

(1974) 09 BOM CK 0014

In the Bombay High Court

Case No : Civil Rev. Application No. 324 of 1974 with Civil Rev. Application No. 338 of 1974

Sushilabai Chhotelal Gupta

APPELLANT

Vs

Ramcharan Hanumanprasad Vaishya and another

RESPONDENT

Date of Decision : 04-09-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Citation : (1976) MhLj 82

Hon'ble Judges : C.S. Dharmadhikari, J

Bench : Single Bench

Advocate : V.R. Padhye and A.P. Padhye, for the Appellant; S.V. Padhye for opponent No. 1, for the Respondent

Final Decision : Allowed

Judgement

C.S. Dharmadhikari, J.—Applicant Sushilabai filed a suit for partition and separate possession of her share in the joint family property against non-applicant Ramcharan Hanumanprasad. The said suit is pending in the Court of the Civil Judge, Senior Division, Nagpur. It was contended by the plaintiff in the said suit that the parties were Halwais by profession and sweet-meet making was their ancestral business. According to the plaintiff, her husband and the husband of defendant No. 2 Parvatibai were also helping defendant No. 1 in the said business, which was a family business. She has further contended that the family was joint family. After the death of Hanumanprasad defendant No. 1 was acting as Karta of the family. All the income from the joint family business and shop used to be in the hands of defendant No. 1 and he used to manage the affairs of the joint Hindu family. It was then contended by the plaintiff that the joint family consisting of her deceased husband Chhotelal, defendant No. 1 Ramcharan and deceased husband of defendant No. 2 Parvatibai viz. Mahadeo, owns and possess immovable property described in the schedule attached to the plaint. She further contended that the plaintiff is residing in a portion of the joint Hindu family house

and her husband died at Nagpur on 12th September 1960 without any issue. According to her, after the death of her husband she acquired the same interest as that of her deceased husband in the joint family property in view of the provisions of Hindu Succession Act, 1957. Therefore, she demanded partition of the joint family property and separation of her share. As the defendant No. 1 denied her claim vide his reply dated 21st August 1971 she was constrained to file the present suit for partition. Defendant No. 1, who is the main defendant contested the suit claim. In his written statement he admitted the relationship between the parties. He further admitted in paragraph 3 of his written statement that in good faith he promised his father and other members of the family to help them for the purpose of maintenance and shelter in his house. He further contended that his father Hanumanprasad died soon after coming to Nagpur within a year or two and thereafter defendant No. 1 was obliged to maintain Chhotelal and Mahadeo. Defendant No. 1 thus fulfilled his obligation by maintaining them. However, he denied the fact that there was any joint Hindu family or that his father Hanumanprasad was the Karta of the said family. According to him, the whole property shown in the schedule was his self-acquired property. In paragraph 8 of his written statement it was contended by defendant No. 1 that the account in the Bank or other immovable property including the house etc. as mentioned in the schedule attached to the plaint are not the property belonging to the Joint Hindu family. He contended that all this property is his self-acquired property. According to him, he was kind enough to maintain his orphan brothers and sometimes for the purposes of business convenience he allowed the name of the defendant No. 2's husband to appear in some transactions. He further contended that on some occasions he purchased the property Benami but the entire amount for acquiring the property was his and nothing was contributed by the plaintiff or defendant No. 2's husband towards the purchase of the property. According to defendant No. 1, both his brothers were living on his charity. After the death of Chhotelal and Mahadeo defendant No. 1 is maintaining the plaintiff and defendant No. 2 by giving them maintenance out of charity. Therefore, in substance it was the case of defendant No. 1 that there was no joint Hindu family as such nor the property of which partition is being claimed by the plaintiff is joint Hindu family property. On the contrary, according to defendant No. 1, the whole property is his self acquired property. Defendant No. 2, the widow of the other brother, practically admitted all the allegations made by the plaintiff in the plaint and she also claimed 1/3rd share in the property. During the pendency of this suit for partition plaintiff Sushilabai as well as defendant No. 2 Parvatibai filed applications for interim maintenance. According to them, they have no independent source of livelihood and, therefore, plaintiff Sushilabai claimed an interim maintenance at the rate of Rs. 300 per month whereas defendant No. 2 Parvatibai claimed an ad-interim maintenance at the rate of Rs. 200 per month. The defendant No. 1 contested this claim made by the plaintiff as well as defendant No. 2 and contended that they are not entitled to any interim maintenance during the pendency of the partition suit. He repeated all the contentions which he had raised in his written

statement. It was further contended by him that such an application for maintenance in a partition suit is not maintainable. The learned Judge of the trial Court, after hearing the parties, dismissed the said applications filed by the plaintiff as well as defendant No. 2 Parvatibai. According to the learned Judge, the plaintiff and defendant No. 2 could not show him any provision from Hindu Law entitling them to such an interim maintenance in a suit for partition in which the very fact of the suit property being joint family property is denied by the contesting defendant No. 1. The learned Judge further found that there is no provision of law under which such claim of interim maintenance in a partition suit can be made. In this view of the matter both these applications were dismissed by the learned IInd Joint Civil Judge, Senior Division, Nagpur. Being aggrieved by this order these two revision petitions have been filed by the plaintiff and defendant No. 2 Parvatibai.

2. Shri Padhye, the learned counsel for the applicants, contended before me that the learned Judge of the trial Court committed an error apparent on the face of record in holding that there is no provision of law which entitles the plaintiff as well as defendant No. 2 to claim such an interim maintenance in a partition suit. Shri Padhye further contended that by mere denial by defendant No. 1 the rights of the plaintiff as well as defendant No. 2 cannot be defeated. According to Shri Padhye, the plaintiff has prima facie shown that the property referred to in the schedule attached to the plaint is a joint Hindu family property. In support of the contention the plaintiff has filed an income tax assessment order, entries from municipal assessment list and a sale-deed. From these documents it is quite clear that the business which was being carried out by defendant No. 1 and deceased Chhotelal and Mahadeo was a joint family business and the property acquired is a joint Hindu family property. According to Shri Padhye, under inherent powers of the Court u/s 151 of the CPC the Court can grant such an interim maintenance in a partition suit. It was further contended by Shri Padhye that the learned Judge of the trial Court has, therefore, refused to exercise the jurisdiction vested in him by law and hence the order passed by him is illegal.

3. On the other hand it is contended by Shri S. V. Padhye, the learned counsel for defendant No. 1 that the order passed by the learned Judge of the trial Court is in accordance with law. The learned counsel further contended that under Hindu law the plaintiff or defendant No. 2 are not entitled to claim any maintenance from defendant No. 1. Defendant No. 1 has denied the allegations made in the plaint that the property in his possession is joint Hindu family property. He has further denied the fact that the family itself was a joint Hindu family. In this view of the matter, according to the learned counsel, when the very factum of the nature of the family as well as the property is denied in a suit for partition, it is not open for the plaintiff to claim any interim maintenance. He further contended that in exercise of powers conferred upon the Court u/s 151 of the CPC such an interim maintenance cannot be granted by the Court.

4. Without going into the merits of the controversy involved in the suit it is quite

clear from the averments made in the plaint, which are either not specifically denied by the defendant No. 1 in his written statement or which are prima facie supported by the the documents produced on record by the plaintiff, that the plaintiff has made out a prima facie case that the property referred to in the schedule attached to the plaint was a joint Hindu family property. The relationship between the parties is admitted by defendant No. 1. It is also admitted by the defendant No. 1 that there was one house at Dalmou in Uttar Pradesh belonging to the father of defendant No. 1 as well as husbands of the plaintiff and defendant No. 2. From para. 3 of the written statement it is further clear that defendant No. 1 in good faith promised to help the members of his family for the purposes of maintenance and shelter in his house and even after the death of Hanumanprasad defendant No. 1 was obliged to maintain Chhotelal and Mahadeo, viz., the husbands of the plaintiff and defendant No. 2. From paragraph 8 of the written statement which is in the nature of specific defence taken by the defendant No. 1, it is further clear that after the death of Chhotelal and Mahadeo defendant No. 1 was maintaining the plaintiff and defendant No. 2 by giving them maintenance though according to him out of charity. From these averments made in the written statement, therefore, prima facie it is clear that defendant No. 1 was maintaining the plaintiff and defendant No. 2. The averments made by the plaintiff in the plaint are prima facie supported by the documents, namely, assessment order passed by the income tax Officer, dated 2nd December 1948 wherein the status of the assessee has been shown as Hindu undivided family consisting of M/s Ramcharan, Mahadeo and Chhotelal Hanuman. The sale-deed dated 10th August, 1949 also shows the name of Ramcharan; defendant No. 2 and his brother namely Mahadeo and Chhotelal as the persons who have purchased the property under the sale-deed. The entries in the assessment list of the Nagpur Municipal Corporation relating to the property also shows the names of all these three persons. It is no doubt true that it is contended by defendant No. 1 in written statement that for the purposes of business convenience he allowed the name of defendant No. 2's husband or the name of the husband of the plaintiff to appear in some transactions and that on some occasions he purchased the property Benami. But that is a matter which will have to be decided finally when the suit will be decided by the learned Judge. Therefore, from the material placed on record, in my opinion, it can safely be said that the plaintiff has made out a prima facie case for filing the suit for partition and separation of her share in the property. At this stage I am only concerned with finding out as to whether a prima facie case has been made out by the plaintiff and nothing said by me in this order or judgment should be construed to mean that the controversy involved in the suit in this behalf is being finally decided by me. Therefore, the question which is required to be decided in these revision petitions is limited one. I am only concerned with the question, as to whether in such a suit, where the plaintiff is able to make out prima facie case for claiming a partition and separate possession in the joint Hindu family, can the plaintiff claim interim maintenance during the pendency of the suit. It is no doubt true that there is no specific provision in this behalf in the Code of Civil

Procedure. But in my opinion, such a claim can be made by the parties by taking recourse to the provisions of section 151 of the Code of Civil Procedure. As to what is the true nature of scope of section 151 of the CPC has been considered by the Supreme Court in *Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal*, . In this context it was held by the Supreme Court:

It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them... Section 151 itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court: it is a power inherent in the Court by virtue of its duty to do justice between the parties before it. Further, when the Code itself recognizes the existence of the inherent power of the Court, there is no question of implying any powers outside the limits of the Code.

Therefore, if the Court found that in the interest of justice it is necessary to grant such an interim maintenance, in my opinion, a Civil Court has ample power to pass such an order under its inherent powers conferred upon the Court u/s 151 of the Code of Civil Procedure. Such a view seems to have been taken by the Madras High Court in *Subbaya Maniyagarar Vs. Kandaswami and Another*, . In that case a partition suit was brought by two minors with their mother as guardian against their father being members of joint family. It is no doubt true that in that case in the written statement it was admitted position that they were children of the defendant and the defendant also admitted that the property was a joint Hindu family. In the said suit an application u/s 151 of the CPC was filed claiming an interim maintenance on behalf of the minors. The learned Judge of the trial Court passed an order granting interim maintenance and the said order was challenged before the Madras High Court in revision petition. In this context, it was observed by the Madras High Court:

There is no express provision as far as I know which definitely empowers the Court to pass such an order even after the decision that the suit is maintainable. But the question remains whether the order is not one which would be passed *ex debito justitiae*.

On the principles of natural justice the minor plaintiff, who are admittedly entitled to maintenance should not be allowed to starve while their partition suit is going on, and I am not prepared to say that the order allowing the maintenance is not within the jurisdiction of the Court u/s 151, Civil Procedure Code.

Similar view seems to have been taken in a later case by the Madras High Court in *Muniammal Vs. P.M. Ranganatha Nayagar and Another*, . In this case the

previous decision of the Madras High Court in *Md. Abdul Rahman v. Tajunnissa Begum* A I R 1953 Mad. 420 on which reliance is placed by the learned counsel for the opponents *Shri S. V. Padhye*, was examined. In the said case it was held by the Madras High Court that:

Interim maintenance should not be granted in suits for maintenance or partition where the status and the right of the claimant is hotly contested supported by a volume of prima facie evidence, documentary or circumstantial. This however does not mean that whenever the contesting defendants merely deny the claim of the plaintiff and raise a so-called contest, interim reliefs can be denied, which in fitting cases can be granted u/s 151, Civil Procedure Code.

Similar view was taken by the Nagpur High Court in *Bhagwan v. Jageshwar* 1951 N L J Note 180 and it was held, that so long as a partition by metes and bounds is not effected and so long as an item of the property is not allotted to the mother it is only light that provision should be made for her maintenance though a suit for partition is filed. The Calcutta High Court in *Tarini Gupta Chowdhury Vs. Sm. Gouri Gupta Chowdhury*, has also taken a similar view and has held :

If a claim for maintenance is denied that would not take away the jurisdiction of the Court to make interim orders in suit for maintenance. The jurisdiction of the Court does not depend on the denial of a case by the defendant. It is one thing to say that the Court declines to make an order in a case where facts are disputed and quite another thing to say that the Court has no jurisdiction to make an order because the claim is contested.

As to what is the meaning of a prima facie case, and nature of interim order was also considered by the Calcutta High Court and in this context Calcutta High Court observed:

In *Nemai Chand Jain Vs. Smt. Lila Jain*, we expressed the opinion that if there was a prima facie case and by prima facie case was meant as Lord Evershed M. R. said in *Auten v. Rayner* (1958) 3 All E R 566 at p. 568 a case which called for an answer, the Court could pass orders in a prima facie case. Such an order does not confer any substantive right. Such an order is in aid of a suit. It was said by counsel for the appellant that if moneys were paid and if eventually it transpired that moneys were not to be paid, the husband would be deprived of the amount spent. The rights would be fashioned fully in the suit. There might be in appropriate cases order upon the wife to refund moneys if she were not entitled to be paid interim maintenance. Such payment of money does not amount to substantive right. These are interim payments in the suit. There is no determination of right until the decision in the suit.... The relief asked for in the suit has yet to be determined and decided. If there is a prima facie case and if the Court is of opinion that the plaintiff is entitled to interim relief the plaintiff may be given such relief. That is not deciding the whole case. In these cases the Court is bound to arrive at a conclusion as to whether any interlocutory order will be made or not. There has to be a prima facie opinion. Interlocutory opinions do

not bind the trial Court.

In the case before me, as observed by me, *prima facie*, case has been made out by the plaintiff for claiming a partition and separate possession. Further it is clear from the averments made by defendant No. 1 himself that till the filing of the partition suit the plaintiff as well as defendant No. 2 were being maintained by him. It is also clear from the affidavits filed by the plaintiff as well as defendant No. 2 that they have no independent source of livelihood. In this view of the matter, in my opinion, they cannot be allowed to starve while their partition suit is going on and in the interest of justice Court has got ample power to pass an order allowing the application for interim maintenance under its inherent power u/s 151 of the Code of Civil Procedure, Of course such an order will be subject to the final decision in the suit.

5. It is well settled that under Hindu Law the liability to maintain others arises in two fold manner, (a) from the existence of a particular relationship independent of the possession of any property (b) on possession of property. In the first category fall the cases of the liability to maintain a person's wife, minor sons, unmarried daughters and aged parents. Here the obligation is personal and is brought into existence by the mere relationship. In the other category are those where the liability is dependent on the possession of family property. See *Kamalammal and Others Vs. Venkatalakshmi Ammal and Another*, . Therefore, a manager of a joint family is under legal obligation to maintain the widows of the male members of the joint Hindu family by virtue of the fact that he is in possession of the joint family property. In the present case *prima facie* it is clear that the defendant No. 1 was in possession of the joint family property in his capacity as manager. Therefore, in my opinion, he was under legal obligation to maintain the widows of his brothers, who were members of the joint Hindu family. Therefore, in my opinion, the plaintiff as well as defendant No. 2 are entitled to claim interim maintenance from defendant No. 1.

6. An interim maintenance is claimed by the plaintiff at the rate of Rs. 300 per month and by the defendant No. 2 at Rs. 200 per month. Parvatibai, defendant No. 2 had filed her affidavit in support of her application and claimed Rs. 200 as interim maintenance. She had further stated in her affidavit that formerly defendant No. 1 used to pay Rs. 175 per month to her for her day-to-day expenses, but he has stopped the payment of the said amount to her after the filing of the partition suit. She has further stated that she is solely dependent for her bare existence on the property in the hands and management of defendant No. 1 and she has no independent source of livelihood. Therefore, in my opinion, ends of justice will be met at this stage if the defendant No. 1 is directed to pay the amount of Rs. 175 per month to defendant No. 2 Parvatibai.

7. So far as Sushilabai is concerned, it is contended by defendant No. 1 in his counter affidavit that she is carrying on a Rickshaw business through her servants and, therefore, she is not in the need of any amount for maintenance. However, it is contended by Sushilabai in her affidavit that she has no

independent source of livelihood. Therefore, accepting her word prima facie at this stage, in my opinion, ends of justice will be met if defendant No. 1 is directed to pay an amount of Rs. 150 per month to plaintiff Sushilabai as ad-interim maintenance during the pendency of the partition suit.

8. The plaintiff as well as defendant No. 2, viz., Sushilabai and Parvatibai, will be entitled to this interim maintenance from the date of this order. The amount as directed will be deposited in Court by defendant No. 1 on or before 15th of each month. So far as the amount for the month of September 1974 is concerned, defendant No. 1 shall deposit the said amount in Court on or before 15th of September 1974. The plaintiff as well as defendant No. 2 will be entitled to withdraw the said amounts deposited by defendant No. 1 in the Court after furnishing a solvent security to the satisfaction of the Court. In the result, therefore, both these revision petitions are allowed. The costs of the revision petitions will be the costs in the cause.