
(1943) 01 BOM CK 0014
In the Bombay High Court
Case No : Second Appeal No. 469 of 1941

Dattatraya Putto Honnangi	Vs	APPELLANT
Tulsabai Chidambar Honnangi		RESPONDENT

Date of Decision : 15-01-1943

Acts Referred:

Transfer of Property Act, 1882 — Section 39

Citation : AIR 1943 Bom 412 : (1943) 45 BOMLR 802

Hon'ble Judges : Sen, J; John Beaumont, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

John Beaumont, C.J.—This is a second appeal from the Assistant Judge of Belgaum, and it raises an interesting and important question on the construction of Section 39 of the Transfer of Property Act, 1882, on which there appears to be no direct authority. The facts found are, that the plaintiff is the widow of a man who was possessed of four fields at the time of his death. Defendant No. 1 is the only son of that man. After defendant No. 1 attained his majority he sold the four fields. He sold one of them on May 30, 1935, to defendant No. 2, who is the present appellant, a second one on June 29 of the same year to defendant No. 2; a third field in August 1935 to defendants Nos. 3 and 4, and the fourth field, in January 1936, to defendant No. 2. Defendants Nos. 3 and 4 had no notice of the existence of the plaintiff as a widow of the vendor's father. But defendant No. 2 knew of her existence and he also knew that the property was ancestral property. On those facts the plaintiff sued for maintenance, past and future, and the learned trial Judge held that she was entitled to certain past maintenance and to Rs. 200 a year for future maintenance, and, inasmuch as defendant No. 2 had notice of her claims, he charged half the arrears of past maintenance and Rs. 50 a year in respect of future maintenance on the property in possession of defendant No. 2.

2. Apart from Section 39 of the Transfer of Property Act, the rights of a Hindu

widow to maintenance are well settled. She is entitled to maintenance out of her husband's property, and also out of the property in which he was a coparcener at the time of his death; and it had been held in this Presidency in *Lakshman v. Sarasvatibai* (1875) 12 B.H.C.R. 69 and *Lakshman Ramchandra Joshi v. Satyabhamabai* ILR (1877) 2 Bom. 494 that although a widow was entitled to maintenance out of the rents and profits of the whole of the Immovable property of her husband, that right did not amount to a charge on the property, unless of course a charge had been created; and if the property was sold by the owner to a purchaser, and the sale was not made with the intention of defeating the widow's rights, the purchaser got a good title as against the widow. It had also been held in *Rachawa v. Shivayogapa* ILR (1893) 18 Bom. 679 that although a widow had not a charge upon the estate, if a portion of the estate had been assigned to her for her maintenance, a purchaser of that portion of the estate would take it subject to her right, on the general principle that notice that a person is in occupation of land is notice of that person's rights. So that, in this Presidency at any rate, before the passing of the Transfer of Property Act, the rights of the widow could only be saved by getting a charge on part of the Immovable property for maintenance either by agreement or by a decree of the Court, or by getting part of the Immovable property assigned to her for her maintenance.

3. Section 39 of the Transfer of Property Act, as originally framed, gave statutory effect to the law as it existed in this Presidency, and provided that

Where a third person has a right to maintenance or a provision for advancement or marriage from the profits of Immovable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee if he has notice of such intention or if the transfer is gratuitous.

But in 1929 the section was amended so as to eliminate the necessity of proving an intention to defeat the rights of the widow, and the section now reads :

Where a third person has a right to receive maintenance or a provision for advancement or marriage from the profits of Immovable property, and such property is transferred....the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

The question we have to determine is, what is the meaning of the expression, "has a right to receive maintenance from the profits of Immovable property" ? It is argued by the plaintiff that inasmuch as the widow's maintenance is payable out of the whole estate of her husband, it is payable out of the rents and profits of the suit property, which forms part of that estate, and, therefore, the section applies. On the other hand defendant No. 2 argues that although the maintenance is admittedly payable out of the income of the whole estate, it is

not payable, nor is any rateable part thereof payable, out of the rents and profits of any particular property. It is pointed out that in some cases there may be moveable property amply sufficient to provide for any possible maintenance, and it is argued that in such a case it could not fairly be said that maintenance was payable out of the rents and profits of the Immovable property. It seems to me that on the language of the section it would be possible to adopt either construction without doing violence to the language, and one has to consider which construction best carries out the intention of the Legislature, which would seem to be the protection of a widow's right to maintenance.

4. If the plaintiff's construction is right, in effect it comes to this, that a widow, as against a purchaser with notice of her rights, is virtually in the position of having got a charge on the whole of the Immovable property, because no purchaser of any part of the property can get a good title without seeing that her rights are discharged, and it is suggested that that would interfere with the alienability of the land of the husband or family. However, it may be answered that such a right in the widow would not present an insuperable difficulty to alienation; it would only involve that the purchaser would have to treat her as if she had got a charge, and see either that she released her right if *sui juris*, or if not *sui juris* that some other property was allocated to her maintenance by a decree of the Court, so as to release the property proposed to be sold.

5. There is another possible difficulty on the construction advocated by the plaintiff, which does not arise in this case and on the solution of which I do not propose to express an opinion. That difficulty is in regard to the rights of creditors of the husband. It is well settled that the right of an unsecured creditor of the husband takes precedence over the claim of the widow for maintenance. He can enforce the payment of his debt as against the Immovable property of the husband without regard to the widow's right to maintenance, and it would seem very improbable that the Legislature intended to alter the law in that respect. But if maintenance is regarded as payable out of the profits of all the Immovable property of the husband, it may be difficult to except from the operation of Section 39 property sold for payment of debts, and to limit the section to Immovable property not required to satisfy a claim having priority to the right to maintenance. However, as I have said, that question does not arise in this case.

6. On the other hand, if the defendant is right, and the section only applies in respect of Immovable property which is either charged or in some way allocated to the maintenance of the widow, one difficulty is that the right would seem to depend partly on the facts. When the estate consists only of one Immovable property, so that the maintenance must be payable out of the rents and profits of that property, it is difficult to see why the section should not apply. In the present case, maintenance might be charged on the field which was sold last, though not charged on the other fields. That seems rather capricious. But a more serious difficulty in the way of the appellant's construction is that really it

reduces Section 39 to a nullity, because if the only land affected is land on which the widow has got a charge, which could operate u/s 100 of the Transfer of Property Act, or in respect of land which has been allocated to her maintenance, so that a purchaser would be put on enquiry as to the circumstances of her possession, the section would seem to have no practical operation at all. It seems plain that the object of the Legislature was to safeguard the widow in respect of her right to maintenance, and the Court ought not to adopt a construction which defeats that object. It is no doubt perfectly true that a widow can protect her rights by applying to the Court for a charge. But then, many widows are illiterate and ignorant women, who do not appreciate the necessity of obtaining a charge on specific property, As long as members of the husband's family continue to pay maintenance voluntarily, probably the widow takes no steps, and she may find herself defeated by a sale, and I think it was against that risk that Section 39 was enacted. I think, therefore, that the proper construction of Section 39 is to hold that the widow's maintenance is payable, in the first instance, from the profits of the whole of the husband's Immovable property, and, therefore, if a purchaser has notice of the existence of the widow, the burden is upon him to see that her claims are discharged before he purchases the property. That was the view taken by both the lower Courts, and, on the whole, I think, it is right.

7. The appeal, therefore, will be dismissed with costs.

Sen, J.

8. I agree.