

be compromised, and if so, on what terms. But a Judge who has to hear a case as between the estate and a third party is in a totally different position. It would be entirely wrong for him, to read confidential opinions and information on the one side or the other. He is there, as I said, to decide between that estate and a stranger, and it is not for him to sanction the compromise on behalf of the estate. There are no doubt cases as regards infants where the matter is simple and where it is unnecessary to take separate proceedings in the matter of the infant to have the Court's sanction obtained. But in important cases where it would be undesirable to disclose in public the real grounds on which a compromise is made or a suit brought or defended, separate proceedings may be desirable.

Here, I have got separate proceedings, namely, in connection with the estate of Lallubhai. My clear opinion is that it is for the Judge there to sanction the compromise if he thinks fit. Defendants Nos. 1 and 2 are not *sui juris*. They cannot ask for sanction to compromise unless the Judge in their suit gives them leave.

Solicitors for the plaintiff: Messrs. *Craigie, Blunt & Caroe*.

Solicitors for the defendant: Messrs. *Dastur & Co.*

R. R.

APPELLATE CIVIL.

*Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and
Mr. Justice Crump.*

ANANDILAL BHAGCHAND MARWADI AND ANOTHER (ORIGINAL DEFENDANTS). APPELLANTS *v.* CHANDRABAI MARD TATYA PATIL (ORIGINAL PLAINTIFF), RESPONDENT^a.

^a Second Appeal No. 432 of 1922.

1923.

BAPUJI
SORABJI
LAKHMIDAS
ROWJI.

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October 9.

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Hindu Law—Maintenance—Kept mistress whose husband is alive—Not entitled to maintenance out of her paramour's estate—Avaruddha Stree.

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A kept mistress whose husband is alive cannot be treated as an *avaruddha stree* entitled to maintenance on the death of her paramour.

Khemkor v. Umiashankar⁽¹⁾, distinguished.

SECOND appeal against the decision of Motiram S. Advani, District Judge of Nasik, varying the decree passed by J. H. Sanders, Assistant Judge at Nasik.

Suit for maintenance.

Plaintiff Chandrabai was married to one Tatyā and lived for some time with him. Subsequently, however, she became the mistress of one, Chauthmal, and lived with him till his death in July 1919.

In 1920 Chandrabai sued for a declaration that she had a right to receive Rs. 8 per month as maintenance out of the estate of deceased Chauthmal.

The defendants contended *inter alia* that Chandrabai's husband being alive, her intimacy with Chauthmal was of an adulterous nature and she was therefore not entitled to maintenance under Hindu law.

The Assistant Judge held that there was nothing to show that Chandrabai was unfaithful to Chauthmal while he lived or had been so since his death. He therefore decreed that she was entitled to receive Rs. 8 per month for maintenance out of the estate of Chauthmal.

In appeal, the District Judge varied the decree by awarding Rs. 5 per month.

The defendants appealed to the High Court.

S. C. Joshi with *P. S. Bakhale* for *D. C. Virkar*, for the appellants:—The plaintiff's connection with the deceased was adulterous, as her husband was alive. To award maintenance to her from the estate of her paramour would be against public policy. The point

⁽¹⁾ (1873) 10 Bom. H. C. 381.

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has never been directly before the Court. No doubt the standard works on Hindu law do observe that concubines are entitled to be maintained even though the connection is an adulterous one: Mayne, Hindu Law, section 450, p. 644; (1) Strange, Hindu Law, p. 164 (2) Macnaughten, Hindu Law, p. 119; West and Buhler, p. 164. The observations of Crowe J. in *Ningareddi v. Lakshmana*⁽¹⁾ though pertinent are *obiter*.

The only case which deals directly with this point is *Khemkor v. Umiashankar*⁽²⁾; but it does not decide the question. It proceeded on the ground that as the marriage in that case was invalid the lady was a permanent concubine. The question whether the existence of her first husband would prevent the lady from claiming maintenance was not considered by their Lordships. Moreover it is not clear from the facts stated in the report whether the first husband was alive at the date of the suit. To award maintenance to the plaintiff would be against the spirit of Hindu law which regards adultery as an offence even on the part of the female: Yajnavalkya, II, 290.

We submit that a woman living in adultery during the life-time of her husband cannot be regarded as an "Avaruddha Stree". See *Bai Monghibai v. Bai Nagubai*⁽³⁾.

T. N. Walavalkar, for the respondent:—The decision in *Khemkor's case*⁽²⁾ is a clear authority on the point. That has been the law so long and the principle of *stare decisis* should be applied. A woman living in adultery is under Hindu law a "Swairini" or a wanton woman. No doubt a "Swairini" as such will not be entitled to maintenance. But a "Swairini" when in the exclusive keeping of one individual can attain the position of an "Avaruddha Stree" and can earn maintenance. See

⁽¹⁾ (1901) 26 Bom. 163.

⁽²⁾ (1873) 10 Bom. H. C. 381.

⁽³⁾ (1922) 47 Bom. 401.

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Yajnavalkya, Ch. II, verse 290, and Mitakshara Commentary thereon:—By the particle *Cha* harlots, wanton women (Swairini), common women, and Bhujishya are also included.

तथाच शब्दान् वेदया स्वैरिणीनामपि साधारण स्त्रीणां भुजिष्यांच ग्रहणम्.

SHAH, Ag. C. J. :—The plaintiff in this case claimed maintenance as the kept mistress of the deceased Chauthmal from his heirs. She alleged that for nearly four years prior to his death she had been living with Chauthmal practically as his wife, and on his death she was entitled to be maintained out of his estate. In defence it was pleaded that the plaintiff's husband Tatyra was alive, that the connection between the plaintiff and the deceased Chauthmal was adulterous and that she was not entitled to maintenance from the estate of Chauthmal. Both the lower Courts have disallowed this defence and decreed the plaintiff's claim.

The defendants have appealed and it is urged in support of the appeal that, though she might be an *avaruddha stree* so far as the mode of her living with Chauthmal was concerned, her husband was through-out alive, the connection was adulterous, and a person in the position of the plaintiff is not entitled to maintenance, as she cannot, properly speaking, be an *avaruddha stree*, who would be entitled to be maintained out of the estate of her keeper. On the other hand it is urged that the decision in *Khemkor v. Umiasankar*¹ is a clear authority on this point, and that if she has lived as an *avaruddha stree* would live, the nature of her connection cannot affect her right to be maintained.

A woman, who has lived an adulterous life while her husband is alive, has a limited right of maintenance against her husband according to Hindu law. Verse 70 of the Yajnavalkya Smriti (Achara Adhyaya) and

¹ (1873) 10 Bom. H. C. 381.

Vijnaneswara's commentary thereon show that she is entitled to bare maintenance from her husband. The translation of this portion as given in the translation of Achara Adhyaya by Srishchandra Vidyanava (published by the Bhuvaneshwar press, p. 136) is as follows :—

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" The author now describes how unchaste women are to be treated.

" Yajnavalkya.

" LXX.—The unchaste wife should be deprived of authority, should be unadorned, allowed food barely sufficient to sustain her body, rebuked, and let sleep on low bed, and thus allowed to dwell.—70.

" Mitakshara.

" She who commits adultery, 'should be deprived of authority', i.e., the control over servants and the management of the house-hold, &c., should be taken away. She should be kept 'unadorned', i.e., without collyrium, ointments, white cloth or ornaments : 'with food enough to maintain her body' and sustain her life merely, and 'rebuked' with censure, &c., and 'sleeping on low bed on the ground, and 'allowed to dwell', only in his house. This should be done in order to produce repentance, and not for purification."

It is needless to quote the other texts bearing on this point. They have been referred to and the result stated by Mr. Justice Chandavarkar in *Parami v. Mahadevi*⁽¹⁾ as to the right of an adulterous wife to have maintenance from her husband. In the present case we are not concerned with the exact limits of that right nor are we concerned with the right of a widow who has led an unchaste life to such maintenance. There is conflict of decisions as to the right of such a widow as pointed out by the learned Judge in *Parami's case*⁽²⁾. But as regards the right of the wife there does not appear to be any such conflict in this Presidency, and I refer to the judgment of Chandavarkar J. to save unnecessary elaboration of a point which according to the Hindu law is clear. It is also settled that the connection between a married woman and a man other

⁽¹⁾ (1909) 34 Bom. 278 at pp. 282, 283.

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than her husband would be adulterous according to law. The observations in *Rahi v. Govinda*⁽¹⁾ are clear on that point. Such a woman cannot be an *avaruddha stree* such as could acquire the right to be maintained out of the estate of her paramour. All along her rightful residence would be with her husband and the residence with her paramour wholly wrongful. The idea of *avaruddha stree* is inconsistent with the position which such a woman occupies. Further the obligation to lead a chaste life after the death of the man with whom she lived an adulterous life is not possible of fulfilment according to law when the husband is alive at the time of her paramour's death. The view taken in *Yashwantrav v. Kashibai*⁽²⁾ as regards the obligation of a woman kept in concubinage to lead a chaste life can have no application to a woman kept in that manner when her husband is alive.

The meaning of an *avaruddha stree* (a woman kept in concubinage), who is entitled to maintenance is discussed in *Bai Monghibai v. Bai Nagubai*⁽³⁾. The point that now arises for consideration did not arise in that case. It is clear to my mind that a woman in the position of the plaintiff cannot claim to be maintained out of the deceased paramour's estate when her husband has been alive during the whole period of her adulterous connection.

But it is urged that this view is contrary to the decision in *Khemkor v. Umiashankar*⁽⁴⁾ and the observations of Mr. Justice Crowe in *Ningareddi v. Laksh-mawa*⁽⁵⁾. We have examined the facts in *Khemkor's case*⁽⁴⁾. It is not clear that the husband of Khemkor was alive when Ranchhor, the person with whom she lived as his mistress, died. The principal point considered

⁽¹⁾ (1875) 1 Bom. 97 at pp. 116, 117.

⁽³⁾ (1922) 47 Bom. 401.

⁽²⁾ (1887) 12 Bom., 26.

⁽⁴⁾ (1873) 10 Bom. H. C. 381.

⁽⁵⁾ (1901) 26 Bom. 163.

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in that case was whether the marriage between Khemkor and Ranchhor was valid in view of the fact that the husband of Khemkor was alive at the time. The connection continued after that invalid marriage for a long time, namely twenty years: and there is nothing to show that the husband was alive at the time of Ranchhor's death or that he was alive during the best part of that period of twenty years. The effect of Khemkor's husband being alive during the period of her connection with Ranchhor, upon her claim to maintenance has not been adverted to either in the letter of reference or in the judgment. There was apparently no argument in the case: and this aspect of the point does not appear to have been adverted to by the learned Judges. It is true that the case has been referred to in the recognised books on Hindu law as if the existence of the husband would make no difference in the result; but I do not think that the decision could be read as going so far. I find it difficult to reconcile that reading of the judgment in *Khemkor's case*⁽¹⁾ with the observations of Westropp C. J. in *Rahi v. Govinda*⁽²⁾ to which I have already referred. On the contrary the reference to *Khemkor's case*⁽¹⁾ in those observations seems to suggest that the decision was treated by the learned Chief Justice as applying to a case where the husband was not alive at the time of her paramour's death. I find it equally difficult to reconcile the broader interpretation put upon *Khemkor's case*⁽¹⁾ with the view taken by Nanabhai Haridas J. in *Yashvantrao v. Kashibai*⁽³⁾ as to the obligation of a woman, who has lived as an *avaruddha stree*, to lead a chaste life. Though the decision in *Khemkor v. Umiashankar*⁽¹⁾ has stood for a long time and though it has been understood as applying to a case where the husband may be alive, I think it is clearly

⁽¹⁾ (1873) 10 Bom. H. C. 381.

⁽²⁾ (1875) 1 Bom. 97.

⁽³⁾ (1887) 12 Bom. 26.

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distinguishable on the ground that the fact does not appear from the original record of the case on the file of this Court; and further that that aspect of the point does not appear to have been expressly considered. The observations of Crowe J., which were not necessary for the decision of *Ningareddi's case*⁽¹⁾ are referable to this reading of *Khemkor's case*⁽²⁾ which, for the reasons I have just stated, is not justified by the facts in that case.

I should have referred this point for decision to a Full Bench if I were satisfied that the point which we have to decide was covered by the decision in *Khemkor's case*⁽²⁾. As on the facts the case is distinguishable and as I am clear that a kept mistress whose husband is alive cannot be treated as an *avaruddha stree* who is entitled to maintenance on the death of her paramour out of his estate, I see no objection to give effect to that view.

I would, therefore, allow the appeal, reverse the decree and dismiss the suit. Under the circumstances each party should bear his or her costs throughout.

CRUMP, J. :—I agree.

Decree reversed.

J. G. R.

⁽¹⁾ (1873) 10 Bom. H. C. 331.

⁽²⁾ (1901) 26 Bom. 163.

APPELLATE CIVIL.

1923.

November
16.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

ACHYUT VISHNU PATANKAR (ORIGINAL DEFENDANT No. 2), APPELLANT v. TAPIBAI KOM KRISHNAJI JOSHI AND OTHERS (HEIRS OF ORIGINAL PLAINTIFF), RESPONDENTS*.

Review—Order granting review, effect of—Original order remains in suspense.

When an appellate Court, which has set aside the decree of the lower Court, subsequently admits an application for a review of its judgment, the effect

* Appeal from Order No. 62 of 1922.