(1937) 11 BOM CK 0011

Bombay High Court

Case No: Second Appeal No. 392 of 1934

The Secretary of State for India		APPELLANT
	Vs	
Ahalyabai Narayan Kulkarni		RESPONDENT

Date of Decision: Nov. 22, 1937

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 88
- Transfer of Property Act, 1882 - Section 100

Citation: AIR 1938 Bom 321 : (1938) 40 BOMLR 422

Hon'ble Judges: Divatia, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Divatia, J.

This appeal has been preferred by the Secretary of State for India in Council against a decree in favour of the plaintiffs for a certain amount claimed as arrears of maintenance and for marriage allowance from the estate of one Gopal whose property had been attached by Government u/s 88, Criminal Procedure Code, by a notification in 1921 as he was absconding after being charged with a criminal offence. The first plaintiff was the widow of Gopal''s undivided brother Dhondo who died in 1918 and the second plaintiff is the daughter of the first plaintiff. Their case was that both of them were entitled to maintenance and marriage expenses respectively from the joint family property, the whole of which had become of the ownership of the absconder, the second defendant, by survivorship after the death of Dhondo ; that Government had taken possession of the whole of joint family property in 1921 and it had since then remained in their possession without having been sold. The suit had been instituted in forma pauperis in 1929 and the plaintiffs claimed arrears of maintenance for eight years for both of them at a certain rate and expenses of the second plaintiff''s marriage from the estate.

2. Government opposed the suit on the ground that when the property was attached after defendant No. 2 had absconded, it was entirely at the disposal of Government u/s 88 of the Criminal Procedure Code, that it became of the absolute ownership of Government, and that therefore the Crown was not under any obligation to maintain the widow and the unmarried daughter of the coparcener of a person whose property had been thus forfeited to Government. It was also contended that if the plaintiffs had any claim to the property by way of maintenance, they ought to havel preferred their claim as provided for in Sub-section (6A) of that section, and as that was not done, the present suit was barred. Government also disputed the plaintiffs'' right to the particular amount claimed by them.

3. Both the lower Courts have decreed the plaintiffs'' right to recover maintenance and marriage expenses from Government, and have allowed certain amounts to the plaintiffs by way of arrears of maintenance and marriage expenses.

4. Government now appeal against that decree and reliance is placed upon Sub-section (7) of Section 88. It is contended that the words "the property under attachment shall be at the disposal of Government" mean that the property becomes of the absolute ownership of Government and that the rights of all persons interested in the property are extinguished. It is also, contended that as the plaintiffs did not prefer any claim to this property, the present suit is not maintainable.

5. It must be noted at the outset that the property which had been taken possession of by Government in 1921 has not still been sold by them as provided in Sub-section (7) of the section, nor have they passed an order of confiscation or forfeiture of the suit property. Government place reliance mainly on the wording of Section 88 and contend that if the plaintiffs had any interest in the property, it was; extinguished on account of no claim having been preferred before the Magistrate. Now, with regard to that contention, the lower Courts have negatived it on the ground that there is nothing in this section which compels a person who claims an interest in the absconder''s property to prefer his claim before the Magistrate issuing the order for attachment. All that the section says is that if any claim is preferred to or objection made to the attachment of any property, such claim or objection shall be inquired into. The right of the aggrieved person to prefer a suit without going to the Magistrate under this section has not been taken away. It is true that it is provided that if a person claiming an interest prefers a claim before the Magistrate and that claim is negatived, he can institute a suit to establish his right in a civil Court within one year from the date of the Magistrate''s order. That, however, does not mean that an independent suit by that person is not maintainable. I think the lower Courts were right in taking this view, because looking to the tenor of the whole section, it seems to be the object of the Legislature that although the property was to be at the disposal of Government after it was attached, it was not to be sold until the

expiration of six months from the date of the attachment or until the claim preferred under Sub-section (6A) had been disposed of under that sub-section. It is quite true that if no objection was raised before the Magistrate within six months from the date of the order of attachment or no stay order is brought from the civil Court after filing a suit, Government would be free to dispose of the property as they liked by sale or otherwise, and after Government took any such step, the party who claims interest in the property may not perhaps be able to assert any right, in the property. But so long as the property has not been sold by Government or otherwise disposed of, and so long as Government have continued to remain in possession of the attached property, it would, I think, be open to any party claiming an interest in it to obtain a decree of a civil Court declaring his right in the property, and if he succeeds in obtaining such a decree before Government have finally disposed of the property, that decree would be binding against Government, and the property could be disposed of subject to the rights established under such decree. It is stated in Sub-section (6D) that the order of attachment shall be conclusive subject to the result of a suit instituted by the person aggrieved by the Magistrate''s order. But that, in my opinion, docs not mean that it is not open to the interested party to obtain a decree declaring his rights before Government have proceeded to sell the property. The provision in Sub-section (7), that the property shall not be sold until the claim preferred under Sub-section (6A) has been disposed of, means that the sale is to be subject to the rights of any person interested if such rights are established by a decree. If so, why should such rights be not enforceable even if they are obtained by a decree without going before any Magistrate under Sub-section (6A), so long as the property has not been sold by Government? I, therefore, agree with the lower Courts in holding that the suit is maintainable in spite of the fact that the plaintiffs did not go to the Magistrate under Sub-section (6A), and that the decree would be binding on the Government.

6. That being so, the next question is whether the plaintiffs are persons who have an interest in such property and that such interest was not liable to attachment under the section. The plaintiffs are clearly entitled under the Hindu law to have their maintenance and marriage expenses defrayed from the property attached. Under the Hindu law, if a coparcener takes the property of another deceased coparcener by survivorship, he takes it with the burden of maintaining the widow and unmarried daughters of the deceased coparcener. It cannot be said that this right of maintenance is merely personal in the sense that it has no reference to the property which he gets by survivorship. A distinction has been drawn in some cases between a Hindu''s obligation to maintain his wife and his obligation to maintain the widow of his coparcener. It is said that his obligation to maintain his own wife is a personal obligation, while the obligation to maintain the widow of a coparcener is not personal. It means the husband is bound to maintain his wife even though he has not got any property from his father, and that his obligation to maintain his wife is independent of possession of any property, while the obligation of one coparcener

to maintain the widow of a deceased coparcener whose share in the property he gets by survivorship is an obligation which attaches to that property. In other words, because he gets that property by survivorship and because his interest in the joint property is thus enlarged, he is bound to maintain the widow of the deceased coparcener who had a right to be maintained out of the property which he takes by survivorship. In that sense the property which he takes by survivorship is burdened with the obligation to maintain the widow. It may be that in the technical language it may not fall within the definition of " charge " u/s 100 of the Transfer of Property Act. This charge is a later creation by statute, but the Hindu law has always regarded the widow''s right as a burden on the property. It has thus been held that the right of maintenance attaches to the property itself which is taken by survivorship. For example, in Narbadabai v. Mahadeo Narayan, Kashinath Narayan and Shamabai ILR (1880) Bom. 99, Adhibai v. Cursandas Nathu ILR (1886) Bom. 199, Yamunabai v. Manubai ILR (1899) Bom. 608 : 1 Bom. L.R. 95, Devi Persad v. Gunwanti Koer ILR (1895) Cal. 410 , Jayanti Subbiah v. Alamelu Mangamma ILR (1902) Mad. 45 and Yandru Veeranna and Another Vs. Yandru Sitamma and Another, this right of maintenance has been treated as a burden on the inheritance with the result that the widow is entitled to follow such property in the hands of the coparcener taking it. In a case under the Dayabhaga, viz. Hemangini Dasi v. Kedarnath Kundu Chowdhry ILR (1889) Cal. 758 . the Privy Council has also stated that so long as the estate remained joint and undivided, the maintenance of mothers (who were widows there) remained a charge on the whole estate.. The well known author Golapchandra Sarkar Shastri in his Hindu Law goes further and is of opinion that :-

There cannot be any doubt that under Hindu law the wife''s or widow''s maintenance is a legal charge on the husband''s estate ; but the Courts appear to hold, in consequence of the proper materials not being placed before them, that it is not so by itself, but is merely a claim against the husband''s heir, or an equitable charge on his estate ; hence the husband''s debts are held to have priority, unless it is made a charge on the property by a decree.

7. The result, therefore, in my opinion, is that the plaintiffs are persons who have got an interest in the attached property. Besides, such interest is not liable to attachment because, although it may not be a legal charge, Government acting u/s 88 are not in the same position as a purchaser for value. The holder of such interest for maintenance amounting as it does to a burden on the property is entitled as a matter of right to ask the Court to create a formal charge, and that being so, it cannot be attached by Government who are only concerned with confiscating the absconder''s right, title and interest in the property. The case of Mussumat Golab Koonwur v. The Collector of Benares (1847) 4 M.I.A. 246 proceeds on the same principle when it holds that the right of female dependent members to be maintained out of the estate prevails even against the King who succeeds to the estate by escheat. The fact that Sub-section (7) provides that the property under attachment, although at the disposal of Government, shall not be sold until the

claim preferred is disposed of, would suggest that the rights of persons who claim interest in the property are to be respected. They need not have been fixed in the form of a formal charge ; it is sufficient if they are such that they could be so fixed under the Hindu law and could not be extinguished till the property is sold for value. I do not think this result is affected by the cases of Golam Abed v. Toolseeram Bera ILR (1883) Cal. 861, Mussammat Durgi v. Secretary of State ILR (1928) Lah. 263 and Dattaji v. Narayanrao (1922) 25 Bom. L.R. 228 on which the appellant relies.

8. The result, therefore, in my opinion, would be that both the plaintiffs are entitled to the amount which has been decreed in their favour for arrears of maintenance as well as for the marriage allowance of the second plaintiff.

9. It was sought to be urged that the arrears claimed by the first plaintiff, who died after the suit was filed, ought not to have been decreed in favour of her daughter, the second plaintiff, because they are in the nature of a personal right. But I think that argument is erroneous. As rightly observed by the lower Court, past arrears are certainly a debt due to the person claiming it, t and1 although whether to allow past arrears or not or what amount should be allowed is in the discretion of the Court, it cannot be said that it is not a debt due to the person claiming it and not heritable by her heir. The lower Court was right in holding that the second plaintiff was entitled to recover those arrears which were due to the first plaintiff before her death.

10. For these reasons, I think, the decision of the lower appellate Court is correct. It is, therefore, confirmed and the appeal is dismissed with costs.