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has shown that he has suffered special damage, and it is only such damage that he is entitled to under section 225 of the Municipal Act.

As to the value of the cow there is a considerable conflict of testimony, the plaintiff, on the one hand, alleging that the cow was a large Nagra cow, or up-country cow, and the Collector, the bailiff Sarat Chandra Mitter, and the Inspector Girja Bhusan Haldar, on the other hand, stating that the cow was a small country cow, and whereas the plaintiff states that the cow at the time of the seizure was giving four and-a-half seers of milk a day, the Collector, the bailiff and also the Inspector stated that at the time of the seizure it was a dry and a very thin cow. On this evidence it is impossible to say what the value of the cow was. But apart altogether from this it is impossible on the evidence to say that in consequence of the irregularity the plaintiff really suffered any damages in consequence of the taking of the cow, the irregularity being the non presentation of a bill for the rate and the non-service of a notice of demand. It has not been therefore shewn that the plaintiff suffered any damage on account of that irregularity for it was not his case that, if a bill had been presented to him or if **[475]** the notice of demand had been served upon him he would have paid and so saved the distress and consequent sale. Upon his evidence it is clear that in either case he would not have paid and that when the distress warrant came to be executed he would have allowed the cow to be subsequently removed as it was. It is just possible perhaps to say that if the bill had been presented or a notice of demand previously served upon him he would have gone to the Chairman or some other officer of the Corporation, and that if he had done so the matter would have been explained and he would have been satisfied that he was legally bound to pay the demand and would by paying the demand, have averted the distress. On the evidence as to the value of the cow, it is not shown in my opinion that the plaintiff has suffered special damage in consequence of the irregularity. And, inasmuch as I have found that the distress was not illegal, he is not entitled to any other damage. The suit therefore must be dismissed, but for the reasons I have stated I direct that each party shall pay his own costs on scale No. 2.

Attorney for plaintiff : *A. K. Thakur.*

Attorneys for the defendant Corporation : *Sanderson & Co.*

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31 C. 476.

[476] ORIGINAL CIVIL.

Before Mr. Justice Sale.

PUNNA BIBEE *v.* RADHA KISSEN DAS.*

[18th December, 1903.]

Hindu law—Mitakshara—Maintenance, wife's right to—Partition.

A suit by a Hindu wife against her husband to establish her right to a share in his property, and for partition, in the absence of any allegation that he refuses or has ceased to maintain her, is not maintainable.

Jamna v. *Machul Sahu* (1) and *Beckia* v. *Mochina* (2) distinguished.

* Original Civil Suit No. 151 of 1902.

(1) (1879) I. L. R. 2 All. 315. (2) (1900) I. L. R. 23 All. 86.

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ORIGINAL SUIT.

The plaintiff, Punna Bibee, sued as the wife of one Kartick Kissen Dass Khettry for a declaration of her right to a present share in the property of her husband, for an injunction to restrain him and other defendants from alienating the same, and for partition and other reliefs.

The suit was set down for settlement of issues, and to determine, whether the plaintiff had any interest in the property or any *locus standi* to maintain the suit.

Mr. *Chakravarty* (Mr. *S. R. Dass* with him) for the defendants. The plaintiff has no *locus standi*. A wife is not entitled to a definite share in her husband's estate, while he is alive, and the proposition that she is a co-sharer with him or a co-parcener in the family with her father-in-law and husband is incorrect. See *Mulraz Lachmia* v. *Chalekany Vencata Rama Jagganadha Row* (1), Mayne's Hindu Law (6th edn)., pp. 439, 539, 635, and I submit the plaintiff cannot maintain this suit.

Mr. *A. Chaudhuri* for the plaintiff. A Hindu wife in a sense is co-owner with her husband. See *Jamna* v. *Machul Sahu* (2). [477] Mayne's Hindu Law (6th edn.), p. 609, and *Becha* v. *Mothina* (3). She is entitled to maintenance and residence from her husband's estate. *Devi Persad* v. *Gunwanti Koer* (4), and is therefore entitled to maintain this suit and to ask for an injunction restraining the disposal of his share, and for a partition. See *Tarkalankar Mitakshara*, p. 118 ; *Colebrooke's Inheritance*, Chapter I, s. 1, cl. 7 ; and *Mayne's Hindu Law* (6th edn.), p. 586.

Mr. *Chakravarti* in reply. The cases cited by Mr. Chaudhuri, having reference to wills, are not applicable to the present case. To maintain such a suit as this, the wife's claim for maintenance must amount to a charge on the property. She cannot claim a share simply on the ground that she is entitled to maintenance.

SALE, J. The plaintiff in this case seeks to establish her right to a share in certain property belonging to her husband and for partition.

The suit is against her husband Kartick Das Khettry, and his father Radha Kissen Dass Khettry and also certain assignees of mortgages executed by both father and son and the defence is that the suit is not maintainable. The plea is in the nature of a demurrer, and it is therefore necessary to examine shortly the allegation upon which the claim is based. It appears that the property, the subject-matter of this suit, was originally joint family property, the family being governed by the Mitakshara Law. A partition was effected between various members of the family, and the result of the partition was that the property 18, Mullick Street—the property in suit—was allotted to Radha Kissen Dass Khettry as his separate property. After this Radha Kissen married, and a son, Kartick was born. It appears that Radha Kissen executed a mortgage in respect of that property, upon which mortgage the mortgagee instituted a suit and obtained a decree. It appears that the son Kartick also executed mortgages in respect of his share or interest in the same property and subsequently an application was made in Radha Kissen's mortgage suit for an order for the sale of the property, the proceeds to [478] be in the first place applied in payment of the mortgage debts and the balance to be divided between Radha Kissen or rather between the Official Assignee, Radha Kissen having then become an insolvent, and

(1) (1838) 2 Moo. I. A. 54.
(2) (1879) I. L. R. 2 All. 315.
(3) (1900) I. L. R. 23 All. 86.
(4) (1895) I. L. R. 22 Cal. 410.

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his son Kartick. The order was made on the consent of all parties, the defendant Kartick and his mortgagees coming into the suit for the purpose of consenting. The plaintiff claims that this arrangement amounts to a partition of the property between Radha Kissen and Kartick. She says that she, her father-in-law, and her husband Kartick formed a joint Hindu family governed by the Mitakshara Law, and that as a result of the sale she has been deprived of her maintenance, and accordingly she files this suit to have it declared that she is entitled to a one-third share in the property and for a partition on that basis. Now it has been contended, and I think rightly contended, by the defendant that the plaintiff is not entitled to partition, that she is not a co-sharer with her husband nor a co-parcener in the family jointly with her father-in-law and her husband. No authority has been cited to show that the plaintiff can be regarded as a co-sharer in the family estate with her husband.

It is said, however, that there is authority for the proposition that she is entitled to be regarded as a co-sharer in some subordinate sense, and in support of that proposition the case of *Jamna* v. *Machul Sahu* (1) has been cited. I think it is clear from that case that the expression "co-sharer" in a subordinate sense is used with reference to the right of a widow to maintenance out of her husband's estate, for it was held that the plaintiff in that case was entitled in respect of her maintenance to follow certain properties in the hands of the defendants to whom the properties had passed by virtue of a gift by the husband made in his lifetime. This case is followed in the later case of *Bachia* v. *Mothina* (2). There it was held that the widow was entitled to have her maintenance secured on certain property in the hands of the defendant obtained by them under the will of the plaintiff's deceased husband. These two authorities seem to me to be distinguished from the present case upon two grounds. In the first place the present suit is instituted by the plaintiff to [479] have her right to maintenance declared during her husband's lifetime as against a specific property assigned by her husband, and in the next place it is not against a person claiming under a gift made by the husband either *inter vivos*, or by will, but against the assignees for value of the husband. So far as I am aware there is no authority to show that a claim for maintenance by a wife in the lifetime of her husband is sustainable in the absence of any allegation that the husband refuses or has ceased to maintain her. There is no allegation of this character in the present suit. On the contrary it is admitted that the plaintiff is living with her husband as a member of the joint family.

Further it is admitted that the mortgagee-defendants are assignees for value, although it is alleged that the moneys borrowed were used for immoral purposes and not for the benefit of the general family. These allegations are irrelevant for the purposes of the present case. It is conceded that, assuming the moneys borrowed on the mortgage were for selfish and improper purposes, still the mortgagees are not seeking to have their mortgage enforced against the joint estate, but only against the share of the husband.

It seems to me on the admitted facts and on the allegations made in the plaint itself that the plaintiff is not entitled either to claim or

(1) (1879) I. L. R. 2 All. 315. (2) (1900) I. L. R. 23 All. 86.

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share in any portion of the properties of her husband, nor does she show any cause of action in respect of her right to maintenance. That being so it seems to me that the suit must be dismissed with costs.

Attorney for plaintiff : *A. K. Guha.*

Attorney for defendants : *O. C. Gangooly.*

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31 C. 480 (=8 C. W. N. 395.)

[480] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Hill and Mr. Justice Stevens.

DENO BUNDHU NUNDY *v.* HARI MATI DASSEE.*

[25th February, 1903.]

Civil Procedure Code (Act XIV of 1882) *ss.* 244 *and* 258—*Separate suit—Uncertified adjustment—Suit for staying execution and declaration of satisfaction—Injunction—Specific Relief Act (I of* 1877), s. 56.

Where a decree is alleged to be satisfied by an agreement out of Court, but satisfaction is not certified to the Court, a subsequent suit on the agreement is not maintainable for a declaration that the amount payable under the decree has been paid and satisfied and for an injunction restraining the decree-holder from executing the decree.

S. 244 of the Civil Procedure Code (Act XIV of 1882) is a bar to such suit; s. 258 of the Code does not restrict the operation of s. 244.

Prosunno Kumar Sanyal v. *Kali Das Sanyal* (1), *Azizan* v. *Matuk Lal Sahu* (2) and *Bairagulu* v. *Bapanna* (3) followed.

PER HILL, J. The prayer for injunction restraining the defendant from proceeding with the execution of the decree conflicts with the provisions of s. 56 of the Specific Relief Act (I of 1877).

[**Expl.** 12 C. W. N. 485; 11 C. L. J. 91; 14 C.W.N. 357=4 I. C. 402. **Fol.** 96 I. C. 988 =31 M. L. J. 429. **Ref.** 7 I. C. 55=12 C. L. J. 312; 1 U. B. R. 16=31 M. L. J. 422; **Not foll.** 5 Pat. L. J. 70=55 I. C. 890. **Dist.** 1921 Pat. 360.]

APPEAL by the plaintiff.

Madhusudan Nundy died some time in 1847, leaving him surviving two widows and two sons—Deno Bundhu Nundy, the plaintiff, and Shama Churn Nundy. Shama Churn died some time in the year 1864 without issue, leaving him surviving the defendant, his widow. According to the plaintiff's case the said Madhusudan Nundy left a will by which his properties were bequeathed to the two sons with a clause by which the surviving [481] son took the whole of the property subject to the duty of maintaining the two widows of the testator and the widow of the predeceased son. The plaintiff contended that, as the only surviving son of Madhusudan Nundy, he was entitled to take the whole of the property subject to the widow's right of maintenance. This view was contested by the defendant, the widow of the predeceased son, who alleged that the will in question was a forgery and claimed a widow's estate in the property left by her deceased husband. In 1878 a suit was brought by her against the present plaintiff, in which she prayed to have the will proved in solemn form and for accounts and partition. The suit was settled, and it was agreed that the will was not to be disputed by the defendant, and certain provisions were made amongst others that she

* Appeal from Original Civil No. 46 of 1903, in Suit No. 470 of 1898.

(1) (1892) I. L. R. 19 Cal. 683.
(2) (1893) I L. R. 21 Cal. 437.
(3) (1892) I. L. R. 15 Mad. 302.