(1868) 09 CAL CK 0008

Calcutta High Court

Case No: Appeal No. 21 of 1868

Khetramani Dasi		APPELLANT
	Vs	
Kashinath Das		RESPONDENT

Date of Decision: Sept. 10, 1868

Judgement

Bayley, J.

I would premise by stating that I consider that no question comes before us now as to whether there was or not any ill-treatment or any sufficient cause for the plaintiff to leave her father-in-law''s house, and it is further admitted for the purpose of our decision, that the plaintiff is the widow of a son who left no estate for his surviving father to inherit, and that the widow and not the father would have been the heir to the estate, had the son left any. Moreover, this is a case admittedly to be governed by the Bengal law, and one of a chaste Hindu widow. Baboo Annada Prasad Banerjee has opened his argument in this appeal by urging upon us that the legal, moral, and religious precepts and customs of Hindu society are so intermixed, that it is most difficult to separate the one from the other; and that, in fact, where the Hindu legislators have laid down moral precepts for observance, those precepts were by the customs and religion of the Hindus, binding as legal maxims. Although there is, undoubtedly, much truth in that plea, still I believe the distinction is in fact recognized by the Hindu law itself.

2. Passages are to be found in Colebrooke''s Digest and in Shama Charan Sircar''s compilation of Hindu texts, which show a distinction between the moral obligation which involves a sin (Pap or Mahapap) to be expiated by a religious penance of some kind, in this life, or else by punishment of hell (Put) after this life, and others where a civil remedy or a penalty is indicated. As one instance I que''e the following words from Book II, Chapter IV, Section 1, Art. X, Colebrooke''s Digest (Madras Ed., Vol. I, 409; and London Ed., Vol. II, 110)--Katyayana says: "Neither the husband, nor the son, nor the father, nor the brothers have power to use or to alien the legal property of woman." "If any one shall consume the property of a woman against her consent, he shall be compelled to pay interest to her, and shall also pay a fine to the

king." Baboo Annada Prasad then quotes Art. IX of the same Book and Chapter and Section, and also the notes to Art. X, to show that, in these texts, which refer to the prohibition of giving away property, the one thing to be looked to is that the subsistence of the family, which must necessarily be maintained, should not be jeopardized by such gift. The pleader next quotes the following passages from Manu, Art. XI, and Narada, Art. XII. Art. XI runs thus: "The ample support of those who are entitled to maintenance, is rewarded with bliss in heaven, but hell is the portion of that man whose family is afflicted with pain by his neglect, therefore let him maintain his family with the utmost care." Art. XII says: "Even they who are born or yet unborn, and they who exist in the womb, require funds for subsistence; the deprivation of the means of subsistence is reprehended." But both the texts and the notes here clearly indicate that heaven or hell as the portion of man in a future state, or moral censure in this life, are alone set forth by the legislators; and these cannot be said to constitute legal penalties or to look to the institution of a suit for declaration of the right to maintenance, which a Hindu may neglect to provide for his son''s widow. Art. XV refers mainly to the maintenance of a wife (not a son''s widow), and in one part of the notes it is stated, "the donor commits a sin and, therefore, he should be fined, unless he performs strict expiation." The fining, however, seems to be the lesser and secondary penalty looked to, and the religious expiation by penance, the primary one. Further, Art. CCCXXXI of Book V of Colebrooke''s Digest is cited by Baboo Annada Prasad, in support of his case. That text lays down that outcasts and their sons, eunuchs, madmen, and other disqualified persons must be maintained without any allotment of shares upon the partition of ancestral property. This text, however, does not support the pleader''s views, because it is a maxim of the Hindu law that the disqualified members of a Hindu family cannot inherit, but are more or less incapacitated. But as they are members of a family, it is held, that while on the one hand they are not to share in an estate, still on the other, their maintenance is to be a charge on the estate, of which but for the disqualification they would be entitled to a share with the other qualified members. In our case, however, as there is no estate, this text has no application. I may add that the same remark applies to Section 19, Chapter V of the Dayabhaga.

3. I now turn to the Dayabhaga, the admitted book for Bengal, and, therefore, the book which specially governs the present (Bengal) case. The first passage cited by Baboo Annada Prasad from the Dayabhaga, is Chapter II, Section 23, which refers to a prohibition against the gift or other alienation of the property, "because immovables and similar possessions are means of supporting the family. For the maintenance of the family is an indispensable obligation; as Manu positively declares: "The support of persons who should be maintained is the approved means of attaining heaven, but hell is the man''s portion if they suffer. Therefore let a master of a family carefully maintain them.'" But this text conveys clearly a moral obligation; and the word "indispensable" not only applies as much to a moral as to

legal obligation. Further, the text must be read in connection with the rest of the passage, where the penalty is clearly the loss of the "approved means" of attaining heaven, and not a penalty in this life from the king. Further, if there were any doubt about this, the following text, section 28 of the same Chapter of Dayabhaga, removes it: "But the texts of Vyasa exhibiting a prohibition are intended to show a moral offence: since the family is distressed by a sale, gift, or other transfer, which argues a disposition in the person to make an ill-use of his power as owner. They are not meant to invalidate the sale or other transfer."

4. The Vyavastha 199, page 370, of Shama Charan''s compilation of Vyavasthas, is relied upon by the Principal Sudder Ameen, and apparently by Loch and Kemp, JJ. It is this: "Should a woman without unchaste purposes quit the family house and live with her parents or her own relations, yet still she is entitled to maintenance" (Vyav. Darp., 2nd Ed., 370); but the pleader for the appellant has not been able to show us any passage which provides a civil remedy or penalty for a breach of the obligation laid down in this passage.

5. In regard to the cases cited from 2nd Macnaghten, pages 104, 111, 113, 116, 117 and 119, I would remark that all the passages refer to cases where there were ancestral estates left by the deceased parties, and upon which maintenance might be a charge. Mussamut Bhilu v. Phul Ghand (3 Sel. S.D.E., 223) and Mussamut Hemlata Chowdrain''s case (4 Sel. S.D.E., 19) are also cited. Those two cases were clearly cases where there was ancestral property to provide for the charge of maintenance, or of a like character. The case of Ujjalmani Dasi v. Jaygopal Chowdhry (S.D.E. (1848), 491) is one of contract and stipulation, and Shamasundari Debi v. Baikantmani Roy (S.D.E. (1858), 1220) is solely upon the right of maintenance of a wife not residing with her husband''s family; whereas, as has been before stated, the case with which we have to deal is one exclusively of a son dying without any ancestral property, and leaving a widow who sues her father-in-law for maintenance.

6. It may be well too here to remark, that the pleaders for the respective parties have mostly relied upon decided cases; but we, sitting in a Full Bench of seven Judges, are fully competent to re-consider whether any and which of those decisions are in themselves correct; and we are not actually bound on the present occasion to follow any of them as precedents.

7. After full consideration I can come to no other conclusion than that the Hindu law does not lay down, that if maintenance is withheld by a father-in-law from the widow of his son, that father-in-law having inherited no property from the son which can be a charge for the maintenance of the widow, and the son himself having left no ancestral estate, a civil remedy or a penalty or compensation is to be ordered of the king, can be the subject of suit. My own view is that the Hindu law looked to its moral obligation being capable of being sufficiently enforced from those people for whom the texts were provided, by the overwhelming force of the religious

influences which prevailed under the then Hindu system of society; and that it is only in exceptional cases noted by the provision of fines and amercements and other remedies that the religious and patriarchal power was not to be expected directly to operate to secure the object of the legislators.

8. I concur with the Chief Justice and Mr. Justice Macpherson, and would dismiss this appeal with costs.

Norman, J.

9. The question is whether, under the Hindu law as current in Bengal, where a Hindu dies leaving no property, and a widow unprovided for, such widow can maintain an action in a Court of Law, to compel the father of her deceased husband to give her a pecuniary allowance by way of maintenance.

10. I am of opinion that she cannot. The following texts were cited in support of the argument by the appellant''s Counsel, from Colebrooke''s Digest, Book II, Chapter IV, Section 1, Art. XI, Manu: "The ample support of those who are entitled to maintenance is rewarded with bliss in heaven; but hell is the portion of that man, whose family is afflicted with pain by his neglect; therefore, let him maintain his family with the utmost care." Art. XII, Narada.--"Even they who are born, or yet unborn, and they who exist in the womb, require funds for subsistence: the deprivation of the means of subsistence is reprehended" (1 Col. Dig., Madras Ed., 411).

11. If those texts are carefully considered, it will appear clearly that the duty there prescribed is treated as of divine ordinance; a breach of it as a sin or offence against divine law, not as a crime or offence against human law. The penalties under which such duty is enjoined are the displeasure of heaven, the pains of hell, and the reprehension of mankind. Men are urged to the performance of such duty by Manu by the promise of bliss in heaven; and by Narada by an argument addressed to their reason, pointing out the necessity of securing a due provision for the helpless. Hindu commentators, and specially those of the Bengal School, have distinguished duties of moral obligation, such as those above-mentioned, from breaches of municipal law. In the Smritisara it is said: "The gift of a man''s whole estate is valid, for it is made by the owner; but the donor commits a moral offence, because he observes not the prohibition." So in the Dayabhaga, Jimutavahana, commenting on the above text of Manu, says: "Since it is denied that a gift or sale should be made, the precept is infringed by making one, but the gift or transfer is not null." Very different language is used when the law-giver is dealing with a breach of duties prescribed by municipal law. In Colebrooke''s Digest, Book II, Chapter IV, Section 1, Art. X, a passage from Katyayana is cited: "Neither the husband, nor the son, nor the father, nor the brother, has power to use or alien the legal property of women. If any one of them shall consume the property of a woman against her consent, he shall be compelled to pay interest to her and shall also pay a fine to the king."

12. In this case which points to a breach of municipal law, an infraction of the law of property, the legislator treats it as an offence against human law, or the law prescribed by the supreme power in the State, and indicates a civil remedy. So Manu (speaking of cases which are to be decided by the king) amongst the eighteen principal titles of law, speaks of sales without ownership. There is nothing which tends to show that he ever contemplated that the king was to interfere with the government, conduct, and management of the affairs of a Hindu family by its head.

13. A passage from Sankha is cited in 2 Macnaghten''s Hindu Law, page 116: "To the childless wives of brothers and sons strictly observing the conduct prescribed, their spiritual parent must allot mere food, and old garments, which are not tattered." It looks like a mere injunction to perform such acts as of charity. Nothing can be more unlike a legal right than dependence on such an obligation.

14. When Hindu legislators speak of the right of a deserted wife to maintenance, they express in clear language that such right is one of legal obligation which will be enforced in the Civil Courts. I had occasion to consider that question fully in the case of Rani Ichamayi Dasi against Raja Apurvakrishna Bahadur. The right of a father to maintenance by his sons stands on a footing of its own. See Vyavastha Darpana, 2nd edition, page 375, and the passage from Manu cited in the note. As to other members of the Hindu family, assuming that there is a legal obligation arising from the law of nature and Hindu law upon the head of a family to provide subsistence for helpless members of it, such as infants, who but for such provision might perish of want, it seems by Hindu law to be left wholly in the discretion of the person under such obligation to provide such subsistence in the manner which may seem fit to him. With regard to any claim to maintenance by those who are not absolutely helpless, it may fairly be presumed that the head of the family is the proper person to judge whether the resources and position of the family are such that they ought to be supported without labour, or whether they ought to work, and either contribute their earnings to the general stock, or maintain themselves.

15. There is a large class of cases where, according to Hindu law, an heir succeeding to property takes it subject to the duty of maintaining those whom the late proprietor was bound to support. A case of that kind from the Patna Court of appeal is reported in 2 Macnaghten''s Hindu Law, page 111: A widow was in possession of some property which devolved on her at the death of her husband. The widow of her son who died before his father sued her for alimony to a specific amount; and on referring the case to a Pandit, the following Vyavastha was given: That if a widow live in the house of her mother-in-law, the latter should afford her food and raiment; but that no rules as to a specific portion of alimony had been laid down in the law, and that this should be determined by extent of means. Is it then necessary, supposing that a disagreement should subsist between the mother and daughter-in-law, that the latter should live with the former? If there should be any established rule making it incumbent to give alimony to the family of the person in

possession of the estate, and the person in possession should not give alimony in proportion to the extent of the means, in such case is it competent to any authority to fix the amount that may be given?

16. "Answer.--While the father and other relatives of the husband exist, the residence of a widow in their house is declared to be obligatory on her; and the law does not contemplate any opposition to this rule as in the following text. The father-in-law and the rest are bound to maintain a virtuous and childless widow; but there is no provision for a case in which alimony may be sued for not having been given in proportion to the means."

17. The Hindu law in this subject may be compared with that of Scotland. According to that law, a child is entitled to maintenance in the father''s house, or elsewhere, if the father''s conduct endangers the child''s safety, or if the father chooses to give him separate maintenance. The amount, above bare subsistence according to his condition in life, is at the father''s discretion. This is a more extensive obligation than exists under English law. In the case of Maule v. Maule (1 W&S, 266), which Lord Eldon described as one of the most important cases that ever came before the House of Lords, the Court of Session in Scotland had found that a son, who had a commission in the Army, as ensign, with £90 of pay, and an allowance of £100 a year from his father, was entitled to a maintenance of £800 a year from his father, who was in possession of an entailed estate yielding an income of £10,000 a year. The House of Lords reversed the judgment, and dismissed the suit. Lord Eldon in delivering judgment, after pointing out the number of circumstances to be taken into consideration, the debts and charges on the estate, and other obligations of the proprietor''s possible losses, the necessity of providing for other children or dependant members of the family, to an extent which might vary from year to year, and the harassing enquiries which would be rendered necessary, proceeds to say: "The question comes to this,--Whether the Court of Session has a jurisdiction, on the application of a son, to take into its hands, as between the father and that son, and the father and his family, all the duties of a father of a family; and to state that upon application once made to them the whole administration of the family may be placed under their hands, and may continue there so long as the natural obligation of the father and son exist." Again: "The father must, as it seems to me, be a much better judge of what is proper to be done for his son, when he becomes of age, than any Court on earth can be." Again: "The real question is whether under the particular circumstances of such a case as this, the jus patri£ potestatis in the family no longer belongs to the father, but belongs to the Court of Session." He concludes: I cannot "think that under the law of Scotland, the judgment and discretion of the father no longer belongs to him, but that that judgment and discretion so long as he lives, is to be exercised in a Court of Justice." *** "That your Lordships are to place in a Court of Justice the right to decide upon the manner in which a father shall administer his estate and property between his eldest son, his creditors, his younger children, and all others to whom he owes a natural and moral

obligation during the rest of their joint lives, is a proposition I cannot hold. And if I found it decided in any case that had a direct application to the present, I do not think there is anything that compels us to adopt that decision. I think if such a law existed, it ought not to be suffered to endure a moment longer, but it must be corrected by the legislature." Lord Redesdale says: "The consequence of the decision of the Court of Session would be to give a ground for every child in Scotland to call his father to account for not making him a sufficient allowance. If this is the law of Scotland, I should be sorry to be under the dominion of the law of Scotland. But I take it not to be so." I refer to this case, because it shows the immense mischief that would result, if we were to disregard the distinctions which Hindu lawyers have drawn on the subject under consideration.

18. In my opinion, according to Hindu law as current in Bengal, the obligation of a father-in-law to maintain, out of his own resources, the widow of his deceased son, is a mere moral obligation. If she resides in the house of her father-in-law, and is an infant, and for that or other reasons is unable to maintain herself, there may be, and probably is, both according to Hindu law, and according to natural law, equity, and good conscience, a legal obligation on the part of the father-in-law, who has taken upon himself the care of her person and the charge of entertaining her as a member of his family, and on whose protection she is dependent, to provide her with food and the actual necessaries of life. Compare Rex v. Friend (Russell and Ryan, 20). But in my opinion the father-in-law has a right to determine for himself as to the manner in which that obligation shall be discharged, and the Civil Courts not only ought not, but have no jurisdiction, to interfere with his discretion. Even if we assume that the father-in-law is under any legal obligation to maintain a son''s widow and provide her with food and raiment, if she resides in his house, if she will not accept what he is willing to give, he is not bound in lieu of maintenance to make her a money allowance so as to enable her to reside in another family.

19. In my opinion the appeal must be dismissed with costs.

Phear, J.

20. The plaintiff does not pretend that the defendant will not maintain her at his own house; nor does she go so far as to seriously contend that the conduct of the defendant, or of the members of his family, towards her has been such as to entitle her to refuse to reside under his roof. In truth, no issue is raised on the facts of the case, and the sole question for the Court is, "whether the plaintiff, not finding it agreeable to live in her father-in-law''s house, can legally claim from him a money allowance by way of maintenance to enable her to live elsewhere."

21. The argument of the plaintiff''s pleader may be concisely summarized as follows: That all the injunctions of the old Hindu sages constitute positive law, except so far only as Jimutavahana, for the school of Bengal, sets apart some few precepts as laying down merely a moral duty and not a legal obligation: that the duty of

maintaining the different members of the family is everywhere throughout the Shastras inculcated upon the head of the family, and does not fall among Jimutavahana''s exceptions,--it has, therefore, the force of law, and as such has been recognized by the leading English text writers, Macnaghten, Strange, &c.; that the Vyavastha of the Pandits, and the decisions of the late Sudder Court, have always supported the legal character of the duty; and finally that the son''s widow is admittedly a member of the father''s family. This argument is very plausible at first sight, but does not bear being very closely looked into. Indeed, I think that it fails fatally for the plaintiff, at its very root. It seems to me that it cannot be doubted there are plenty of instances other than those by Jimutavahana, in which the old writers clearly intended to enjoin a moral duty as distinguished from a legal obligation, and in my opinion the subject of maintenance affords some of the most conspicuous examples of this. Of the texts relied upon by Baboo Annada Prasad Banerjee, the strongest are perhaps the following: "The ample support of those who are entitled to maintenance is rewarded with bliss in heaven, but hell is the portion of that man whose family is afflicted with pain by his neglect; therefore, let him maintain his family with the utmost care."--Manu. "Even they who are born, or yet unborn, and they who exist in the womb, require funds for subsistence: the deprivation of the means of subsistence is reprehended."--Narada. "A man may give what remains after the food and clothing of his family; the giver of more, who leaves his family naked and unfed, may taste honey at first, but shall Afterwards find it poison."--Vrihaspati. Many more of a similar tenor might be cited, which reiterate in words, more or less emphatic, the doctrine that it is incumbent upon every man to maintain the dependant members of his family. There are also no doubt other passages to be found, where certain specified members of the family are declared to have a legal claim upon the family property upon a disposition of it taking place, but these are not applicable to the present case, for reasons which I shall presently mention; and, therefore, I omit for the moment to notice them.

22. Now it seems to me very plain that the writers who enunciated the foregoing precepts and their like, only desired in them to lay down moral principles for the guidance of the head of the family; the only sanction appealed to is of a religious and prospective character. The civil power is in no way brought under notice, although it may be remarked, the same authors knew well enough how to use that power, if necessary, for the enforcement of their commands. Indeed, it often enough happens that precepts of a general character uttered by the Rishis are accompanied by directions, that the king or sovereign power should punish the infraction of them, but nothing of the sort occurs here. In these places, the authors are not dealing with rights of individuals; they do not pretend to define anything of the nature of a right, and they give no hint of a remedy, by which any right could be asserted. I repeat that it seems to me clear they were here simply prescribing to the head of the family principles which he should observe in his government, and were not intending to give a foot-hold for the intrusion of the civil power within those

inner limits, from which it has been, undoubtedly, for ages the policy of the Hindu social system to exclude it. It may well be, on the other hand, that the head of the family cannot lawfully eject a dependant member from his circle, without reasonable cause. Possibly the defendant is legally bound to afford the plaintiff subsistence under his roof, she on her part conforming to his orders, and working for the common fund if he should think this necessary. If so, no doubt the Civil Court would, in the event of default on his part, find the means of compelling him to perform his duty. But this is not the plaintiff''s case. She claims, simply by way of maintenance, and on the bare right to be maintained without other consideration, an annuity to be paid out of the father''s property in which her husband, had he been alive, would have had no interest whatever. If then her suit be well founded, it follows that a son''s widow has a legal right to a share in the father''s property during his life-time, while her husband before his death had not such a right. Every Hindu lawyer will feel that it needs very strong authority to support such a distinction as this. It appears to me, however, that the matter is altogether bare of authority, except so far as the texts which I have quoted, or referred to, afford any; and I have already said that, in my opinion, they do not. I am not speaking regardless of the additional texts which are appealed to by Mr. Justice Loch, in his elaborate judgment, but it seems to me a mistake to treat them as having application to the claim put forward by the plaintiff in this suit. Without pursuing them in detail, I think I may, without error, say that they all have reference to the terms upon which partition or inheritance of property is to take place. Mr. Justice Loch concludes from the passages quoted by him (particularly as I gather, a text of Kataiyyana and the commentary of Jagannatha upon it, in page 600, Madras Edition of Colebrooke''s Digest, Vol. II) "that the maintenance of a Hindu widow is not merely a moral obligation, but a charge on the inheritance." This is no doubt true if the word inheritance mean the inheritance of her husband; but even then it does not, I apprehend, so much flow from the texts quoted, as from other portions of positive law laid down by the old law-givers. Yajnavalkya for instance, commanded that a husband should maintain his wife, and if he did not keep her in his own house, he should give her a third part of his wealth, or being poor, should provide her with maintenance; and, on the death of the husband, no one will question that she becomes entitled by the Hindu law, which is current in Bengal, to the whole inheritance, in the event of there being no issue; or otherwise to a share by way of maintenance. Nothing can be clearer than the rights of a Hindu widow by positive law, as against the inheritance of her husband. But I know of no authority which specifically gives her the like rights, or any other rights as against the property of her father-in-law. So again, sons and others, who by reason of infirmity, &c., are disqualified from taking the share in an inheritance which would otherwise come to them, are directed to be maintained by those to whom their shares thus go over; and a direction of this kind, given by the law-giver, when prescribing the mode and condition of inheriting, is, I think, rightly construed as amounting to the creation of a charge upon the inheritance. No circumstances of this nature are attendant upon

the general texts, which alone can be made to bear upon the question of maintenance by the father of the son''s widow. It seems to me that the two classes of cases are quite distinct, namely those in which the claimants of maintenance have expressly given to them the right of recourse to a particular fund, and those in which no such rights have been expressly given. It cannot be logically inferred, that because some dependant members of a family, whom the head is declared morally bound to maintain, are entitled by express provisions of the law to make good their claims against his estate as so many charges upon it, therefore all dependant members whom he is declared morally bound to maintain have the same rights, even in those instances where such express provisions are absent. But this it appears to me is exactly the mistake in reasoning which has been committed in this case, and without it the plaintiff''s claim cannot get any real support from the old Hindu law-givers.

23. The English text writers, as Macnaghten and Strange, naturally do not carry the matter further, for they only profess to exhibit a compilation of the law made from the old Sanskrit authorities, as expounded by the pandits. Sir T. Strange''s words are most general, and seem to me, in no way, calculated to support the conclusion which Mr. Justice Loch draws from them. Undoubtedly, they express very emphatically that "maintenance by a man of his dependants is with the Hindu a primary duty." The question before us is, whether the obligation to maintain is such a character as to give the dependant who is the object of it, a legal claim to be paid an annual sum out of the supporter''s estate. Mr. Justice Loch''s quotation from Strange is in the text preceded by the sentence, the obligation to "maintenance, as between parents and child, is eventually mutual." If, therefore, the obligation amounts to a pecuniary charge in the one case, it must in the other; but I have never yet heard it argued that by Hindu law, a father, in indigent circumstances, is entitled to a money allowance from the son payable out of the latter''s self-acquired property. I cannot myself think that Sir T. Strange intended to do more than give the doctrines of the Hindu moral law on a social and domestic duty of high importance, and I am unable to construe his words into an enunciation of a legal right of recourse to specified property. Macnaghten''s text scarcely bears upon the point under discussion, and has not been appealed to, but several of the cases given by him in his Hindu law have been cited by Mr. Justice Loch in his judgment, and by the pleader of the appellant before us. I will not treat these in detail now. It is sufficient, I think, to say of them, that in each the claim put forward for determination was a claim by a widow to be held a co-sharer with her deceased husband''s brothers, or others, in property in their hands, after the death of the father. This claim was, in every instance, negatived, but, at the same time, it was said that she was entitled to proper "maintenance." The widow was, in fact, told, "you have mistaken your rights; you are not entitled to any share of the property. The utmost you can ask is to be maintained." And, in this view, these precedents are really adverse to the present plaintiff''s claim, for they impliedly declared that the son''s widow has no proprietary

rights whatever against the deceased father''s property. Indeed it is expressly said in one of Macnaghten''s precedents (one not quoted before us, or by Mr. Justice Loch) that the widow is only entitled to be maintained in the joint family of her late husband, and cannot, by law, claim a money payment of the nature of alimony. See 2 Macnaghten''s Hindu Law, page 111, Case IV.

24. Of the seven decisions of the Sudder Dewanny Adawlut, which have been brought to our notice in the argument, only one appears to me, in any way, to favour the plaintiff''s case. This is the decision in the case of Ujjalmani Dasi v. Jaygopal Chawdhry (4 S.D.R. (1848), 491). It appears that in that case the Principal Sudder Ameen had taken a Vyavastha from the Pandit of the division, which declared the widow of a son dying before his father entitled to a maintenance proportionate to the amount of the father-in-law''s property. The Sudder Dewanny Adawlut did not actually decide whether this was good law or not; its judgment was sought upon other points only, and in giving it, Mr. W. Jackson said: "The plaintiff''s widow is admitted by the Pandit''s Vyavastha to have a legal right to maintenance, under the Hindu law, from the family estate" Seemingly, the only question brought before the Court was, whether this assumed right had been displaced by a special agreement, and if not, at what amount should the maintenance be assessed. In Rai Sham Ballabh v. Prankrishna Ghose (3 Sel. S.D.R., 33), it is reported that three sons took the inheritance on the death of their father, continued to live jointly, and with them lived the widow of a brother who had predeceased his father. The three brothers having died, a suit for partition took place, and the property was divided among their respective sets of heirs, one-third going to each set. The widow who was a party was declared entitled to nothing but food and raiment. Her claim was, accordingly, dismissed, and no charge of any kind in her favour was established against the estate.

25. In the case of Mussamut Bhilu v. Phil Chand (3 Sel. S.D.R., 223), two brothers are represented as having lived together in joint enjoyment of property under the Mitakshara law. One died leaving a widow, and his share of course went to the surviving brother. The Court held (no doubt rightly) that the brother thus taking by survivorship the share of the property from which the widow was legally entitled to obtain maintenance, at the hands of her husband, during his life, was also bound to maintain the widow. In other words, he took the property with its burden. The Court does not support its judgment by the statement of this reason, but I think it affords the true explanation of the decision. In the case of Mussamut Hemlata Choudhrain v. Padma Mani Choudhrain (4 Sel. S.D.R., 19), the widow''s claim to share in the deceased father''s estate was dismissed, because her husband had died in his father''s life-time. She was at the same time told that her claim should have taken the form of a claim for maintenance, and she was left the option of suing for it in another action. So that here no decision was judicially come to as to her right to maintenance, and still less was there any declaration either that she was originally entitled to make a money claim against the father, or that she was now entitled to

proceed against his estate. In Harasudari Gupta v. Nabagobind Sen (S.D.R. (1850), 422), the report is so scanty that no conclusion either way can be drawn from it. Also nothing is said as to whether the deceased husband left property or not. The like observation may be made with regard to the case of Ramdhan Bhattacharji (S.D.B. (1852), 796); and it may also be added that there the father-in-law had expelled the widow from his family, and so refused to give her even food and raiment under his own roof. In the case of Shamasundari Debi v. Baikantmani Roy (S.D.R. (1858), 1220), no decision was delivered by the Court as to the right to maintenance, or as to the circumstances under which it was put forward in that case. It was only determined that the widow did not forfeit the right, which she had, by residing away, involuntarily; and to this effect only, do the decisions, Khudeemani Debia v. Tarachand Chuckerbutty (2 W.R., 134), Ahalya Bai Debia v. Lakhimani Debia (6 W.R., 37), and the judgment of the Supreme Court in the case of Sibasundari Dasi v. Krishna Kishore Neoghy (2 Tay. & Bell, 190) as I read them, lay down the law. Probably, at this date, it would hardly be contended that if the plaintiff is entitled to a charge upon the father-in-law''s property at all, she loses the right to it, merely by adopting such place of residence as is most agreeable to her.

26. I have now, I believe, reviewed all the authorities which have been put forward in support of the plaintiff''s right to succeed in this suit. The result to my mind is that the claim which the plaintiff now sets up as a legal right, has no basis in the precepts of the old Hindu law-givers, and has not been shown to have been ever judicially affirmed by the superior Courts of this country. On the other hand, there is certainly one decision of this Court, viz., Rajumani Dasi v. Sibchandra Mullick (2 Hyde, 103), which declares that a right, such as that which is now sought to be established, has no foundation in Hindu law.

27. It seems to me, therefore, that the view taken by the Chief Justice and Mr. Justice Macpherson is entirely correct. I am quite of opinion, notwithstanding the earnest pleading of Baboo Annada Prasad to the contrary, that the Hindu law-givers did intentionally often enjoin moral duties as distinct from legal obligations, and I agree with the Chief Justice that we must not convert these moral duties into legal liabilities. The mischief which we might do, as the Chief Justice remarks, by want of care in this respect, is very great. For instance, if we upheld the right of every widow of every son, who died during his father''s life-time, to compel the father to pay her out of his property a money allowance in lieu of maintenance, can any one fail to see that we should not only sap the very foundation of the Hindu family system, but should impose upon the father a burden most unreasonable, if not impossible, for him to bear. I may add that the Privy Council, in a late judgment, has discountenanced the supposition that every thing uttered by the old law-givers remains to this day so much positive law. Their Lordships say (1 B.L.R. (P.C.), 12): "The duty, therefore, of an European Judge, who is under the obligation to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received

by the particular School which governs the district, with which he has to deal, and has there been sanctioned by usage."

28. I express no opinion as to whether any one taking by inheritance property out of which a dependant member of the late owner''s family had, in fact, been receiving maintenance up to the time of the deceased''s death, would or would not take it charged with the continuance of that maintenance. I apprehend that a question of this kind would, in every case, depend upon the facts. I also say nothing as to the right of a dependant member of a family to compel the head to afford food and raiment within the family house, or in the case of forcible exclusion therefrom, to make a money payment in lieu of such maintenance. I confine myself strictly to the issue which I mentioned at the outset as being the issue of law on which the plaintiff''s suit depends, and on that issue, I think the plaintiff fails to make out her right. Accordingly, it appears to me that the decision which is now appealed against, should be affirmed with costs.

29. Mr. Justice L.S. Jackson and Mr. Justice Hobhouse have requested me to say that they concur in the judgment which I have just read.

E. Jackson, J.

30. I, also, am of opinion that the plaintiff is not entitled to obtain maintenance from her father-in-law in the shape in which she claims it, i.e., as a money allowance. The plaintiff appears never to have resided with her father-in-law as a member of his family. Her husband died while she was very young, only six years of age, and with the exception of two or three days immediately after the death of her husband, she has always resided with her own parents. As to any ill-usage she alleges she may have received, it is difficult to credit the deposition of a girl of eleven years of age relating what occurred when she was only six years of age. The plaintiff having, therefore, always lived separately from her father-in-law, and there being no ancestral property in the family, I cannot see how she can claim a money allowance from her father-in-law. It may be that if she had always lived as a member of her father-in-law''s family, he could not turn her out of doors in a destitute condition, and if he did so, she might compel him to give her food and raiment and house room. All the texts which have been quoted for the appellant seem to me to go no further than this, and it may even be that if the plaintiff had, after living as a member of her father-in-law''s family, been obliged by ill-usage to leave it, that then she would be entitled to a money allowance in lieu of the food and raiment which the father-in-law was bound to give to her. But it is quite clear to me upon the statement of the plaintiff herself that she never has been a member of her father-in-law''s family; and that even the treatment she alleges she received, contains no sufficient ground for her leaving her father-in-law''s house. The plaintiff has always been, in fact, a member of her own father''s family, and has always been maintained by her own father, and is still being maintained by him. I am not satisfied that she is, in any way, in want of actual maintenance. Indeed she does not

ask for it. She asks that while she is being maintained by her own father, her father-in-law may be required to pay her a monthly allowance in money. No text has been quoted which, in my opinion, supports any such claim, and I would, therefore, dismiss the plaintiff''s suit with all costs.

Glover, J.

31. I, also, am of opinion that this appeal should be dismissed. It appears to me that all the authorities quoted have reference to cases where an estate is taken by inheritance, and not where an estate is made by individual exertion. An estate descends cum onere, and amongst its obligations is the maintenance of those who are by Hindu law excluded from the inheritance; but there is a vast difference between an estate that comes to a person by the mere accident of birth, and one that is acquired by his own skill and labour; and no precept of Hindu law has been quoted to show that the founder of his own fortune is under the same obligations as he who inherits an estate. It is admitted in the present case, that the respondent succeeded to no ancestral property, and that whatever means he has, has been self-acquired. And as it cannot be doubted that by Hindu law he might give that property away absolutely at his pleasure, he is not bound to share it even with his sons, and a fortiori not with son''s widows.

32. But if it were conceded that there was an obligation on a father-in-law to maintain the childless widow of his son, that obligation would not, I think, be binding in law, nor give the widow a right to maintain an action against her father-in-law.

33. In all the Sections of the Dayabhaga, where the maintenance of those excluded from inheritance is set forth, the nature of the penalty for nonperformance is spiritual, rather than temporal. The offender is threatened with condign punishment in "hell" (Dayabhaga, Ch. II, Sec. 23), but no mention is made of secular interference, or of an appeal to the king on behalf of the family. And this is the more remarkable, as in many other cases a distinct temporal penalty is prescribed, and if the non-performance of the duty of maintaining those who were excluded from inheritance, had been a wrong punishable by law, doubtless the fact would have been so stated instead of that the offender is left to receive his punishment in the other world.

34. The case of Khudeemani Debia v. Tarachand Chuckerbutty (2 W.R., 134) did not (as appears to be supposed) decide the widow''s right to maintenance from her father-in-law. That point had already been decided by the lower Courts, and the only question before the High Court in special appeal, was whether the widow could demand that maintenance without living with her husband''s family,--a question which there is now no necessity for deciding. I would dismiss this appeal with costs.