

(1961) 09 KAR CK 0001
In the Karnataka High Court
Case No : Second Appeal No. 670 of 1957

Kare More Sharabanna Rudrappa and Others	APPELLANT
Vs	
Basamma and Others	RESPONDENT

Date of Decision : 26-09-1961

Acts Referred:

Transfer of Property Act, 1882 — Section 18, 27, 39

Citation : AIR 1962 Kar 207 : (1962) ILR (Kar) 150

Hon'ble Judges : K.S. Hegde, J; B.M. Kalagate, J

Bench : Division Bench

Advocate : K.R. Gopivallabha Iyengar, for the Appellant; B. Ramachandra Rao, for the Respondent

Judgement

(1) The facts relevant for the purpose of deciding the question of law urged in this appeal are the following: The first plaintiff is the wife of the third defendant. Plaintiffs 2 and 3 are the minor children of the third defendant and the first plaintiff. In the suit, the plaintiffs have claimed maintenance from the third defendant and they have sought a charge on the suit properties for the maintenance that may be decreed in their favour. The Courts below have held that the plaintiffs are entitled to claim maintenance from the third defendant. That finding is not challenged in this Court. The first appellate Court granted the first plaintiff maintenance at the rate of Rs. 600/- per year and for plaintiffs 2 and 3 at the rate of Rs. 200/- each, per year.

(2) Sri K. R. Gopivallabha Iyengar, the learned counsel for the appellants contend that the rate at which the maintenance was granted to the plaintiffs is excessive. We do not think that this contention is correct. As found by the Courts below, the net amount income of the third defendant was Rs. 2000/-. The only persons who are entitled to be maintained by him are the plaintiffs. That being so, it cannot be said that the rate fixed by the first appellate Court is excessive.

(3) The more important question for decision is whether the plaintiffs are entitled to a charge over the suit property for the maintenance decreed in their favour.

The Courts below have granted the charge prayed for. Before proceeding to consider the correctness of that decision, it is necessary to set out a few more facts.

The third defendant was a member of an undivided family till 20-5-1952, on which day it is alleged that he separated from the other co-partners. The first defendant is the father of defendants 2 and 3. The second defendant is the elder brother of the third defendant. After that partition, the third defendant purported to gift all his properties in favour of defendants 4 and 5 who are the sons of the second defendant. The Courts below have come to the conclusion that the partition in question was effected with a view to defeat the claims of the plaintiffs and that the plaintiffs had been compelled to leave the house sometime prior to that partition. They have also come to the conclusion that the Gift Deed Exhibit B-2 (dated 23-5-1952) in favour of defendants 4 and 5, the sons of the second defendant, was also executed with the same object in view.

In the opinion of the first appellate Court, despite the gift under Ex. B-2, the plaintiffs are entitled to a charge over the properties gifted in view of S. 39 of the Transfer of Property Act. The Courts below did not set aside either the partition deed or the gift deed as the transactions covered by those deeds had been voluntarily entered into by the third defendant whatever might have been his motive in so doing. Therefore, all that we have to consider in this appeal is whether the provisions contained in S. 39, T.P. Act can be availed of in justification of the charge granted by the Courts below.

(4) Section 39 reads thus:

"Where a third person has a right to receive maintenance, or a provision for advancement of marriage from the profits of immovable property, and such property is transferred, the right may be enforced against the transferee, if he had 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 next question is, had the plaintiffs right to receive maintenance from the profits of the suit property? If they had such a right, then they can rely on S. 39 in support of the charge granted in their favour.

It was argued by Sri Gopivallabha Iyengar, that the liability of a Hindu to provide maintenance to his wife and minor daughters is a personal liability; it has nothing to do with his property; nay it is irrespective of his possessing any property. The scope of this contention was examined in *Radhabai Gopal Joshi vs. Gopal Dhondo Joshi* AIR 1944 Bom 50. In the course of his judgment, Lokur, J. who delivered the judgment of the bench, after referring to the observations of Westrop, C. J. in the Full Bench case in *Savityribai v. Luximibai* ILR 2 Bom 573 (FB) that :

"The injection contained in the texts is not rendered dependent upon or in

anywise qualified by a reference to the possession of family property, and purports to impose a personal legal obligation enforceable by the sovereign or the State. The obligation, too, is not asserted to be merely occasional, but permanent and continuous" opined:

"This (observation above referred to) merely emphasises the well recognised doctrine that the maintenance of the wife is a legal and imperative duty of the husband independently of his possession of any property. But it does not mean that she has no right to be maintained out of her husband's property, if he possesses any". The point in controversy was considered by Viswanatha Sastri, J. in *Manikyam v. Venkayamma* AIR 1957 A.P. 710. Therein his Lordship observed:

"Though the right of the wife to separate maintenance does not form a charge upon her husband's property, ancestral or self-acquired, yet, when it becomes necessary to enforce or preserve such a right effectively, it can be made a specific charge on a reasonable portion of the property. If the right of maintenance is imperiled or jeopardized by the conduct and dealings of the husband or father with reverence to his properties, the Court can create a charge on a suitable portion thereof, securing the payment of maintenance to the wife or children. Such a charge can be created not only over the properties in the hands of the husband or father but also over properties transferred by him either gratuitously or to persons having notice of the right to maintenance". (as summarised in the head note).

This decision was later affirmed by a Division Bench of the same High Court in *Chandamma v. anima Venkatareddi* AIR 1958 A.P. 396. Similar was the view taken by a single Judge of the Madras High Court in *Vellayammal Vs. Srikumara Pillai*, . As against theses decisions Sri Gopivallabha Iyengar, invited our attention to the decision of Chandrasekhara Aiyar, J. (as he then was) in *Pavayamal and Another Vs. Samiappa Goundan and Others*, wherein the learned Judge held that in the case of a Hindu wife and unmarried daughters, it cannot be said that they have got a right to receive maintenance "from the profits of immovable property" within the meaning of S. 39. The judgment in question is a very brief one. In it there is no discussion of the law on the point nor any reference to decided cases. The Andhra Pradesh High Court in the above mentioned cases dissented from the view taken in *Pavayamal and Another Vs. Samiappa Goundan and Others*, . Similarly the learned Judge who decided *Vellayammal's* case, *Vellayammal Vs. Srikumara Pillai*, did not follow that decision. We do not think that the decision in *Pavayamal and Another Vs. Samiappa Goundan and Others*, lays down the law correctly.

(5) It was lastly urged by Sri Gopivallabha Iyengar that Hindu Adaptations and Maintenance Act (which shall be hereinafter called "Act") has altered the law in this regard. It was contended that the "Act" is a self-contained Act and the same having not provided any charge for the maintenance due to Hindu wives and unmarried daughters on the property of the husbands or the fathers as the case may be, the plaintiffs cannot get any charge at any rate for the maintenance that

became due after the "Act" came into force or for the maintenance that may become due hereinafter. Section 18 provides for the grant of maintenance to "Act". The charge in question is claimed not under S. 18 or under S. 20 of the "Act" but under S. 39 of the T. P. Act. We have earlier come to the conclusion that the wife as well as the minor children have a right to receive maintenance from the profits of the immovable property of the husband or the father as the case may be.

Section 27 of the "Act" merely provides that a dependent's claim for maintenance under that Act shall not be in charge on these we of the deceased or any portion thereof, unless one has been created by the will of the deceased, by a decree of Court by agreement between the dependent and the owner of the estate or portion or otherwise. Dependents are those who are set out in S. 21 of the "Act". Neither the wife nor the unmarried daughters come within the class of persons mentioned in S. 21. They have their own independent right. That belong so, their right can in no manner be hedged by the provisions contained in S. 27. We do not think that the contention that the "Act" in any manner has taken away the right of the wife as well as of the minor children to get a charge is correct.

(6) In the result, this appeal fails and the same is dismissed with costs.

(7) Appeal dismissed.