

(1968) 02 MAD CK 0028
In the Madras High Court

Tiruvannamalai Animal

APPELLANT

Vs

Sadasiva Mudali and Others

RESPONDENT

Date of Decision : 01-02-1968

Acts Referred:

Citation : (1968) 2 MLJ 569

Hon'ble Judges : M.M. Ismail, J

Bench : Division Bench

Judgement

M.M. Ismail, J.—The appellant is the second wife of one Sadasiva Subbaraya Mudaliar, the fifth respondent herein, whose sons through the third wife are respondents 1 to 4 herein. The appellant herself has a son through the fifth respondent. She filed O.S. No. 27 of 1954 on the file of the Subordinate Judge's Court, Chittoor, as next friend and guardian of her minor son, for partition of his share and maintenance for herself. During the pendency of the suit, the appellant's son became a major and he settled his claim with the fifth respondent and obtained his share from the family properties, and the appellant herself withdrew her claim for maintenance with liberty to file a separate suit for that purpose. The appellant thereafter filed O.S. No. 13 of 1958 on the file of the Court of the District Munsif, Tiruttani, and on 31st August, 1959, she obtained a decree for maintenance at the rate of Rs. 15 per month and a sum of Rs. 10 per year towards clothing and the amount decreed in her favour was charged against certain items of joint family properties mentioned in that decree. Thereafter respondents 1 to 4 herein filed the present suit for partition of their 4/5ths share in the joint family properties impleading their father the fifth respondent and the appellant herein as defendants. In paragraph 7 of the plaint they contended as follows:

The plaintiffs after due enquiry have come to know that the second defendant had filed a pauper O.P.No. 21 of 1957 which was later numbered as O.S. No. 13 of 1958 in this Honourable Court against the first defendant alone for maintenance past and future and claims for separate residence and obtained a

decree against the first defendant alone on 31st August, 1959 creating a charge over the plaint B schedule properties for the maintenance claim past and future. Inasmuch as the plaintiffs were not impleaded as necessary parties by the second defendant in that maintenance suit O.S. No. 13 of 1958, the decree creating a charge in the entire plaint schedule joint family properties in O.S. No. 13 of 1958 will not bind the plaintiffs to the extent of their 4/5ths share in the said properties. The action of the second defendant in collusion with the first defendant in bringing the plaint B schedule properties to sale is highly illegal inasmuch as the plaintiffs' 4/5ths share in the plaint B schedule properties are concerned.

In the end the plaintiffs prayed for " a preliminary decree declaring that the plaintiffs are entitled the 4/5ths share in the plaint schedule mentioned properties ", for appointing a Commissioner to divide the plaint properties into five equal shares and to allot four such shares to the plaintiffs and to direct the defendants to deliver possession of such divided 4/5ths share to the plaintiffs or to take delivery of possession through process of Court. Naturally the fifth respondent remained ex parte and the appellant alone defended the suit. Taking into account the pleadings of the parties, the learned District Munsif framed five issues, the fourth of which is-as follows:

Whether the charge created in O.S. No. 13 of 1958 is not binding on the plaintiffs' share in the properties?:

The learned District Munsif by his judgment and decree, dated 30th December, 1961 held that the charge created in O.S. No. 13 of 1958 was binding on the plaintiffs and passed a preliminary decree in favour of the plaintiffs subject to the charge created over their shares also in O.S. No. 13 of 1958. Against this judgment and decree, respondents 1 to 4 herein preferred A.S. No. 86 of 1962 on the file of the Court of the District Judge of Chingleput. The learned District Judge came to the conclusion that the charge created in O.S. No. 13 of 1958 will not bind the shares of respondents 1 to 4 herein and in that view allowed that appeal preferred by them and modified the decree of the learned District Munsif so as to make it clear that the shares allotted to respondents 1 to 4 herein in the joint family properties will-not be subject to the charge created in O.S. No. 13 of 1958 in favour of the appellant herein. It is against the judgment and decree the present Second Appeal has been filed.

2. The sole question that arises for determination in this appeal is whether the charge decree created in favour of the appellant in O.S. No. 13 of 1958 stands automatically modified or is liable to be modified so as to affect only the share to be allotted to the first defendant in the present partition suit releasing the shares to be allotted to respondents 1 to 4 herein from the said charges.

3. Mr. A. Ramachandran, the learned Counsel for the appellant, contended that the decree obtained by the appellant against the fifth respondent in O.S. No. 13 of 1958 was obtained against him in the capacity of the manager of the joint

family and the charge was created rightly against the joint family properties and that charge cannot be modified or restricted in the present proceedings. The contention on the other hand of Mr. Chandramouli, the learned Counsel for respondents 1 to 4 herein, is that respondents 1 to 4 herein were not eo nomine parties to O.S.No. 13 of 1958 and consequently they were not bound by the decree in that suit and their share of the joint family property was not affected by the charge created in that suit and in any event, once they filed the present suit for partition, there has come into existence a division in status as between them on the one hand and the fifth respondent on the other and under the Hindu Law, the liability to maintain the appellant being exclusively that of the fifth respondent, the charge must be deemed to operate only in respect of the share of the fifth respondent.

4. As far as the general principle of law is concerned either in relation to the competency of the first respondent to represent the entire joint family in O.S. No. 13 of 1958 or in relation to the liability to maintain the appellant by the fifth respondent, there can be no doubt. The legal position is stated thus in paragraph 253 of Mulla's Principles of Hindu Law, 13th Edition:

It is not necessary, in order that a decree against the manager may operate as resjudicata against coparceners who were not parties to the suit that the plaint or written statement should state in express terms that he is suing the manager or his being sued as a manager. It is sufficient if the manager is in fact suing or being sued as representing the whole family.

In respect of the liability to maintain a person like the appellant, the legal position is stated in the following terms in paragraph 543 of the Mulla's Principles of Hindu Law, 13th Edition:

(1) The Manager of a joint Mitakshara family is under a legal obligation to maintain all male members of the family, their wives and their children. On the death of any one of the male members, he is bound to maintain his widow and his children. The obligation to maintain these persons arises from the fact that the manager is in possession of the family property.

Admittedly on the date when the appellant filed O.S. No. 13 of 1958, her husband, namely, the fifth respondent was a member and the manager of the coparcenary consisting of himself and respondents 1 to 4 with the result the fifth respondent in his capacity as manager of the joint family was under an obligation to maintain the appellant herein. Therefore, the decree which the appellant obtained in O.S. No. 13 of 1958 was binding on the entire joint family and the charge created against the joint family properties was validly created even though respondents 1 to 4 herein were not eo nomine parties to that suit or the decree. Hence the contention of respondents 1 to 4 herein that the said decree in O.S. No. 13 of 1958 Was not binding on them since the suit was filed only against the fifth respondent and they themselves were not eo nomine parties to the suit or to the decree, must fail.

5. The next question for consideration is whether even if the decree in O.S. No. 13 of 1958 was validly passed and was binding on respondents 1 to 4 herein it can be contended by the respondents now that by virtue of the fact that they are seeking a partition of their shares in the property from that of the fifth respondent that decree could not hereafter operate against their shares in the property and the operation of the charge must be restricted only to the share of the fifth respondent. Mr. Chandramouli appearing for respondents 1 to 4 herein relied on several decisions to show that the liability to maintain a wife is that of the husband alone and that too is based on the relationship existing between them as husband and wife and if any part of the property is liable for the maintenance of the appellant it is her husband's share in the property and they, namely, respondents 1 to 4 being only the step-sons of the appellant are under no obligation to maintain the appellant and consequently she cannot have any claim against the shares of respondents 1 to 4 for the purpose of enforcing her charge for maintenance. The learned Counsel for the appellant did not dispute the general principles underlying this contention. However, the limited question that arises in this case is whether the charge decree originally validly created in O.S. No. 13 of 1958 thus automatically gets itself limited or restricted in its operation to the share of the property to be allotted to the fifth respondent; alternatively whether respondents 1 to 4 herein can claim any relief by way of asking for the amendment of the decree so as to make the charge effective only against the share of the fifth respondent. On behalf of the appellant, a decision of a Bench of this Court in Akki Dodda Basappa Vs. Akki Mallamma and Another, , was relied upon. In that case, the plaintiff was the brother and the second defendant was son of the deceased husband of the first defendant. The first defendant's husband died in or about 1918 leaving him surviving the first defendant, the second defendant his son by the first wife and the plaintiff his brother. On the date of his death, the first defendant's husband was a member of the undivided family consisting of himself, the plaintiff and the second defendant. In 1928 the first defendant filed a suit for maintenance and residence against the plaintiff and the second defendant and obtained a decree on 23rd January, 1929 by which the plaintiff and the second defendant were directed to pay maintenance at the rate of Rs. 40 per month and the arrears of maintenance and the maintenance decree was made a charge on the property described in the schedule to the decree, which admittedly belonged to the joint family. Subsequently the plaintiff and the second defendant effected a partition between themselves. Thereafter the plaintiff filed the suit contending that by reason of the said partition, the charge created in the earlier suit did not bind his share obtained at the partition. He put his case in these terms in the plaint in the suit:

Under Hindu Law defendant 1 is entitled to be maintained out of her husband's property and there is no such obligation against the plaintiff after the division of the joint family properties. The decree in O.S. No. 3 of 1928 became inoperative after the division between plaintiff and defendant 2. The decree in O.S No. 3 of

1928 is against the joint family properties and there are no such properties now. There is no personal obligation on the plaintiff to maintain, defendant 1.

6. It will be seen that the case of the plaintiff in that suit was practically the same as that of respondents 1 to 4 in this case. In dealing with the question whether the plaintiff in that case was entitled to file and maintain such a suit, this Court held that such a suit was not maintainable. Before the learned Judges it was urged that by reason of the subsequent partition, the plaintiff was no longer bound to maintain the first defendant and the said decree obtained against him must therefore be declared inoperative; as the decree was a maintenance decree it was open to the plaintiff to institute a suit by reason of the events that happened subsequently to the date of the decree, that there was a change of circumstances which would necessitate the modification of the said decree, that it was competent to the Court to modify the same in view of the said change of circumstances and that the partition was such a subsequent event and under the Hindu law the obligation to maintain a widow was only from out of her husband's share and as the husband's share had now fallen to defendant 2 the proper person to maintain her was defendant 2, the plaintiff's obligation having ceased with the disruption of the family. The learned Judges of this Court came to the conclusion that such a contention was not tenable. They observed:

When a member of an undivided family dies leaving him surviving his widow and his sons and brothers, her right to maintenance is against the entire joint family composed of the sons and brothers of the husband. It may be that if she waits until a partition takes place she may have a lesser right, i.e., instead of a right over the entire family, a right over those persons who take her husband's share. But if before a partition is effected, she gets her rights declared, defined and reduced to a certainty by a decree of Court, her rights cannot be taken away by any subsequent partition effected among the members of the family....At the partition it is open to members to stipulate that the widow's maintenance may be paid by any one of the members as in this case by defendant 2 and that in default of payment the other members may have a right to contribution or indemnity against the person who under the partition was made liable to pay. But that is an arrangement inter se between the members with which the widow has no concern.

Where a widow has secured a charge on certain properties that charge is not defeated by any subsequent transfer of the said properties by the members of the family and she is entitled to enforce the charge in the hands of the transferee. In our opinion partition would be a subsequent transfer and her charge is liable to be enforced in respect of the properties charged in whosoever's hands the properties may be. We are, therefore of the opinion that the plaintiff is not entitled to the declaration sought.

In my opinion, this decision of this Court fully supports the contention of the appellant. Mr. Chandramouli, the learned Counsel for the respondents 1 to 4 sought to distinguish this decision on two grounds, namely, (1) in that case the

plaintiff in the subsequent suit was eo nomine a party in the earlier suit; and (2) the charge was not created on the entire joint family property but only against a part of the joint family property. With regard to the first point of distinction sought to be made, I have already indicated that the fifth respondent as manager of the joint family was entitled to represent the entire family and once a decree has been obtained against him in that capacity, that decree was binding on respondents 1 to 4 as well whether they were eo nomine parties or not. Consequently, the fact that respondents 1 to 4 herein were not eo nomine parties in O.S. No. 13 of 1958 will not affect the principles of law applicable to the case. The second point of distinction is also equally unsustainable. The very decision referred to by me makes it clear thus:

In fixing the quantum of maintenance the measure has always been taken to be the husband's share but as observed in *Karuppa Koundan and Another Vs. Chinna Nallammal and Others*, , and also by *Varadachariar, J.*, in *Ramarayudu v. Sitalakshmamma* (1937) 46 M.L.J. 550, the charge created, in her favour need not be limited to the husband's share but in certain circumstances may exceed the husband's share.

Once the charge need not be restricted to the husband's shares and it can exceed the husband's share, there can be no valid distinction between a charge exceeding the husband's share and a charge created against the whole of the joint family property. Therefore, I am of the opinion that the attempt made by Mr. Chandramouli to distinguish the case referred to above from the case on hand fails.

7. Under these circumstances, I allow this appeal and set aside the judgment and decree of the learned District Judge and restore the judgment and decree of the learned District Munsif. The parties will bear their respective costs throughout.

No leave.