

BOMBAY HIGH COURT

Akku Prahlad Kulkarni

Vs.

Ganesh Prahlad Kulkarni

(Lokur, N.J. Wadia and Rajadhyaksha, JJ.)

13.03.1944

JUDGMENT

Lokur, J.

1. This second appeal raises an important question of Hindu law regarding the status of a permanently kept concubine whose husband is living, and her right to be maintained out of her paramour's estate after his death. The facts of the case, as found by the Courts below are not disputed here. The plaintiff's father Pralhad died in 1933, having made a gift of some of his ancestral joint family property to defendant 1, who was in his exclusive and continuous keeping as his mistress for seventeen years till his death, although her husband is still living and has not divorced her. The plaintiff filed this suit to recover possession of the said property from her on the ground that the gift was invalid and not binding on him. Both the Courts below have held that the property being ancestral joint property, its gift by the plaintiff's father is invalid and the plaintiff is entitled to recover its possession from defendant 1. The trial Court, however, held that as defendant 1 was the permanently kept mistress of the plaintiff's father and had remained faithful to him, she was entitled to be maintained out of his estate. The plaintiff was, therefore, given a decree for possession of the property in suit, subject to the obligation of making provision for her maintenance, the quantum of the maintenance and the manner of securing it being left to be determined in execution proceedings. In appeal the learned District Judge held that defendant 1's intercourse with the plaintiff's father being adulterous, she was not his avarudha stree and was not entitled to be maintained out of his estate after his death. He, therefore, allowed the appeal and gave the plaintiff an unconditional decree for possession. The simple question in this appeal is whether defendant 1 can claim maintenance out of her deceased paramour's estate in the hands of his son. As I shall presently show, there is a conflict of decisions of this High Court regarding this question, and so it is necessary to review the whole law on the point, with special reference to the ancient texts. Defendant 1 left her husband many years ago and lived faithfully with the plaintiff's father as his exclusively kept mistress for a period of nearly seventeen years till his death. She was thus his "permanent concubine," and, to use the words of Lord Darling in *Bai Nagubai v. Bai Monghibai*¹ she possessed a recognized status below that of wife and above that of harlot, almost a wife, according to ancient authorities, the distinction of the concubine from harlots being due to a modified chastity, in that she was affected to one man only, although in an irregular union merely. Harlots solicited to immorality; concubines were reserved by one man.

¹ A.I.R 1926 P.C. 73

There is no express Smriti text specially providing maintenance to a concubine. The basis of the recognition of the status of a concubine and her right to be maintained out of her deceased paramour's estate is the texts of Katyayana and Narada cited and explained by Vijnaneshwara in Mitakshara, c. II, Section 1, pl. 7, 27 and 28. In pl. 7 a wife's right of inheritance to the property of her deceased husband is mentioned and in pl. 27 Vijnaneshwara says:

Heirless property goes to the king, deducting, however, a subsistence for the females as well as the funeral charges... That is excluding or setting apart a sufficiency for the food and raiment of the women, 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.

2. Farther explaining this Vijnaneshwara says in pl. 28, This relates to women kept in concubinage: for the term employed is 'female' (yoshit). The text of Narada likewise relates to concubines; since the word there used is 'women' (stree):" vide Colebrooke's treatise on the Hindu Law of Inheritance, 335.

3. The word used for "women kept in concubinage" and "concubines" in the original is avaruddha stree. Similarly in pl. 7 Vijnaneshwara quoting Narada says, Among brothers, if any one dies 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. But, if they behave otherwise the brethren may resume that allowance.

4. Here also the Sanskrit word for "women" is "stree" in the same sense. The same view is expressed in Vyavahara Mayukha, c. IV, Sections 8,5,6 and 7(vide Mandlik, p. 149). It is true that the texts quoted were dealing generally with provision for the "women" of deceased coparceners and it is on the authority of these texts that the widows of deceased coparceners are held entitled to be maintained by the survivors. But as observed by Nanabhai Haridas J. in *Yashvantraw v. Kashibai*² whether those text-writers really intended to include in the expression "women" "concubines" or "kept women" it is now unnecessary to speculate. It suffices for us that commentators and judicial authorities have distinctly declared that they are so included, and it is not disputed that an avaruddha stree is, after her paramour's death, entitled to be maintained out of his estate, but judicial decisions have from time to time placed several limitations or conditions on that right.

5. The first condition is that she must have been continuously and exclusively in his keeping. This follows from the very word avaruddha (restricted). How long she should thus be in his exclusive keeping before his death, in order to be entitled to claim maintenance out of his estate after his death, cannot be fixed by any hard and fast rule. As observed by Chandavarkar J. in *Ningareddi v. Lakshmawa*³ she must have been so long kept continuously till his death that it can be said that the connexion had become permanent, and it is only then, that is on his death, that his estate in the hands of those who take it becomes liable to her maintenance. She can have no claim of maintenance against him during his lifetime, since he can discard her at any time at his will: *Ramanarasu v. Buchamma (1900) 23 Mad. 282*. In *Bai Nagubai v. Bai Monghibai*⁴ a

²12 Bom. 26(Supra)

⁴A.I.R. 1926 P.C. 73

³26 Bom. 163

period of five years was held to be sufficient. In the present case defendant 1 was in the exclusive

keeping of the plaintiff's father for 17 years. It can, therefore, be safely said that her connexion with the plaintiff's father was permanent and the first condition has been fulfilled. The second condition is that she must preserve sexual fidelity to her deceased paramour. The reasons for this condition are to be found in the judgment of Nanabhai Haridas J. in *Yashvantraw v. Kashibai*⁵ There is no allegation in this case that after the plaintiff's father's death defendant 1 has not preserved her fidelity to him, and if she is found entitled to maintenance out of his estate, it will be available to her only as long as she preserves her fidelity to the deceased. A third condition was sought to be laid down in *Bai Monghibai v. Bai Nagubai*⁶ viz., that her connexion with her deceased paramour should be perfectly open and recognised and she must have been kept practically as a member of his family. But in *Bai Nagubai v. Bai Monghibai*⁷ the Judicial Committee held that it was not necessary that she should have resided in the same house with the deceased together with his wife and the regular members of his family; and in *Dayavati v. Kesarbai*⁸ it has been held that it is not even necessary that she should have been recognised by the family of the deceased or that her relationship with the deceased should have been open or known to his family. A fourth condition mentioned in *Dayavati v. Kesarbai*⁹ is that she must be the mother of illegitimate children by him. In this case it is not necessary to consider whether that is an essential condition for the claim of an avaruddha stree to be maintained out of the estate of her deceased paramour, since defendant 1 has been the mother of an illegitimate child by the plaintiff's father. I may add that in this Province this condition has never been considered as essential. Lastly, in *Anandilal Stagehand v. Chandrabai*¹⁰ Shah Ag. C.J. and Crump J. imposed a further condition that her intercourse with her paramour should not have been adulterous. This condition is not fulfilled in the case of defendant 1 as she was married when she went into the keeping of the plaintiff's father and her husband, who never divorced her, is still living. It is now urged that this condition is not warranted by any text and is opposed to what was the settled law for over half a century at least. I shall, therefore, first consider the texts and then the judicial decisions on this point. As I have already pointed out, in the texts of Katyayana and Narada quoted by Vijaneshwara the words used are yoshit and stree respectively, which have been interpreted as including avaruddha stree, which literally means "a woman subject to control or restraint." What is meant by avaruddha is explained by Vijaneshwara himself in his commentary on Yajnavalkya's verse 290 in c. xxiv dealing with 'stree sangrahana.' That verse prescribes a fine of fifty panas for any-one who has intercourse with dasis and others who are avaruddha or bhujishya, even though intercourse with them may be permissible. In his commentary on this verse, Vijaneshwara has explained what is meant by avaruddha and bhujishya. According to Gharpure's translation (page 406) avaruddha means 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.

6. Bhujishya, according to Gharpure's translation, means "restricted in the matter of sexual intercourse to certain persons." M.M. Kane argues that bhujishya, therefore, means a woman who is restricted to any limited number of persons and not necessarily restricted to one man. The Sanskrit words used are purushaniyataparigraha and Balambhatti has explained the word "purusha" as meaning "swamibhinna" (other than the master): vide

⁵ 12 Bom. 26(Supra)

⁷ A.I.R. 1926 P.C. 73

⁹ A.I.R 1934 Bom. 66

⁶ A.I.R. 1923 Bom. 130(Supra)

⁸ A.I.R 1934 Bom. 66

¹⁰ A.I.R. 1924 Bom. 311

Setlur's Mitakshara, Vol. 1, p. 1105. The correct translation of the definition of bhujishya would, therefore, be "a mistress who is restrained from intercourse with other persons (other than the swami or master)". This shows that the only distinction between an avaruddha stree and a

bhujishya stree is that the former is required to stay in the house of her paramour with the object of avoiding any lapse of service. Every avaruddha is a bhujishya and a bhujishya has only to live in the house of her paramour in order to become an avaruddha. The Judicial Committee has now held in *Bai Nagubai v. Bai Monghibai*¹¹ that since the emancipation of slaves, residence in the house of the paramour is not necessary to entitle a concubine to claim maintenance out of her paramour's estate after his death. Hence even a bhujishya, if she remains in the keeping of one man till his death and can be regarded as his permanent concubine, will be entitled to maintenance, so long as she preserves her sexual fidelity to him. In interpreting the expression "tathaiva cha" in Yajnavalkya's verse, Vijnaneshwara says that thereby even veshyas (harlots), swairinis (wanton women) and sadharanastris (common prostitutes), who are bhujishya, are included and adds: "Having been kept by another, they are as good as his wives." In support of this he has cited Narada's text which may be rendered as follows:

A wanton woman (swairini), one who is not a Brahmin, a veshya (a prostitute) or a nishkasini (slave who has been discarded by her paramour): intercourse with these is permissible when they belong to a lower order but not when they belong to a higher order. When, however, any one of these is a bhujishya (exclusively kept by anyone), although intercourse with them is permissible, one must not approach them as they are in the exclusive keeping of another.

7. This shows that a swairini can be a bhujishya when she is exclusively kept by one man, and anyone else having intercourse with her incurs the penalty of a fine. As regards the meaning of swairini, Vijnaneshwara, citing Manu, says that swairini is a woman who abandons her own husband and goes to another man of her own varna out of love for him. It thus appears clear that when a woman becomes restricted to one man, whether she is a swairini (a wanton woman having her husband living) or a veshya (harlot), she is to be looked upon as if she were his wife. It is not disputed that a harlot leading the life of a common prostitute can at any time stick to one man and become his avaruddha stree. In the above passage Vijnaneshwara has placed swairini also in the same category. This is still more clear from Vijnaneshwara's commentary on Yajnavalkya's verses 118 and 119 in the chapter on Dayawibhaga. In dealing with the partition of the assets of a deceased Hindu he says: "Swairini and others who are avaruddha by the father, though even in number, should not be divided among the sons." Commenting on this, Subodhini says that the word "though" indicates that they are certainly not divisible if they be uneven in number. This passage is translated by Colebrooke as follows:

But women (adulterous or others) kept in concubinage by the father must not be shared by the sons though equal in number.

8. This leaves no doubt that the father could have swairinis or adulterous women as his avaruddha strees or concubines. It follows, therefore, that a married woman leaving her husband and living with another as his permanently kept mistress can attain the status of an avaruddha stree by remaining faithful to him, although her connection with him may

¹¹ A.I.R. 1926 P.C. 73

be adulterous and according to the commentators an avaruddha stree is entitled to be maintained out of her deceased paramour's estate so long as she preserves her sexual fidelity to him. This is how the law stood under the ancient texts.

9. So far back as in 1832 a question arose about the right of an illegitimate daughter to succeed to her father's estate, her mother having married her father during the lifetime of her first husband without getting a divorce from him. The Pandits replied that the marriage was not legal and that the daughter was illegitimate and could not get a share in the father's property, but her father's heirs who would take his assets must support her (West & Buhler's Hindu Law, 4th Edn., p. 392). The reply does not say anything regarding her mother's maintenance, but the learned authors have added the following remark (p. 393):

As the husband of the second Pat-wife, is still alive, the woman cannot be correctly called a Patwife, but is an adulteress and concubine. As a concubine she has no right to inheritance, but only to maintenance for herself and her daughter from the heirs of the man under whose protection she lived. The concubine of a late proprietor is entitled to maintenance from his heirs.

10. Obviously this remark was based on the decision in *Khemkor v. Umiashankar 10 Bom*¹². In that case a reference was made to the High Court by the Judge of the Court of Small Causes, Ahmedabad, as to whether a Brahmin woman who had contracted marriage with a man of that caste during the lifetime of her first husband, and without his consent, was entitled to maintenance. The question was considered by Westropp C.J. and Nanabhai Haridas J. and they held that the woman could not be regarded as the lawful wife of her so-called second husband, but as the mother of his illegitimate children, that is to say, as his concubine, she was entitled to maintenance. In *Ningareddi v. Lakshmawa*¹³ one Govindraddi had kept as his mistress a married woman Lakshmawa whose husband was living. Govindraddi was joint with his son Ningareddi and made a gift of a portion of the ancestral family property to Lakshmawa for her maintenance in consideration of his past cohabitation with her. It was held that the gift was not binding on his son, but the son was bound to provide maintenance for her as she had lived with his father till his death and their connection was such as could be called permanent. On page 165, Crowe J. observed:

There can be no doubt on the authorities that a concubine is entitled to maintenance, though the connection was an adulterous one, provided that it was of a permanent nature.

11. Chandavarkar J. concurred in the decision. Although both these were decisions of Division Benches, yet in *Rama Raja Thavar v. Papanmal*¹⁴ Shah Ag. C.J. and Cramp J. took a different view and held that an adulterous intercourse, though continuous and exclusive, could not confer upon a concubine the status of an awaruddha stree and that she could not claim maintenance out of her paramour's estate after his death. In doing so Shah Ag. C.J. observed that the facts in *Khemkor v. Umiashankar*¹⁵ were distinguishable and that the remarks of Crowe J. in *Ningareddi v. Lakshmawa*¹⁶ were unnecessary for the

¹² H.C.R. 381

¹⁴ A.I.R. 1925 Mad. 1230(Supra)

¹⁶26 Bom. 163

¹³26 Bom. 163

¹⁵10 Bom. H.C.R. 381

decision of that case. I may say with the utmost respect that these observations are not justified by the facts of those cases. *Regarding Khemkor v. Umiashankar*¹⁷ Shah Ag. C.J. says (p. 208):

It is not clear that the husband of Khemkor was alive when Ranchhor, the person with

whom she lived as his mistress, died. The principal point considered in that case was whether the marriage between Khemkor and Banchhor was valid in view of the fact that the husband of Khemkor was alive at the time. The connection continued after that invalid marriage for a long time, namely 20 years: and there is nothing to show that the husband was alive at the time of Ranchhor's death or that he was alive during the best part of that period of 20 years.

12. It is true that if her husband died and she continued to be in the keeping of her paramour, her subsequent intercourse with him ceased to be adulterous and her previous adultery would not debar her from acquiring the status of an avaruddha stree subsequently: vide *Tukaram v. Dinkar*¹⁸ But if her husband was alive till her paramour's death and if that was a sufficient ground to disqualify her for claiming maintenance as his concubine, the question of her husband's death would have been raised and considered in *Khemkor v. Umiashankar*¹⁹ It was known that her husband was living when her paramour went through the form of a marriage with her and yet she was awarded maintenance out of his estate regardless of the question as to whether her connection continued to be adulterous until his death. This shows that it was taken for granted that even if the intercourse was throughout adulterous, she was entitled to claim maintenance out of his estate.

13. In *Ningareddi v. Lakshmawa*²⁰ Crowe J.'s observations are clear and unequivocal, and Shah Ag. C.J. says that those observations, which were not necessary for the decision of the case, are referable to an incorrect reading of *Khemkor v. Umiashankar*²¹ But the facts in *Ningareddi v. Lakshmawa*²² as set out in the judgment of the trial Court (at p. 164) clearly show that Lakshmawa was a married woman and her intercourse with her paramour was adulterous. It was, therefore, necessary to consider whether continuous and exclusive intercourse, though adulterous, would confer upon a concubine a right to maintenance out of her deceased paramour's estate, and Crowe J. definitely stated it as settled law that it would. With respect, I think that those observations were not obiter, but were quite necessary for determining Lakshmawa's claim to maintenance in that case. It must, therefore, be said that *Rama Raja Thavar v. Papanmal*²³ really overrules the Division Bench rulings in *Khemkor v. Umiashankar*²⁴ and *Ningareddi v. Lakshmawa*²⁵ and I respectfully think that. there was really no sufficient reason to upset the law which had been settled for nearly 15 years.

14. The reasons which prevailed with Shah Ag. C.J. in doing 30 appear from his judgment to have been that an adulterous wife has a claim to bare maintenance against her husband if she gives up her misbehaviour, that adulterous intercourse cannot confer the status of an avaruddha stree, that her rightful residence is with her husband and her residence with her paramour is wrongful, that adultery is a grave offence and that the

¹⁷10 Bom. H.C.R. 381(Supra)

¹⁹10 Bom. H.C.R. 381(Supra)

²¹10 Bom. H.C.R. 381

¹⁸ A.I.R. 1931 Bom. 221

²⁰26 Bom. 163

²²26 Bom. 163

²³ A.I.R. 1925 Mad. 1230(Supra)

²⁵26 Bom. 163

²⁴10 Bom. H.C.R. 381

obligation to lead a chaste life even after the death of her paramour is inconsistent with her position as a married woman. In spite of all these considerations Vijnaneshwara, as I have already pointed out, regarded swairinis in the exclusive keeping of a father as his avaruddha strees not liable to be divided among his sons, and it was declared a crime for anyone to approach even such swairini concubines of another.

15. The Roman law recognized and regulated in concubinage (concubinatus) a permanent cohabitation, though without the sanction of marriage, between parties to whose marriage there was no legal obstacle, and in every case where such an obstacle existed, unless the obstacle was one merely founded on public policy, such as that of being Governor of a Province, who was not permitted to marry a native of that province, the law inflicted a punishment on parties cohabiting in defiance of law (Sandars' Institutes of Justinian, Edn. 2, p. 111). This restriction was for the purpose of legitimising the issue by her subsequent marriage with her paramour. But that condition is not necessary for the acquisition of the status of an avaruddha stree under the Hindu law and in *Bai Monghibai v. Bai Nagubai*²⁶ Shah Ag. C.J. observed (at p. 415) that a woman, with whom the connexion was perfectly open and recognised, and who was kept practically as a member of the family, though no marriage with her could be, or was in fact effected was an avaruddha stree. It is no doubt true that adultery is condemned in the strongest terms by all the Hindu law givers and is made punishable in various ways: *Rahi v. Govind*²⁷) Yet even an unchaste wife, if she gives up her misbehaviour, is declared entitled to bare maintenance: *Parami v. Mahadevi*²⁸. It was held in *Rahi v. Govind*²⁹ that though a son born of adulterous intercourse be not a dasiputra entitled to inheritance, he was yet entitled to be maintained out of the assets of his father. I do not find any remarks in that case which, as remarked by Shah Ag. C.J. in *Rama Raja Thavar v. Papanmal*³⁰ it is difficult to reconcile with the view that the existence of the husband does not debar a permanently kept mistress from acquiring the status of an avaruddha stree.

16. What seems to have weighed most with the learned Judges who decided *Rama Raja Thavar v. Papanmal*³¹ is that adultery is recognized as a grave crime and it would be against public policy to allow a woman to acquire a recognized status, with valuable rights attached to it, by violating the law every time she consorts with her paramour. But when the husband allows his wife to live in adultery with her paramour so long that their connection may be deemed to be "permanent," he must be taken to have deserted her and connived at her incontinence. Even under Section 497, Penal Code, such connivance is a good defence to the charge of adultery. If in such circumstances the woman lives permanently and exclusively in the keeping of one man till his death, then there is a moral obligation on the part of the man's heirs to see that she should not be left destitute after his death. As observed by Spencer J. in *Dayavati v. Kesarbai*³²

The question is not really so much one of the legal relationship between a man and a woman as of equity that a woman who has been kept for a number of years and given a position almost equal to that of a wife should not be left to starve after the death of the man who kept her. Thus, it is a matter not of a contract during the lifetime of the parties but of obligations arising out of the personal law of Hindus as defined by their religious texts.

²⁶ A.I.R. 1923 Bom. 130(Supra) ²⁸34 Bom. 278

³⁰ A.I.R. 1925 Mad. 1230(Supra)

³² A.I.R 1934

Bom. 66

²⁷1 Bom. 97

²⁹1 Bom. 97

³¹ A.I.R. 1925 Mad. 1230(Supra)

17. Although the question of adultery did not directly arise before the Judicial Committee in *Bai Nagubai v. Bai Monghibai*³³ their Lordships have expressly said (at p. 162) that "providing the concubine be permanent until the death of the paramour, and sexual fidelity to him be preserved, the right to maintenance is established. These are the only two conditions laid down by their Lordships, and referring to the case in *Ningareddi v. Lakshmawa*³⁴ in which maintenance was

allowed out of the estate of the deceased to his permanently kept mistress, although her intercourse with him was adulterous, their Lordships said that it was "a decision whose authority has not been questioned." M.M. Kane argues that their Lordships quoted only the headnote of that case and their remark was intended to apply to that only. But it is difficult to believe that their Lordships lost sight of the facts of that case or did not read the proposition of law laid down by Crowe J. in the very opening of his judgment. Had their Lordships not agreed with that proposition, they would not have accorded their unqualified approval to the decision in that case. By reason of their indirect concurrence in the view taken in *Ningareddi v. Lakshmawa*³⁵ it may even be said that the decision in *Rama Raja Thavar v. Papanmal*³⁶ is no longer good law. Even apart from that, on a correct interpretation of the law laid down by the Mitakshara, I respectfully prefer to follow the earlier decisions in *Khemkor v. Umiashankar*³⁷ and *Ningareddi v. Lakshmawa*³⁸ and hold that defendant 1 is entitled to claim maintenance out of the estate of the plaintiff's father as his avaruddha stree so long as she preserves her sexual fidelity to him. The appeal must be allowed. The decree of the lower appellate Court is set aside and that of the trial Court restored. The plaintiff shall pay defendant 1's costs in this. Court and in the lower appellate Court.

N.J. Wadia, J.

18. I agree and have nothing to add.

Rajadhyaksha, J.

19. This is an appeal against an order passed by the District Judge of Satara in civil Appeal No. 301 of 1940 reversing the order of the Subordinate Judge of Tasgaon in civil Suit No. 179 of 1939. The facts of the case as found by the two lower Courts are as follows. The plaintiff's father was one Pralhad Kulkarni, who died in the year 1933. Defendant 1 Akku kom Narsu was his mistress and lived with him continuously for 25 years up to his death. She had also a son born to her from him. On 1st June 1927, by Ex. 23, he made a gift of Palus Survey No. 770/9A in her favour. After the death of Pralhad in 1933, the plaintiff filed the present suit to recover possession of the property gifted to defendant 1 on the ground that the gift was illegal and invalid as the property was joint and ancestral property of the family, and Pralhad had no right to make a gift of it. He further alleged that defendant 1's husband was living and that as the mistress of his father she led an adulterous life. He, therefore, contended that the transaction was not binding upon him.

20. Defendant 1 resisted the suit alleging, inter alia, that she was not married to one Narsu Mhaske, that she had heard people say that she was married to Narsu, that she had never seen her husband, much less lived with him, that she had left her parents' house when she

³³ A.I.R. 1926 P.C.73

³⁵26 Bom. 163

³⁷10 Bom. H.C.R. 381

³⁴26 Bom. 163

³⁶ A.I.R. 1925ad. 1230

³⁸26 Bom. 163

was a child of eight or nine years and had thereafter lived continuously as the mistress of Pralhad. She denied that she was legally married to Narsu or that her husband was alive. She contended that even if her husband was alive, it must be assumed that her marriage with him was dissolved. She urged that the gift in her favour was valid and binding upon the plaintiff.

21. The learned trial Judge found that the defendant was married to Narsu and that her husband

was living. He held that her marriage with Narsu was not dissolved, and that even so, she was in the exclusive and continuous keeping of the plaintiff's father Pralhad as his mistress. Relying upon the decisions of this Court in *Khemkor v. Umiashankar 10 Bom. H.C.R. 381(Supra)* and *Ningareddi v. Lakshmawa*³⁹ he held that although her connexion with Pralhad was adulterous in character, it did not preclude her from claiming the status of an avaruddha stree and as such getting maintenance out of the property left by Pralhad. He expressed an opinion that the later ruling of this Court in *Rama Raja Thavar v. Papanmal*⁴⁰, did not have the effect of overruling the earlier decisions. He accordingly passed an order directing the defendant to deliver possession of the suit property to the plaintiff subject to the obligation imposed upon the plaintiff of making provision for defendant's maintenance. He ordered that the quantum of maintenance admissible to the defendant and the manner in which it shall be secured should be determined in execution.

22. Against that order the plaintiff filed an appeal to the District Court. The learned District Judge agreed with the lower Court on the finding of fact, viz., that the defendant and Narsu had never lived as husband and wife except for some short time during the childhood of the defendant, that she had left her husband over 25 years ago even before she attained puberty and that she had since then lived exclusively as the mistress of the plaintiff's father Pralhad up to the time of his death. He found that the defendant's marriage with Narsu had not been dissolved and that her connexion with Pralhad was throughout adulterous. For these reasons, relying upon the decision in *Rama Raja Thavar v. Papanmal A.I.R. 1925 Mad. 1230(Supra)(Supra)* he was of opinion that the defendant could not claim the status of an avaruddha stree and was therefore not entitled even to maintenance. As the earlier decisions in *Khemkor v. Umiashankar 10 Bom. H.C.R. 381(Supra)* and *Ningareddi v. Lakshmawa 26 Bom. 163(Supra)* had been considered and distinguished in the later decision in *Rama Raja Thavar v. Papanmal A.I.R. 1925 Mad. 1230(Supra)(Supra)* he considered that this latter decision was binding upon the Subordinate Courts. He therefore allowed the appeal and modified the decree of the lower Court by deleting the order which required the plaintiff to take the property, subject to the obligation of making provision for the defendant's maintenance. Against that order the defendant has come in second appeal.

23. The point that arises for decision is whether although the defendant was, up to the death of Pralhad, exclusively in his keeping as his mistress, she is deprived of the status of an avaruddha stree by reason of the fact that her husband was living and is therefore not entitled to claim maintenance out of the estate of Pralhad. The point is covered by the decision of this Court in *Rama Raja Thavar v. Papanmal A.I.R. 1925 Mad. 1230(Supra)(Supra)*. But it has been contended by Mr. Gajendragadkar for the appellant that the ruling in that case is in conflict with the earlier decision in *Khemkor v. Umiashankar 10 Bom. H.C.R. 381(Supra)* and *Ningareddi v. Lakshmawa 26 Bom. 163(Supra)* and as it has unsettled the

³⁹26 Bom. 163

⁴⁰ A.I.R. 1925 Mad. 1230(Supra)

law which was till

then considered to be well-established, the ruling in *Rama Raja Thavar v. Papanmal A.I.R. 1925 Mad. 1230(Supra)(Supra)* requires to be reconsidered.

24. The earliest case on the point is *Khemkor v. Umiashankar 10 Bom. H.C.R. 381(Supra)*. In that case, Khemkor, the plaintiff, considered herself married to one Ranchhor while her former husband was alive, and, on the death of Ranchhor, claimed maintenance out of his estate, even

though she was not his legal wife. The Judge of the Court of Small Causes, Ahmedabad, in his order of reference expressed his opinion that the plaintiff could not be considered Ranchhor's legal wife and that she must be viewed in the light of a concubine. Even so, he thought that she was, as such, entitled to maintenance out of the property of the deceased. The reference was heard by Westropp C.J. and Nanabhai Haridas J. They concurred in the opinion of the Judge of the Court of Small Causes of Ahmedabad that the plaintiff Khemkor could not be regarded as the lawful wife of Banchhor, she having been married in the lifetime of her first husband without the consent of that husband. They also agreed with the Judge in thinking that as the mother of illegitimate children of Ranchhor, that is as his concubine, she was entitled to maintenance. The same view was taken in *Ningareddi v. Lakshmawa*⁴¹ by Crowe and Chandavarkar JJ. The facts of that case are almost similar to the facts before us. It was held therein that (p. 168):

Where in a joint Hindu family a father makes a gift of a portion of the family property, during his lifetime, by way of maintenance to his concubine in consideration of past cohabitation, the gift is not binding on his son, though the son is bound to provide maintenance for a concubine who lived with his father till his death. 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. It is only on his death that his estate in the hands of those who take it becomes liable for her maintenance.

In the course of the judgment Crowe J. observed (p. 165):

There can be no doubt on the authorities that a concubine is entitled to maintenance, though the connexion was an adulterous one, provided that it was of a permanent nature.

Chandavarkar J. stated at p. 170 as follows:

Having regard to the finding of the District Court that after the execution of the deed, the defendant continued to be in the keeping of the plaintiff's father until his death and that the connexion then became permanent, we must hold that the defendant became entitled to maintenance after the death of the plaintiff's father, and she cannot be deprived of the property in dispute unless provision is made for the maintenance by the plaintiff.

On the authority of these two decisions, it was well understood that a concubine in the permanent and exclusive keeping of her paramour was entitled to maintenance

⁴¹(02) 26 Bom. 163

out of the estate of her paramour even though her connexion with him was adulterous in character by reason of the fact that her husband was alive. The case in *Yashvantraw v. Kashibai*⁴² laid down a further condition that continued continence was, under the Hindu law, a condition precedent to a deceased coparcener's concubine claiming maintenance. That is how the law stood and was understood by the well-known text-book writers until 1922. In that year, the case in *Bai Monghibai v. Bai Nagubai*⁴³ was decided by Sir Lallubhai Shah, Ag. C.J., and Crump J. It was held in that case that the rule of Hindu law

which allows maintenance to a mistress in the exclusive keeping of a deceased person out of the income of his estate is strictly limited to the avaruddha stree, i.e., a continuously kept concubine with whom the connexion of the deceased was perfectly open and recognized and who was kept practically as a member of the family though no marriage with her could be or was in fact effected. In that case Bai Nagubai who claimed maintenance as the mistress of one Vasanji was found by the Court to be a concubine in the exclusive keeping of Vasanji up to the day of his death; but as she did not live with Vasanji in his house as a member of the family, the Court held that she could not claim the status of an avaruddha stree properly so called and was, therefore, not entitled to maintenance. This view, however, was rejected by the Privy Council when the matter went in appeal before them in *Bai Nagubai v. Bai Monghibai*⁴⁴ Their Lordships of the Privy Council laid down: The right in Bombay of a concubine of a deceased Hindu to maintenance out of his estate exists only in the case of a woman properly called 'avaruddha', but it is not now a condition to the right that she should have resided in the same house with the deceased together with his wife and regular family, whatever may have been the case when a concubine was a slave of the household.

25. Then we come to the case in *Rama Raja Thavar v. Papanmal A.I.R. 1925 Mad. 1230(Supra)*.(Supra) In that case Chandrabai, the plaintiff, claimed maintenance as the kept mistress of the deceased Chauthmal and alleged that for nearly four years prior, to his death she had been living with him as his wife and that, therefore, on his death she was entitled to be maintained out of his estate. In defence it was pleaded that as the plaintiff's husband Tatyia was alive, the connection between the plaintiff and the deceased Chauthmal was adulterous and that, therefore, she was not entitled to maintenance out of the estate of Chauthmal as she could not be regarded as an avaruddha stree. Shah C.J. and Crump J., before whom the matter came in appeal, upheld the defence contention that the plaintiff could not be regarded as an avaruddha stree entitled to be maintained out of the estate of her paramour and distinguished the earlier cases of *Khemkor v. Umiashankar 10 Bom. H.C.R. 381(Supra)* and *Ningareddi v. Lakshmawa 26 Bom. 163(Supra)* Shah C.J. observed (p. 68)

I should have referred this point for decision to a Full Bench if I were satisfied that the point, which we have to decide was covered by the decision in *Khemkor v. Umiashankar 10 Bom. H.C.R. 381(Supra)* As on the facts the case is distinguishable and as I am clear that a kept mistress whose husband is alive cannot be treated as an avaruddha stree who is entitled to maintenance on the death of her paramour out of his estate, I see no objection to give effect to that view.

⁴²(88) 12 Bom. 26(Supra) ⁴⁴ A.I.R. 1926 P.C. 73

⁴³ A.I.R. 1923 Bom. 130(Supra)

26. As pointed out by Sir Dinshah Mulla at p. 588 of his "Principles of Hindu Law:

This ruling was inconsistent with what was understood to have been held in *Khemkor v. Umiashankar 10 Bom. H.C.R. 381(Supra)* viz., that a woman may be an avaruddha stree although her husband was alive during the period of her keeping.

It is now urged before us that that case, overruling as it did what was understood to have been the law for over fifty years, was not correctly decided and the decision requires to be reconsidered. It, therefore, becomes necessary for us to examine somewhat closely the reasons which led the learned Judge to take the view which he did. In the course of his judgment at p. 66 the learned Judge observes:

Such a woman (that is a woman living adulterously in the keeping of another) cannot be an avaruddha stree such as could acquire the right to be maintained out of the estate of her paramour. All along her rightful residence would be with her husband and the residence with her paramour wholly wrongful. The idea of an avaruddha stree is inconsistent with the position which such a woman occupies. Further, the obligation to lead a chaste life after the death of the man with whom she lived an adulterous life is not possible of fulfilment according to law when the husband is alive at the time of her paramour's death. The view taken in *Yashvantraw v. Kashibai* ('88) 12 Bom. 26(Supra) as regards the obligation of a woman kept in concubinage to lead a chaste life can have no application to a woman kept in that manner when her husband is alive... It is clear to my mind that a woman in the position of the plaintiff cannot claim to be maintained out of the deceased paramour's estate when her husband has been alive during the whole period of her adulterous connection.

The learned Judge has given no authorities, textual or otherwise, for this particular view of the words "avaruddha stree". Although this particular point did not then arise for decision, the learned Judge himself has considered elaborately the meaning of the words "avaruddha stree" in the case which he decided ten months earlier, *Bai Monghibai v. Bai Nagubai* A.I.R. 1923 Bom. 130.(Supra) The texts hearing on the question are set out in detail by him at pages 408 to 411 and also by their Lordships of the Privy Council when the matter went in appeal before them in *Bai Nagubai v. Bai Monghibai* A.I.R. 1926 P.C. 73(Supra) at pages 159 and 160. It is, therefore, not necessary to repeat them here, except in so far as it becomes necessary to do so to consider the arguments advanced before us. In laying down the right of females of the family to maintenance out of the estates of the deceased, the text of Katyayana uses the word "yoshit" and that of Narada the word 'stree' (paras. 27 and 28 of c. II, Section 1 in the Commentary on verses 135 and 136). In explaining the use of these words as including "women kept in concubinage," Vijnaneshwara uses the words "avaruddha stree." The words "avaruddha stree" are also used in referring to women kept in concubinage, while dealing with "effects not liable to partition" both in the Mitakshara (para. 22 in the Commentary on verses 118 and 119) and in Vyavahara-Mayukha (Mandlik's Hindu Law, p. 70 and Sanskrit text of Vyavahara-Mayukha edited by Gharpure, p. 57). The words "avaruddha stree" occurring in verse 290 of Yajnavalkya in Vyavahara Adhyaya have been explained by Vijnaneshwara as "women 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." A doubt, whether, when the original texts used the words, "stree" and "yoshit," they were intended to cover the cases of concubines, was expressed by Nanabhai Haridas J. in *Yashvantraw v. Kashibai* 12 Bom. 26.(Supra) At 28(Supra) the learned Judge observes:

There are texts providing generally for 'women' of deceased coparceners. It is under those

texts that the widows of such coparceners are held entitled to be maintained by the survivors; and they lay down the condition of continued chastity. Whether those text-writers really intended to include in the expression 'women' concubines or 'kept women' it is now unnecessary to speculate. It suffices for us that commentators and judicial authorities have distinctly declared that they are so included. But if they are so included, the restriction of continued chastity imposed by the text must equally apply to them, as otherwise they would be in a more advantageous position than the widows.

27. Sir Lallubhai Shah gave expression to the same doubt in *Bai Monghibai v. Bai Nagubai* A.I.R. 1923 Bom. 130(Supra) of the report he observed:

It may be open to doubt whether the original texts of Katyayana and Narada which have been interpreted as referring to 'avaruddha stree' by commentators like Vijnaneshvara and Nilakantha, were originally intended to cover the case of an 'avaruddha stree. 'But, as observed by Nanabhai Haridas J. in *Yashvantraw v. Kashibai* 12 Bom. 26(Supra) as the commentators whose opinion is part of Hindu law which the Courts have to administer have accepted that view there is no going behind it; and if an attempt is to be made to discover the reason of this rule, it seems to me to rest on the consideration that if the woman lives practically as a dependent member of the family and accepts all the limitations, though unmarried, of a married life openly and avowedly, she gets the benefit of the rule which makes it obligatory upon the heirs of a Hindu householder to maintain the women of the family.

28. In dealing with fines imposable on persons Yajnavalkya lays down the rules as follows in verse 290:

It is clear that some distinction is contemplated between the words "avaruddha" and "bhujishya," and it was argued by Mahamahopadhyaya Kane that a woman who deserts her husband and lives in adultery with some one else (who is correctly described as that woman who abandons her husband and goes to another man of her own varna out of love for him is called swairini) may be a bhujishya but does not attain the status of an avaruddha stree. The word "avaruddha" is explained by Vijnaneshwara in the commentary as women prohibited by the master from intercourse with other men with an injunction to stay at home with the object of avoiding lapse of service. The exact words are: In describing bhujishya the words used are . Mahamahopadhyaya Kane argued that this meant "women restricted to particular persons in the matter of sexual intercourse and not to one person." This was how Mr. Gharpure translated it in his edition of Yajnavalkya Smriti of 1920; but in the 1939 edition of the work this line is translated as "women restricted in the matter of sexual intercourse to a certain person." Balambhatti in his commentary on the Mitakshara explains the word , i. e., other than her master. It cannot, therefore, be said that the word "bhujishya" connotes that the woman is restricted to a limited number of persons, otherwise the words used would have been . It is true that the

words used are not , but it is in this sense that the text has been understood by Balambhatti and translated, in my opinion correctly, by Mr. Gharpure. It would then appear that restriction in the matter of sexual intercourse to one person is a feature common to both avaruddha stree and bhujishya. In describing the former, a negative form of expression is used, viz., "Prohibited from having intercourse with any other man," and in describing the latter, a positive form is used, viz., "restricted to one person in the matter of sexual intercourse." The distinction between the two, therefore, is to be looked for in some other feature, and the one obvious from the text is the place of residence. In describing avaruddha stree, the words used are --"She should live in the house." These words do not occur in the definition of bhujishya. It was on these lines that a distinction was drawn between the two expressions by Crump. J. in *Bai Monghibai v. Bai Nagubai A.I.R. 1923 Bom. 130(Supra)* But the Privy Council held, when the case went in appeal before their Lordships, *Bai Nagubai v. Bai Monghibai A.I.R. 1926 P.C. 73(Supra)* that it is not a condition of the right of an avaruddha stree that she should have resided in the same house with the deceased together with his wife and regular family whatever may have been the case when a concubine was a slave of the household.

The practical distinction between an avaruddha stree and bhujishya has therefore disappeared. It is clear from the text and it was conceded by Mahamahopadhyaya Kane that it is possible for a swairini to be a bhujishya. If so, in view of the Privy Council ruling, it is possible for her under given conditions to attain the status of an avaruddha stree. This position seems to be further clear from the expression "avaruddha" used by Vijnaneshwara in the Commentary on verses The matter dealt with there is the partition of the property of the deceased father including the female slaves. The words used are: . It is translated by Mr. Gharpure as women kept in concubinage by the father, such as adulteresses and others, although even in number must not be shared by the sons.

It was suggested by Mahamahopadhyaya Kane that this text should be construed as meaning "concubines and adulteresses." But there is no conjunctive particle (and), and in my view the translation given by Mr. Gharpure is correct. To the same effect is the translation accepted by Sir Lallubhai Shah at p. 409 of the report in *Bai Monghibai v. Bai Nagubai A.I.R. 1923 Bom. 130(Supra)*. That is also the implication of the Commentary of Balambhatti at p. 149 of 1914 edition. This is, in my opinion, a clear indication that in the eye of the Hindu law, it is possible for a swairini--an adulteress--to be an avaruddha stree, provided she satisfies the other condition, viz., remains faithful to the paramour till his death and continues to be true to his memory. The mere existence of the husband, therefore, which makes the connection with the paramour adulterous would not come in the way of her becoming an avaruddha stree. After considering the texts the learned Judge, Sir Lallubhai Shah, lays down this dictum in *Bai Monghibai v. Bai Nagubai A.I.R. 1923 Bom. 130(Supra)* viz. that the rule was really restricted to the case of a woman, with whom the connexion was perfectly open and recognised, and who was kept practically as a member of the family, though no marriage with her could be, or was in fact, effected.

It would be noticed that in laying down this definition of an avaruddha stree, the learned Judge

does not say that the connexion must be a non-adulterous one. In fact, in coming to this view of the real scope of the word "avaruddha stree" the learned Judge has examined the earlier cases, including those in 10 Bom. H. G. B. 3819 and *Ningareddi v. Lakshmawa* 26 Bom. 163(Supra) and he observes (p. 414):

These cases to my mind clearly show that the woman concerned in each case had practically led the life of an 'avarudha' stri.

At page 412 the learned Judge observes:

All these cases were from the mofussil, and the facts in each case show that there was no dispute then that the relation in which the woman concerned stood to the person keeping her was that of an "avaruddha stree"... But the life which the woman in each of these cases led with her so-called husband or paramour was the life of an avaruddha stree as she practically lived as a wife and as a member of the family in the house of the man.

It is no doubt true that the precise point, viz. whether a woman who had her husband living could claim maintenance as an avaruddha stree did not arise for consideration in that case. But it is to be noted that although it was clear from the reports of the cases in *Khemkor v. Umiashankar* 10 Bom. H.C.R. 381(Supra) and *Ningareddi v. Lakshmawa* 26 Bom. 163(Supra) that the women who claimed maintenance had their husbands living, the learned Judge saw no difficulty in regarding that the woman in each case had led the life of an avaruddha stree. It is possible also to say that when the learned Judge used the expression "though the marriage with her could not be... effected," he had in mind cases like those in *Khemkor v. Umiashankar* 10 Bom. H.C.R. 381(Supra) and *Ningareddi v. Lakshmawa* 26 Bom. 163(Supra) where no valid marriage could take place because of the existence of the husband of the concubine. Kanga J., who was the trial Judge in that case, laid down the law as follows (see p. 426).

According to the authorities a Hindu is not bound to maintain his kept mistress in his lifetime. He can discard her at any moment and she cannot compel him to continue her in his keeping or to provide for her future maintenance. But where a Hindu woman has been kept by a Hindu until his death 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. Her right to maintenance is conditional upon her continued chastity.

And Crump J. observed (p. 427) that as a general statement of the law no exception can be taken to this provided it is remembered that the connexion denoted by the words 'kept mistress' must be of the nature which the Hindu law demands; and the only point which he emphasised as distinguishing the case of an avaruddha stree from that of bhujishya was that a kept mistress (avaruddha stree) must live in the house of her paramour. It is, therefore, obvious that in the view of his Lordship the fact that the connexion was an adulterous one was no bar to a kept mistress of a Hindu claiming maintenance as an avaruddha stree. The words "kept mistress" were till then understood to imply that the woman must be in the exclusive keeping of the paramour, and that the connexion must be

permanent in the sense that it continued up to the death of the paramour: see *Dayavati v. Kesarbai*⁴⁵ Her right to maintenance was, of course, conditional upon her continued chastity. It would thus appear that neither of the learned Judges who subsequently decided the case in *Rama Raja Thavar v. Papanmal A.I.R. 1925 Mad. 1230(Supra)* considered that the fact that the connexion of the concubine with her paramour was adulterous prevented her from claiming the status of an avaruddha stree. As I have already observed the texts in fact contemplate a swairini attaining the status of a bhujishya or an avaruddha stree.

29. Shah C.J., in *Rama Raja Thavar v. Papanmal A.I.R. 1925 Mad. 1230(Supra)* refers to the case in 1 Bom. 97 That was a case where the illegitimate son of a shndra claimed a share in the estate of his father. "Being the son of a kept woman he would have been entitled to a half share," as stated by Westropp C.J. at p. 115 of the report, and the learned Judge goes on to observe:

This being so, we have next to consider whether the special circumstance, that the intercourse between Teja Kurad and Gau, the mother of the plaintiff, was adulterous... alters the case.

Upon the authorities the learned Judge held that the plaintiff, being the result of an adulterous intercourse, could not take as heir even to the extent of half a share, but the plaintiff was entitled only to maintenance. As pointed out by Wallis C.J. in the Full Bench case in *Soundararajan v. Aruna*⁴⁶ The limitation as to her being an exclusive and continuous concubine is not to be found in the texts and appears to have been imposed by the Courts as necessary to secure due evidence of the paternity, just as the further restriction that the connexion must not have been incestuous or adulterous was imposed on general grounds of morality. Even though a concubine may be a married woman when the connexion begins (and therefore the connexion is adulterous) she can still be a dasi and her son a dasiputra provided the connexion has ceased to be adulterous when the son is conceived (i.e. where the husband of the concubine dies before conception) *Tukaram v. Dinkar*⁴⁷ It would thus be seen that the condition that the connection must be nonadulterous is one not imposed by texts, but on general grounds of morality and that too only where a son born of such an intercourse claims a share in the estate of his father. And even that requirement is modified to this extent that even though in its inception the connexion may be adulterous, the son is still entitled to a share in the estate of his father if the connexion ceased to be adulterous at the time of the conception. Even if it has not ceased to be adulterous at the time of conception, the son is still held entitled to maintenance although not entitled to a share in the estate of his father. All these considerations do not apply when the mistress herself claims maintenance. There is no authority, textual or otherwise, except the case in *Rama Raja Thavar v. Papanmal A.I.R. 1925 Mad. 1230(Supra)* for holding that a kept mistress whose connexion with her paramour is exclusive and permanent cannot claim the status of an avaruddha stree unless

⁴⁵ I.R 1934 Bom. 66

⁴⁷ A.I.R. 1931 Bom. 221

⁴⁶ A.I.R. 1916 Mad. 1170

the connexion is non-adulterous. The texts, if anything, support the contrary view. As I

have pointed out, the same learned Judges who took this view in the case in *Rama Raja Thavar v. Papanmal A.I.R. 1925 Mad. 1230(Supra)* regarded in *Bai Monghibai v. Bai Nagubai A.I.R. 1923 Bom. 130(Supra)* that the women concerned in *Khemkor v. Umiashankar 10 Bom. H.C.R. 381(Supra)* and *Ningareddi v. Lakshmawa 26 Bom. 163* did occupy the status of an avaruddha stree although it was clear that their connexion with the paramour was adulterous. It is, therefore, difficult to accept the view of the learned Judges in *Rama Raja Thavar v. Papanmal A.I.R. 1925 Mad. 1230(Supra)* that the idea of an avaruddha stree was inconsistent with the position which a woman living in adultery with her paramour occupies.

30. The learned Chief Justice in that case further thought that the obligation to lead a chaste life after the death of the man with whom she lived an adulterous life was not possible of fulfillment according to law when the husband is alive at the time of her paramour's death. I find it difficult to accept this reasoning for depriving the defendant in this case of the status of an avaruddha stree. It is true that the text of Narada which has been quoted in *Bai Monghibai v. Bai Nagubai A.I.R. 1923 Bom. 130(Supra)* lays down: "Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord." And following this text, it has been held in *Yashvantraw v. Kashibai 12 Bom. 26(Supra)* that "continued continence is, under the Hindu law, a condition precedent to a deceased coparcener's concubine claiming maintenance." But this condition of continued continence applies both to the widows and concubines, and is a condition precedent to their continuing to receive maintenance out of the estate of the deceased. But I cannot see why the mere existence of the husband of a concubine at the time of the paramour's death should make the obligation of leading a chaste life after his death impossible of fulfillment. If a kept mistress has continued to be faithful to her paramour for 25 years in spite of the existence of her husband (and this fidelity is a condition precedent to her being entitled to maintenance), I cannot see why she should not continue to be faithful to his memory even after his death. It may be that the husband may file a suit for restitution of conjugal rights against the kept mistress after the death of the paramour, a contingency which is, in the highest degree, remote. Such a suit may or may not be decreed. If she voluntarily goes to her husband or is compelled by law to go to him, then the moment she does so, she makes herself disentitled to receive any maintenance from the estate of her paramour. Otherwise her position and that of a widow are not dissimilar; and if the right of a widow to receive maintenance is conditional upon her leading the life of chastity, there is no reason why an avaruddha stree should not be placed in the same position, as indeed she has been, as decided in *Yashvantraw v. Kashibai 12 Bom. 26.(Supra)* In my opinion the existence of a husband does not necessarily make the condition impossible of fulfillment.

31. The limitation imposed by the learned Chief Justice in *Rama Raja Thavar v. Papanmal A.I.R. 1925 Mad. 1230(Supra)* upon the precise connotation of the word "avaruddha stree", imposed as it appears more by consideration of morality than anything else, was, as the learned Judge himself recognised, opposed to the two earlier decisions of this Court in *Khemkor v. Umiashankar 10 Bom. H.C.R. 381(Supra)* and *Ningareddi v. Lakshmawa 26 Bom. 163 (Supra)*. The learned Judge sought to distinguish *Khemkor v. Umiashankar 10 Bom. H.C.R. 381(Supra)* on the ground that it did not appear from the record whether Khemkor's husband was alive during the period of her living as a mistress of Ranchhor. The report of the case does not

give any indication one way or the other, but as the learned Judge himself states, the case was always referred to in the recognised books on Hindu law as if the existence of the husband would make no difference in the result. In *Ningareddi v. Lakshmawa* 26 Bom. 163(Supra) at least, the extract of the judgment of the trial Court reproduced in the report shows that Lakshmawa left her udki husband and went to live with Govindraddi and that their connexion was adulterous. Even so, the learned Judges in that case held her to be entitled to maintenance. Sir Lallubhai Shah considered that the observations of Crowe J. in that case, viz., There can be no doubt on the authorities that a concubine is entitled to maintenance though the connexion was an adulterous one provided it was of a permanent nature, were not necessary for the decision of that case. With respect I am not prepared to agree. It is true as Mahamahopadhyaya Kane argued that the main question then considered was the validity of the gift of ancestral property in favour of a concubine. But the learned Judges would never have ordered the payment of maintenance if they took the view that because Lakshmawa was living in adultery she was not entitled to maintenance. It is true that the point for consideration before Sir Lallubhai Shah in *Rama Raja Thavar v. Papanmal* A.I.R. 1925 Mad. 1230(Supra)was not expressly argued in *Ningareddi v. Lakshmawa* 26 Bom. 163 but we can only infer that the point was considered so well settled (as Crowe J. himself thought) since the decision in *Khemkor v. Umiashankar* 10 Bom. H.C.R. 381(Supra)and accepted without demur by text book-writers that no doubt was cast on the proposition to which Crowe J. gave expression. It is to be noted that Sir Narayan Chandavarkar J., an erudite Hindu Judge, was a party to that decision. Sir Lallubhai Shah also thought that the observations of Westropp C.J. in 1 Bom. 9711 showed that he read *Khemkor v. Umiashankar* 10 Bom. H.C.R. 381(Supra)as meaning that the adulterous connexion had ceased when Ranchhor died. I have carefully read the judgment of Westropp C.J. in 1 Bom. 97.11 But I am unable to see that the learned Judge took that view of *Khemkor v. Umiashankar* 10 Bom. H.C.R. 381" Even according to his reading of *Khemkor v. Umiashankar* 10 Bom. H.C.R. 381(Supra)and *Ningareddi v. Lakshmawa* 26 Bom. 163 Sir Lallubhai Shah thought that those decisions were correct, because at the date of the death of the paramour the husband of the mistress may not have been living. On this ground alone he distinguished on facts those cases from the one with which he was dealing, viz., the husband being alive when the paramour died. In laying down the law he observed at page 67 of the report: It is clear to my mind that a woman in the position of the plaintiff cannot claim to be maintained out of the deceased paramour's estate when her husband has been alive during the whole period of her adulterous connexion.

If I may say so with respect, this test, viz., whether her husband is alive or not at the date of the paramour's death, is bound to create an anomalous situation. If the husband dies one day after the paramour's death, then the mistress would not be entitled to maintenance; but if he dies one day before the death of the paramour, she would be so entitled, because on the day of the paramour's death the husband was dead and he "was not alive during the whole period of her adulterous connexion." It is difficult to justify this distinction on any logical basis. If, on the other hand, the right to receive maintenance is made to depend upon how long the connexion was adulterous and how long no adulterous, we shall be introducing an element of uncertainty in law which is to be deplored. Further, among the shudras where an illegitimate son is entitled to a share in the estate of his father, he is refused that share if the connexion was adulterous when he was conceived. But even then he is held entitled to maintenance. If so, it is somewhat difficult

to deny that privilege to his mother. Lastly, if a gift to the mistress by way of maintenance is regarded in the light of compensation for injury done to her by the past illicit cohabitation (as Sir Narayan Chandavarkar J. put it in *Ningareddi v. Lakshmawa* 26 Bom. 163 at p. 170)(Supra), it would appear that the justification for coimpenation by way of maintenance is greater in a case such as the one before us, where not only has an injury been done to the mistress by past illicit cohabitation, but she is actively or otherwise seduced from the path of rectitude and morality. As Spencer J. observed in *Dayavati v. Kesarbai* A.I.R 1934 Bom. 66,(Supra) the question is not really so much one of the legal relationship between a man and a woman as of equity that a woman who has been kept for a number of years and given a position almost equal to that of a wife should not be left to starve after the death of the man who kept her.

These observations would apply with almost equal force in a case such as the one before us, as the prospect of getting anything like adequate maintenance from her husband is, on the authorities, remote and is reduced to nothing when the husband is penurious. It may further be noted that *Ningareddi v. Lakshmawa*⁴⁷ was approved by their Lordships of the Privy Council in *Bai Nagubai v. Bai Monghibai*⁴⁸ At page 163 of the report they refer to *Ningareddi v. Lakshmawa* 26 Bom. 163(Supra) as " a decision whose authority has not been questioned." It is true as Mahamahopadhyaya Kane pointed out that this observation was made with respect to the particular point that their Lordships had to decide, viz., whether it was incumbent on the mistress to live in the paramour's house in order to entitle her to getmaintenance out of his estate after his death. But in stating the law, both Crowe J. in *Ningareddi v. Lakshmawa* 26 Bom. 163(Supra) and Kanga J. as the trial Judge in the case before their Lordships made a pointed reference to the right to maintenance of a concubine in the permanent and exclusive keeping of the paramour even though she was living in adultery. And yet their Lordships approved of the decision in *Ningareddi v. Lakshmawa* 26 Bom. 163 (Supra).A point similar to the one before us came up for decision before the Court of the Judicial Commissioner of Nagpur in *Kamtabai v. Umabai*⁴⁹, Macnair A.J.C. observes:

In *Rama Raja Thavar v. Papanmal* A.I.R. 1925 Mad. 1230(Supra)Shah Ag. C.T. and Crump J., held that a kept mistress whose husband was alive was not entitled to maintenance on the death of her paramour: bat these Judges in *Bai Monghibai v. Bai Nagubai* A.I.R. 1923 Bom. 130(Supra)had decided another question regarding the right of a concubine to maintenance and this decision was not approved by their Lordships of the Privy Council: *Bai Nagubai v. Bai Monghibai* A.I.R. 1926 P.C. 73(Supra). Although their Lordships of the Privy Council bad not to deal with the question which I am considering, they expressed approval of the case in *Ningareddi v. Lakshmawa* 26 Bom. 163(Supra) where it was held that even if the connexion was adulterous, the estate of the paramour might be liable for her maintenance.

⁴⁷29 Bom. 163

⁴⁹ AIR 1929 Nag 127

⁴⁸ A.I.R. 1926 P.C. 73

32. In Mayne's Hindu Law, 9th Edn., para. 450, it is stated that concubines are entitled to maintenance even though the connexion with them is an adulterous one. I respectfully think the

reasons given by Shah Ag. C.J. and Crump J. that a concubine is entitled to maintenance from her husband, that she cannot live a chaste life when her husband is alive at the time of her paramour's death are not entirely satisfactory. In my opinion, then, Mt. Umabai is entitled to maintenance although her husband is alive."

33. With very great respect to the learned Judges who decided the case in *Rama Raja Thavar v. Papanmal A.I.R. 1925 Mad. 1230(Supra)*. I am unable to accept the view taken therein either on the authority of texts, judicial decisions, or equity, and hold that a concubine who has been in the permanent and exclusive keeping of the paramour is entitled to maintenance out of his estate even though her connexion with him may have been adulterous in character, provided she continues to be chaste and faithful to his memory. I therefore agree with the order proposed by my learned brother.

.