

(1936) 12 BOM CK 0007
In the Bombay High Court

Purshottamdas Harjivandas Patel and Others

APPELLANT

Vs

Rukmini and Others

RESPONDENT

Date of Decision : 02-12-1936

Acts Referred:

Transfer of Property Act, 1882 — Section 6

Citation : AIR 1937 Bom 358

Hon'ble Judges : Wassoodew, J

Bench : Division Bench

Judgement

Wassoodew, J.—This speal arises out of a suit by the plaintiff, a Hindu widow, against the executors and trustees of her husband for maintenance at a sum higher than that recoverable from a fund set apart by her deceased husband in a post-nuptial agreement of separation dated 22nd June 1907, and confirmed in the husband's will dated 19th October 1919, for separate residence, for arrears of maintenance in the amount of Rs. 150 and for a declaration of a charge for maintenance on the properties of the husband. The grounds upon which the higher rate was claimed were that the income available was insufficient to meet her needs and that the estate of her husband could afford paying more on the same scale as the co-widows.

2. The defence was that the terms of the agreement and the will debarred the plaintiff from making the claim, that there was no justification for claiming an enhanced rate of maintenance, that the suit was not maintainable in the absence of proper and necessary parties such as the residuary and other legatees, and that the plaintiff being a party to a decree in an administration suit against the executors by the residuary legatees in which she did not contest the terms of the will, cannot sustain this claim in derogation of the terms of the will. In disallowing those contentions the learned trial Judge found that having regard to the value of the property and the income therefrom, the plaintiff should be allowed a total maintenance of Rs. 1,000 a year payable in the first instance out of the fund earmarked for the purpose by her husband in the agreement, and if

that fell short of the sum allowed, the balance should be paid out of the other properties in the hands of the trustees. A charge was created on certain properties and the arrears of maintenance claimed which the trustees were willing to pay were allowed with interest at six per cent. Against that decree one of the trustees and executors has filed this appeal. The material facts are these: Owing to disagreement and unsuitability of temper the plaintiff and her husband separated by mutual consent in 1907. At that time they entered into an agreement whereby the plaintiff consented to live separately, and her husband in his turn agreed to provide for her maintenance and residence by setting apart the annual in from one share in the New Cotton Mills at Ahmedabad. The relevant terms of that agreement are as follows:

So we both of us jointly and through the intervention of Seth Amratlal Damodardas have ooma to the arrangements mentioned below. That as long as you live you should for your maintenance and clothing receive directly from the Mill in your full right the dividend that may be paid every six months on one share of my ownership of the certificate of Rs. 1,000 of the Ahmedabad New Cotton Mills bearing No. 403. Neither I nor my heirs and executors will cause any obstruction or hindrance therein... As also neither I nor my heirs and executors will so long as you live deal with the said share by way of sale, pledge gift or in any other manner. The interest received for the said share for both the halves is Rs. 80. If hereafter from time to time whether the amount increases or decreases, you have the right to take the said amount... Neither I nor my heirs and executors will come in the way of your receiving the dividend on the abovesaid share No. 403 directly from the Mill in your own independent right... And you stay at a distance of a hundred paces from the house in which I reside. We have executed this document in your favour on that understanding... And you have no right to get maintenance) and clothings in any manner other than the dividend on share No. 403 mentioned above... The rent of the house is included in the dividend on the share No. 403 mentioned above.

3. The husband has made his heirs and representatives liable as well as himself for the fulfilment of his engagement and it is clear from the words used that the agreement was to operate during the lifetime of his wife. In effect it provides for the maintenance out of a definite and fixed fund and contains an express stipulation against a claim for further maintenance out) of any other property of the husband. It is common ground that the value of the share appreciated and the annual dividend rose gradually from Rs. 80 to Rs. 1,000 and more in some years. During the two years before the suit the average annual dividend was between Rs. 300 and Rs. 375. In 1916, during the lifetime of the husband, who after the separation from the plaintiff had married two more wives, from the last of whom he had two daughters, the plaintiff unsuccessfully sued him to secure a higher rate of maintenance. In December 1919 the husband died leaving a will dated October of that year. In that will the following instructions were left for the executors in regard to the plaintiff's maintenance (vide Ex. 20):

My first wife Rukmiui has gone away from my house after committing a theft. She is very mischievous. I am not at all on good terms with her. She has given and gives me great trouble. She having beaten my second wife Shakri, she was also fined in a criminal Court. A deed has been executed on 22nd June 1907, in connexion with her maintenance and in the above deed a "tharav" has been made to the effect that she should be given the dividend of the share No. 403 of the Ahmedabad New Ootton Mills Company which is standing in my name. The said share should be transferred in the name of Seth Amratlal Gor-dhandas after my death and dividend should be continued to be paid to her as is done at present. I do not keep any right of hers on that share or on any other property of mine and I do not give her anything and my executors in order to satisfy the confidence that I have put in them should not give her any more property nor should spend any of my properties through her, She should not be allowed to interfere with the management and expenses of the properties and should not do anything by which she directly or indirectly can interfere. I clearly order that the said Rukmini my wife should not adopt anybody and I make a clear objection to adoption. Although a clear "tharav" was made for her maintenance she had filed a false suit which has also been dismissed.

4. After the husband's death the executors named in the will assumed management of the property. In 1925, Suit No. 1361 was filed on behalf of the two daughters for administration of the property against the executors. The plaintiff was made a party to the suit and she did not question the dispositions under the will, nor did she claim a higher rate of maintenance in those proceedings. Under the decree which was passed in that suit on 27th, March 1928, the executors were directed to make certain payments to the residuary legatees upon the ascertainment of the residue, Till March 1930, the plaintiff, notwithstanding the gradual reduction in the annual dividends, did not ask for more maintenance; but on 11th March 1930 she gave notice to the executors of her claim which was denied by defendant 2, one of the executors. She then instituted this suit on 16th April 1930. The learned trial Judge thought that the husband was not entitled to limit the widow's maintenance by a will, for she was "in a subordinate sense a co-owner with him in the property and her right to maintenance was in a limited way a charge on his property". It may be pointed out that that reasoning of the learned trial Judge is wrong and contrary to authority. It cannot be suggested that a Hindu wife has any property or co-ownership in her husband's estate. West, J, in *Narbadabai v. Mahadeo Narayan* (1880) 5 Bom. 99 has observed as follows:

A Hindu wife has no property or co-ownership in her husband's estate in the ordinary sense which involves independent and co-equal powers of disposition and exclusive enjoyment. Her right is merely an inchoate right to partition, which she cannot transfer or assign away by her own individual act; and, unless such right has been defined by partition or otherwise, it cannot be released by her to her husband.

5. The learned trial Judge did not base his conclusion on that ground alone for he regarded the agreement as not binding on the plaintiff. In his opinion the change of circumstances could not be ruled out of consideration in giving effect to the agreement and it was for the Court to consider whether the restrictions imposed by the husband were reasonable and whether they should be given effect to in view of the general rule of law that the amount of maintenance is liable to variation with the change of circumstances of the family and the value of the estate. It is now well recognized that by marriage a Hindu widow acquires a right to be maintained according to the estate and condition of her husband of which right she cannot be divested except by her own misconduct. In this case the husband and wife had lived separately by mutual consent and the husband has laid aside a part of his estate out of which the wife agreed to receive maintenance. Except when the wife sued her husband for an enhanced rate of maintenance in 1916, the wife had accepted the arrangement and had lived upon the income for nearly 11 years after the husband's death. The question therefore arises whether the wife can, notwithstanding the agreement, sue the husband's executors for increasing the monthly rate of maintenance out of the income of other properties in their hands on the ground stated above. It is said that the standard of her comfort should be measured by that of her co-widows in accordance with the provisions made by the husband in his will. Upon examination of the terms of the agreement, I do not think it can be said on principle that that agreement is either opposed to public policy or the spirit of the Hindu law. Such an agreement is entirely different from an anti-nuptial agreement to live separately after marriage. The latter cannot be defended under the rules of Hindu law or morality. Normally therefore the Court would give effect to an agreement providing for separation and maintenance unless it were proved to have been obtained by any of the circumstances invalidating a contract, such as fraud, undue influence or mistake. No such circumstance has been alleged, and it appears from the record that both parties entered into it out of their own free will.

6. The learned counsel for the plaintiff-respondent has argued that in no circumstances can a Hindu wife enter into a valid agreement agreeing to relinquish her right to claim enhanced maintenance in future out of her husband's property either in his own or in the hands of his heirs or executors; and he has attempted to support that proposition by certain observations of West, J. in *Narbadabai v. Mahadeo Narayan* (1880) 5 Bom. 99. In that case the husband shortly before his death had quarrelled with his wife and they entered into an agreement by which he allotted to her the free use of a room in his house for her residence and separate allowance for maintenance at the rate of Rs. 7 a month. Subsequent thereto the husband made a gift of his entire property in favour of his sons. After the death of the husband the wife sued the sons for arrears of past maintenance and for making provision for her future maintenance out of the property in their hands which was the subject of the gift. The Court held that the Hindu husband could not alienate by a deed of gift to his sons the

whole of his Immovable property, though self, acquired, without making for his wife who is destitute and has not forfeited her right to maintenance, a suitable provision to take effect after his death and that after the husband's death she was entitled to follow such property to recover her maintenance, her right to which was not affected by any agreement made by her with her husband in his lifetime. That case, in my opinion, is distinguishable on facts. No estate of the husband was set apart to meet the charges of maintenance of the wife either during the husband's lifetime or after his death and the entire property was disposed of by gift. The Court held that there could be no consideration for the release of a wife to maintenance when there was a mere promise to pay Rs. 7 a month by the husband. The gift to the sons followed promptly on the release, and was obviously intended to shut out any future claim of the wife. It cannot be regarded as an exercise in good faith of the husband's general authority and discretion but was distinctly an endeavour to place the wife, should she survive her husband, in a state of destitution. There is nothing in that judgment which is consistent with the view that under no circumstances can the husband satisfy the wife's claim to maintenance by agreeing to set aside a fund sufficient to meet the requirements of the wife in every respect. One of the main grounds on which West, J. decided in favour of the wife was that the latter had not taken any property of the husband which would deprive her of the right to maintenance which she would otherwise have.

7. The essential difference lies in the fact that in this case a fund has been earmarked for the purpose of meeting the charges of maintenance of the wife. But it has been urged that as maintenance fixed by a decree is liable to be increased or decreased whenever there is a change of circumstances, the rate fixed by mutual agreement between the husband and the wife could not be invariable. We were referred to *Sidlingapa v. Sidava* (1878) 2 Bom. 624 in support of that view. In that case there was no decree debarring the parties from claiming any increase, and in my view if there was such a provision in the decree, the claim for an enhanced rate could not be sustained. The right essentially rests on personal obligation and the maintenance is usually fixed on the needs of the woman and the ability of the income of the husband and his property to meet them. If the rate is fixed upon those considerations either by an agreement or by a decree and there is no stipulation against increase, it stands to reason that the Court would reconsider the position in the light of changed circumstances. But where, as here, there was an express agreement renouncing the claim to maintenance out of any property of the husband other than that specified in the agreement, it is difficult for a Court to set aside that agreement.

8. It has been suggested that the cause of action for a wife to sue her husband for maintenance is entirely distinct from the cause of action of the widow for maintenance on the death of her husband and consequently the agreement by a wife will not operate to extinguish her right to claim maintenance from her husband's estate in the hands of the executors. The learned counsel for the plaintiff has relied on the observations in *Mt. Sham Devi v. Mohan Lal* AIR 1934

Lah. 167. That was not a case of agreement between the husband and wife such as we have here. The only question that arose in that case was whether in view of a prior decree against the husband for maintenance the widow was barred from exercising her claim for maintenance against her husband's heirs. There is nothing in the report of the case to suggest that the prior decree for maintenance debarred the wife from claiming her right against the heirs. Here the wife has agreed with the husband to receive maintenance from a fund assigned to her by the husband, and the question of her right to claim additional maintenance out of another fund in the hands of her husband's heirs must ultimately be decided by the terms of that agreement. Those terms in this case are clear and admit of no implication. It cannot be said that the husband was contracting out of his legal liability to maintain his wife and the agreement is not susceptible of the interpretation that she was releasing a right to future maintenance which she perhaps could not do, if the release operated as a transfer of that right, in view of the prohibition in Section 6, T.P. Act. All that she purported to do or did was to renounce her right to claim maintenance out of any fund other than the one which she agreed should be set apart to discharge the husband's liability. On principle the present case cannot be distinguished from *Mohieswara Rao v. Ayya Devara Durgamba* AIR 1924 Mad 687. There a Hindu widow contracted with her husband's coparceners to receive a fixed maintenance per annum and not to claim any increase in future even in case of change of circumstances. The Court held that the agreement was valid and binding upon the widow on the ground that it was tantamount to a release of the widow's right to increased maintenance in future. Although that was not the case of an agreement between the husband and the wife, the correctness of the principle upon which the agreement with the husband's heirs was upheld cannot be doubted. Therefore in my opinion the agreement must operate as a bar to the plaintiff's claim in this suit.

9. The above finding is decisive of the plaintiff's claim to enhanced maintenance. But apart from it, on the merits, we do not think that the plaintiff has made out a case for increasing her maintenance. In *Ekradeshwati Bahuasin v. Homeahwar Singh* AIR 1929 P.C. 128 their Lordships of the Judicial Committee remarked that the maintenance should be such an amount as would enable the widow to live consistently with her position as a widow, with the same degree of comfort and reasonable luxury as she had in her husband's house, unless there are circumstances which affected, one way or the other, her mode of living there. But that is not an absolute rule for the guidance of Courts in all cases where maintenance is claimed. There are other circumstances upon which the amount of maintenance depends, viz. the past relations of the wife with her husband. These cannot be ignored. There is an indication in the will of the husband that the plaintiff had failed to perform her duties as a wife. The differences between the husband and the wife are also narrated in the agreement. Prima facie therefore she could not be treated on the same level as the other co-widows for whom the husband had an affectionate regard. It is true that in some years there

were windfalls, but the average income between 1923 and 1930 was practically the same and satisfied the plaintiff's normal requirements. Even when the income was less, as apparently it was when the agreement was entered into, she was content to carry on within that income. It is also true that the total income out of the husband's estate had progressively increased, but latterly there has been a set-back. Assuming that it was such as could support the plaintiff's case that was no ground without satisfactory proof that her needs had substantially increased for allowing her claim. The learned Judge below therefore seems to me to have erred in acceding to her prayer for treating her (on the same footing as the other co-widows.

10. There are two other contentions urged in this appeal. The first is that the suit was untenable on the ground of nonjoinder of parties. It seems to us that so long as all the executors who are trustees were parties to the suit, the estate of the husband was sufficiently represented. The other ground is that the plaintiff, nor having contested in the administration suit the terms of the will, has forfeited her claim inasmuch as she cannot approbate and reprobate. That contention, in our opinion, is not well founded. No suggestion has been made that by her conduct she has received any material addition to her income or that in 1925 she ought to have raised the same contention as she does in the present suit. It is possible to suppose that there was no reason then for her to claim enhanced maintenance. As regards the arrears of maintenance, the executors have conceded the plaintiff's claim and there is no dispute about it in this appeal. Therefore the directions in the lower Court's decree that the defendants should pay Rs. 150 with six per cent, interest on it from the date of suit and that the defendants should continue to make payments out of the dividends of the New Cotton Mills shares earmarked for the plaintiff's maintenance will stand. In other respects the plaintiff's claim fails. Therefore we allow this appeal and reverse that part of the decree only in so far as it allows the plaintiff's maintenance at a sum higher than the income of the assigned fund out of the other estate of the deceased Madhavlal Nathubhai and creates a charge on his properties for that maintenance. The direction in the lower Court's decree in regard to the payment of dividends and arrears thereof is maintained. In the circumstances we direct that the plaintiffs should bear their own costs throughout both in the trial Court and in the appeal Court and the costs of the defendants throughout shall come out of the estate.

Broomfield, J.

11. The most important point in the appeal is whether the plaintiff's claim to increased maintenance is barred by the agreement between her and her husband in 1907 by which certain dividends were assigned for her maintenance and she relinquished her right to get maintenance out of any other property. I agree with my learned brother that this agreement must be held binding on the plaintiff. She was capable of contracting; she was about thirty years old at the time. There is no suggestion of undue influence or anything of that kind *Mohieswara Rao v.*

Ayya Devara Durgamba AIR 1924 Mad 687 is an authority for the view that an agreement between a widow and the coparceners of her husband not to claim increased maintenance in case of change of circumstances is valid and binding. I do not think there is any foundation for Mr. Dave's contention that a similar agreement between the husband and wife is not equally binding. Of course the distinction between the husband's personal obligation to maintain his wife and the widow's claim to maintenance out of her husband's estate does exist. In that connection I may mention Surampalli Bangaramma v. Surampalli Brambaze (1908) 31 Mad. 338 in addition to the cases cited in the argument. The release of the husband's personal obligation by the wife, even if legal, would not of course be any bar to her claim as a widow against the husband's estate, but the agreement with which we are concerned cannot be regarded as a release of the husband's personal obligation only. It is an agreement to accept the portion of the property of the husband as provision for the wife's maintenance and contains an undertaking not to ask for maintenance out of any other property. I do not see anything illegal in that nor do I find anything in Narbadabai v. Mahadeo Narayan (1880) 5 Bom. 99 the case on which Mr. Dave has principally relied, which is inconsistent with the validity of such an agreement.

12. My learned brother has pointed out what was decided in Narbadabai v. Mahadeo Narayan (1880) 5 Bom. 99. A Hindu cannot dispose of his entire property by gift or will so as to defeat the right of his widow to maintenance. A Hindu widow cannot release her right to future maintenance unless it has been defined by partition or otherwise. The facts in that case are entirely different. The husband promised a monthly payment of Rs. 7 during his own lifetime (as it appears) and in consideration of this promise only which as West, J. said was no consideration at all?the wife relinquished her claims on her husband's estate, which was afterwards disposed of without any provision being made for her maintenance. Under those circumstances it was held that the persons who took the estate were legally bound to pay the maintenance promised by the husband. West, J. emphasized the fact that the wife had taken no part of the husband's property. There is no similarity between that case and the present. Here, part of the husband's estate, which by agreement was accepted as adequate for the purpose, was assigned for the maintenance of the wife during her lifetime. There was no relinquishment of right to future maintenance nor has the plaintiff's right to maintenance out of the assigned fund ever been questioned. The husband's will confirmed the provision. All that the plaintiff relinquished was her right to claim maintenance out of the other property of the husband in case of changed circumstances; and as the permanent assignment of the dividends to her was good consideration for that relinquishment, I see no reason why she should not be bound by it. I agree with the order passed by my learned brother.