(2016) 03 KL CK 0164

In the High Court Of Kerala

Case No : Mat. Appeal No. 25 of 2015

Seena Darwin and Others — APPELLANT

Vs

Darwin Joseph — RESPONDENT

Date of Decision : 30-03-2016

Acts Referred:

Family Courts Act, 1984 — Section 7
Transfer of Property Act, 1882 — Section 39

Citation : (2016) 03 KL CK 0164

Hon'ble Judges : C.K. Abdul Rehim and S.P. Chaly, JJ.

Bench : Division Bench

Advocate : V.S. Babu Gireesan, Advocate, for the Appellant;

Final Decision : Allowed

Judgement

S.P. Chaly, J.—1. The above appeal is preferred against the judgment in O.P. No. 1565/2012 of the Family Court, Ernakulam dated 29.11.2014, whereby the decree sought for by the appellants was partially granted, providing maintenance at the rate of Rs. 1,500/- each per month to appellant Nos. 2 and 3 and Rs. 5,00,000/- each to them towards marriage expenses, against the claims for Rs. 3,000/- each per month towards maintenance to the appellants and Rs. 15,00,000/- each towards marriage expenses of appellants 2 and 3.

2. Brief facts for the disposal of the appeal are as follows:-

3. The 1st appellant and respondent are husband and wife. Their marriage was solemnized on 29.1.1989. In the said wedlock appellants 2 and 3 children were born. The original petition is filed by the appellants contending that the respondent had neglected to maintain and deserted them, which necessitated the appellants to file O.P. No. 786/2005. By judgment dated 29.11.2005, maintenance was awarded to the appellants at the rate of Rs. 750/- each per month. Consequent to non-payment of the said amount to the appellants, E.P. No. 55/2010 was filed to execute the same and a portion of the said amount was

deposited and the E.P. is pending finalisation.

4. It is contended that, pending adjudication of the earlier petition, interim attachment of a property was ordered and the respondent with the intention of defeating the rights of the appellants from securing fruits of the decree had created a sham document and filed a petition to set aside the ex parte decree. After recording evidence the original petition was disposed of by order dated 17.1.2007 declining the prayer for lifting the attachment.

5. The wife of the respondent''s brother, in whose favour the agreement for sale was executed, filed a suit for specific performance in collusion with the respondent. On receiving information, the appellants got impleaded in the said suit viz.; O.S. No. 394/2010, on the files of the 2nd Additional Sub Court, Ernakulam and the said suit was dismissed by judgment dated 9.9.2010.

6. The appellants have filed the original petition in question contending that, the meager amount awarded by the court as maintenance for the appellants in 2005 is quite insufficient to meet the day to day expenses, especially the educational expenses of appellants 2 and 3. The 2nd appellant at the time of application was aged 22 years and for her matrimonial expenses the respondent is not willing to share. The 2nd appellant is concerned about her future. That the appellants are entitled to get maintenance at the rate of Rs. 3,000/- each per month (incorrectly shown in the body of judgment as Rs. 2,000/-) and the respondent is liable to pay the said amount from the year 2010 onwards. In order to meet the marriage expenses, the 2nd and 3rd appellants are entitled to realise Rs. 15,00,000/- each. Even though the respondent is capable of raising such amount, he is purposefully avoiding payment of the amount to the appellants. It is also contended that the respondent is totally neglecting appellants 2 and 3 and their future is in uncertainty. That apart it is contented that, the respondent is a permanent employee in Keltron drawing a salary of Rs. 20,000/- per month. The sole intention of the respondent is to alienate the property in favour of his brother''s wife, with the malafide intention of defeating rights of the appellants in getting the maintenance and the marriage expenses.

7. The 1st appellant is indebted to Banks and other institutions towards the amounts incurred with respect to construction of residential house and maintenance of appellants 2 and 3. The income received by the 1st appellant from the business which she is conducting, is not even sufficient to pay the debts incurred by the 1st appellant. It is also contended that the appellants are entitled to get maintenance and marriage expenses as claimed in the petition. It is thus seeking a decree for maintenance at the rate of Rs. 3,000/- each per month to the appellants and Rs. 15,00,000/- each as marriage expenses to the 2nd and 3rd appellants, the aforespecified original petition is filed.

8. The respondent entered appearance and filed written statement refuting the allegations and the claims made in the original petition. It is contended by the respondent that the petition is filed with an ulterior motive of making unlawful

enrichment at the cost of the respondent, that the appellants have filed O.P. No. 786/2005 earlier, and the said original petition was allowed on 29.11.2005 and that a decree was passed therein allowing the 1st appellant to recover an amount of Rs. 1,15,000/- and 12 sovereigns of gold ornaments or its value with 8% interest till realization from the respondent, that the appellants 2 and 3 were granted an order to realise an amount of Rs. 750/- each per month from the respondent from the date of original petition and that the claim of the 1st appellant was rejected by the court as per the said judgment and decree.

9. That apart it is also contended that the maintenance payable to the appellants 2 and 3 was already fixed by the court by the said order and if they are not satisfied with the decree so passed the remedy available to them is to challenge the same before the appellate forum. It is also contended that there is no provision either in the Family Court Act, 1984 or in the Code of Civil Procedure enabling the appellants to claim the relief successively, that it is settled law that the appellants cannot go beyond the decree and therefore, the relief claimed in the original petition seeking maintenance to the appellants is not maintainable and hence liable to be rejected. That apart it is also contended that the decree sought for as marriage expenses for the 2nd and 3rd appellants is not maintainable as there is no provision in law that enable the Christian daughters to claim marriage expenses and therefore, the said claim is beyond the scope of jurisdiction conferred under Section 7 of the Family Courts Act, 1984.

10. It is also contended by the respondent that the 1st appellant has deliberately suppressed true and correct facts from the purview of the court, that it is the 1st appellant who abandoned the respondent and is living as per her whims and fancies without even permitting the respondent to stay in their house. That apart it is also contended that she is the owner of the establishment called ''Manorama Typing Centre'' situated opposite to the High Court of Kerala and that around 20 persons are working in the said centre, wherein job works are being undertaken. It is also contended that the 1st appellant is engaged in photostat business and she earns income of more than Rs. 75,000/- per month. It is also contended that the statement in the original petition with respect to the liabilities are nothing but concocted stories. Respondent is sick and unhealthy and he is suffering from old age diseases for which he is undergoing treatment, that he has no income of his own and he is retired from the establishment. It is also contended that he is depending on his family members for his survival and treatment and that the 1st appellant after enjoying the fruits of his income had mercilessly abandoned him when she realized that he is no more useful to her. It is also the contention of the respondent that he is residing in a lodge and the family members are taking care of him. The statements made by the appellants in the original petition with respect to his job and income are also disputed by the respondent. The claim for enhancement sought for is highly excessive and without any base. The claim raised by the appellants 2 and 3 towards the marriage expenses is also excessive. Therefore, the appellants have no cause of action and sought for dismissal of the original petition.

11. The original petition was amended by the appellants as per order in I.A. Nos. 2090/2014 and 2088/2014, by incorporating respondents 2 and 3 as additional respondents and also incorporated an additional prayer. Apart from the relieves sought for in the original petition at the time of its institution an additional relief for declaration was sought for to the effect that the sale deed created by the respondent in favour of additional respondents 2 and 3 during the pendency of the original petition is null and void. It is also contended that the said transaction is done by the respondent with the intention of defeating the right of the appellants. To the amendment the respondent has filed an additional objection to the effect that at the time of agreement for sale and execution of the sale deed, there were no charge, encumbrance or prohibitory order from the court prohibiting alienation of the property, that the transaction is a bonafide one and there is no collusion. It is denied that there is pendente lite transaction. The property was not subjected to any charge or litigation at the time of conveyance and that the transfer is a genuine one for valid consideration. That apart it is also contended that the respondent was in need of huge amount for discharging his liability incurred for paying the decree debts in O.P. No. 786/2005, for financially helping the 1st appellant for construction of the house incurring amount to the tune of Rs. 7,00,000/-, for his treatment and for clearing loans to various financial institutions.

12. Respondents 2 and 3 filed written objection contending that the 3rd respondent entered into an agreement for purchase of 2.02 Ares of vacant land in Sy. No. 953/1 of Rameswaram village, Kochi from the 1st respondent, by which the total sale consideration agreed upon was Rs. 6,07,000/-, that after a month 1st respondent expressed his willingness to sell 2 cents of vacant land on the western side of the above mentioned land and the said portion was proposed to be sold for an amount of Rs. 2,63,500/- per cent. That apart it is also contended that the original documents and necessary tax receipts were shown by the 1st respondent for convincing him about the marketable title of the property. It is also contended that when those documents were perused it was found that an attachment was effected from the Family Court, Ernakulam in O.P. No. 786/2005 for an amount of Rs. 4,15,000/- and that there was a prohibitory order from the Sub Court, Ernakulam in O.S. No. 180/2008 which was later on lifted by another order. It is also contended by the 2nd and 3rd respondents that the 1st respondent produced order of the Family Court, Ernakulam dated 12.07.2005 lifting the order of attachment and has produced receipt showing the deposit of an amount of Rs. 4,39,043/-.

13. That apart it is also contended that there is a mortgage loan over the property by PMSE Bank, Palluruthy and the 1st respondent has produced a discharge certificate of the said loan along with the original title deed to convince the 3rd respondent, that the property is free from all encumbrances and it was subsequently that respondents 2 and 3 have entered into an agreement for sale to purchase the said property and there was no pending litigation at the time of entering into the agreement on 29.8.2013, that 81 square meters of land was

purchased from the 1st respondent by the 2nd respondent as per registered sale deed of the office of the Sub Registrar, Kochi after paying due sale consideration on 17.10.2013. The remaining 2.02 Ares of land were also purchased by the 3rd respondent by virtue of another registered sale deed of the very same SRO. It was two weeks after the said execution of documents, 1st respondent approached the 2nd respondent and informed that his wife and children filed another original petition seeking enhanced maintenance and for marriage expenses and it was dismissed by the court prior to the registration of the sale deed and it was also informed that appeal is pending before the High Court against the said judgment. It was also contended that the properties were purchased by the 2nd and 3rd respondents after due enquiries and verification and they are bonafide purchasers for value and at the time of the purchase of the properties, there was no attachment against the said properties. In such circumstances the respondent prayed that the appellants are not entitled to get a decree charged on the properties pertaining to the sale deeds executed in favour of respondents 2 and 3. From the pleadings, Family Court has raised the following questions for consideration:

"1. Whether the petition is maintainable?

2. Whether the petitioners are entitled to get a decree for maintenance from the respondent? If so, what is the quantum of maintenance payable to the petitioners?

3. Whether petitioners 2 and 3 are entitled to get a decree for Rs. 15 lakhs each by way of marriage expense?

4. Whether the petitioners are entitled to get a decree for declaration to the effect that the sale deeds created by respondent in the name of additional respondents 2 and 3 during the pendency of this petition are null and void?

5. Reliefs and costs?"

14. The 1st appellant was examined as PW1 and has marked Exts.A1, A2 and A3 series of documents. The 2nd respondent was examined as RW1 and has marked Exts.B1 to B21 documents. The 1st respondent, even though filed proof affidavit, did not mount the box for cross-examination. After appreciating the rival contentions, documents and pleadings put forth by the parties, Family Court has partly allowed the original petition by passing a decree for an amount of Rs. 1,500/- each per month for maintenance of appellants 2 and 3 and Rs. 5,00,000/- each towards their marriage expenses creating charge over the property which is under attachment as per the maintenance decree in the original petition in question and also the decree of maintenance in O.P. No. 786/2005, ignoring the sale deed executed by the 1st respondent in favour of respondents 2 and 3. It is thus challenging said judgment of the Family Court, this appeal is preferred.

15. Even though notices were served on the respondent, he has not cared to

appear either personally or through counsel.

16. Heard learned counsel for the appellants.

17. The main contention advanced by the learned counsel for the appellants is that, the maintenance ordered at the rate of Rs. 1,500/- each per month to appellants 2 and 3 cannot be sustained in view of the present economic situation prevailing, inflation and other adverse economic and financial situations. It is also contended by the learned counsel that the amount of Rs. 3,000/- claimed is very reasonable amount especially taking into account the financial capacity of the respondent. That apart it is contended that while respondent retired from Keltron he has received huge amount towards the retiral benefits. Therefore, the respondent is capable and able to provide maintenance at the rate of Rs. 3,000/- each per month to appellants 2 and 3. It is also contended that even though an amount of Rs. 15,00,000/- each was claimed towards the marriage expenses, the court below without understanding the true factual situations, capacity and financial viability of the respondent, granted only a meager amount of Rs. 5,00,000/- each. That apart it is contended that, even though the 1st appellant is conducting photostat business and typing centre she is not receiving the amounts as contended by the respondent and that apart she has huge financial commitment towards various financial institutions in connection with the loan availed by her. Therefore, it is contended by the counsel that the amount of Rs. 15,00,000/- each claimed towards marriage expenses for appellants 2 and 3 is not on the higher side especially taking into account the present day expenses towards the conduct of the marriage and its preparation. Learned counsel has also contended that in spite of receipt of notice by the respondent, he has not even cared to appear and that by itself is an indication that he has utter disrespect and disregard to the orders passed by the court. It is also contended that the evidence on records produced before the court below will establish that the respondent has capacity, means and wherewithal to pay the amounts as claimed in the original petition.

18. We have gone through the pleadings advanced by the rival parties before the court below, the appeal memorandum and the records relating to documents and evidence tendered by the parties before the court below. Since the respondent has not come up in appeal, we are confining our consideration to the relevant aspects regarding the claim of the appellants alone. As we have already noticed, since the respondent has not cared to adduce evidence there is no contra oral evidence to meet the claims raised by the appellants. Therefore, from the available evidence on record, we propose to proceed to find out whether the appellants are entitled to get any enhancement to the amounts already decreed. It is true that in an earlier round of litigation appellants 2 and 3 were provided with maintenance at the rate of Rs. 750/- each per month and that has become final and conclusive. But that by itself is not a ground dissuading the appellants from seeking the maintenance at a later point of time taking into account any predominant change of circumstance, economic situations and hostile financial

and other disadvantages suffered by the appellants. Even though a contention was raised that appellants 2 and 3 are not entitled to claim maintenance and marriage expenses since there is no provision under law to claim such amounts, the said contention is also brushed aside by the trial court. However, respondent has not filed any appeal challenging the judgment impugned and therefore, the said finding has become conclusive. The court below also found that respondents 2 and 3 are not bonafide purchasers of the properties in view of Section 39 of the Transfer of Property Act and a statutory charge is created thereunder.

19. Family Court also found that the appellants 2 and 3 are educated and of marriageable age and hence the respondent is bound to contribute towards their marriage expenses. After assimilating all the fact situation and evidence, the court below even though has found that appellants are entitled to maintenance and marriage expenses, the amount claimed by them on account of the same are excessive. To arrive at such a conclusion the Family Court had appreciated the evidence tendered by the respondent by which he has categorically asserted that he is a retired person and he is not receiving any monthly income. That apart Family Court has also taken into account the treatment undergone by the respondent, and towards the same he is spending amounts. It is also found by the court below that the 1st appellant has got substantial financial commitment against her business and towards the construction of the house and to various financial institutions.

20. It was also found by the court below that the appellants, even though were not able to produce any documents to prove the income or savings of the respondent, the respondent has got immovable properties of his own that was alienated during the pendency of the case. It was thus reckoning all the necessary factors that the Family Court has found that the appellants 2 and 3 are entitled to get a decree at the rate of Rs. 1,500/- each per month towards the maintenance and Rs. 5,00,000/- towards their marriage expenses. Appellants have not produced any further evidence or brought to our notice any material aspect from the evidence on record to establish that the Family Court should have passed a decree as sought for. The Family Court has found that there is no proof to establish the financial capacity of the respondent in terms of money. To get over this factual situation the appellants could not point out any factual aspects either from the records available or otherwise. But any how the Family Court has found that the respondent has properties and we are of the considered opinion that the amount of Rs. 1500/- each per month ordered with respect to maintenance of appellants 2 and 3, grown up children, educated and of marriageable age, in the present economic situation may not be sufficient enough to maintain themselves.

21. Moreover the father has certain responsibilities with respect to the maintenance, well being and growth of the children and also their marriage, especially girl children. This is more so when they are not employed and has no source of income of their own. Therefore, taking into account, the financial

sources of the respondent, he is liable to pay maintenance and marriage expenses to appellant Nos. 2 and 3 and the findings of the court below are reasonable, fair and does not suffer from any legal infirmities. But taking into account the pros and cons, whether the quantum fixed by the court below is liable to be enhanced.

22. Taking in to account the inflation in money value, enhancement in the prices of consumables, commodities required in every day life and other economic situations, we are of the considered opinion that the amount of maintenance can be enhanced by Rs. 1,000/- each from the already decreed amount of Rs. 1,500/-. But at the same time we are of the definite opinion that appellants 2 and 3 are not entitled to succeed in this appeal with respect to the marriage expenses ordered by the Family Court at the rate of Rs. 5,00,000/- each, since we found the amount to be reasonable. However, the amount of maintenance ordered by the Family Court is enhanced from Rs. 1,500/- each per month to Rs. 2,500/- each per month to appellants 2 and 3. The 1st appellant is not entitled to any amount towards the maintenance because it is already on record that the 1st appellant is receiving income from the business conducted by her in photostat and typing.

Therefore, the appeal is allowed in part to the aforesaid extent. There is no order as to cost.

