

(1926) 04 PRI CK 0003

In the Privy Council

Case No : Privy Council Appeal No. 156 of 1924

Bai Nagubai Manglorkar

APPELLANT

Vs

Bai Monghibai (since deceived) and others

RESPONDENT

Date of Decision : 29-04-1926

Acts Referred:

Citation : (1926) AIR(PC) 73

Hon'ble Judges : Salvesen, Ameer Ali, John Edge, Darling, Blanesburgh, JJ.

Advocate : T.L. Wilson and Co., Lattey and Hart, J.M. Parekh, G. Lowndes, L.De Gruyther, E.B. Raikes, for the Appearing Parties.

Judgement

Lord Darling

This is an appeal in forma pauperis by special leave from a decree of the High Court dated the 11th August 1922, (reported in A. I. R. 1923 Bom. 130 - Ed.) which reversed a decree of that Court in its original jurisdiction dated the 25th November 1921.

The question in the appeal is whether the appellant is entitled to maintenance from the estate of one Vasanji Madhavji Thaker, deceased.

The appellant is a member of the Gurav caste of Hindus, and at the age of twelve years was given into the keeping of a Shethia, or rich Hindu, named Gopal Mulji and lived with him for twelve years and bore him two children and during that time made the acquaintance of the deceased, who was a friend of his and used to accompany him occasionally when he visited her.

The deceased was a very wealthy Hindu of the Lohana caste, who was married but on bad terms with his wife (with whom he did not cohabit) and her two sons, whom by his Will he afterwards practically disinherited. He was from Guzerath and lived in Bombay, and was therefore governed by the Mayukha.

The appellant, when of the age of about twenty-six, had to leave Gopal Mulji because of ill-treatment by him.

The deceased then took her under his protection and she lived with him on terms of affection on either side for at least five years before his death, bore him a daughter, was faithful to him during his life and has been faithful to his memory since his death. Such was the esteem of the deceased for the appellant that he would have married her had not their difference of caste made it impossible.

After his death she applied to his executors for maintenance and to his widow and issue to admit her claim thereto, and on their failure to comply with her request she instituted the present suit claiming maintenance as a Hindu concubine of the deceased in his sole keeping till his death. The respondents put in written statements in which they alleged that the appellant was a prostitute and was not faithful to the deceased during his life and had not led a chaste life since his death, but they did not deny that the facts alleged by her, if proved, would entitle her to maintenance.

The following are the issues raised by counsel for the respondents with the findings of each Court thereon :-

(1) Whether the plaintiff (appellant) was in the sole keeping of the deceased before his death.

Both Courts : Yes.

(2) Whether the deceased paid to the plaintiff a fixed monthly allowance of Rs. 400 per month prior to his death.

1st Court : Payments made averaging Rs. 400 per month.

2nd Court : Payments were made : exact amount not material.

(3) Whether the plaintiff has continued to be chaste after the death of the deceased.

Both Courts : Yes.

(4) Whether the plaintiff is entitled to any and what maintenance

1st Court : Yes ; reference as to amount

2nd Court: No.

At the trial it was proved that the deceased for the last five or six years of his life, if not for longer, had left his family house in the occupation of his wife and her children and was residing almost, if not entirely, with the appellant in a house rented in her name, that he had engaged a governess to teach her and her daughter, that he kept a motor car for his and her use, and that he took her up country with him and told his friends to call on him at the house where she lived, that his sons visited him there and that he was nursed there during his last illness and only removed shortly before his death.

The trial Judge in his judgment defined the legal position to be that, where a

Hindu woman has been kept by a Hindu till his death as his permanent concubine - as he found was the fact in regard to the appellant - his estate is liable for her maintenance in the hands of those who take it, even though the connexion with her was an adulterous one, but that her right to maintenance is conditional upon her chastity.

He stated that the appellant gave her evidence in a very straightforward manner and that he believed her, that he thought all the evidence given on her behalf truthful, and he disbelieved the evidence on the other side.

He held that it was established that Vasanji did not care for his family, nor they for him, and that he looked to the appellant as the person who was a member of his family and looked to her for nursing. He passed a decree in appellant's favour for maintenance and directed a reference to ascertain its amount.

The Respondents 3, 4 and 5 appealed, but did not in their grounds of appeal suggest that, if the trial Judge's findings of fact were correct, the appellant was not entitled to maintenance.

At the hearing of the appeal the appellate Court adopted a new contention put forward on behalf of the respondents 3 - 5 by a counsel who had not appeared for them at the trial. That contention was that the Hindu concubine of a Hindu, though faithful to him till his death, was not entitled to maintenance from his estate unless she was *avaruddha*. The appellate Court held that this term is in law applicable only to a woman openly kept by a Hindu in his own family and as a member of his family. They found on the evidence that the plaintiff was in the exclusive keeping of the deceased during the last four or five years immediately before his death in the sense that she consorted with him alone during that time, but that the deceased did not make the plaintiff's house his residence, that the connexion between the deceased and the plaintiff was not perfectly open and recognised, and was nothing more than that which a man might have with a woman who was his kept mistress living outside his house and unknown to his family. They also found that the plaintiff was not openly kept by the deceased in his own family and as a member of the family, "that she was not his dependent" and was not known as such to all concerned ; and that she had not accepted practically the obligation of a family life, but was merely a kept mistress of the deceased. The learned Judges stated that the question whether a mistress of a Hindu in the position of the plaintiff was entitled to maintenance had not been previously decided by the High Court. They held that only a woman who was in the position of an *avaruddha stri* to the deceased was entitled to any maintenance against his estate in the hands of his heirs, that the expression *avaruddha stri* meant at the present time a woman who openly lived as a wife, though not legally married, and as a member of the family in the house of the man, and was recognised by all concerned as permanent concubine.

Having come to this conclusion, they scrutinised the evidence (which was given when no such questions had been raised) to find out whether the appellant had

been so kept. As to the effect of this evidence Shah, Ag C. J. differed in certain points from the trial Judge ; but Crump, J., accepted his findings, yet found that even on them the appellant was not entitled to maintenance. The High Court on appeal accordingly dismissed her suit.

From their decree dated the 11th August, 1922, the appellant, after obtaining a certificate under Ss. 109 and 110 of the Civil Procedure Code, obtained on the 28th November, 1922, special leave to appeal in forma pauperis, and she submits that her appeal should be allowed and the decree of the trial Judge restored.

The question now to be decided upon this evidence is whether the appellant is entitled to maintenance out of the estate of the deceased and this, as appears from the judgments delivered in the Court of Appeal, depends upon whether, upon the facts proved, she was in strict sense, according to the Hindu law, as prevailing in Bombay, the "permanent concubine" of deceased. This word concubine has long had a definite meaning, whether expressed in the language of India or of Europe. The persons denoted by it had, and have still where it remains applicable, a recognised status below that of wife and above that of harlot. In the Glossary of Ducange, under the title Concubina, we read that *Pellex honestior est quam Amica, ut quae accidat proprius ad uxoris naturam* : and this, it would seem, is because *uxor nomen est dignitatis non voluptatis*. Almost a wife, according to ancient authorities, the distinction of the concubine from harlots was due to a modified chastity, in that she was affected to one man only, although in an irregular union merely. So Bracton is quoted by Ducange as writing, *Eadem etiam concubina legitima dicitur ad discrimen ejus quae quaestum facit*. Harlots solicited to immorality : concubines were reserved by one man.

The law, which must decide this case, originated in the sayings of almost immemorial sages, but has long been condensed into such treatises as the Mitakshara and the Mayuka. The relevant passages from the Mitakshara are, in the judgment of the Court of Appeal, thus quoted from Stokes Hindu Law :-

"Heirless property goes to the king, deducting however, a subsistence for the females as well as the funeral charges . . . the expression deducting, however, a subsistence for the females as well as the funeral charges" is explained as excluding or setting apart a sufficiency for the food and raiment of the woman, and as much as may be requisite for the funeral repasts and other obsequies in honour of the late owner, the residue goes to the king. . . ."

This relates to women kept in concubinage for the term employed is "females" (yoshid). The text of "Narada" likewise relates to concubines since the word there used is "woman" (stri). . . But a king who is attentive to obligations of duty should give a maintenance to the women of such persons." The words used for women kept in concubinage" and "concubines" in the original are "evarudhha stri." "Vijnano swara" there clearly explains the meaning of the word

"stri" in "Narada's" text, and the word "yoshid" used in Katyayana's text as including "avaruddha" stri." The text of "Narada" in para. 7 of the same section of the "Mitakshara" runs as follows ; - "Thus Narada has stated the succession of brothers, though a wife be living : and has directed the assignment of a maintenance only to widows. Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property. Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord.

The women or female slaves, being unequal (in number, to the shares), must not be divided by the value, but should be employed in labour (for the co-heirs) alternately. But women (adulteresses or others) kept in concubinage by the father must not be shared by the sons, though equal in number for the text of Gautama forbids it.

The appeal Court decided, and their Lordships agree with them, that the right to maintenance, such as is here claimed, is limited to those women who amongst Hindus are properly called avaruddha ; a word ordinarily and accurately rendered by "concubine" in English. Avaruddha has been defined by various writers, and the appeal Court approved of this definition, taken from page 406 of Gharpure's Translation of the Vyavahara Adhyaya of the Mitakshara :

"Avaruddha" stri means women who are the protected slaves of another, and Shah, Ag. C. J., quotes with approval these words from the commentary on the word "avaruddha."

These very women are prohibited by the master from intercourse with other men, with an injunction to stay at home, with the object of avoiding any lapse of service. These are known as avaruddha or protected slaves.

As Shah Ag. C. J., points out in his judgment, the Mayukha is on this point in agreement with the Mitakshara ; and he quotes from Mandlik's Hindu Law, p. 70, this passage :

Striae are female slaves. When uneven in number, they are to be made to work by turns as may be found workable ; when even in number, they are to be divided. The kept mistresses of the father, however, though even in number, should not be divided, as directed by the following text of Gautama : There is no division of women appointed by the father for enjoyment."

These latter words are evidently a recognition of the manifest impropriety of allotting to sons the concubines of their father ; women who might very well be mothers of the half-brothers of these same sons.

In the judgment of the appeal Court it is essential that to be avaruddha stri, or concubine, entitled to maintenance, the woman must be, in the words of Shah, Ag. C. J., a continuously kept concubine, a woman in open residence and avowed connexion with the man.

That originally such women were slaves, and necessarily resident in the house as members of the family, is certain. But slavery no longer exists in India, so it is now contended that the *avaruddha stri*, though free women, must yet be subject to such restraint as is involved in living as a member of the family which in this case would mean living in the same house with the wife and children of the deceased man. It is unnecessary to hold here that "*avaruddha*" does now, as Mr. Raikes suggested, mean no more than kept and reserved for the sexual enjoyment of one man, to whom the mistress remains faithful ; for all the facts of this case, even as accepted by the Court of appeal, go far beyond any such mere reservation. In the Court of appeal, Shah, Ag. C. J., used these words :

Taking a broad view of the case, I am satisfied that plaintiff was in the exclusive keeping of the deceased Vasanji, during the last four or five years prior to his death, in the sense that she consorted with him alone during that time. But that connexion is not, in my opinion, sufficient to bring the case within the scope of the rule which entitles a continuously kept concubine to maintenance. I may mention that the English expression "continuously kept concubine" is the nearest approach to the meaning of "*avaruddha stri*." It connotes an open residence and avowed connexion with the man, both of which I think can be fairly said to be absent in the present case. I do not desire to lay down any hard and fast rule as to what mode of life and character of the connexion between the kept woman and her paramour would be sufficient to constitute her an "*avaruddha stri*" ; that must depend upon the facts and circumstances of each case and must be decided as a question of fact on the evidence.

Crump, J.'s judgment is to the like effect. Both Judges lay much stress on the fact that the appellant was not kept in the house of the deceased's family, but in a separate house, as was the fact.

Kanga J., the trial Judge, however, thus deals with that matter and the events of deceased's last illness :

The natural inference from this is that the deceased did not care for the members of his family, and the members of his family did not care for him, and the deceased looked to the plaintiff as the person who was a member of his family, and looked to her for nursing him.

Their Lordships agree with the trial Judge in this view of the matter. And so the real question would appear to be whether to be of the family the concubine, otherwise entitled to maintenance, must reside in the same house with the deceased, together with his wife and the regular members of his family. Their Lordships are of opinion that such common residence is now unnecessary, whatever may have been the case when the concubine was a slave of the household. The emancipation may have been gradual, as several decided cases would indicate, but the case of *Ninga reddy v. Lakshmana* 190126 Bom. 163 = 3 Bom. L. R. 647, a case in the appellate Court, decided in 1901, appears sufficient to establish the present position. As the head-note expresses it :

Under Hindu law a concubine gets no right of maintenance against her paramour unless, having been kept continuously till his death, it can be said that the connexion had become permanent.

The facts of that case, so far as they are relevant to this one, were that one Govindraddi had a wife Venkawa, who, owing to ill-health, left him about the year 1877 and went to reside with her parents. Govindraddi then took Laksh mawa to his house and she lived with him as his mistress. In 1890, Venkawa, having regained her health, rejoined her husband ; but Govindraddi continued to visit his mistress Laksh mawa till his death in 1897. The Court decreed maintenance to Lakshmawa, the concubine. In this case the man and the woman were Hindus and the paramour was governed by the law of the Mayukha, and in their Lordships' opinion the decision above mentioned is sufficient authority for holding that providing the concubinage be permanent, until the death of the paramour, and sexual fidelity to him be preserved, the right to maintenance is established ; although the concubine be not kept in the family house of the deceased. This incident of residence in the family house was not the essential reason for the right to have maintenance from the goods of the deceased paramour, but rather a means of ensuring the qualified chastity of the mistress.

As the claim of the appellant here had been, before the trial Judge, resisted mainly on the ground that she had not remained chaste and faithful to the deceased, and not definitely on the ground that she was never in the position of avaruddha stri (permanent concubine) towards him, their Lordships are of opinion that the view most favourable to (1) 1901 26 Bom. 163 = 3 Bom. L. R. 647 her should be taken in considering the evidence going to prove her exact position or status resulting from her connexion with the deceased. For, had she been duly warned, the appellant might well have brought more evidence to fortify that contention and going to prove her precise situation. To their Lordships, however, it appears that the facts proved or admitted are certainly strong enough to bring this case within the rule entitling the appellant to maintenance out of the property of the deceased, since the findings in her favour go beyond those held sufficient, in the case of Ningareddi v. Lakshmawa, 190126 Bom. 163 = 3 Bom. L. R. 647 by the Court of appeal in Bombay, a decision whose authority has not been questioned.

Their Lordships will humbly advise His Majesty that the decree of the High Court, dated the 11th August 1922, should be set aside, except as to the costs of Bai. Monghibai, Charandas Vasonji Thakkar, Ranchhoddas Vasonji Thakkar (minors) and Pragji Dayal Hariani (the order as to which is to stand), and that the decree of the High Court in its Original Civil Jurisdiction, dated the 25th November, 1921, should be restored. The appellant must have her costs of the appeal to the High Court, and such costs of this appeal as she may be entitled to as an appellant in forma pauperis, and the Respondents Nos. 1, 4, 5 and 6 will also have their costs of this appeal, all such costs to be paid out of the estate.