

(1937) 05 MAD CK 0002
In the Madras High Court

Dandamudi Ramarayudu

APPELLANT

Vs

Dandamudi Sitalakshmamma and Another

RESPONDENT

Date of Decision : 06-05-1937

Acts Referred:

Citation : AIR 1937 Mad 915 : (1937) 46 LW 550

Hon'ble Judges : Varadachariar, J

Bench : Division Bench

Judgement

Varadachariar, J.—This appeal arises out of a suit for maintenance. The plaintiff is the widowed daughter-in-law of defendant 1. Her

husband, who was the only son of defendant 1, died in 1920, a few months after his marriage, leaving the plaintiff a minor then aged 11 or 12.

Though the written statement alleges that even after her husband's death the plaintiff used to be living with defendant 1, only occasionally visiting

her parent's house, no serious attempt has been made to prove it and the case has proceeded on the footing that, but for other objections, the

plaintiff would be entitled to separate maintenance including arrears. As regards the claim for arrears, some objection on the score of limitation was

raised but there is no substance in it and it was rightly not pressed before us. Nor is there much force in the objection that there was no demand. It

is well settled law that even the absence of a demand will not deprive a widow of her right to arrears, though that circumstance may have to be

taken into account in determining the extent of the liability to be imposed upon the defendant for arrears due for a long period. The evidence

adduced on the plaintiff's side attempted to establish demand on a number of occasions. Even if the whole of that evidence be not accepted, there

can be little doubt in the circumstances that there must have been some demands before the formal notice was given prior to the institution of the suit.

2. The real question for determination is as to the rate of maintenance, past and future. There is also a question as to the extent of properties to be

charged for the maintenance that may be decreed in plaintiff's favour. The lower Court held that 500 bags of paddy may fairly be taken to be the

net income derived by defendant 1 from the family lands. It left the outstandings out of account on the ground that debts approximately to the same

extent were due by the family. An objection was raised before us on behalf of the plaintiff to the lower Court's conclusion under this head and our

attention was drawn to portions of the evidence indicating that defendant 1 had attempted improperly to secrete some of the outstandings for his

own benefit by assigning them in the names of other persons. Whatever force there may be in this objection, we find that the lower Court had

before it the account books of defendant 1 for a period of nearly ten years. In a case of this kind, it is possible to estimate the income of the family

only in a rough way and we do not find sufficient ground to differ from the lower Court's general estimate of the income, with reference to which

the maintenance payable to the plaintiff should be fixed. For the same reason we overrule the appellant's objection to that finding. Seeing that there

were no other members in the family, except defendant 1, to be provided for, the lower Court fixed 150 bags of paddy per annum as a reasonable

provision for the plaintiff's maintenance, inclusive of claims for residence and other sundry items. The defendant complains that this is too high,

while the plaintiff complains that this is too low. Here again, we do not feel we will be justified in interfering with the award given by the lower

Court unless we are satisfied that its discretion has been improperly exercised. Even assuming that the allowance is a bit too liberal, we do not feel

called upon to interfere with it in the circumstances of the case.

3. The objection raised by the appellant against that portion of the decree which relates to arrears of maintenance seems to us more substantial, as

also the objection to the form of the decree declaring the charge. But before dealing with them it is necessary to deal with a preliminary objection

raised on behalf of the respondent to the maintainability of this appeal. During

the pendency of the suit in the Court below defendant 1 was adjudicated insolvent on the application of a creditor. The plaintiff alleged that the insolvency proceedings were collusive; but, for the purposes of the present preliminary objection we have to proceed on the footing that an adjudication order has been made and remains in force. On the adjudication, the Official Receiver was added as defendant 2. A question seems to have been raised before the lower Court as to whether, after the addition of the Official Receiver as a party, it was open to defendant 1 to continue the defence. After hearing arguments, the lower Court ruled on 14th September 1933 that it was open to defendant 1 to continue the defence of the suit. It does not appear that the Official Receiver, though he continued to be a party on the record, took any further part in the conduct of the defence. When the decree was passed by the lower Court, it was accordingly defendant 1 who filed this appeal impleading the Official Receiver as a party respondent. On these facts, Mr. Lakshmayya (for the plaintiff-respondent) contends that after the vesting of the estate in the Official Receiver the insolvent has no locus standi to appeal against the decree. We are unable to accede to this contention.

4. We do not see anything which justifies our denial of the right of appeal to a person who is eo nomine a party to the decree. The decree as it stands is a personal decree against defendant 1 though there is also the declaration of a charge. Whether on the objection raised before the lower Court it should have struck out the name of defendant 1 or not is another matter; we doubt whether the lower Court would have been justified in striking his name out. It cannot be said that the claim in the suit is one which only related to the property of the insolvent. As pointed out in *Subbarayar and Bros. v. Muniswami Iyer and Sons*. AIR 1926 Mad 1133 the expression ""relating to the property"" should not be treated as synonymous with ""affecting the property"". It is true that it is only by reason of the possession of co-parcenary property that defendant 1 became liable to the plaintiff. But when the plaintiff complains that defendant 1 has been in possession of the whole of the family property from 1920 to the date of the institution of the suit, and has withheld maintenance payable to her during all that time, defendant 1's liability, so far at any rate as the arrears of maintenance are concerned, is undoubtedly a personal liability. The

mere fact that the plaintiff will also be entitled to" ask that it should be charged on the property, will not show that the liability is not personal but only shows that the plaintiff's remedy is twofold and cumulative. Even as regards the future liability of defendant 1, it is no doubt limited by the possession of the property and the extent of the property, but as long as he is in possession of joint family property his liability will continue to be personal to the limit of the property. It is therefore not right to say that the claim of the plaintiff in the suit is one which solely related to the property of the insolvent. The objection founded on Section 59, Provincial Insolvency Act, does not therefore seem to us well founded.

5. Nor is there greater force in the objection founded on Order 22, Rule 8, Civil P.C. The case is certainly not literally within the terms of Order

22, Rule 8. It is true that the word "plaintiff" in that Rule must in relation to appeals be read as including an appellant; but the case here is not that

of a person who became insolvent pending an appeal and there is also the question whether the proceeding is one which an "assignee or receiver

might maintain for the benefit of his creditors". The appeal, if successful, will no doubt incidentally benefit the creditors but, as we have already

explained, that is not the whole scope of the suit. The objection under Order 22, Rule 10, Civil P.C., has no force because Rule 10 is only a

permissive Rule and does not impose a disability upon a person already on the record. So far as general principles applicable to the status of an

insolvent are concerned, we do not think there is such a preponderance of authority as supports the respondent's contention. Tribhovandas

Narotamdas Vs. Abdulally Hakimji Paghdivalla, may be distinguishable on the ground that the suit (so far as it claimed a forfeiture of the lease held

by the defendant) "related to the property" of the insolvent; but assuming that to some extent it favours the respondent's contention, we may point

out that the learned Judge recognises that he is not following the view taken in earlier cases both in Bombay and in Calcutta. In this Court the

reasoning of the decision in *Tatireddi v. Ramachandra Rao* AIR 1921 Mad 402, which was approved of by the Full Bench in *Subbaraya Goundan*

and *Another Vs. V.V.R. Virappa Chettiar Bank and its partners being Valliappa Chettiar and Others*, , is clearly against the theory of total

incapacity of the insolvent to continue proceedings in a case like the present. We

accordingly overrule the preliminary objection.

6. Dealing with the merits of the claim to arrears, it seems to us that the learned Judge was not in the circumstances justified in awarding past

maintenance to the plaintiff at the rate which he has adopted. It is well recognized that the Court will be justified in drawing a distinction according

to the circumstances of each case between the rate at which past maintenance is to be awarded, and the rate at which future maintenance is fixed.

The circumstances of this case illustrate the necessity for such a distinction. The learned Judge finds that between 1920 and 1929 paddy was

selling at something like Rs. 8 to 10 per bag. In a decree which he passed in 1934, at a time when paddy was selling at Rs. 2 or 3 per bag, he calls

upon the defendant to pay the value of something like 1200 bags of paddy at an average price of Rs. 8 per bag, which means that the defendant

must sell about four times the quantity of paddy which the Judge had in mind when making the award. It may in certain circumstances be

advantageous to both parties to award maintenance in kind, but in the present case it would obviously work injustice to the defendant. It is not as if

the defendant has been putting by the sale price of 150 bags of paddy year after year between 1920 and 1929. It must also be remembered that in

1920 when her husband died, the plaintiff was a girl of 11 or 12. "Whatever might be her needs in later years in life, we find it impossible to agree

with the view of the learned Judge that in the years when the plaintiff was barely in her teens and was living with her parents, she reasonably

required Rs. 100 per mensem for her maintenance. Having regard to all these circumstances, we think it proper to reduce the award in respect of

arrears of maintenance up to date of suit to Rs. 600 per annum. From the date of the institution of the suit the plaintiff will be entitled to

maintenance at 150 bags of paddy per annum valued in the manner given in the judgment of the lower Court.

7. As regards the charge, we think it an unreasonable hardship on defendant 1 to declare the maintenance a charge upon the whole extent of his

Immovable property. In *Jayanti Subbiah v. Alamelu Mangamma* (1904) 27 Mad 45 it was recognised that prima facie the charge must be on the

husband's share in the joint family property. Assuming that in exceptional circumstances a Court may declare a charge on a larger extent of the

joint family property, we do not think the circumstances of this case either call for or justify a charge upon anything more than her husband's share.

If the plaintiff's husband were alive today, defendant 1 would undoubtedly be entitled to get divided from him by a mere declaration of his intention

with the result that one half of the family property would be absolutely at the disposal of defendant 1. It seems to us too much to hold that the

plaintiff's position has been so far improved by her husband's death as to justify our making it impossible) for defendant 1 to alienate any portion

of his property free of the plaintiff's claim for maintenance. We have been informed that defendant 1 has made alienations of his property during

the pendency of the suit and any modification that we may make in the lower Court's decree may diminish the plaintiff's chance of realizing the

fruits of the decree in her favour. We can only say that the charge that we propose to declare will take effect from the date of the institution of the

suit and no alienation made by defendant 1 during the pendency of the suit will prejudice the rights of the plaintiff as declared by our decree . We

would accordingly set aside so much of the lower Court's decree as declares the plaintiff's maintenance a charge on the whole of the Immovable

properties mentioned in Schedules. A and A-1 to the plaint and send the case back to the lower Court to ascertain on a fair division what will

represent a half share of these properties as on the date of suit and to declare a charge in plaintiff's favour on the half share so ascertained. The

decree will make it clear that the charge to this extent is available to the plaintiff not only in respect of the future maintenance, but also in respect of

arrears of maintenance accrued due prior to the institution of the suit.

8. The appeal is allowed to the extent above indicated and the decree of the lower Court is accordingly modified. The costs awarded to the

plaintiff in the lower Court will be proportionately reduced. As the appeal has succeeded in part and failed in part and the memorandum of

objections wholly fails, we make no order as to costs either in the appeal or in the memorandum of objections.