Appellate Jurisdiction. (a)

Special Appeal. No. 130 *of* 1869.

VISALATCHI AMMAL.....*Special Appellant.* (*Plaintiff.*)

ANNASAMY SASTRY.....*Special Respondent.* (*Defendant.*)

A Hindu widow is entitled to charge, on account of her maintenance, a piece of land in the possession of her father-in-law, (the defendant) which formed a portion of the ancestral property of the family and had been alloted on partition to defendant encumbered with a mortgage debt of the family to the full value, and which had, subsequently to the partition in the life-time of the plaintiff's husband, been redeemed by the defendant with self and separately acquired funds.

Held, also, that the plaintiff's refusal to live in the defendant's house as one of his family did not disentitle her to maintenance.

1870. *January* 19. *S. A. No.* 130 *of* 1869.

THIS was a Special Appeal against the decision of E. W. Bird, the Civil Judge of Tanjore, in Regular Appeal No. 58 of 1868, confirming the decree of the Court of the Principal Sadr Amin of Combaconum, on the Principal Sadr Amin's Side, in Original Suit No. 90 of 1866.

This was a suit for maintenance, the prayer of the plaint being that defendant, who is the adoptive father of plaintiff's deceased husband, (he died in 1855), may be ordered to provide her with food, clothing, and other necessaries at the rate of Rupees 159 annually, and to pay her Rupees 100 for the performance of certain religious rites, Rupees 52-12-0 for the purchase of brass and copper vessels, and Rupees 1,272 on account of arrears of past maintenance from the date of her coming of age (1858) to the date of the institution of this suit. The whole claim was valued at Rupees 1,583-12-0.

The defendant in his answer, besides objecting that plaintiff, circumstanced as she was, was not entitled by the Hindu law to separate maintenance, and that her claim to arrears of maintenance was barred by the Statute of Limitation and by her voluntary residence with her own family, and omission to demand maintenance from the defendant, contended that his property, the extent of which he asserted had been grossly exaggerated by plaintiff, was not ancestral but self-acquired, and that plaintiff had no right to claim maintenance out of self-acquired property; that she had no right under any circumstances to claim a lump sum for the

(a) Present: Scotland, C. J. and Innes, J.

1870. *January* 19. *S. A. No.* 130 *of* 1869.

performance of her religious rites and the purchase of vessels and that an allowance of 15 kalams of paddy and Rupees 8 a year was the highest rate at which her claim, if maintainable, could be estimated, regard being had to his means.

The issues framed were

(1.) What is the extent and nature of defendant's property?

(2.) If plaintiff is entitled to maintenance, at what rate should it be fixed?

(3.) Is the defendant's self-acquired property liable to be charged with plaintiff's maintenance?

Is she entitled to claim the sum she demands or any lump sum for the purchase of vessels and the performance of ceremonies?

The following was the judgment of the principal Sadr Amin :—

First as to the 2nd issue; the nature and extent of defendant's property. The plaintiff's witnesses represent it to consist of 6 velies of nunjah and of poonjah producing Rupees 100 a year, but their evidence was shown on cross-examination to be very unreliable. The defendant's witnesses on the other hand state that his landed estate consists of rather less than four velies of nunjah land and of poonjah producing Rupees 50 a year. On the whole, I do not think I shall greatly err if I estimate the defendant's income from his landed estate at Rupees 35 a month, and there is no evidence that he possesses any other source of income.

The next question is what is the nature of this landed estate: is it ancestral or self-acquired? It is allowed by plaintiff that $\frac{3}{32}$ pungu of nunjah land (about $\frac{1}{8}$ of a veli) is the only part of it which belonged to the defendant's ancestors, and that the rest has been acquired by the purchases evidenced by the exhibits I to XXIV. The contention is whether the land so acquired can be regarded as his self-acquisition. The plaintiff urges that they cannot on the ground that they are the result of the profits of the $\frac{1}{8}$ veli and of the ordinary gains of learning imparted to the defendant by his own family. I think, however, it is quite clear upon the evidence that this account of the defendant's property is not correct.

1870. *January* 19. *S. A. No.* 130 *of* 1869.

The defendant, an aged and infirm man, but in full possession of his faculties was personally examined, and I incline to give very great credit to his evidence corroborated as it is by the testimony of four witnesses, all of whom seemed to me to be of greater veracity than the majority of persons who appear in that capacity in this Court. The gist of his statements was that the ⅛ veli of nunjah land which descended to him from his ancestors was mortgaged to its full value when it fell to him on partition; that he derived his learning in the Sastras from his maternal uncle and from one Aswatta Naraina Sastri, a famous Pundit of those days, subsisting during the years of his discipleship on the alms of pious Hindus, and that he acquired the wealth by which he paid off the mortgage on the ⅛ veli and purchased the other lands of which he is now the owner through the liberality of the Maharajah of Mysore who gave him a monthly pension of Rupees 21, and bestowed on him occasional presents of several hundreds of Rupees in recognition of his learning in the Sastras. Now this account is in itself very probable, and is supported by the oaths of defendant and witnesses of uncommon credibility, and as the plaintiff has shown no reason for discrediting it, I accept it as substantially true.

The next question is, must not the defendant's property be held upon these facts to be self-acquired? I think it must—it seems to me unquestionable that the lands purchased by the defendant himself, which of course form the great bulk of his estate, must be considered his self-acquisition, for it is absurd to suppose that they could have been purchased from the income of the ⅛ veli which is allowed to be the only land which descended to defendant from his ancestors. Even had it been unencumbered, and if defendant's learning had been imparted to him by or at the expense of his family—an allegation in support of which there is nothing on the record but strong evidence to the contrary—I do not think that a pension and large presents from a Prince can be classed among the ordinary gains of learning. But further in my opinion there are good grounds for maintaining, as defendant's pleader did, that even the original ⅛ veli must be considered in law as the defendant's self-acquisition, inasmuch as it is property which had "descended in succession, from an ancestor and had been seized

1870. *January* 19. *S. A. No.* 130 *of* 1869.

by others and had remained unredeemed by the father and the rest" and was redeemed "by the defendant" without "expenditure of ancestral property," *Mitakshara, Chapter 1st, Section* 4, *paras.* 1 *to* 6, and which therefore as the author of the *Smriti Chandrika* teaches on the authority of a text of *Kalayana* "ranks as self-acquired (*Smriti Chandrika, Chapter VIII, Section* 27, Kristnasamy Iyer's translation.)

I find therefore on the 2nd issue that the defendant is possessed of self-acquired immoveable property from which he derives an income of Rupees 35 a month, and I now proceed to consider the 1st issue whether the plaintiff can claim to charge her maintenance on this property. The defendant's pleader said she could not on the authority of a passage of the *Mitakshara on Subtraction of Gift* quoted by Mr. Justice Strange in Section 209 of his Manual (2nd edition) which runs as follows:—"Where there is no property, but what has been self-acquired, the only parties whose maintenance out of such property is imperative are aged parents, wife and minor children." No authority was quoted on the other side. It will perhaps assist us to determine this question if we consider the nature of the interest which a son possesses in his father's self-acquired immoveable property. In the *Mitakshara* the placita on the subject are apparently somewhat conflicting. In Chapter 1st, Section 1, para. 27, the author tells us on the authority of a text of a *Vyasa* that the father is "subject to the control of his s n and the rest in regard to the immoveable estate whether acquired by himself or inherited," but in Section 6, para. 10 he lays it down that "a father has a predominant interest" in his own acquired property, (it is clear from the context that both real and personal property are contemplated) and that "the son must acquiesce in the father's disposal of it," "since he is dependent on his father in regard to the paternal estate" and for this position he quotes in the next para. a text from *Manu* which apparently fully supports it. In the *Smriti Chandrika* the question is discussed more fully and satisfactorily. In Chapter 8, para. 21, the author after quoting with approbation a construction of a text of *Yajnavalkya* to the effect that a partition of the grandfather's property takes place at the will of the grand-

1870. January 19. S. A. No. 130 of 1869.

son only, remarks that it would seem from this construction that the ownership of the father and son is unequal in respect of the father's property, and then in answer to the question how can such inequality exist while a son possesses a right by birth in both his father's and grandfather's property, replies, "that in the case of the grandfather's property the ownership (Swamien) and also independent power (Swatantriem) are both equal in the father and the son; whereas in the case of the father's property, while he is alive and free from defect, the father alone possesses independent power and not the son," and in explanation of this term "independent power" he quotes a text of *Brahaspati*—"He may give the wealth away at his pleasure or enjoy it himself; but after his extinction his sons are pronounced entitled to equal shares," (para. 25.) It would seem therefore that the estate which the Hindu law current in this Presidency gives a son in his father's self acquired reality is analogous to that vested estate subject to be divested by power of appointment which is generally created under an English marriage-settlement for the children of the intended marriage, and it is difficult to conceive that any right of the nature of maintenance can be an incident of such an estate.

It appears to me that maintenance in the proper sense of the word is a charge on the inheritance; that here there is no inheritance on which it can be charged and that this suit therefore is not maintainable, nor do I think that the defendant is under any personal obligation to support the plaintiff. The passage of the *Mitakshara on Subtraction of Gift* previously quoted enumerates the relatives whom a man is bound to support when there is no inheritance, viz., his aged parents, wife and minor children, and plaintiff does not stand in any of these relations to defendant, so that even if she were willing to reside with him (as she owns she is not) I do not think the defendant would be under any legal obligation to receive her and provide for her.

Although the conclusion at which I have arrived renders it necessary for me to dismiss this suit with costs, I shall record my findings on the 3rd and 4th issues for the convenience of the parties in case there should be an appeal, and either of the Appellate Courts should consider my decision on the 1st issue or my finding on the 2nd issue errone-

1870. *January* 19. *S. A. No.* 130 *of* 1869.

ous. First, as to the lump sum the plaintiff claims for the purchase of vessels and the performance of religious ceremonies. No authority has been adduced to justify such an award, nor can I discover any, and it seems to me that a money allowance proportionable to the income derived from the inheritance and sufficient for the supply of all necessaries to the plaintiff is the proper form of awarding maintenance. What would such an allowance be in this case is the question raised in the 3rd issue, and the only point remaining for determination, and looking to the fact that the defendant has had other children born to him since his adoption of the boy who was married to the plaintiff and whose share would be only ¼ of the share of the son subsequently born, I think a monthly payment of Rupees 5 (five) would be a fair allowance. In calculating arrears, I think the fact that the necessaries of life (and a widow can claim little more than the bare necessaries) were procurable at a lower rate in past years, and that if plaintiff had obtained a decree for maintenance when her right first accrued, it would probably have been fixed at a lower rate,— I think therefore that Rupees 400 would be a fair sum to award on account of that item.

The Civil Judge, upon appeal, confirmed the decision of the Acting Principal Sadr Amin.

The plaintiff presented a special appeal to the High Court from the decree of the Civil Court for the following reasons :—

I. The facts found constitute the property in the possession of the defendant's ancestral property.

II. A father-in-law is bound to maintain his daughter-in-law even out of his self-acquired property.

Sanjiva Row, for the special appellant, the plaintiff.

Srinivasa Chariyar, for the special respondent, the defendant.

The Court delivered the following

JUDGMENT :—The question involved in this special appeal is the right of a Hindu widow to charge, on account of her maintenance, a piece of land in the possession of her father-in-law, the defendant, which formed a portion of the ancestral property of the family and had been allotted on

1870. January 19. S. A. No. 130 of 1869.

partition to defendant encumbered with a mortgage debt of the family to the full value and which had since in the life-time of the plaintiff's husband been redeemed by the defendant with self and separately acquired funds.

The Courts below have decided that the land so recovered became self-acquired property and was not chargeable with the plaintiff's maintenance and they dismissed the plaintiff's suit.

The points taken in this appeal by the vakil for the special appellant were two.

First, that the redemption of the land did not constitute its self-acquired property, but that, having been recovered in right of the equity of redemption which passed from the family to the defendant, it was still ancestral property to a share of which the plaintiff's husband was entitled; it was not self-acquired in the sense in which that term is used in the authorities in the passages which declare self-acquired property to be not subject to partition.

Second, that a widow is entitled to be maintained by her father-in-law from his self-acquired property. On behalf of the respondent the further point was taken that the plaintiff refusing to reside in the house of the family for no good cause could not claim a pecuniary allowance for her maintenance.

The first point assumes that the defendant's legal liability to the charge of the plaintiff's maintenance is conditional upon the defendant's being possessed of property to a joint interest in which his son (the plaintiff's husband) was entitled, and it is beyond doubt that the Hindu law which governs in this part of India vests in a son on his birth a right to a share in paternal ancestral property. Now the Lower Courts have found that $\frac{1}{8}$ of a veli of the immoveable property possessed by the defendant in the life-time of the plaintiff's husband was inherited by him and his co-parceners from their ancestor, and was allotted to him on a division encumbered with the mortgage charge from which he redeemed it before the death of the plaintiff's husband out of his self and separately acquired funds. Unless therefore the mere circumstance of this portion of the property having been

1870. *January* 19. *S. A. No.* 130 *of* 1869.

redeemed with such funds had the effect of altering its legal character, as the Lower Courts have held that it did, the plaintiff's husband was unquestionably entitled to a joint interest.

For this position the primary authorities relied upon are the *Mitakshara, Chap.* 1, *Section* 4, *paras.* 1 *and* 2, and the *Smriti Chandrika, Chap.* 8, *Sections* 24 *and* 27. In the former the text of *Yajnavalkya* is given which ordains in relation to property not divisible: "nor shall he who recovers "hereditary property which had been taken away give it "up to the parceners," and the exposition of this by *Vignaneswara* is "any property which had descended in succession "from ancestors and had been seized by others and remained "unrecovered by the father and the rest through inability "or other cause, he among the sons who recovers it with the "acquiescence of the rest shall not give up to the brethren "or other co-heirs: the person recovering shall take such pro-"perty." In the *Smriti Chandrika,* (Krishnasawmy Iyer's translation) the independent power of a father "over pro-"perty descending from a grandfather but seized by stran-"gers which the father recovers by his own exertions and "what the father has gained by science, valor or the like," and his non-liability to give such property in partition to his sons, it being regarded as his self-acquisition, are positions propounded on texts of *Brahaspati* and *Katyayana,* and the author's exposition of the texts is "that which be-"longs hereditarily to the family but had been seized by "strangers and recovered by the father through his self-exer-"tion alone, and that which was acquired by the father him-"self through science, valor or the like, these the father need "not give to his sons in partition." Similar expositions of the same texts are to be found in the *Daya Vibhaga* of the *Madavahya* at pages 13 and 47 of Mr. Burnell's translation, and in the *Vyavahara Mayukha, Chapter* 4, *Section,* 7 *paras.* 2, 3, and *Daya Krama Sangraha, Chapter* 4, *Section* 2, *paras.* 6-9.

We are of opinion that the rule of law thus propounded is inapplicable to the present case. In the first place, we are not prepared to hold that the rule extends to property held by a title derived from the joint family. The language both of the texts and the commentaries seems to us at present to indicate that the rule was intended to apply strictly,

1870. January 19. S. A. No. 130 of 1869.

to hereditary property of which the members of the family had been violently or wrongfully dispossessed or adversely kept out of possession for a length of time:—"Property unjustly detained which could not be recovered before" is the import of the ordinance of *Manu, Chap. IX, Sl.* 209.

But supposing this construction not to be correct, we rest our opinion on the ground that the recovery to be within the ordinance should appear to have been undertaken when the neglect of the co-parceners to assert their title had been such as to show that they had no intention to seek to recover the property, or were at least indifferent as to its recovery, and thus tacitly assented to the recoverer using his exertions and means for that purpose, or upon an express understanding with the recoverer's co-parceners. This implied or express assent we take to be what is meant to be conveyed by the passage in the exposition of *Vignaneswara*—"he among the sons who recovers it, with the acquiescence "of the rest." The passage plainly excludes a recovery without some intimation of a willingness on the part of the recoverer's co-parceners that he should make the exertion to recover the property at his own cost, and, so qualified, the operation of the text in forfeiting the rights of the co-parceners becomes reasonable and just.

In the commentary of *Jaggannatha* in the *Digest, Book* 5, *Ch.* 5, *Sec. CCCLVIII*, this interpretation is alluded to with approval as upheld by *Raghunandana* and other authorities, and Sir Thos. Strange mentions it without question in his Treatise on Hindu Law, page 217, 1st Ed. In accordance with it too is the view taken of the law by Mr. Colebrooke and Mr. Ellis in their remarks on a case in 1810, reported in 2, *Strange's Hindu Law*, 379. The former remarks:—"the acquiescence spoken of by the Pundit is re-"quired under the restriction stated in the Mitakshara "commenting on a passage of Yajnavalkya. Where no "division has taken place, *i.e.*, if the brothers were not sepa-"rated in their interests and concerns, the patrimony which "is recovered is recovered to the use of all the heirs," and we are not aware of any authority for a different view of the law except that of the commentators referred to in the *Digest* as opposed to *Raghunandana*.

1870. *January* 19. *S. A. No.* 130 *of* 1869.

Now the recovery in the present case was not of property either taken or withheld hostilely or in any way abandoned, and the only assent given to it was that expressed by the allotment of the right to the piece of land on the division. The land was held rightfully under a mortgage made by the family and the equity of redemption was dealt with by the co-parceners as a valuable ancestral right and vested in the defendant by the division; and it may fairly be presumed that due allowance was made in apportioning the land to his share for the mortgage upon it. So that the nature of the recovery was simply this that the defendant as sole mortgagor by the operation of the division enforced the family right of redemption and obtained possession of a portion of the ancestral property freed from the charge subject to which it had been allotted to him. Being acquired in this way, the piece of land in question was simply, we think, the defendant's divided portion of the ancestral immoveable property as between himself and his sons. There is no ground whatever for saying that the land was acquired with the acquiescence of the sons shown by their neglect or indifference in regard to its recovery.

But assuming that the redemption was in the circumstances a recovery within the ordinance, there is another ground on which we think it must be held that the land continued to be ancestral property in which the plaintiff's husband was jointly interested. In the *Mitakshara* this qualification is laid down. If it (the property) be land, he "(the recoverer) takes the fourth part and the remainder is "equally shared among all the brethren. So Caukha ordains, "land (inherited) in regular succession, but which had been "formerly lost and which a single heir shall recover solely by "his own labour, the rest may divide according to their due "allotments having first given 4th part." The authority of this text of Caukha seems to be generally acknowledged, but in the *Smriti Chandrika*, Chap. 7, Sec. 25, it is stated that some have thought that it relates to the case of land recovered without permission from the co-heirs and not to land recovered with such permission, and in the section of the *Digest* before referred to, there is a remark to the same effect. If that were taken to be the true construction, still the present case would, for the reasons just expressed, be within the

1870. *January* 19. *S. A. No.* 130 *of* 1869.

text. We are not however of opinion that it can be so restricted. The author of the *Smriti Chandrika* says of the opinions just alluded to "that which is reasonable may be adopted," and the provision of ¼ share of the land before division for the exertion and cost of the recovery seems a very reasonable one to apply in every case. But independently of this, the weight of authority in support of the general operation of the text is sufficient to make it the law. The exposition in the *Mitakshara* and *Smriti Chandrika* is perfectly general. So it is too in the *Daya Vibhaga* of the *Madavahya, p.* 47. Again in the *Mayukha, Chap.* 4, *Sec.* 7, *para.* 3, the text is treated as a special rule relating to land generally, and the same effect is given to it in the *Daya Bhaga, Chap.* 6, *Sec.* 38 and the *Daya Krama Sangraha.*

Upon these grounds our decision is that the piece of land redeemed by the defendant continued to be ancestral property to which he and his sons were entitled as co-parceners, and consequently that in respect of her husband's share which at his death passed to the defendant and his other surviving co-parceners, the piece of land is held subject to a charge on account of the plaintiff's maintenance. As we have no reason to think that the income of the piece of land is insufficient to provide fit and proper maintenance for the plaintiff, this decision renders unnecessary the expression of any opinion as to the legal liability of the defendant to provide for the plaintiff's maintenance out of his self and separately acquired property.

With respect to the objection on the part of the respondent that the plaintiff's refusal without cause to live in the defendant's house as one of his family disentitles her to claim an allowance towards her maintenance, we are of opinion that it is not maintainable. Residence in her husband's family as a condition of a widow's right to her proper maintenance is a position unrecognized by any authority that we are aware of, and against it there are the decisions of the Madras Sudder Court referred to in Mr. Strange's Manual, Chapter 7, para. 210. Propriety of moral conduct is the single condition that we find laid down, and it would seem to be unsettled whether that affects her right to an allowance for the bare necessaries of life.—*See* 1, *Strange's Hindu Law.*

1870. *January* 19. *S. A. No.* 130 *of* 1869.

The result of our judgment is that the decrees of the Lower Courts dismissing the suit must be reversed, but at present the Court cannot pass the final decree in the appeal unless the respondent consents to abandon his objection to the reasonableness of the allowance found by the Court of First Instance only. Should the objection be abandoned, there will be a decree reversing the decrees of the Lower Courts and ordering the payment by the defendant of the sums found by the Court of First Instance together with the plaintiff's costs in this and the Lower Court. Should the respondent still rely upon the objection, the Civil Court must be required to return its finding on the issue :—

Whether the sum of Rupees 5 monthly is a fair and reasonable allowance for the plaintiff's maintenance while living with her own family ; and whether the sum allowed for arrears of maintenance is properly payable and, if not, then what are the reasonable and proper sums to be allowed ?

We are not to be understood as deciding that the plaintiff has no legal claim beyond the amount of income of the piece of land proportionate to her husband's share as co-parcener. The law is probably so, but at present a decision on the point is not necessary as the Court of First Instance appears to have assessed the sums found proportionately to the share of the plaintiff's husband. The finding of the Civil Court may render a decision necessary.

Appeal allowed.

Appellate Jurisdiction. (*a*)

Special Appeal No. 246 *of* 1869.

KAMAKSHI.....*Special Appellant.*

NAGARATHNAM.....*Special Respondent.*

By Hindu law on the death of one of two sisters to whom the joint hereditary office of dancing girls attached to a pagoda had passed on the death of their mother the share of the deceased sister in the office devolves on her daughter and not on the surviving sister by survivorship.

1870. *January* 19. *S. A. No.* 246 *of* 1869.

THIS was a Special Appeal from the decision of J. D. Goldingham, the Acting Civil Judge of Madura, in Regular Appeals Nos. 255 and 258 of 1868, confirming the Decree of the Court of Small Causes of Madura, on the Principal Sadr Amin's Side, in Original Suit No. 46 of 1867.

(*a*) Present: Scotland, C. J., and Collett, J.