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for its reversal and to obtain a declaration that the lands are held by them on the dhára tenure, and that the defendants are ordinary tenants thereof.

That the decision of the Survey Officer as to tenure is not final, and that such a suit as the present will lie, was hardly disputed before us and has now been settled by the Full Bench decision in *Antaji Kashinath* v. *Antaji Mahadev*[1]. The fact that the plaintiffs are the khots of the village does not seem to us to affect the case, for a khot can hold dhára land just as any one else can. The Subordinate Judge disposed of the suit on its merits, and the Assistant Judge should have heard the appeal also on its merits and determined the real point at issue between the parties, *viz.*, whether the lands are the dhára lands of the plaintiffs or whether the defendants are the occupancy tenants thereof within the meaning of the Khoti Settlement Act.

We reverse the decree of the lower appellate Court and remand the appeal for legal disposal. Costs to be costs in the cause.

Decree reversed.

(1) P. J. for 1896, p. 1 ; I. L. R., 21 Bom., 480.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

1896. *February* 3.

PURSHOTAMDAS MANEKLAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* BAI MANI (ORIGINAL DEFENDANT), RESPONDENT.*

Husband and wife—Restitution of conjugal rights—Defence—Plea of impossibility of sexual intercourse—Legal defences to suit for restitution—Judge has no discretion to refuse decree except when legal plea is proved.

A plea by a wife that sexual intercourse with her is impossible owing to her incurable disease or physical malformation is not in itself a good defence to a suit by the husband for restitution of conjugal rights.

A Judge has no discretion to refuse a decree for restitution of conjugal rights for other causes than those which in law justify a wife in refusing to return to live with her husband, and he cannot abstain from passing a decree in favour of a plaintiff-spouse, because he considers that it would not be for the benefit of either side that the decree should be granted.

* Second Appeal, No. 245 of 1895.

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Dadaji v. *Rukmabai*(1) followed.

Where, therefore, the lower appellate Court found that there was no cruelty, but that the suit was brought by the husband as a counter-move to defeat the claim of the wife for separate maintenance and a considerable time after she had ceased to live in his house and because on the last occasion when she returned to live with him she left the house crying,

Held, that these circumstances were not sufficient in law to justify the Court in refusing the husband's claim for restitution of conjugal rights.

SECOND appeal from the decision of T. Hamilton, District Judge of Surat, in Appeal No. 99 of 1893.

Suit by a husband for restitution of conjugal rights. The defendant pleaded cruelty and that the plaintiff had superseded her by marrying a second wife.

The Subordinate Judge passed a decree for the plaintiff. The defendant appealed, and in appeal urged (*inter alia*) that she might not to be compelled to live with her husband, as by reason of her state of health sexual intercourse was impossible.

The District Judge of Surat reversed the decree of the lower Court and dismissed the suit. In his judgment he said :—

"Defendant appeals on the ground (*inter alia*) that she ought not to be compelled to live with her husband, as sexual intercourse is impossible and as her state of health is bad.

"Although this plea was not specifically raised in the lower Court, it can, I think, be allowed in appeal, as the facts now alleged by the defendant were admitted by plaintiff in the lower Court.

"The marriage has admittedly never been consummated owing to some physical malformation of the defendant. They have now been married some twelve years and defendant is said to be twenty-five years of age. Doctors have been consulted, and the case appears to be a hopeless one. Consequently plaintiff has taken a second wife.

"I am not aware if a marriage between Hindu adults is voidable, as it is amongst Christians, by reason of a physical impossibility to sexual intercourse. A plea such as is now raised by defendant is a good answer to a suit for restitution of conjugal rights in England. It is more than enough, for it is a plea that the marital tion does not and never did exist. There is, I believe, no decision of any High Court on the point nowraised by defendant. As suits for restitution of conjugal rights are foreign to Hindu law, strictly speaking, though allowed now-a-days, I think I shall be justified in adopting the rule of canon law, and in holding that defendant cannot be compelled to live with her husband."

The plaintiff appealed to the High Court.

Shivram Vithal Bhandarkar, for the appellant (plaintiff).

(1) I. L. R., 10 Bom., 301.

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Nagindas Tulsidas for *Ganpat Sadashiv Rao* for the respondent (defendant).

The following authorities were cited :—*Ricketts* v. *Ricketts*(1); *Dadaji* v. *Rukmabai*(2); *Scott* v. *Scott*(3); *B.* v. *M.*(4); *P.* v. *S.*(5); *Norton* v. *Seton*(6); *X.* v. *Y.*(7); *Lewis* v. *Hayward*(8); *Binda* v. *Kaunsilia*(9).

PARSONS, J.:—This suit was brought by the appellant for restitution of conjugal rights against his wife, the respondent. The defence was cruelty. The Subordinate Judge held this unproved, and passed a decree for the appellant. The District Judge on appeal took up one only of the grounds of appeal and disposed of the appeal on it though it was a plea not raised in the Court of first instance. He considered that he could do this, because the facts alleged by the defendant were admitted by the plaintiff in the lower Court. We are of opinion that the facts were not so clearly admitted as to justify the neglect to follow the proper practice, *viz.*, to raise an issue on a new plea and decide it only after allowing the parties a full opportunity of adducing evidence thereon. The District Judge assumes physical malformation and that the case is a hopeless one. The Subordinate Judge says only that the defendant has some incurable disease about her hip-bone. No medical evidence has been taken. No issue was framed. We are, therefore, at a great disadvantage in dealing with the case.

The only point we can raise is this, *viz.*: Is a plea by a wife, that sexual intercourse with her is impossible owing to her incurable disease or physical malformation, in itself a good defence to a suit by the husband for restitution of conjugal rights? That point we decide in the negative. In Browne and Powle's work on Divorce (5th Ed.) at p. 141 it is stated that "the impotency of the petitioner with a prayer for a decree of nullity is clearly an answer (to a suit for restitution of conjugal rights), as that sets up a denial of the marriage (*Ricketts* v. *Ricketts*(1)). And so

(1) 35 L. J., P. and M., 92.
(2) I. L. R., 10 Bom., 301.
(3) 34 L. J., P. and M., 23.
(4) 2 Robert, 580.
(5) 37 L. J., P. and M., 80.
(6) 3 Phill., 147.
(7) 34 L. J., P. and M., 81.
(8) 35 L. J., P. and M., 105.
(9) I. L. R., 13 All., 126.

also would be any other ground for nullity of marriage." The last sentence can only mean a ground on which the defendant in the suit could ask for a decree of nullity. It is obvious that a defendant could not set up his or her own adultery or cruelty as a defence to the suit. This is clearly laid down in *Dadaji* v. *Rukmabai*[1], where Sargent, C. J., concludes his judgment in these words: "Civil Courts cannot with due regard to consistency and uniformity of practice (except perhaps under the most special circumstances) recognise any plea of justification other than a marital offence by the complaining party as was held to be the only ground upon which the Divorce Courts in England would refuse relief in *Scott* v. *Scott*[2]." At page 192 of the same work it is said: "If at the time of its solemnization either of the parties to the marriage is impotent, the marriage is voidable *ab initio*, and the Court may pronounce a decree declaring it null and void—*B.* v. *M.*[3] and *P.* v. *S.*[4]." "But a suit for nullity on this ground can only be brought by the party who suffers the injury. Therefore the impotent party cannot sue on the ground of his own impotency—*Norton* v. *Seton*[5]; *X.* v. *Y.*[6]; *Lewis* v. *Hayward*[7]." Marriage does not exist solely for sexual intercourse. The reciprocal duties and obligations of the husband and wife under Hindu law will be found exhaustively discussed by Mahmood, J., in the case of *Bindu* v. *Kaunsilia*[8]. It would manifestly be wrong to allow one of the parties to withdraw from the performance of the duties and obligations binding on him on a ground which gives him no just cause of complaint and of which the other party does not complain.

We reverse the decree of the lower appellate Court and remand the appeal for a legal disposal on the merits. Costs to be costs in the cause.

Decree reversed and case remanded.

On remand the District Court reversed the decree of the

(1) I. L. R., 10 Bom., 301.
(2) 34 L. J., P. and M., 23.
(3) 2 Robert, 580.
(4) 37 L. J., P. and M., 80.
(5) 3 Phill., 147.
(6) 34 L. J., P. and M., 81.
(7) 35 L. J., P. and M., 105.
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Subordinate Judge and dismissed the plaintiff's claim. The following is an extract from the judgment:—

"I agree with the view of the lower Court, that, on the evidence in the case, legal or gross cruelty is not proved by defendant against plaintiff. Nor has this point been seriously pressed in appeal. The main contention for defendant has been that, in spite of gross cruelty not being proved, there are sufficient reasons in this case to justify the Court in refusing to compel defendant to return to her husband's house. * * * It is admitted by the plaintiff himself that, although he and defendant were married some eleven years before this suit, defendant had only lived with him four or five months since the marriage and that she had been living with her relations. It is not denied that, for all these years, plaintiff made no provision for his wife. Again, there is the admitted fact of plaintiff's second marriage. This was in defiance of the rules of his caste, and he was fined Rs. 500 on this account by his caste. The cause of this second marriage is clearly owing to the fact of the marriage between plaintiff and defendant never having been consummated, because of defendant's bodily defects. It is true, as pointed out by the High Court in their order of remand, that marriage does not exist solely for sexual intercourse. The fact, however, that this marriage has never, and, apparently, can never be consummated, has an important bearing on the *bona fides* or otherwise of plaintiff's present claim. He has let the defendant live so many years away from him and admits that he is satisfied with his second wife. It is only when defendant had instituted several proceedings against him in 1892 (*e. g.* for maintenance and also a criminal charge of bigamy) that we find him bringing the present claim for restitution of conjugal rights. Though before the Magistrate on 31st July, 1892, plaintiff proposed his willingness to receive his wife back again, yet there can be no doubt (as held by the lower Court) that he did not treat her properly when she returned, for defendant 'left the house crying' at once, as plaintiff admits. Having regard to all these facts it may reasonably be inferred, as urged for defendant, that the present suit is not brought *bonâ fide*, but as a counter-move to defendant's claim for maintenance."

From this decision the plaintiff preferred a second appeal to the High Court, S. A. 595 of 1896.

Shivram Vithal Bhandarkar for the appellant (plaintiff).

Ramdatt Vithoba Desai for *Nagindas Tulsidas* for the respondent (defendant).

The following cases were cited in argument:—*Paigi* v. *Sheonarain*[1]; *Bai Premkwar* v. *Bhika*[2]; *Uka* v. *Bai Heta*[3]; *Basapa* v. *Ningi*[4]; *Dadaji* v. *Rukmabai*[5]; *Scott* v. *Scott*[6]; *Binda* v. *Kaunsilia*[7].

(1) I. L. R., 8 All., 78.
(2) 5 Bom. H. C. Rep., 209.
(3) P. J., 1880, p. 322.
(4) P. J., 1878, p. 6.
(5) I. L. R., 10 Bom., 301.
(6) 34 L. J., P. & M., 23.
(7) I. L. R., 13 All., 126.

FARRAN, C.J.:—We think that the District Judge is not correct in holding that the cases show that a Judge has a discretion in refusing a decree for restitution of conjugal rights for other causes than those which in law justify a wife from refusing to return to live with her husband and that he cannot abstain from passing a decree in favour of a plaintiff spouse, because he considers that it would not be for the benefit of either side that the decree should be granted.

The law which we are bound to follow upon this subject is, we think, that laid down in *Dadaji* v. *Rukmabai*[1], where Sir Charles Sargent, C. J., says: "It may be advisable that the law should not adopt stringent measures to compel the performance of conjugal duties; but as long as the law remains as it is, civil Courts, in our opinion, cannot with due regard to consistency and uniformity of practice (except perhaps under the most special circumstances) recognise any plea of justification other than marital offence by the complaining party, as was held to be the only ground upon which the Divorce Courts in England would refuse relief in *Scott* v. *Scott*[2]." That decision was given after all the cases upon the subject which have been relied upon by the respondent before us and in the judgment of the District Judge had been cited, and was a most carefully considered judgment. It has been adopted as the correct view in *Binda* v. *Kaunsilia*[3] and ought, we think, to be considered as settling the law. It would, in our opinion, lead to great doubt and difficulty if any other view of the law were adopted.

Here the District Judge has held that there was no cruelty, but that the suit was brought by the husband as a counter-move to defeat the claim of the wife for separate maintenance and a considerable time after his wife had ceased to live in his house and because on the last occasion when the wife returned to live with her husband she left the house crying. These are not, in our opinion, circumstances sufficient in law to justify the Court in refusing the plaintiff's claim. The plaintiff by his pleader expresses his willingness to allow the defendant a separate room

(1) I. L. R., 10 Bom., 301. (2) 34 L. J., Pr. & M., 23.
(3) I. L. R., 13 All., 126.

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in his house and to supply her with food and raiment. On this undertaking being given, which should be embodied in the decree, we reverse the decree of the District Judge and restore the decree of the Subordinate Judge. Each party to bear his and her own costs throughout.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

1896. *February* 3.

BHANA (ORIGINAL PLAINTIFF), APPELLANT, *v.* CHINDHU (ORIGINAL DEFENDANT No. 1), RESPONDENT.*

Hindu law—Joint family—Family debt—Liability of family property—Manager—Decree against a manager—Execution sale—Auction-purchaser.

Where family property is sold in execution of a decree, obtained against a brother as manager of a joint Hindu family, for a family debt contracted by his father and himself and a brother, the interest of all the members of the family passes to the auction-purchaser though they have not been joined as parties to the suit or to the execution proceedings.

SECOND appeal from the decision of Ráo Bahádur Chunilal Maneklal, First Class Subordinate Judge with appellate powers at Dhulia.

Ramsing Megha, and Meherchand and Ramdas, two of his five sons, borrowed money from Chindhu, the defendant, and passed an acknowledgment (kháta) for the amount.

Ramsing died and Ramdas being absent, Chindhu sued Meherchand on the kháta and obtained a decree against him. In execution of this decree Chindhu attached and sold certain fields which were the ancestral property of Meherchand and his four brothers. The property was sold as Meherchand's.

Ramdas, the absent brother, subsequently sold his interest and that of his three minor brothers in these fields to the plaintiff, who brought this suit against Chindhu to recover $\frac{4}{5}$ths of the fields in question which Chindhu had bought at the execution sale.

Both the lower Courts rejected the plaintiff's claim. They found that Meherchand was manager of the joint family, and

* Second Appeal, No. 1 of 1895.