

(2014) 06 SHI CK 0166
In the High Court Of Himachal Pradesh
Case No : RSA No. 47 of 2014

Sushil Kumar and Others

APPELLANT

Vs

Tara Devi

RESPONDENT

Date of Decision : 25-06-2014

Acts Referred:

Hindu Adoptions and Maintenance Act, 1956 — Section 18, 18(1), 19, 19(2), 21
Hindu Marriage Act, 1955 — Section 13(b), 25, 26
Transfer of Property Act, 1882 — Section 39

Citation : (2014) 06 SHI CK 0166

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Advocate : Ramesh Sharma, Advocates for the Appellant; Vipul Sharda, Advocates for the Respondent

Judgement

Rajiv Sharma, J.—This Regular Second Appeal is directed against the judgment and decree dated 28.10.2013, rendered by learned District Judge, Una, in Civil Appeal No. 20-XIII/2013.

2. Key facts necessary for the adjudication of the regular second appeal are that the respondent/plaintiff (hereinafter referred to as the "plaintiff" for the sake of convenience) filed a suit for maintenance against the appellant/defendants (hereafter referred to as the "defendants" for the sake of convenience). According to the plaintiff, she was married to Kashmiri Lal. Her father-in-law, namely, Sidhu, had two sons, namely, Kashmiri Lal, her husband and Gurdass Ram, her elder brother-in-law (Jeth). She lost her husband about 30 years ago. According to the plaintiff, the ancestral property was inherited by the defendants as sole proprietors. She had to work hard from morning to evening in the house of the defendants. Earlier, she filed a civil suit against her father-in-law and brother-in-law, which was decreed by the then learned District Judge, Hamirpur and Una on 9.2.1984. She was granted maintenance at the rate of Rs. 75/- per month. She requested the defendants to pay maintenance to her, but they refused to do so.

3. Written statement was filed by the defendants. According to them, husband of the plaintiff died forty years ago. They denied that they inherited the ancestral property.

4. Learned trial court framed the issues on 7.12.2011 and dismissed the suit vide judgment and decree dated 13.2.2013.

5. Plaintiff feeling aggrieved by judgment and decree dated 13.2.2013 filed an appeal before learned first appellate court, who vide judgment and decree dated 28.10.2013 allowed the appeal. Hence, this regular second appeal. It was admitted on following substantial questions of law on 25.2.2014:-

"1. Whether the impugned judgment of the learned lower Appellate Court is vitiated on account of non-considering the maintainability of the fresh suit on the face of subsisting previous judgment?

2. Whether the fresh suit under Section 25 of the Adoption and Maintenance Act is not tenable when the order of maintenance was already in existence?"

6. Mr. Ramesh Sharma, learned Advocate, has vehemently argued that the learned first appellate court has misconstrued and misread oral as well as documentary evidence. According to him, the second suit was not maintainable.

7. Mr. Vipul Sharda, learned Advocate, has supported the judgment and decree passed by the learned first appellate court dated 28.10.2013.

8. I have heard learned counsel for the parties and have also gone through the record carefully.

9. Since both substantial questions of law are interconnected and interlinked, the same are taken up together for determination to avoid repetition of discussion of evidence.

10. PW1, Tara Devi, the plaintiff, led her evidence by way of filing an affidavit. According to her, she was married to Kashmiri Lal, who died 30 years ago. Her father-in-law and brother-in-law also expired. The defendants refused to maintain her. She had to file a civil suit, which was decreed by the then learned District Judge, Hamirpur and Una dated 9.2.1984. She proved copy of the judgment dated 9.2.1984 vide Ext. P1 and the copy of order of this court, Ext. P2.

11. One of the defendants, Sodi Ram, appeared as DW1 and led his evidence by way of filing an affidavit. According to him, the property in question was not ancestral property. He denied that the plaintiff was ignored by them. According to him, the plaintiff had herself left the house and was living at her parental house since 1972. He admitted that he was working as Accountant at Una and his other two brothers were earning their livelihood at Ludhiana. He further deposed that his father had provided maintenance to the plaintiff. He admitted that he along with brothers had inherited the property owned by his grandfather. He earned Rs. 5000/- per month.

12. Learned trial court has failed to take into consideration the judgment dated 9.2.1984 rendered by the then learned District Judge, Hamirpur and Una. Paras 6 and 7 of the judgment dated 9.2.1984 read as under:-

"Now the next aspect is whether this property is coparcenary. Ld. Counsel for the appellant has cited Angat Singh and Narain Singh Vs. Dhan Kaur, wherein it was observed that:-

A widow of a predeceased son who has not inherited any property from her husband nor from her parents and having no son or daughter is entitled to, maintenance if her father in law has nay ancestral property which is included in the term coparcenary property. The word coparcenary property in section 19 cannot mean coparcenary property as understood in Mitakshara law because that would nullify to a great extent, the very purpose of the situate and as the word "coparcenary property in this context is not a word of art, parliament was using this word to give it the ordinary meaning that is the property which has been inherited from a common ancestor. The expression coparcenary property contained in Section 19(2) of the Act is wide enough to include property in which the deceased husband had an interest as a joint owner during his life time. Remembering that in Hindu Law the term joint family property is used as synonymous with coparcenary property. The term coparcenary includes ancestral property includes ancestral property as the terms is understood in the Punjab Customary law.

So, in view of the interpretation by the Punjab and Haryana High Court, and admission by Sidhu respondent, the property is coparcenary and it is subject matter of the charge."

13. It is evident from the operative part of the judgment dated 9.2.1984 that in view of the admission made by Sidhu, respondent, the property was coparcenary and was subject matter of the charge. The suit was filed by the plaintiff against her father-in-law Sidhu and her brother-in-law, Gurdass Ram.

14. According to sub-section (1) Section 19 of the Hindu Adoptions and Maintenance Act, 1956, (hereinafter referred to as the "Act" for the sake of convenience) a Hindu wife, whether married before or after the commencement of the Act is entitled to be maintained after the death of her husband by her father-in-law; provided and to the extent that she is unable to maintain herself out of her own earnings or other property or, where she has no property of her own, is unable to obtain maintenance-(a) from the estate of her husband or her father or mother, or (b) from her son or daughter, if any, or his or her estate.

15. In the present case, the earlier suit was filed by the plaintiff against her father-in-law and brother-in-law. The property was held to be coparcenary. The defendants have inherited the property from Gurdass Ram. The plaintiff as per her statement categorically deposed that she is not able to earn her livelihood. According to sub-section (1) Section 22 of the Act, the heirs of a deceased Hindu are bound to maintain the dependents of the deceased out of the estate inherited

by them from the deceased. Since the defendants inherited the estate from the father-in-law of the deceased, therefore, they are legally bound to maintain the plaintiff.

16. Their Lordships of Hon''ble Supreme Court in *Sadhu Singh Vs. Gurdwara Sahib Narike and Others*, have held that heirs of the deceased are obliged to maintain the widow out of the property of the deceased inherited by them and the widow can also enforce her right to receive maintenance even against the transferee of her deceased husband's property. Their Lordships have held as under:-

"4. Under Section 18 of the Hindu Adoptions and Maintenance Act, a Hindu wife is entitled to be maintained by her husband during her life time, subject to her not incurring the disqualifications provided for in sub-Section (3) of that Section. The widow is in the list of dependants as defined in Section 21 of the Act. The widow remains a dependant so long as she does not remarry. Under Section 22, an obligation is cast on the heirs of the deceased Hindu to maintain the dependant of the deceased out of the estate inherited by them from the deceased. Under sub-Section (2), where a dependant has not obtained by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of the Act, the dependant would be entitled, but subject to the provisions of the Act, to maintenance from those who take the estate. It is seen that neither Section 18 relating to a wife nor Section 21 dealing with a widow, provides for any charge for the maintenance on the property of the husband. To the contrary, Section 27 specifies that a dependant's claim for maintenance under that Act, shall not be a charge on the estate of the deceased unless one would have been created by the will of the deceased, by a decree of court, by an agreement between the dependant and the owner of the estate or otherwise. Thus a widow has no charge on the property of the husband. Section 28 provides that where a dependant had a right to receive maintenance out of an estate, that right could be enforced even against a transferee of the property if the transferee had notice of the right, or if the transfer is gratuitous, but not against a transferee for consideration without notice of the right. Section 28 is in *pari materia* with Section 39 of the Transfer of Property Act. The Kerala High Court in *Kaveri Amma Vs. Parameswari Amma and Others*, has liberally interpreted the expression "right to receive maintenance" occurring in the section as including a right to claim enhanced maintenance against the transferee. The sum and subtotal of the right under the Hindu Adoptions and Maintenance Act is only to claim maintenance and the right to receive it even against a transferee. In the absence of any instrument or decree providing for it, no charge for such maintenance is created in the separate properties of the husband.

5. In the case on hand, since the properties admittedly were the separate properties of Ralla Singh, all that Isher Kaur could claim *de hors* the will, is a right to maintenance and could possibly proceed against the property even in the hands of a transferee from her husband who had notice of her right to

maintenance under the Hindu Adoptions and Maintenance Act. No doubt, but for the devise, she would have obtained the property absolutely as an heir, being a Class I heir. But, since the devise has intervened, the question that arises has to be considered in the light of this position."

17. The plaintiff has been paid only maintenance at the rate of Rs. 75/- per month as per judgment dated 9.2.1984. The defendants have rightly been held to pay monthly maintenance of Rs. 666/-, each, total Rs. 2000/- to the plaintiff, by the learned District Judge from the date of filing of the suit, 26.5.2010, taking into consideration inflationary trends. The amount awarded by the learned District Judge is neither excessive nor disproportionate. The plaintiff was entitled to file second suit seeking maintenance from the defendants.

18. In Menokabala Dasi Vs. Panchanan Seal, , the Division Bench of High Court of Calcutta has held that when there is no provision in decree for variation of amount of maintenance, the amount can be varied by way of suit only. The Division Bench has held as under:-

2. The learned Judge in the court below has considered all the facts of the case. According to the appellant, she resides in a rented house at a monthly rental of Rs. 25/- and her average monthly expenses exceed Rs. 100/-. The respondent was employed by Messrs, Macnell and Barry and his basic pay was Rs. 284/-. With clearness allowance he was getting Rs. 460/- per month. It is further alleged that he realizes monthly rent from a house at Haltu aggregating to Rs. 180/-. In the affidavit in opposition, the respondent has mentioned that he was suffering from tuberculosis and he has another wife and several children whom he has to maintain. He also has to maintain his blind sister. He was indebted to the Mercantile Co-operative Society Ltd., to the extent of Rs. 4619/- and a sum of Rs. 140/- was deducted from his pay every month. The learned Judge, after taking into consideration all the facts, came to the conclusion that no increase in the rate of maintenance was justified. We have been informed that since the passing of the order in the court below, the respondent has retired and his pension is approximately Rs. 227/- per month. We do not see any reason to differ with the learned Judge on the merits and see no reason to interfere with the finding as to the quantum of maintenance. I might mention here that we made an attempt to settle the matter, but owing to the attitude taken by the appellant the matter could not be settled. In the court below, the learned Judge has observed that the decree provided maintenance for Rs. 40/- per month, but did not provide for any increment by reason of change of circumstances. Mr. Ghosh appearing on behalf of the respondent has taken the point that under such circumstances, an application does not lie for increase of maintenance even under the provisions of the Hindu Adoption and Maintenance Act, 1956. In view of the repeated applications made in this case and in view of the observations made by the court below, we are of the opinion that this point of law should be allowed to be taken although in the memorandum of appeal there is no specific ground to that effect. The matter has been argued before us fully by both the

parties and we proceed to give our decision on the point. For this purpose, we have to examine the provisions of the Hindu Adoptions and Maintenance Act (Act 78 of 1956) (hereinafter referred to as the "said Act") Chapter III of the said Act deals with subject of "maintenance". Section 18(1) provides that subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of the said Act, shall be entitled to be maintained by her husband during her lifetime. Section 23 of the said Act provides for the amount of maintenance. Sub-section (1) provides that it shall be at the discretion of the court to determine whether any, and if so what, maintenance shall be awarded under the provisions of the said Act, and in doing so the court shall have due regard to the considerations set out in Sub-section (2) or Sub-section (3), as the case may be. Sub-section (2) relates to the amount of maintenance to be granted to a wife, children or aged or infirm parents. Sub-section (3) relates to the amount of maintenance to be awarded to a dependant under the said Act. We are not concerned with Sub-section (3). Sub-section (2) provides that, in determining the amount of maintenance, regard shall be had to the position and status of the parties; the reasonable wants of the claimant; if the claimant is living separately whether the claimant is justified in doing so, the value of the claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source etc., and the number of persons to be maintained by the person who is to pay the maintenance. Section 25 is important and is set out below: "The amount of maintenance, whether fixed by a decree of court or by agreement either before or after the commencement of this Act, may be altered subsequently if there is a material change in the circumstances justifying such alteration." This statutory provision is no more than a codification of the existing provisions of the Hindu Law which always conferred power upon the court to alter the amount of maintenance where circumstances have altered. The point, however, is as to the procedure to be adopted in making such alteration. Briefly speaking, the law before the introduction of the said Act was that, where a decree was passed for maintenance and it contained provisions for making an application to alter the quantum of the maintenance owing to change of circumstances, then and then only an application could be made. Otherwise, the court had no jurisdiction to alter the amount of a decree by means of an application, and it was always necessary to institute a suit for that purpose. The question is as to whether the position has, altered under the said Act. This requires a consideration of several decisions. But before I do so, I would like to refer to the provisions of the Hindu Marriage Act 1955 (Act XXV of 1955) and consider an analogous provision with regard to the payment of permanent alimony and maintenance where a decree is passed under the provisions of the same Act. I set out below the provisions of Subsections (1) and (2) of Section 26:

"25 (1) Any court exercising jurisdiction under this Act, may at the time of passing any decree or at any time subsequent thereto on application made to it for the purpose by either the wife or the husband, as the case may be, order that

the respondent shall, while the applicant remains unmarried, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant and the conduct of the parties, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

2. If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under Subsection (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just."

3. It will be observed that in this provision, it is expressly mentioned that the payment of maintenance may be ordered at the time of the passing of the decree or at any time thereafter by application made to the court which may vary, modify or rescind any such order in such manner as it may deem fit and just. While Section 25 of the Hindu Marriage Act expressly lays down a procedure by way of an application, Section 25 of the said Act does not lay down any such procedure.

6. In our opinion, under Section 26 of the said Act, alteration in the amount of maintenance fixed by a decree cannot be order ed by an application, unless there is provision in the decree itself granting liberty to the decree-holder to have such variation made by way of an application. Where there is no such provision, the only way in which the amount of maintenance fixed by a decree can be varied is by way of a suit. In the instant case, the original decree did not contain any such provision and consequently the variation in the amount of maintenance cannot be ordered by way of an application. For that purpose, it would be necessary to institute a suit. The application resulting in the decree appealed against was misconceived, and was liable to be dismissed.

19. Their Lordships of Hon"ble Supreme Court in Ruma Chakraborty Vs. Sudha Rani Banerjee and Another, have held that a perusal of Section 3(b) of the Hindu Adoptions and Maintenance Act, 1956 would clearly show that the intention of the legislature was to provide a real maintenance and not a bare or starving maintenance. Their Lordships have held as under:-

"14. A perusal of Section 3(b) of the Hindu Adoptions and Maintenance Act, 1956 would clearly show that the intention of the legislature by including food, clothing, residence etc. was to provide a real maintenance and not a bare or starving maintenance. The intention of the legislature is further indicative from the words "also the reasonable expenses of" appearing in clause (ii) of Section 3(b), clearly meaning thereby that an unmarried daughter besides the expenses of food, clothing, residence etc. is also entitled to the expenses of and incident to her marriage. The intention of the legislature becomes absolutely clear and lucid from the heading and contents of Section 23 of the Hindu Adoptions and

Maintenance Act, 1956 which speaks of amount of maintenance. Therefore, it can safely be said that what is implicit under Section 3 is made explicit in Section 23. In the instant case, while dissolving the marriage under Section 13(b) of the Hindu Marriage Act, 1955, the court ordered maintenance for minors only with mutual consent."

20. Accordingly, in view of the observations and discussion made hereinabove, there is no merit in the regular second appeal and the same is dismissed. Pending application(s), if any also stands disposed of. There shall, however, be no order as to costs.