

(1939) 10 MAD CK 0052
In the Madras High Court

Prerepa Bhagavat Sastrulu (died) and Another	APPELLANT
Vs	
Saridey Lakshmikantam	RESPONDENT

Date of Decision : 02-10-1939

Acts Referred:

Citation : AIR 1940 Mad 511 : (1940) 1 MLJ 60

Hon'ble Judges : Wadsworth, J

Bench : Division Bench

Judgement

Wadsworth, J.—This appeal raises a question regarding the right of the permanently kept concubine of a deceased Hindu to claim maintenance when she has not had a child by the deceased. It is a question upon which authority is meagre. The only definite pronouncement is contained in an obiter dictum of Spencer, J., at page 810 in the case of Rama Raja Thevar Vs. Papammal and Another, . The learned Judge was dealing with a case of a claim by a concubine who in fact had a daughter by her deceased paramour. In laying down the conditions upon which a concubine may be entitled to maintenance he observes:

Another condition that has been put on the right of a concubine to be maintained is that she should be the mother of illegitimate children,

2. quoting as authorities the case of Khemkor v. Umiashankar (1873) 10 B.H.C.R. 381 and Strange's Hindu Law, Chapter 8, p. 174. The other learned Judge while agreeing generally with the conclusion of Spencer, J., says nothing about the question whether the right of maintenance depends upon the existence of children by the concubine. Turning to the authorities for this pronouncement I find that the case of Khemkor v. Umiashankar (1873) 10 B.H.C.R. 381, does not lay down any rule that a concubine who has no children is disentitled to maintenance. The judgment is very short and the essential point is found in one sentence which is:

We also agree with the Judge in thinking that as the mother of the illegitimate children of Ranchor, that is, as his concubine, she is entitled to maintenance.

3. The judgment quotes as authority Strange's Hindu Law and West and Buhler. This passage may well be an indication that the essential criterion is not whether the claimant is the mother of illegitimate children but whether she was a regularly kept concubine of the deceased. When we turn to the passage in Strange, Vol. I, page 174 we find the learned author after referring to the rights of illegitimate children to maintenance adds the sentence "the mothers of such children also have a like claim." The contrary proposition that concubines who are not the mothers of illegitimate children have no claim to maintenance is not stated. I have not been able to verify the passage, in the old edition of West and Buhler quoted by the learned Chief Justice in Khemkor's case (1873) 10 B.H.C.R. 381. Turning to the original texts in the Mitakshara upon which the right of a concubine to maintenance is built, we find very little assistance. Chapter II, Section 1, paragraph 27 contains the following:

It is said by Katyayana "heirless property goes to the King deducting however a subsistence for the females".

4. Then in paragraph 28:

This relates to women kept in concubinage, for the term employed is "females" (yoshid). The text of Narada likewise relates to concubines.

5. There is nothing in these texts to indicate that the question whether or not a concubine has children has any bearing on her right to maintenance. The learned editor of the latest edition of Mayne's Hindu Law p. 824 points out the lack of authority for the pronouncement of Spencer, J., to which I have referred and expresses the opinion that a barren concubine is entitled to maintenance just as much as a barren widow. In the case of Bai Nagubai v. Bai Monghibai (1926) 51 M.L.J. 577 : L.R. 53 IndAp 153 : ILR 50 Bom. 604 , the Privy Council had occasion to deal at length with the question of the right of a concubine to maintenance, particularly with reference to what is required to bring a concubine within the category of avarudha stri. That was a case in which the woman in question had a child and their Lordships do not consider whether the right of maintenance is or is not affected by the existence or absence of children. But they do lay down that a woman may be an avarudha stri under modern conditions even if she is not living with the family of her paramour, thus overruling one of the conditions which Spencer, J., accepts as necessary to support the claim of a concubine to maintenance. The argument from silence is, of course, dangerous, but it may be remarked that the judgment contains no reference to any limitation of the right to maintenance to concubines who have children. It seems to me with great respect that the proposition laid down in the obiter dictum of Spencer, J., is one which has been constructed on an erroneous inference from the sentence in Strange's Hindu Law and the sentence in Khemkor's case (1873) 10 B.H.C.R. 381 to which I have referred, that it is unsupported by any text and that it cannot be held to be authoritative. There is no apparent logical or moral basis for the alleged rule and it has not been shown to have the support of custom. I therefore come to the conclusion that a

permanently Kept concubine of a Hindu may be entitled to maintenance even though she is childless. This disposes of the main question in the present appeal.

6. The subsidiary question relates to the propriety of the order of remand. The learned District Munsif did record a finding as to the proper rate of maintenance when holding that the plaintiff was not entitled to maintenance at all. He records however that there is practically no evidence regarding the income of the estate of the deceased paramour of the plaintiff. When hearing the appeal the learned Subordinate Judge found that the plaintiff was entitled to maintenance and having regard to the fact that the plaintiff had got a decree in a connected suit for a certain debt due from the estate of the deceased and that there was another claim for maintenance against the same estate brought by a widow of the deceased which had been remanded for taking further evidence as to the quantum of the assets and liabilities of the estate, the learned Subordinate Judge came to the conclusion that it was desirable to remand this suit also for further evidence on the same point, the evidence in both suits to be taken in common. The parties agreed to the latter course. But it is contended in appeal that there was no justification for the remand having regard to the fact that the amount of maintenance had already been decided on the evidence available by the trial Judge. With some hesitation I come to the conclusion that there are no sufficient grounds for interfering with the remand order. As a general rule it is undesirable to remand a case merely in order to give an opportunity to both parties to adduce evidence which might and ought to have been put before the trial Court; and there is a clear danger that such a remand order may in effect be an invitation to perjury. But in the circum-stances of the present case there was something to be said for the remand. The claim for maintenance of the plaintiff and the claim for maintenance of the widow in the connected suit both had to be borne by the estate of the deceased which also had to meet the decree in the present appellant's other suit. In order to arrive at the correct rate of maintenance to the widow and to the concubine it was desirable to consider both claims with reference to the available assets and the demands legitimately made upon such assets. From this point of view there is a good deal to be said for deciding the two maintenance claims contemporaneously after a full enquiry regarding the available assets. I do not therefore think it necessary to interfere with the order of remand and I uphold the learned Subordinate Judge's view as to the legality of the plaintiff's claim for maintenance.

7. In the result therefore the appeal is dismissed with costs.

8. Leave to appeal granted.