions of the Courts. I rule that the plaintiff must prove his case, and is, therefore, bound to begin.]

In the course of the evidence for the plaintiff his witnesses deposed that the expenses of marriage on both sides were defrayed by the executor of the will of the defendant's deceased father, Janárdhan Pándurang. By that will the testator devised all his property, including the ancestral estate, to his widow, Jayantibái, the defendant's mother. The defendant was the only child of the testator by Jayantibái, who after the testator's death married Dr. Sakhárám Árjún and lived with him and the defendant in the same house. The witnesses further deposed as to the husband's means, that with the aid of his maternal uncle, Náráyan Dharmáji, with whom he lived, he earned the sum of about Rs. 30 or Rs. 40 a month in the trade of plan-making, but that in some months he earned nothing. They also deposed that Náráyan Dharmáji had his wife and daughters living with him in the same house. The medical witnesses, who had personally examined the plaintiff, swore that he had no symptoms of asthma or consumption.

Counsel for the defence were not called upon.

PINHEY, J.—Mr. Advocate General, unless you are particularly anxious to make some remarks for the assistance of the Court, I think I need not trouble you, as I am prepared to dispose of the case at once. I have been considering the case since it was last before the Court on Saturday, and I have been looking into the authorities, and I have arrived at the opinion that the plaintiff cannot maintain this action.

It is a misnomer to call this a suit for the restitution of conjugal rights. When a married couple, after cohabitation, separate and live apart, either of them can bring a suit against the other for the restitution of conjugal rights, according to the practice in England, and according to the later practice of the Courts in India. But the present suit is not of that character. The parties to the present suit went through the religious ceremony of marriage eleven years ago, when the defendant was a child of eleven years of age. They have never cohabited. And now that the defendant is a woman of twenty-two, the plaintiff asks the Court to compel her to go to his house, that he may complete his

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contract with her by consummating the marriage. The defendant, being now of full age, objects to going to live with the plaintiff, objects to allowing him to consummate the marriage, objects to ratifying and completing the contract entered into on her behalf by her guardians while she was yet of tender age. It seems to me that it would be a barbarous, a cruel, a revolting thing to do to compel a young lady under those circumstances to go to a man whom she dislikes, in order that he may cohabit with her against her will; and I am of opinion that neither the law nor the practice of our Courts either justified my making such an order, or even justifies the plaintiff in maintaining the present suit.

I have looked through the reported decisions of the Courts in England and of the Courts in India; but I cannot find one that covers the ground covered by the facts of this case. There is not an instance, that I know of, in which a Court has compelled a woman, who has gone through the religious ceremony of marriage with a man, to allow that man to consummate the marriage against her will. It may, of course, be said that in England marriages are generally celebrated between persons of mature age, who usually consummate the marriage on the same day, and that, therefore, one must not expect to find a case on all fours with this among the English cases. But, then, on the other hand, it must be remembered that the practice of allowing suits for the restitution of conjugal rights (and that is what is asked for in the plaint) orginated in England under peculiar circumstances, and was transplanted from England into India. It has no foundation in Hindu law—the religious law of the parties to this suit. Under the Hindu law such a suit would not be cognizable by a Civil Court. For many years after I came to India such suits were not allowed. It is only of late years the practice of allowing such suits has been introduced into this country from England (I think only since the amalgamation of the old Supreme and Sadar Courts in the present High Courts has brought English lawyers more into contact with the mofussil).

This being so, I think I am not bound to carry the practice further than I find support for it in the English authorities, especially when the granting of the relief prayed would produce

consequences revolting not only to civilized persons, but even to untutored human beings possessed of ordinary delicacy of feeling. The practice of allowing those suits in England has become much discredited, and has been rendered almost inoperative by the legislation of the past year. See Stat. 47 & 48 Vic., cap. 68, sec. 2. It is, in my opinion, matter for regret that it was ever introduced into this country. As, however, it has been introduced into this country, I am bound to follow it so far as it has received the sanction of this Court or of the Privy Council. I find, however, neither precedent nor authority for granting the relief asked for in this suit, and I am certainly not disposed to make a precedent, or to extend the practice of the Court in respect of suits of this nature beyond the point for which I find authority. The defendant has not appeared in Court, but the evidence shows that she has been brought up in the enlightened and cultivated home of her step-father, the late much lamented Dr. Sakhárám Árjún, a well-known citizen of Bombay. I am glad, therefore, that, in the view of the law which I take, I am not obliged to grant the plaintiff the relief which he seeks, and to compel this young lady of twenty-two to go to the house of the plaintiff in order that he may consummate the marriage arranged for her during her helpless infancy.

Before concluding my remarks I wish to guard myself from being supposed to endorse the contention in the written statement, that the plaintiff was not entitled to claim the society of his wife because he is poor. A poor man has as much right to claim his wife as a rich man to claim his. The plaintiff gave much false evidence as to his pecuniary position; and his uncle, who was examined on plaintiff's behalf on the same point, gave, if possible, evidence less credible still. Nevertheless, the general result of the evidence shows that plaintiff can earn a livelihood and keep a wife (as he himself said repeatedly) "according to my poor circumstances." The poverty of the plaintiff is not one of the reasons which I should give for the rejection of plaintiff's claim. There will be decree for the defendant with costs.

Decree for defendant.

Attorneys for the plaintiff.—Messrs. *Chalk and Walker.*

Attorneys for the defendant.—Messrs. *Payne, Gilbert and Sayáni.*