(1975) 01 BOM CK 0026

Bombay High Court

Case No: First Appeal No. 420 of 1967

Annappa Balappa Shirhatti		APPELLANT
	Vs	
Malabai Annappa Shirhatti		RESPONDENT

Date of Decision: Jan. 31, 1975

Acts Referred:

- Hindu Adoptions and Maintenance Act, 1956 - Section 18, 23, 25, 4
- Limitation Act, 1963 - Section 30
- Transfer of Property Act, 1882 - Section 100

Citation: (1976) 78 BOMLR 539 : (1976) MhLj 790

Hon'ble Judges: Vaidya, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Vaidya, J.
The above First Appeal is filed by the husband of the respondent, challenging the validity and propriety of the judgment and decree for maintenance, passed in Special Suit No. 36 of 1966, on February 28, 1967, by the Civil Judge, Senior Division, Kolhapur.

2. The wife''s allegations, in the plaint, may be briefly stated as under:

3. The plaintiff and the defendant were married twenty-five years before the suit, filed on August 4, 1965. They lived together as husband and wife for a period of twelve years. A son was born to them, but unfortunately he died. The husband began to find fault with the wife because there was some defect in her leg; and she was not of fair complexion. He began to pick up quarrels with her. One day he turned her out of his house after the death of his son. Since that time, she has been staying at her brother''s place. Her brother repeatedly tried to send her back to her husband. The husband refused to take her on the ground that he did not like her. He even threatened to beat her.

4. The husband is a well-to-do person, having his business of agriculture, tobacco and money-lending; and he gets a net annual income of about Rs. 10,000 per year. In spite of this he did not make any provisions for maintenance of his wife. She, therefore, claimed maintenance for the last twelve years and future maintenance, in respect of which she claimed a charge to be kept on the property of her husband.

5. The suit was resisted by the husband. He contended that he never ill-treated or deserted the wife or neglected to maintain her. The wife, on the contrary, used to pick up quarrels with him, on account of her hot temper; and used to go away Jo her brother''s place. In spite of this, his wife used to come and stay with him at intervals; and go back again after some quarrels.

6. According to him, he repeatedly made attempts to bring his wife back to his house with the help of his relatives and neigh bours; but the wife refused to go and stay with him. She wanted to stay with her brother only because she was looking after treatment of her brother, who was suffering from paralysis. He always expressed his readiness and willingness to allow the wife to stay with him. He, therefore, submitted that the suit was liable to be dismissed.

7. In view of these cortentions, six issues were framed by the learned Civil Judge. On behalf of the wife, the wife herself; her brother, Balu Bharamu Wani, a relative, Adappa Laxman Shirhatti; and one Tukaram Yeshwant Patil, were examined. They fully supported the case of the wife, who stated at the hearing that she wanted monthly maintenance of Rs. 100, which the husband could easily afford to pay. She also stated that her husband had married a second wife, two and a half years before she gave evidence in 1967. On behalf of the husband, the only evidence was that of the husband himself. Although he denied in the cross-examination that he had married a second wife, by name Sulabai, he did not care to examine her.

8. The learned Civil Judge believed the wife and her witnesses; and concluded; (1) that the husband had wilfully neglected to maintain her; (2) the wife was entitled to get maintenance; (3) that she was entitled to get maintenance at the rate of Rs. 45 per month; (4) that she was entitled to get the past maintenance for only ten years before the suit, as that was the period during which the husband had deserted her, as proved by the wife and her witnesses; and (5) that she was also entitled to get a charge on the property in respect of the maintenance.

9. The said findings are challenged in the above First Appeal. The wife has not filed any cross-objections, or appeal, challenging the rate of maintenance awarded by the learned Civil Judge.

10. The first ground, which was urged in support of the appeal by Mr. Pratap, was that the learned Civil Judge erred in law in throwing the burden of proof on the husband to show that Sulabai was not his mistress and in drawing an inference against him, merely because he had not examined Sulabai. Mr. Pratap also submitted that the learned Judge erred in believing the wife and disbelieving the

husband with regard to the efforts made by the husband to get back to her matrimonial home.

11. There is no substance in these contentions. The learned Civil Judge, who had the advantage of hearing the witnesses, believed the wife as she could not be shaken in cross-examination. She was also supported by the other evidence of the witnesses, mentioned above, which clearly established that the husband had deserted her, about ten years before the suit. The learned Civil Judge has discussed the evidence in detail in paras. 5, 6 and 7 of his judgment. He has rightly held that the husband had wilfully neglected to maintain his wife. He also came to the conclusion that having regard to the provisions of Section 18(2)(a) of the Hindu Adoptions and Maintenance Act, she was entitled to live separately from her husband, without fore Meeting her claim to maintenance. It cannot be said that the learned Civil Judge was wrong in expecting the husband to examine Sulabai, as Sulabai''s husband was on intimate terms with the husband''s brother, as admitted by him. The first ground urged by Mr. Pratap, must be, therefore, rejected.

12. The second ground, which was urged by Mr. Pratap, was that in determining the quantum of maintenance at Rs. 45 per month, the learned Civil Judge failed to take into consideration the fact that her father had died after the coming into force of the Hindu Succession Act; and she had, therefore, a share in the property of her deceased father. There is no merit in this contention, because in determining the quantum of maintenance u/s 23(2)(d) of the Hindu Adoptions and Maintenance Act, the Court has to consider the value of the claimant''s property and any income derived from such property, or from the claimant''s own earnings or from any other source. The husband has not established by evidence, the value of the wife''s property, or her income. The mere fact that her father died subsequently to the coming into force of the Hindu Succession Act; and she was staying with her brother, does not mean that she has any separate property or income after she was deserted by her husband and when she began-residing in her brother''s house.

13. In the absence of any evidence led by her husband to show that she was having any income of her own and that she was in fact having income which would be more than the quantum of maintenance payable by the husband, the husband cannot challenge the order of maintenance passed in her favour. Moreover, the learned Civil Judge has awarded only Rs. 45 per month as maintenance, which was less than what she had claimed in 1965. The amount cannot be considered to be in any manner exhorbitant. The learned Civil Judge has discussed the evidence, considering all the aspects and fixed the quantum of maintenance at Rs. 45 per month. The wife has not challenged the decree, perhaps because she has got liberty to apply for enhanced maintenance, u/s 25 of the Hindu Adoptions and Maintenance Act. I find no reason to interfere with the quantum of maintenance fixed by the learned Civil Judge.

14. It was then urged by Mil Pratap, that in any event, the learned Civil Judge erred in law in creating a charge on the defendant''s property, evidenced by the extracts from the Record of Eights, exhs. 22 to 27, which was joint family property of the defendant and his brothers. At the hearing, the plaintiff-wife gave evidence that the defendant was living separately from his brothers; but the learned Civil Judge has observed, in para. 9 of his judgment, that it was not disputed before him that the defendant had only 1/3rd share in the property. Although he has thus made remarks, in his judgment, it is not clear in the decree that the charge is created only in respect of the 1/3rd share. It is the case of the defendant that there was no partition; and in the circumstances, the property being ancestral property, it cannot be considered to be the property in which the defendant has only 1/3rd share.

15. It is well-settled that a charge in favour of the wife can be created u/s 100 of the Transfer of Property Act. (See Rustamalli Goharalli Mirza Vs. Aftabhuseinkhan Najafallikhan Mirza, . Mr. Pratap submitted that there was no prayer for a charge being created on the joint family property, but prayer (b) in para. 8 of the plaint, clearly asks for a charge in respect of the maintenance on the Immovable properties of the defendant.

16. Moreover, whether the defendant has divided or undivided share in the property, it makes no difference, so far as maintenance of his wife is concerned, as she is a member of the joint family. She is entitled to be maintained as a member of the joint family by the entire family as long as the family remained joint. (See Mulla''s Hindu Law, 14th edn., para. 543).

17. In Rama Rao v. Rajah of Pittapur ILR (1918) 41 Mad. 778 . : 20 Bom. L.R. 1056 s.c.. Lord Dunedin observed (p. 784) :

...It seems clear that this right is an inherent quality of the right of coparcenary -that is, of common property. The individual enjoyment of the common property being ousted by the management of the head of the family, they have a right till they exercise their right to divide, to be maintained out of the property which is common to them, who are excluded from the management, and to the head of the family who is invested with the management.

The right to maintenance out of joint family property was dealt with again by the Privy Council in Vellaiyappa Chetty v. Natarajan I.L.R (1931) 55 Mad. 1 p.c : 33 Bom. L.R. 1556 s.c..

18. The question there was whether an illegitimate son of a Sudra was entitled as a member of the family to maintenance out of the joint family property in the hands of the collaterals with whom his father was joint. Sir Dinshah Mulla in delivering the judgment of the Board pointed out (p. 15) :

...that the illegitimate son of a Sudra by a continuous concubine.. is a member of the family; that the share of inheritance given to him is not merely in lieu of

maintenance, but in recognition of his status as a son; that where the father has left no separate property and no legitimate son, but was joint with his collaterals,... the illegitimate son is not entitled to demand a partition of the joint family property in their hands, but he is entitled as a member of the family to maintenance out of that property;....

19. To say that the member of a joint family to whom maintenance has been denied shall cause the family to be divided and the. family estate partitioned, or go without anything, is not providing an appropriate remedy for the injustice done to him. As there is a right to maintenance there must be an appropriate remedy when that right is denied. (See Cherutty v. Ravu [1940] Mad. 830). It is, for instance well-settled that the head of the undivided joint Hindu family has to defray the expenses of the marriage.

20. It is argued by Mr. Pratap that the old Hindu Law with regard to joint family has now been superseded by Section 4 of the Hindu Adoptions and Maintenance Act, which runs as follows:

Section 4. Save as otherwise expressly provided in this Act,-

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

There is no substance in this contention, because no provision is made in the Hindu Adoptions and Maintenance Act, for the maintenance of the wife of a coparcener qua a member of the coparcenary joint family. The provisions contained in the Hindu Adoptions and Maintenance Act, are only relating to the right that the wife can claim for maintenance from the husband.

21. It is only in respect of matters for which the provisions have been made in the Act, that the Act can supersede the earlier Hindu law. It cannot be said that the right of the wife, as a member of the family of her husband, to claim maintenance is inconsistent with any of the provisions of the Hindu Adoptions and Maintenance Act, I, therefore, find nothing in Section 4, which militates against the operation of the old Hindu law, under which it is well-settled that the member of the joint family is entitled to be maintained out of the joint family property. Even assuming that the husband''s interest in the property, as evidenced by the extracts from the Record of Rights exhs. 22 to 27, is an undivided interest, the property can be subject to a charge for the wife''s maintenance.

22. The last point, which was urged by Mr. Pratap was that under Article 105 of the Limitation Act, 1963, a suit by a Hindu for arrears of maintenance, must be filed

within three years, from the date when the arrears are payable. He, therefore, submitted that the learned Civil Judge erred in law in awarding ten years'' past arrears, merely because the desertion took place ten years prior to the suit i.e. about 1955.

23. Under the old Limitation Act, 1908, Article 128 provided the period of twelve years for a Hindu to file a suit for the arrears of maintenance, from the date when the arrears were payable. u/s 30 of the Limitation Act, 1963, notwithstanding anything contained in the new Act, any suit for which the period of limitation is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908, may be instituted within a period of seven years next after the commencement of the Act, which commenced on January 1, 1964, or within the period prescribed for such suit by the Indian Limitation Act, 1908, whichever period expires earlier.

24. In the present case, as desertion started in 1955, under the old Limitation Act, a suit could be filed within twelve years there from i.e. before 1967, the suit having been filed in 1965, is, therefore, within time. It must, however, be noted that the plea of limitation was not at all taken in the lower Court, although even in the absence of such a plea, the Court is bound to take such notice of the law of Limitation.

25. It seems that the lawyers, who appeared for the husband in the lower Court, did not care to raise a plea of limitation, having regard to the contents of Section 30 of the Limitation Act, 1963. Mr. Pratap''s plea that the suit is barred by limitation, or that the decree should have been for three years'' past maintenance is, therefore, without any foundation and is rejected as inconsistent to the provisions of Section 30 of the Limitation Act, 1963.

26. No other ground was urged in support of the First Appeal. The judgment and decree passed by the learned Civil Judge, are confirmed. The First Appeal is dismissed with costs.