

(1964) 07 GUJ CK 0009
In the Gujarat High Court
Case No : First Appeal No. 340 of 1960

Chandrakunverba

APPELLANT

Vs

Randhirsinhji Chandrasinhji

RESPONDENT

Date of Decision : 16-07-1964

Acts Referred:

Bombay Merged Territories and Areas (Jagirs Abolition) Act, 1953 — Section 14, 2, 3
Hindu Adoptions and Maintenance Act, 1956 — Section 21, 22(1), 23(3), 4

Citation : AIR 1965 Guj 270

Hon'ble Judges : P.N. Bhagwati, J; J.N. Metha, J

Bench : Division Bench

Advocate : M.N. Thakkar, for the Appellant; N.R. Oza, for the Respondent

Judgement

Metha, J.

(1) This appeal arises from the judgment and decree of the learned Civil Judge (Senior Division), Baroda, in Special Civil Suit No. 31 of 1957, dated 30th October 1958, by which he had decreed the plaintiff's claim for arrears of maintenance at Rs. 115/- per month and had accordingly awarded Rs. 2,640/- to the plaintiff. The plaintiff's claim was for Rs.300/- for herself, and Rs. 45/-, for pay of the three maid servants, in all Rs. 345/- per month.

(2) The plaintiff is the widow of late Thakore of Gadboriad State, Omkarsinji, who expired on 17th February 1934. The defendant succeeded to the Gadi of the State, which was a semi-jurisdictional State, with civil, criminal and revenue jurisdiction. The Thakore had a right to recover custom, excise and land revenue. The plaintiff based her claim of maintenance on the Hindu Law and as the Gadboriad State was governed by the custom of primogeniture. After the death of her husband the Thakore's estate was taken under management for about 12 years by the Government and at the time the plaintiff was allowed maintenance at Rs. 115/- per month by the Government. After the defendant succeeded to the throne the maintenance was first reduced to Rs.100/- per month and then to Rs.90/-. She was paid at the rate of Rs.90/- per month till 31st May 1955. From

1st June 1955 the defendant further reduced the maintenance amount to Rs. 50/- per month and even the pay of the maid servants was discontinued. According to the plaintiff, the other co-widow Gulabkunverba was getting maintenance at the rate of Rs.125/- per month. Being the widow of the late Thakore, as per her status and requirements, the plaintiff claimed a sum of Rs.300/- per month for her maintenance. She gave a notice on 24th July 1956 to the defendant which was replied by the defendant on 29th July 1956 by which he refused to pay maintenance at the rate of more than Rs.50/- per month. It is the plaintiff's case that the defendant succeeded to the entire estate of her late husband as an heir and inherited all the properties including ornaments, cash and other properties. In view of the defendant's income the plaintiff claimed a total amount of Rs.10,920/- by way of arrears from the defendant from 1st August 1954 giving a deduction for the amount paid to her. The defendant's plea was that the plaintiff was not entitled to any such maintenance according to Hindu Law or according to the custom of the State; that the co-widow and the other widow of the elder brother Motisinhji were paid Rs.50/- only per month as maintenance; that the deceased had no separate property and had only a life interest in the property of the State. The defendant denied that he had the property alleged by the plaintiff or that he derived the income as alleged by the plaintiff and he stated that the plaintiff had sufficient properties of her own and got a net income of Rs.1200/- while the defendant had no income after the merger of the State. He had even no money to pay the arrears of Mewas Fund to the Government. The trial Court held that the defendant had sufficient means to pay the arrears of maintenance at the rate of Rs.115/- per month, and, on that basis, awarded arrears to the plaintiff. It further held that the defendant was liable to the extent of her property which he got as Ex-ruler. The plaintiff has, therefore, preferred this appeal for the balance of claim.

(3) At the hearing of the appeal Mr.Oza requested us to exhibit the notice correspondence marked Exs. 14/4 and 14/5 which remained unexhibited through oversight. Mr.Thakkar for the plaintiff-appellant had no objection and we have ordered the said documents to be exhibited in the case at Exs.100 and 101.

(4) Mr.Oza for the respondent raised a preliminary point that the plaintiff's right of maintenance, if any, from the Thakore's estate being an incident of Jagir was extinguished u/s 3 of the Bombay Merged Territories and Areas (Jagirs Abolition) Act, 1953, Bombay Act No. XXXIX of 1954, hereinafter referred to as "the Act". Plaintiff's claim, if any, could be only for compensation from the Government, after the date of operation of the Act viz. 1-8-54. As this point went to the root of the whole claim, he requested us to allow him to raise that point as a pure question of law for the first time in this appeal. Mr. Thakkar for the appellant, however, contended that as the defendant's appeal No.116 of 1959 was dismissed summarily on 21st January 1959 by this Court, the matter was res judicata and that the point should not be allowed to be raised so as to result in two inconsistent decrees. Mr.Oza tried to rely on a decision of the Bombay High Court in Hussain Sab Vs. Sitaram Vighneshwar, to show that a summary

dismissal under O.41, R.11 was in its consequence different from dismissal after hearing of the appeal and that it left the original decree untouched, as no appellate decree was to be drawn in which there would be a merger of the trial Court's decree. It is not necessary for us to go into the wider question as to whether the trial Court's decree which has now become final could be disturbed by permitting any such plea, as, in our opinion, there is no substance in the preliminary objection of Mr.Oza as to the maintainability of the plaintiff's claim. For the purpose of this contention Mr.Oza relied on the merger agreement, Ex.86m signed by the defendant on 25th May 1948 for the merger of Gadboriad Taluka with the Province of Bombay. It is entered into by the defendant as a Talukdar of Gadboriad Taluka. In clause (c) thereof it is provided that all properties vesting in the Talukdar which were being used for the benefit of the public or any section thereof in the Taluka except those buildings which formed part of the Darbargadh used for his residence shall vest in the Government of Bombay. Clause (d) thereafter provided that the Talukdar shall be entitled to the full ownership, use and enjoyment of all other properties vesting in him including the superior proprietary rights in all lands in the Taluka. Clause (d), therefore, which is material for our purpose, recognises the rights of full ownership, use and enjoyment of the Talukdar in all lands of the Taluka. Now "Jagir" is defined in section 2 (vi) of the Act as the grant by or recognition as a grant by, the ruling authority for the time being before the merger of a village, whether such grant is of the soil or an assignment of land revenue or both, and includes villages, groups or portions of villages.

"(b) held by a Ruler of a former Indian State merged in the pre-reorganisation State of Bombay as Jagir in his own State before the merger and recognised after the merger as of his ownership, use and enjoyment as his private property under the merger agreement, or

(c) held by a talukdar of a merged taluka or estate and recognised as of his ownership, use and enjoyment under the merger agreement."

This definition section S (vi) is thus an inclusive definition and the concept of Jagir artificially extended to cover the cases specifically mentioned in the inclusive clause. The definition in language in sub-clause and sub-clause (c) shows that while in the case of a ruler of a former Indian State only the villages "held as Jagir" in his own state are included, in the cases of a talukdar, all the villages held by him as such are included. The only condition for the villages held by a talukdar of a merged taluka to constitute a "Jagir" is that said villages held by the talukdar be recognised as of his ownership, use and enjoyment as his private property under the merger agreement, Ex. 86, it is clear that the defendant's ownership and enjoyment in the lands in the Gadboriad taluka held by him as a talukdar were in the terms of recognised under the merger agreement except in so far as they the benefit of public and which, therefore, under clause (c) vested in the Government. Therefore, Mr. Oza is right in contending that on the evidence on record the Thakore's Gadboriad taluka estate was a Jagir.

Section 3 of the Act provides as under:

"Notwithstanding anything in any usage, grant, Sanad, order, agreement, or any law for the time being in force, on and from the appointed date, i.e. 1-8-54.

(i) all Jagirs shall be deemed to have been abolished:

(ii) save as expressly provided by or under the provisions of the Act, the right of a jagirdars to recover rent or assessment of land or to levy or recover any kind or tax, cess, fee, charge or any hak and the right or reversion or lapse, if any, vested in a Jagirdar, and all other rights of a Jagirdar or of any person legally subsisting on the said date, in respect of a Jagir village s incidents of Jagir shall deemed to have been extinguished".

Section II provides for compensation to the Jagirdar while section 14 provides for compensation for abolition or extinguishment or modification of a rights or interest inproperty of persons other that a Jagirdar. Therefore, u/s 3 in case of persons other than a Jagirdar their rights which were legally subsisting on 1-8-54 in respect of a Jagir village would be to have been extinguished only if they were subsisting as incidents of Jagir and for these rights only section 14 provides for compensation. Therefore, for application of S.3 it is not sufficient that such person other than a Jagirdar must have some right in respect of a Jagir village but the right must be in the nature of an incident of a Jagir. Mr. Oza can succeed in his contention only if he shows that the right of maintenance claimed by the plaintiff was an incident of Jagir. The incident must necessarily be appurtenant to and must follow the Jagir. such a right must be necessarily dependent on the fact of the existence of Jagir and could nor exist independently or apart from it. In this connection Mr.Oza relied on a decision of the Bombay High Court dated 19th September 1958 in Special Civil Appln No. 1546 of 1958 under the Art. 227 of the Constitution of India in Madansingh Samantsingji v. State of Bombay of the Division Bench of the Bombay High Court consisting of Chainani J. (as he then was) and Badkas J. which would be binding on us. There the claim of maintenance was of the younger brother of the Jagirdar of Umegadh Jagir in Sabarkantha District and it was based on the custom of the Jagir that the junior members of the Jagirdar's family had a right to be maintained out of the income of the estate and for which purpose a Jiwai Lekh or a maintenance deed was even executed. That was clearly a case of an incident of a Jagir as apart from the existence of Jagir, no such right of maintenance could be legally enforced. Even in that decision following the decision of the Privy Council in Maharana Futterhsangji Jaswantsangji v. Desai Kallianaraiji 1 Ind App 34 PC Bapurao v. Krishtappa Bachappa 37 Bom LR 599: (1935 Bom 380), and in view of S. 39 of the Transfer of Property Act it was held that a personal allowance payable to a member of the family for his life-time which was not hereditary did not possess the qualities both of immobility and indefinite duration in a degree which entitled it to be held to be an interest in immovable property. The claim of maintenance was not held to be a right or interest in the Jagir. However, it was still a right of property held as an incident of Jagir, which was held to have been extinguished

under S.3 of the Act and for which compensation could be claimed under S.14. This decision could have no application unless it is shown that what the plaintiff claims is an incident of Jagir. The plaintiff has based her claim not on an incident of Jagir or on any Jiwai grant by a ruler. Her claim is purely based on the personal Hindu law on account of personal relationship to the deceased as the defendant had inherited all her husband's properties by the customary rule of primogeniture which prevailed in the State. This claim is not by way of an incident of Jagir in any sense of the term and involves no question of any grant. It is not dependent in any manner on the questions whether the estate was a Jagir or not. If there had been a claim for continuance of the Jiwai grant to her by the ruler, totally different questions would have arisen whether the ruler could resume the grant at the sweet will and whether the new sovereign had recognised any such grant. That is not the case here for the plaintiff does not seek to enforce any Jiwai grant as an incident of Jagir tenure by virtue of any custom. She has a right under the personal law, which is the Hindu Law, to be maintained by the heir of her deceased husband to the extent of the property inherited by him. what would be the adequate provisions in that behalf would be a pure question of fact which has to be determined in the light of several factors, the number of persons entitled to receive maintenance, the requirement as per the status of the members of the family, the total income derived by the family and other commitments would have to be weighed in deciding the quantum of maintenance which could be awarded to the plaintiff. What would be the adequate maintenance is to be decided not from the nature of any grant or custom of the Jagir, but on a consideration of the nature of the personal obligation of the defendant in view of the fact that he had inherited the plaintiff's husband's estate. Mr.Oza relied in this contention on the word "Nemnook" or allowances used by the plaintiff to refer to the allowance granted to her. But it should be kept in mind that the basis of the suit is not a grant but the legal right vested in her under the Hindu Law.

(5) Mr.Oza next contended in this connection that the Talukdar's estate by reason of the custom of primogeniture was an impartible estate in which no family members or coparceners have any right of maintenance in absence of any proof of a special custom. Mr.Oza, therefore, contended that there being no such custom the plaintiff could not claim any such maintenance. For this purpose he relied on the decision of the Privy Council in *Sri Raja Rao Venkata Mahibati v. Rajah of Pittapur*²⁰ Bom L R 1056: (AIR 1919 P C 81). In that case the holder of an impartible Raj adopted a son to him and therefore devised the Raj by will to a son born of one of the wives after the adoption. After the Raja's death the son of the adopted son sued the devisee for maintenance. No evidence was given of any special custom of the family by which grandsons of the last holder could claim maintenance as a right. apart from the custom, their Lordships pointed out that the plaintiff had not advanced any claim based on any personal relationship under the special texts of the Hindu Law which was limited only to the widow parents and the infant child and which did not include the grandson. In that case

the obligation attached to the individual and was independent of the fact of there being ancestral or joint family property. The claim of the grand son was, therefore, rejected in that case as the only foundation of the claim was that he was a coparcener. It was observed at page 1062 (of Bom L R) : (at p.83 of A I R):

"An impartible Zamindari is the creature of custom and it is of its essence that no coparcenery exists. This being so, the basis of the claim is gone, inasmuch as it is founded on the consideration that the plaintiff is a person who, if the Zamindari were not impartible, would be entitled as of right to maintenance. There is no claim based on personal relationship".

This passage could not help Mr. Oza in fact it provides a complete answer to all his arguments. It clearly brings out the distinction between a claim based on the custom of the Jagir which could be looked up as an incident of Jagir and a claim based on a personal relationship which is totally an independent obligation, irrespective of the fact whether the estate is a Jagir or nor. As stated in Mulla's Hindu Law, 1959, (12th edition), at page 697, in para 542, a Hindu is under a legal obligation to maintain his wife, his minor sons, his unmarried daughters, and his aged parents, whether he possess any property or nor. The obligation to maintain these relations is personal in character, and arises from the very existence of the relation between the parties. In para 544 at page 698 it is further stated that an heir is legally bound to provide, out of the estate which descends to him, maintenance for those persons whom the late proprietor was legally or morally bound to maintain. the reason is that the estate is inherited subject to the obligation for maintenance to be devolved on the defendant by reason of his having inherited the property of the deceased as not because of any custom of the Jagir or as an incident of Jagir but because the deceased was under a legal obligation to maintain the plaintiff and the estate of the deceased was inherited by the defendant subject to obligation.

(6) Mr.Oza further tried to make out a distinction that the deceased could not be said to be an heir of the deceased in respect of the Jagir property as it came to him not as heir but in his own right because of the rule of primogeniture. Here also, as pointed out in para 590 at page 737 of Mulla's Hindu Law, as per the well-established principles of succession, the only modification which impartibility suggests in regard to the right of succession is the existence of a special rule for the selection of a single heir when there are several heirs of the same class who would be entitled to succeed to the property if it were partible under the general Hindu Law. Therefore, even though own single heir is preferred, it is still a case of succession to the impartible estate and the successor must, therefore, be bound by the legal obligation, which the deceased had, to maintain his wife to the extent of the property inherited by him. We cannot, therefore, agree with Mr.Oza that there was no succession in respect of Jagir property. The defendant having succeeded to the property or the Thakarat, he was liable to maintain the widow of the deceased Thakore. It is immaterial whether the deceased kept any separate property which would no have any character of impartibility and which

would always devolve on the widow and other ordinary heirs, for, in our view even the impartible estate was also inherited by a successor and was subject to the obligation which the deceased had to maintain his wife, parents, and the infant child.

(7) Mr.Oza further contended that (1) that a claim of arrears of maintenance could not be entertained in absence of any allegation or evidence of wrongful withholding;

(2) that in any case the claim was deemed to have been abandoned by the conduct of the plaintiff which misled to the defendant into a belief that he was not to provide for any additional amount from his current income;

(3) that the matter being one of discretion, the trial court's discretion in withholding the arrears of maintenance could not be legally interfered with, and

(4) that after the Hindu Adoption and Maintenance Act, 1956, which came into force on 21-12-56, no such claim of arrears was legally competent.

In this connection, Mr.Oza strongly relied on the decision of the Privy Council in *Raja Yarlagadda Mallikarjuna Prasada Nayadu v. Durga Prasad Nayadu* ILR 24 Mad 147 (PC), which says that although no previous express demand and refusal is necessary, it is only the evidence of wrongful withholding which is the ground of liability for arrears of maintenance. The Privy Council expressed its disagreement with the Bombay view in *Motilal Prannath v. Bai Kashi* I L R 17 Bom 45, if it meant that non-payment of maintenance when due did not constitute prima facie proof of such wrongful withholding. It was held at page 155 that non-payment of maintenance to a person entitled thereto would constitute prima facie proof of wrongful withholding and upon a consideration of all circumstances of each particular case it must be decided whether such prima facie proof had been rebutted. In the case before their Lordships, even though in the previous suit only partition was claimed and no claim for maintenance was advanced, unwillingness of the defendant to pay full maintenance was inferred from the fact of the plaintiff's claim in the suit and from the absence of any reasonable offer or setting aside a reasonable sum for the purpose. As regards the defence of abandonment, the Privy Council at page 156 observed:

"He does not allege, in his defence, nor is there any evidence, that he was in any way prejudiced by the form of the previous action. It may well be that, if he had been misled into the belief that the claim for maintenance was abandoned and had in consequence not set aside any portion of his annual income to meet such a claim, he would have had a good defence to the present action. But, without some such ground of defence, it is impossible to hold that the younger brothers of the defendant have forfeited an undoubted right merely because they were, in the first instance, advised to institute a wrong suit and did not claim their maintenance as it fell due."

This decision also makes it clear that the non-payment of maintenance itself

would constitute a prima facie proof of wrongful withholding, and it has to be seen whether in the circumstances of the case such prima facie proof had been rebutted by the defendant. As for the defence that the claim was forfeited also, it is in terms laid down that such a defence must be alleged and that there must be evidence that the defendant was misled into a belief that the claim was abandoned and in consequence thereof the defendant had not set aside any portion of his annual income. We do not see how this decision could help Mr.Oza in the present case. The notice Ex.100 in this case in terms refers to two previous demands-one dated 18-7-54 and the other dated 5-9-55, by the plaintiff, when her amount for maintenance was sought to be reduced by the defendant. In reply Ex. 101 the defendant had in terms denied the claim of the plaintiff and had stated that whatever he was paying was not as of right. even in the suit also the same contentions were raised by the defendant and he had totally denied the plaintiff's claim. The plaintiff in the present case demands maintenance only from 1-8-54. Before that date she had already protested by her application dated 18-7-54. The plaintiff's father Ex.74 has also stated in his deposition that except giving application they had not raised any other protest when the amount was reduced from Rs.90 to Rs.50 per month. The defendant in his reply Ex.101 to the notice Ex.100 has not denied any such demand by the plaintiff. Thus the demand of the plaintiff, the conduct of the defendant in reducing the plaintiff's maintenance from time to time in spite of her protests, his total denial of the plaintiff's claim and even his contention that whatever was paid was not as of right leave no doubt of his unwillingness to entertain the plaintiff's claim and on his total refusal of her claim in spite of the demand. The plaintiff has, therefore, sufficiently proved wrongful withholding. We find on principle no difference in a case where nothing is paid or where inadequate amount is paid, and than too, not as of right but ex-gratia without admitting any liability. Besides the defendant has not raised the defence of abandonment in the written statement nor has he led any evidence to show that he was misled into any belief and in consequence of which he had not set apart anything from his current income to meet the plaintiff's claim. On the contrary, there is clear evidence that he was not prepared to entertain any such claim by the plaintiff and was prepared to fight out the plaintiff's claim. Merely because the plaintiff in the past, when the estate was a Talukdari estate, had not raised any protest and had continued to accept the maintenance paid to her would not disentitle her from making a subsequent protest which she had made at least from 18-7-1954. Her claim of arrears of maintenance is confined to a period subsequent to her demand. We, therefore, cannot agree with Mr. Oza that there was any waiver or abandonment of the plaintiff's claim. Mr. Oza also tried to reply on the decision of the Madras High Court in (Godavarti) Sobhanadramma Vs. (Godavarti) Varaha Lakshmi Narasimhaswami and Another, and Dattatraya Maruti Shanbhag Vs. Laxman Jattappa Shanbhag, , to show that in awarding the arrears the trial Court had a discretion as regards the period and the extent of arrears to be awarded. These cases would have no application in the present case because the trial Court has awarded arrears of maintenance for the entire period claimed by

the plaintiff and at the full rate, which the trial Court considered adequate for her maintenance and, therefore, there is no question of any exercise of discretion in his case. Finally, Mr. Oza relied on the provisions of the Hindu Adoptions and Maintenance Act, 1956, hereinafter referred to as "the Act", but we find nothing in that Act which would deprive the plaintiff of her right to arrears of maintenance which had already accrued to her on account of the wrongful withholding by the defendant. Section 21(iii) includes a widow in the definition of the word "dependants" and section 22(1) provides that the heirs or a deceased Hindu are bound to maintain the dependants of the deceased out of the estate inherited from the deceased. Section 23 (1) provides that it shall be in the discretion of the Court to determine whether any, and if so what, maintenance should be awarded under the provision of the Act and in doing so the Court shall have due regard to the considerations set out in subsection (3). Sub-section (3) provides that in determining the amount of maintenance to be awarded to a dependant the Court shall have regard to:

"(a) the net value of the estate of the deceased after providing for the payment of his debts;

(b) the provision, if any, made under a will of the deceased in respect of the dependant;

(c) the degree of relationship between the two;

(d) the reasonable wants of the dependant;

(e) the past relations between the dependant and the deceased;

(f) the value of the property of the dependant and any income derived from such property; or from his or her earnings or from any other source;

(g) the number of dependants entitled to maintenance under this Act".

We have gone through all these provisions and we find no provision in the Act to the effect that the right of maintenance already accrued should not be enforced in so far as it is within the limitation after the coming into force of the new Act. When arrears are claimed what is sought to be enforced is only a right which has already accrued and for which no separate provision is necessary under the new Act.

We, therefore, do not see any substance in the preliminary objections of Mr. Oza that the plaintiff had no legal right to claim the arrears of maintenance and we must now consider whether the appellant justifies the claim for increase of maintenance. [After considering the circumstances of the case their Lordships came to the conclusion that a fair order would be to award the arrears of maintenance at the rate of Rs. 250/- per month with effect from 1-8-1954 and the judgment proceeded:]

(8-10) We, therefore, allow this appeal and modify the decree of the trial Court by awarding Rs. 7,500/- as arrears of maintenance on the basis of Rs. 250/- per

month with proportionate costs all throughout with future interest at 4% per annum on Rs. 7,500/- from the date of the suit till payment. The defendant to bear his own costs all throughout.

(11) Appeal allowed.