

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Chandavarkar.

NINGAREDDI (ORIGINAL PLAINTIFF), APPELLANT, v. LAKSHMAWA
(ORIGINAL DEFENDANT), RESPONDENT.*

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September 3.

Hindu Law—Maintenance—Concubine—Permanent connection—Gift of joint family property—Father—Son's liability.

Where in a joint Hindu family a father makes a gift of a portion of the family property, during his lifetime, by way of maintenance to his concubine in consideration of past cohabitation, the gift is not binding on his son; though the son is bound to provide maintenance for a concubine who lived with his father till his death.

Under Hindu law a concubine gets no right of maintenance against her paramour, unless, having been kept continuously till his death, it can be said that the connection had become permanent. It is only on his death that his estate in the hands of those who take it becomes liable for her maintenance.

SECOND appeal from the decision of T. Walker, District Judge of Dhárwár, reversing the decree passed by Ráo Sáheb Sheshgiri R. Koppikar, Joint Subordinate Judge of Dhárwár.

Govindraddi, the plaintiff's father, had a wife Venkawa (plaintiff's mother), who owing to ill-health left him about the year 1877, and went to reside with her parents. Govindraddi then took defendant Lakshmawa to his house, and she lived with him as his mistress.

On the 10th June, 1890, Govindraddi executed a registered deed of gift (Exhibit 39) to Lakshmawa bestowing $3\frac{1}{2}$ *kuryis* of land on her for her life by way of maintenance, and providing that at her death it should revert to his son, the plaintiff.

Soon after this, Venkawa having regained her health, rejoined her husband, but Govindraddi continued to visit Lakshmawa till his death in November, 1897.

In 1898 the plaintiff filed this suit against defendant to recover possession of the land conveyed to her by the deed of gift.

The defendant contended that the gift was valid; and that in any case she need not part with the land unless an adequate provision was made for her maintenance.

The Joint Subordinate Judge of Dhárwár awarded to the

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plaintiff possession of the lands unburdened with any charge of maintaining the defendant. In his judgment he said :

The land passed by the deed of gift was the undivided property of plaintiff and his father, and the latter had no authority to transfer by gift any specific portion of the joint estate (*vide* Mayne's Hindu Law, section 335, 5th Edition).

As an alienation by the father of the part of the family estate, the deed is equally bad as it was passed by him to his kept mistress. As the purpose is immoral it cannot bind the son.

It is, however, contended that the parties being Shudras, Govindraddi was bound to maintain his mistress and that the agreement passed by him to provide for defendant during her lifetime is binding on plaintiff. The question is whether the connection between Govindraddi and defendant was of such a nature as to lay a legal obligation upon him, or his son after him, to provide for her maintenance. It is admitted by defendant and her witnesses that defendant deserted her Udki husband to live with Govindraddi. Though their connection was adulterous, the fact by itself is insufficient under the authorities to bar her right of maintenance (*vide* *Khemkor v. Umiasunkor*, 10 Bom. H. C. 381, and *Vrahadavandas v. Yamuna*, 12 Bom. H. C. 229). But the liability to maintenance exists only where the connection was of a permanent nature, analogous to that of the female slaves who in former times were recognized members of a man's family: (*vide* Mayne, section 408; also *Sikki v. Venkatasamy* (8 Mad. H. C. 144) As the connection lasted only ten or eleven years, I do not consider that defendant's case comes within the authorities quoted above. The cases cited by defendant's pleader, I. L. R. 1 Bom. 97 and I. L. R. 12 Bom. 26, do not apply. The one refers to the rights of an illegitimate son and the other to the right of a concubine to enforce an order for maintenance already acquired by her. The principles applicable in such cases are not on all fours with the claim of a mistress to be maintained out of the estate of the family to which her deceased paramour belonged. I hold that defendant lived in Govindraddi's house only for ten or eleven years, and that the connection being temporary gives her no claims as to maintenance.

The District Judge of Dhárwár, on appeal, reversed the decree passed by the Subordinate Judge for the following reasons :

It is evident that Govind was much attached to this woman. Not only may this be inferred from the fact that she was with him for twenty years while he lived and with him when he died; but in 1892 when Venkawa brought a suit against her about her enjoyment of these 3½ *kurgis* of land, Govind forced his wife to withdraw her opposition (as she herself says) by threatening to turn her out of the house. I have no hesitation in terming this connection a permanent one, or in holding that Govind, in thus compensating the woman for past services voluntarily rendered, and at the same time making provision for her as he was in honour bound to do, made a perfectly valid alienation of the family property (Exhibit 49).

The plaintiff preferred a second appeal.

Shamrao Vitthal for appellant (plaintiff):—The property given to the defendant was joint family property. The gift is not binding on the plaintiff as he was a minor at the time. Further, it is invalid, the consideration being immoral. The connection between Govindraddi and defendant at the date of the gift was not of a permanent character so as to make it obligatory upon him, according to Hindu law, to make a provision for her maintenance. See *Vrandavandas v. Yامنabai*.⁽¹⁾

D. A. Khare for respondent (defendant):—The connection between Govindraddi and defendant was permanent, for although she was not living in Govindraddi's house until his death, she was clearly still under his protection and he used to visit her till his death. Under Hindu law a concubine is entitled to maintenance, and the plaintiff is bound to maintain the defendant. We contend that the alienation made by the father is binding upon the son, having been made for a good consideration.

Crowe, J.:—This was a suit brought by Ningareddi to set aside a gift of ancestral property made by his father Govindraddi during his lifetime to the defendant Lakshmawa.

The lower Appellate Court has found that Lakshmawa was the concubine of Govindraddi and lived with him till his death in November, 1897. In 1890 Govindraddi passed to defendant a registered deed bestowing on her $3\frac{1}{2}$ *kurgis* of land for her life, after which it was to revert to his son, the plaintiff. The question of Hindu law is whether the alienation by Govindraddi is valid.

There can be no doubt on the authorities that a concubine is entitled to maintenance, though the connection was an adulterous one, provided that it was of a permanent nature, and Mr. Khare relies on the circumstance that defendant was living under the protection of Govindraddi till his death, and therefore there was no intention on his part to sever the connection. He further contends that the gift was made in lieu of maintenance, that it is not contended it is unreasonable or excessive, and that no

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advantage will be gained by upsetting the arrangement made by the father and acquiesced in by his wife.

It is, as observed by Mayne, section 311 (5th Edition), an established rule of Hindu law that a father can make no disposition of the joint property which will prejudice his issue, unless he obtains their assent or unless there is some established necessity or a moral or religious obligation to justify the transaction. In the present case it is found that plaintiff was a minor at the time of the alienation and came of age only during the pendency of the present suit. The transfer to defendant of the specific portion of the joint property was made before any right to defendant for maintenance had accrued. It has been held on more than one occasion that a suit for maintenance against a paramour by his concubine during his lifetime will not lie. The man could be under no legal or moral obligation to provide for the maintenance of his concubine for the remainder of his life when it was open to her to terminate the connection between them at any time. We are, therefore, compelled to hold that plaintiff is not bound by the deed of gift of a specific portion of the ancestral estate and that he is entitled to recover possession. The plaintiff, however, is legally bound to provide for the maintenance of the defendant.

We reverse the decree of the lower Appellate Court and direct that the plaintiff be put in possession of the land specified in the plaint. We direct, further, that the lower Appellate Court do ascertain what will be a proper maintenance for defendant, and to take measures to secure that maintenance for her during her lifetime in order to avoid her being put to the expense of a separate suit for that purpose as was ordered in the case of *Vrandavandas Ramdas v. Yamunabai*.⁽¹⁾ In the peculiar circumstances of this case we think that the parties should respectively bear their own costs of the suit and appeal, together with any further costs that may be incurred in the course of the inquiry.

CHANDAVARKAR, J. :—The plaintiff Ningareddi sues to recover the possession of a field as part of his ancestral property which was in the enjoyment of his father Govindraddi until his death. Govindraddi died two months before the date of the suit. The

(1) (1875) 12 Bom. H. C. 229.

defendant claims to hold the field for life under a deed executed in her favour by the plaintiff's father on the 10th of June, 1890, in consideration of past services voluntarily rendered to him by her.

Both the lower Courts have held that the plaintiff's father had kept the defendant as his mistress. The Subordinate Judge, however, found that at the time when the deed was executed the connection between the defendant and the plaintiff's father had not become permanent to entitle her to maintenance as a concubine under the Hindu law. He, therefore, awarded the plaintiff's claim. But the District Judge has rejected it, holding that as the defendant lived with the plaintiff's father as his mistress until his death, his alienation of the field in dispute as a provision for her maintenance is binding upon the plaintiff.

The District Judge's finding, that the connection between the defendant and the plaintiff's father became permanent by the fact of her having lived with him as his concubine until his death, has been attacked before us, but as there is some evidence on the record to support it, we cannot disturb it in second appeal.

But we think that the District Judge was wrong in taking the circumstance of the permanent connection into consideration in determining the validity of the deed. That deed had been executed some years before the plaintiff's father died, and the question is whether the plaintiff's father could then alienate the property belonging to him and his son so as to bind the latter.

The answer to that question must depend upon the jural relations of the parties to the deed as they existed at the time of its execution. At that time the defendant had been in the keeping of the plaintiff's father for some years and their connection was then wanting in the essential element of permanence to entitle her to maintenance. The plaintiff's father could have discarded her at any moment, and she could not have compelled him either to continue her in his keeping or to provide for her future maintenance. According to the Hindu law, a concubine who has been kept by a man for some years, or even many years, gets no right of maintenance against him, unless, having been kept continuously till his death, it can be said that the connection became permanent. It is only then—*i.e.* on his death—that his

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estate in the hands of those who take it becomes liable for her maintenance. That is the view taken by the Madras High Court in *Ramanarasu v. Buchamma*,⁽¹⁾ and it does not conflict with the ruling of this Court in *Rahi v. Govinda*.⁽²⁾

We think, moreover, that the view is warranted by the texts, because while the maintenance of a continuously kept concubine is expressly mentioned in the Hindu law books as a charge on his estate after his death and as a liability incurred by those who inherit it, nowhere has it been expressly said that a man is bound to maintain his kept mistress during his lifetime. On the principle of *Expressio unius est exclusio alterius*, which is also the principle followed in the interpretation of Hindu law books, I think that according to the Hindu law there was no legal obligation on the part of the plaintiff's father to maintain the defendant merely because she had lived with him for some years as his concubine.

The defendant therefore had not obtained any right of maintenance against the plaintiff's father before the execution of the deed now in dispute. When, however, he agreed by that deed to provide for her maintenance in consideration of past cohabitation, he incurred a legal liability. Though such an agreement is not supported by consideration, yet as an agreement to compensate for past services voluntarily rendered, it was both according to the English and the Indian law valid and enforceable against him: see section 25, clause (2), of the Indian Contract Act (IX of 1872) and *Dhiraaj Kuar v. Birkumajit*.⁽³⁾

But though it was binding on him, yet the question still remains whether, under the Hindu law, it is binding upon his son. According to that law, a son is bound to pay the debts of his father, who was joint with him, if those debts were not contracted for any illegal or immoral purpose; and he is also bound by the father's alienation of joint property if that alienation was made for the payment of such debts. The question, therefore, narrows itself to this—When in a joint Hindu family a father alienates any portion of the family property by way of maintenance for his concubine in consideration of past cohabitation, does the liability which he legally incurs by virtue of such

(1) (1899) 23 Mad. 282.

(2) (1875) 1 Bom. 97.

(3) (1881) 3 All. 787.

agreement create a debt which his son is bound to pay? It is not every alienation of the family property made by a Hindu father that binds the son. To be binding on the son it must be an alienation made for the payment of an *antecedent* debt: see *Lala Surja Prasad v. Golab Chand*,⁽¹⁾ *Surja Prasad v. Golab Chand*,⁽²⁾ and *Arunachala v. Munisami*.⁽³⁾ Here it can hardly be said that there was any debt pre-existing for the payment of which the plaintiff's father could settle the field in dispute for her life on the defendant. The plaintiff's father had been under no legal liability at all to the defendant until he executed the deed, and when he executed it in consideration of past cohabitation, it was in the discharge of what was at the best a precedent moral obligation. The real nature of such a deed is that it is a deed of gift. That was the view taken of a similar deed by this Court in the case of *Vrandavandas v. Yamunabai*,⁽⁴⁾ and a father cannot make a gift of joint property so as to bind his son: *Baba v. Timma*,⁽⁵⁾ *Bala v. Balaji Martand*.⁽⁶⁾

But, assuming that when the plaintiff's father agreed to provide for the maintenance of his concubine in consideration of past illicit cohabitation, he contracted a liability in the nature of a debt, still, to be binding upon the son, it must be a debt contracted for purposes which are not immoral. Can it be said that when a Hindu father promises to compensate his kept mistress for past cohabitation, the debt created by the promise is not tainted by immorality? So far as the father himself is concerned, it is indeed a debt arising out of a moral obligation, for, in the language of Straight, J., in *Dhiraj Kuar v. Bikramajit*,⁽⁷⁾ it is supported by a moral consideration. But, though it is a debt which the law compels the father to pay when he has promised to pay it because it arises out of a pre-existing moral obligation, yet it does not on that account cease to be a liability arising out of the father's past immorality, and as such it is not binding on the son. The debt, from that point of view, has its origin in an immoral purpose. But even if it is a debt contracted in the

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(1) (1900) 27 Cal. 724.

(4) (1875) 12 Bom H. C. 229.

(2) (1900) 27 Cal. 762.

(5) (1883) 7 Mad. 357.

(3) (1883) 7 Mad. 39.

(6) (1897) 22 Bom. 825.

(7) (1881) 3 All. 787.

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fulfilment of a moral obligation, and as such not immoral), it is, at any rate, a debt in the nature of compensation made to the woman by way of maintenance for the injury done to her by the past illicit cohabitation. That is the real nature of the liability, according to *Gibson v. Dickie*.⁽¹⁾ If, then, it is a compensation for injury done to the woman, it is a debt which sounding in damages is in the nature of a fine or penalty, which, according to the texts bearing on the subject, a Hindu son is not bound to pay.

The conclusion we come to, therefore, is that the deed in dispute is not binding upon the plaintiff and must be set aside. But, having regard to the finding of the District Court that after the execution of the deed the defendant continued to be in the keeping of the plaintiff's father until his death and that the connection then became permanent, we must hold that the defendant became entitled to maintenance after the death of the plaintiff's father, and she cannot be deprived of the property in dispute unless provision is made for her maintenance by the plaintiff. That was the course adopted by this Court in *Fran-davandas v. Yarrunabai*,⁽²⁾ and we think it ought to be followed in this case.

I therefore agree to the decree proposed by my learned colleague.

Decree reversed.

(1) (1815) 3 M. & S. 463.

(2) (1875) 12 Bom. H. C. 229.