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I think so, because the Specific Relief Act is applicable to India, and enacted for India, where the majority of the population are Hindus, and throughout the whole of which country the idea of a joint Hindu family is well understood. But I rather regret that it is so for this reason: we have to decree specific performance, and what will be the result. The result will be that the plaintiff will obtain a transfer to himself of a three pie share in a certain property. He will have no right to joint enjoyment of that property, and he will be unable to obtain separate possession of it without bringing a suit for partition. So that we are giving the plaintiff a decree which at best, in all human probability, will only lead to further disagreement and further litigation. That is not the kind of case in which I personally should be disposed to decree specific performance. But the Legislature have thought otherwise, and after all our own personal views are nothing, the intentions of the Legislature everything. I think, therefore, that the appeal must be dismissed with costs.

*Decree confirmed.*

J. G. R.

### APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.*

1920.  
February 10.

BAI PARWATI, WIFE OF MANSUKH JETHA (ORIGINAL DEFENDANT No. 1),  
APPELLANT v. GHANCHI MANSUKH JETHA (ORIGINAL PLAINTIFF),  
RESPONDENT. °

*Civil Procedure Code (Act V of 1908), Order XXI, Rule 33—Decree for restitution of conjugal rights—Decree should not be executed by detention in prison—Husband protected against civil or criminal proceedings for maintenance if wife disobeys Court's order to live with husband.*

A decree for restitution of conjugal rights was passed in favour of the plaintiff, the husband, by the lower appellate Court. It directed that the

° Second Appeal No. 1085 of 1918.

wife should go and live with the husband and in the event of wilful disobedience of the Court's order, the wife should be asked to go to jail as she had suffered rigorous imprisonment for three years on a criminal charge and was quite accustomed to that life. On appeal to the High Court,

*Held*, that under Order XXI, Rule 33, Civil Procedure Code, 1908, the decree should not be executed by detention in Civil Prison, although the Court had power to order the wife, if she did not obey the decree, to go to Jail.

The tendency of modern legislation is against sending women to jail in civil matters. It is a sufficient consequence for the refusal to obey a decree for restitution if the wife has to maintain herself, and cannot make any claim against her husband for maintenance.

SECOND appeal against the decision of M. M. Bhatt, Assistant Judge, A. P., at Ahmedabad reversing the decree passed by P. M. Bhatt, Joint Subordinate Judge at Ahmedabad.

Suit for restitution of conjugal rights.

The plaintiff Ganchi was married to Bai Parwati (defendant No. 1) in the year 1908. For about two years after marriage, Bai Parwati lived with her husband and then she was convicted on a charge of administering poison to her husband and father-in-law and sentenced to three years' rigorous imprisonment. She suffered the sentence and on her return from jail she lived with her maternal uncle.

In 1917 the plaintiff filed a suit for restitution of conjugal rights.

The defendant No. 1, Bai Parwati, contended *inter alia* that the plaintiff and his brother ill-treated her and that she apprehended imminent danger to her life by the treatment of her husband.

The Subordinate Judge dismissed the suit on the ground that the ill-treatment alleged by defendant No. 1 was proved.

On appeal, the Assistant Judge reversed the decree and directed that defendant No. 1 do go and live with

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the plaintiff as his wife, and after considering the provisions of Order XXI, Rule 33, Civil Procedure Code, 1908, he further directed that in the event of wilful disobedience of Court's order defendant No. 1 should be asked to go to jail as she has already suffered rigorous imprisonment for three years and was quite accustomed to that life.

Defendant No. 1 appealed to the High Court.

*H. V. D'Alia*, for the appellant.

*M. H. Mehta* for *M. H. Vakil*, for the respondent.

MACLEOD, C. J.:—This is a suit brought by the plaintiff, the husband, for restitution of conjugal rights against his wife, the first defendant. The suit was dismissed by the trial Court. In appeal the plaintiff got a decree. The 1st defendant was ordered to go and live with her husband. Order XXI, Rule 33, gives the Court discretion to order that such a decree shall not be executed by detention in prison. The learned appellate Judge has considered that rule, but considered that as the wife had already suffered rigorous imprisonment for three years on a criminal charge, and was quite accustomed to that life, it would not be any violence to her feelings to be asked to go to jail for wilful disobedience of the Court's order.

Now it may be admitted that the Court has power to give a husband a decree for restitution of conjugal rights, and no doubt the Court has power to order the wife, if she does not obey the decree, to go to jail. But the Code especially provides that the Court may order that the decree shall not be executed by detention in prison. Generally the tendency of modern legislation is against sending women to jail in civil matters. Section 56 of the Code provides that they shall not be arrested or detained in a civil prison in

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execution of a decree for payment of money, and except in very serious questions of contempt of Court, I doubt whether a Court would ever order a woman to be sent to jail merely for refusing to obey a decree of an ordinary nature. It may be said that decrees for restitution of conjugal rights are of a particular nature, that the law recognises that the husband is entitled to have his wife living with him, and that the only way to enforce obedience to such an order would be by ordering the detention of the wife in prison if she refused to comply with the decree. But the days are past when a wife was considered as a mere slave or chattel of the husband. In my opinion a decree for the restitution of conjugal rights is a relic from the barbarous and middle ages. It is recognised, and has been recognised for many years in England, that a decree for restitution of conjugal rights is merely a preliminary step to enable a wife to get a divorce when she would not otherwise be able to do so, since the refusal of the husband to obey a decree for restitution of conjugal rights is considered as desertion, and desertion equivalent to cruelty, and therefore, such desertion, coupled with adultery, will be sufficient to enable a wife to get a decree for divorce. That is the only use to which proceedings for restitution of conjugal rights are now put in England. In this country they may be used by the husband as a means for preventing the wife from claiming maintenance, since, if the Court passes an order against a wife to go and live with her husband, and she refuses to do so, then she is debarred herself from making any claim to maintenance. For a wife is only entitled to separate maintenance if she has some good reason for living apart from her husband. In my opinion it is a sufficient consequence for the refusal to obey a decree for restitution if she has to maintain herself, and cannot make any claim against

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her husband for maintenance. In any event in this case the reasons given by the learned Judge for refusing to exercise his discretion in favour of the defendant cannot be supported. I should, therefore, amend the decree of the lower appellate Court, by directing under Order XXI, Rule 33, that the decree shall not be executed by detention in prison. The appellant will have the costs of the appeal.

HEATON, J. :—A decree in this case for restitution of conjugal rights is no doubt justified by the circumstances which have come to light in the course of the case. But when the appellate Judge came to consider whether he should or should not make a direction such as is contemplated by Order XXI, Rule 33, of the Civil Procedure Code, that is, a direction that the decree shall not be executed by detention in prison, he decided that he would not make any such direction. For that decision he gave what is to me an astonishing reason; he thought that because the wife had already suffered rigorous imprisonment for three years, and was quite accustomed to that life, it would not do any violence to her feelings to require her to go to jail for wilful disobedience of the Court's orders. It would be interesting to ascertain in how many cases of persons who had once been sent to jail, it would not do violence to their feelings to be required to go to jail a second time. I imagine the number would be singularly few.

Then the Judge gave another reason. He said the decree would be a nullity, and that if he were to give such a direction the object of taking and giving it would be frustrated. That is not so either. The decree for restitution of conjugal rights accompanied by a direction that the decree shall not be executed by imprisonment is not a nullity. It is a declaration that the marital obligation of living with her husband

rests on the wife, and it protects the husband against any proceedings for maintenance which the wife may institute under section 488 of the Criminal Procedure Code. Such a decree, therefore, does serve a really useful purpose. In this case I feel not the slightest hesitation in saying that the direction that the decree shall not be executed by imprisonment ought to be added, for though it is perfectly true that the wife certainly ought not to be able to secure separate maintenance, it is equally true that it would be ludicrous to send her to jail for refusing to live with her husband whom she at one time apparently had attempted to murder. I, therefore, agree with the order proposed.

*Decree amended.*

J. G. R.

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## APPELLATE CIVIL.

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*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.*

GOBA NATHU BAROLA (ORIGINAL PLAINTIFF), APPELLANT *v.* SAKHARAM TEPI PATIL AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS<sup>o</sup>.

1920.

February 10.

*Civil Procedure Code (Act V of 1908), section 47—Decree-holder—Auction-purchaser—Resistance to taking of possession of property by judgment-debtor and by a third party—Suit against both to recover possession maintainable.*

The plaintiff obtained a decree against defendant No. 1, in execution of which the property in dispute was sold, and purchased by the plaintiff with leave of the Court. In seeking to take possession of the property, the plaintiff was obstructed by the judgment-debtor (defendant No. 1) as also by a stranger (defendant No. 2). The plaintiff filed a suit to recover possession of the property from both defendants; but it was objected that the suit was barred by section 47 of the Civil Procedure Code :—

*Held*, overruling the objection, that the defendant No. 2 not being a party to the original suit, the plaintiff's proper remedy to get possession of the

<sup>o</sup> Second Appeal No. 95 of 1919.