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Court : Andhra Pradesh

Decided On : Sep-24-1954

Reported in : AIR1955AP5

Judge : Umamaheswaram, J.

Acts : Hindu Law; [Code of Civil Procedure \(CPC\), 1908](#)

Appeal No. : Appeal No. 751 of 1950

Appellant : Eluri Krishnamurthy and ors.

Respondent : Eluri Suryakantamma

Advocate for Def. : G. Chandrasekhara Sastri, Adv.

Advocate for Pet/Ap. : D.P. Narayana Rao, Adv.

Judgement :

(1)The defendants are appellants, O. S. No. 63 of 1945 was filed by the respondent herein on the file of the Subordinate Judge's Court of Masulipatam, for recovery of maintenance, past and future, and for other incidental reliefs.

Her case was that her deceased husband Narsimha Rao and appellants were brothers, that her husband died about 25 years ago soon after her marriage and that no maintenance whatsoever was provided by the appellants to her.

She alleged that the net income realised to the family of the defendants was not less than Rs.5,000/- a year and that she was entitled to claim future maintenance at the rate of Rs.50/- per mensem. So far as the past maintenance was concerned, she limited her claim to the sum of Rs.300.- a year for a period of 12 years. She also prayed that provision might be made for cattle, utensils and residence.

(2) The 4th defendant filed a written statement, which was adopted by his brothers i.e., defendant's 1 to 3. He contended that after the death of the father of defendants 1 to 4, their maternal uncle, that is, the plaintiff's father, was managing their affairs and providing maintenance for the plaintiff out of their family income. that the maintenance claim of the plaintiff was settled by providing her with a thatched house and allotting 40 cocoanut trees and 15 palmyrah trees, and that she was not entitled to claim any maintenance, past or future. He also urged that, in any event, having regard to the income of the family, not more than Rs.100/- per annum should be awarded to her.

(3) The Subordinate Judge of Masulipatnam discussed the evidence bearing on this question of settlement of maintenance in paragraphs 5 and 6 and found that the defendants' story was absolutely false. He found that the family income was not less than Rs.3,000/- per year and awarded future maintenance at the rate of Rs.400/- per year. He held that the plaintiff was entitled to claim arrears of maintenance for a period of 12 years at the rate of Rs.200 per year. In lieu of residence, he directed that either a lump sum of Rs.300/- or a sum of Rs.2/- per month might be paid. For utensils and other moveables, he allowed Rs.100/-. The entire 'A' schedule properties attached to the plaint were charged for the maintenance decreed.

The defendants have preferred the above appeal reiterating the several objections raised by them in the trial court and the plaintiff has filed a memo of cross-objections claiming enhancement of future maintenance by Rs.100/-.

(4) So the questions that arise for consideration in the appeal are:

1. Whether the respondent's claim was settled by allotment of a thatched hut and 40 cocoanut trees and 15 palmyrah trees?
2. What is the income of the appellants' family and what amount should be decreed to the respondent for future maintenance?
3. Whether the respondent is entitled to any areas of maintenance, and if so, how much?

(5) In paragraph 3 of the written statement, the date of the settlement and the names of the mediators who were present at the time are not mentioned. The circumstances under which the settlement took place are also not specified in detail. There is no document evidencing the settlement. The only two witnesses who are examined in support of this statement are the 2nd defendant and his mother, that is, the mother-in-law of the respondent. The court below rightly rejected their evidence as being interested and not worthy of credence. They also do not specify where exactly the cocoanut trees and palmyrah trees allotted to the respondent stand. I have carefully gone through the oral evidence of D. Ws. 1 and 2 and I agree with the finding of the trial court that the settlement pleaded is absolutely false.

(6) So far as the income from the family lands is concerned, I think the estimate of the Subordinate Judge, fixing it at not less than Rs.3,000/- is a moderate one. (His Lordship went through the evidence and continued:) The learned advocate for the respondent contended that I should take into consideration the income of the family and the share which the respondent's husband would be entitled to as on the date when she filed the suit for maintenance and that I should therefore allow the memo of cross-objections and award future maintenance at the rate of Rs.500/- per year.

In support of that contention he relied upon the Bench decision of the Madras High court in -- 'Manikka Mudaliar v. Soubagia Ammal', 27 Mad LJ 291: (AIR 1915 Mad 26) (A). The two propositions laid down in that decision are neatly set out in the head-note and are as follows:

'(1) The amount of maintenance should be fixed by reference to the income of the family as it stood at the date of the suit and not as it stood at the date of her husband's death.

(2) The basic of calculation also should have reference to the husband's share as at the date of suit if he were then alive, and not as it was at the date of his death'.

In -- 'Veerayya v. chellamma', AOr 1939 Mad 37 at pp. 38-39 (B), Wadsworth J. followed the decision, referred to supra. He distinguished some of the earlier decisions of the Madras High Court and held as follows:

'But on this question of the date with effect from which the husband's share is to be estimated, there is a very clear ruling of a Bench of this Court in -- 'Manikka Mudaliar v. Soubagia Ammal', (A), which is later than the cases just referred to, and, so far as I know, has not been challenged by subsequent rulings of this Court in the twenty four years that had elapsed since the decision was passed.

In that case, it was definitely laid down that the maximum amount of maintenance of a widow should be fixed with reference to the income from the husband's share not calculated as on the date of his death but as on the date of the suit regard being had to the increase of family property, which had taken place in the interval between the date of the husband's death and the date of the suit. That decision must be taken as authoritative, at least so far as I am concerned.

I think it follows that in a suit for enhancement of maintenance the maximum which could be awarded to the widow would be the amount of the income of the share to which the deceased husband would have been entitled had he been alive and co-parcener at the date of the suit for enhancement.'

(7) In -- 'Audemma v. Varada Reddy', AIR 1949 Mad 31 (C), though the conflict of the Bench decisions of the Madras High Court on this point was noticed, the matter was not referred to a Full Bench. But in -- 'Veerraju v. NMarayanamma', : AIR 1953 Mad 159 (FB) (D), the Full Bench of the Madras High Court approved the decision of the Bench in -- 'Manikka Mudaliar v. Soubagia Ammal', (A) Rajamnnar C. J., who delivered judgment of the Full Bench, observed as follows:

'On principle we are in entire agreement with the decisions in -- 'Manikka Mudaliar v. Soubagia Ammal', (A) and 'Veerayya v. Chalammal', (B). The law is well settled that the widow of a deceased co-parcener in a joint Hindu family has a right of maintenance against the surviving co-parceners 'quod' the share of her deceased husband which survives to them. This is an absolute right which accrues to her as a member of the joint family.....

'It follows, therefore, that on the death of her husband, a widow continues to be a member of the joint family along with the male co-parceners. Her fortunes are bound up with the fortunes of the family. If the income of the family increases, she will be entitled to the benefit of it. Likewise, if the income of the family decreases, she must submit to a reduction of her maintenance. The learned Advocate for the appellants did not contest the proposition that the quantum of maintenance to which a widow is entitled is subject to variation, even when fixed by the court, by reason of a change of circumstances. This feature is inconsistent with the contention of the appellants that the widow's maintenance should be fixed taking into consideration her husband's share in the income of the joint family at the time of his death and at no subsequent time'.

There is, therefore, no doubt that so far as the Madras High Court is concerned, it is authoritatively laid down that what has to be taken into consideration is the share which her husband would have been entitled on partition were he then living at the time of the filing of the suit for maintenance or for enhancement or reduction of maintenance.

(8) With a view to avoid uncertainties or unnecessary complications. this court should normally follow the Full Bench or Bench Division of the Madras High Court in matters of procedure or even substantive law unless those decisions are manifestly wrong or opposed to legal principles. In this particular case, it does not very much matter, as already stated, whether the share of the husband is fixed at 1/6th as on the date when he dies or at 1/5th as on the date of the filing of the suit for maintenance for the difference between 1/5th and 1/6th is only about Rs.100/-. It is nowhere laid down that the maintenance awarded to the widow should be equal to the share of the husband, though that is the maximum awardable. The

Court, in determining the rate of maintenance, should have regard to the value of the estate, the income derived therefrom, position and status of the family & the reasonable wants of the widow including not only the ordinary expenses of living, but what she might reasonably expend for religious and other duties incidental to her station in life. So, whether the net income representing her husband's share is Rs.500/- or Rs. 60/- the amount of maintenance fixed by the court below, that is Rs.400/- is, in my opinion, reasonable and proper. I, therefore, confirm the finding of the trial court as regards the quantum of future maintenance.

(9) Having regard to the facts of the present case, it is unnecessary for me to express my final view as to whether the Full Bench decision of the Madras High Court in -- 'Veer Raju v. Narayanamma', (D), should be followed in its entirety or the observations of that eminent Judge Bhashyam Ayyangar in -- 'Jayanti Subbiah v. Alemelu Mangamma', 27 Mad 45 at p. 48 (E), should be followed. In his characteristic and forcible way, the learned Judge summed up the legal position as follows:

'When an undivided Hindu family consists of two or more males related as father and sons or otherwise and one of them dies leaving a widow she has a right of maintenance against the surviving co-parcener or co-parceners 'quoad' the share or interest of her deceased husband in the joint family property which has come by survivorship into the hands of the surviving co-parcener or co-parceners & though such right does not in itself form a charge upon her husband's share or interest in the joint family property, yet when it becomes necessary to enforce or preserve such right effectually, it could be made a specific charge on a reasonable portion of the joint family property, such portion of course not exceeding her husband's share or interest therein'.

I quite agree with the reasoning of the Full Bench that if the income representing the undivided share of the husband, which has survived to the other members increases or decreases, the rate of maintenance payable to the widow has also to be varied according to the circumstances. The co-parceners to whom the right has passed by survivorship, are not bound to pay more than the income representing that undivided share. It is certainly the income derived by the family as on the

date of the suit for maintenance, or on the date when the suit for enhancement or reduction of maintenance is filed, that will have to be taken into account. But does it necessarily follow that what has to be taken into consideration is not the share which the husband was entitled to at the time of his death, but the share which he would have been entitled to on partition were he then living as on the date of the suit for maintenance, or for the enhancement or reduction of maintenance? If the Full Bench decision is followed in entirety, the following difficulties or anomalies might arise.

Assuming that the husband was entitled to $1/X$ share at the time of his death and to $1/Y$ share at the time of the filing the suit for maintenance, how and on what basis are the arrears of maintenance to be fixed for the period of 12 years prior to the filing of the suit for maintenance? Is it on the basis of $1/Y$ share or on the basis of $1/X$ share? Assume that at the time of filing the suit for maintenance the share of the husband was $1/Y$ and a charge was created on $1/Y$ share of the property at the time of filing the suit, for enhancement, or reduction of maintenance, the share of the husband would be $1/Z$; is the charge created under the prior decree in respect of $1/Y$ share to be altered to $1/Z$? Why should any uncertainty by reason of the fluctuations in the shares in the joint family be introduced in fixing the maintenance?

The rule laid down by Bhashyam Ayyangar J. in '27 Mad 45 (E)' appears to be more simple and definite as the widow would be entitled to maintenance from and out of his undivided share which passed by survivorship at the time of his death to the surviving co-parceners. Why not apply the reasoning underlying the seventh rule laid down by the Full Bench of the Madras High Court in -- 'Peramanayakam Pillai v. Sivaraman', : AIR1952 Mad419 (FB) (F) which is in the following terms:

'The share or in other words the fraction of the share which the alien acquires is unalterably fixed on the date of the alienation and is not subject to fluctuation either by subsequent births or deaths in the family and in all respects his rights must be determined and equities worked out as on the date of the alienation.'

The share which the husband was entitled to at the time of his death might be taken as the basis for fixing the maintenance in the same way as the Full Bench

has laid down the share of the alienor at the time of the alienation should be taken into account in working out the rights of the alienee.

The recent Full Bench decision of the Madras High Court in -- 'Parappagari v. Nagamma', : AIR1954 Mad576 (G) dealing with the interpretation of S. 3(2), Hindu Women's Right to Property Act, is to the effect that the widow is entitled to the share which her husband would be entitled to as on the date of instituting the suit for partition and not the share as on the date of his death.

The following observations of Subba Rao J. at page 578 viz.,

'The rights of a widow under general Hindu law in the joint family were well settled. Under the Mitakshara School, a wife of a co-parcener becomes a member of the family though she does not attain the status of a co-parcener. In remote antiquity her claim to a share was recognised; but the later development of law, perhaps due to her subordinate position in the family reduced the content of her rights and confined it to a claim for maintenance from and out of the joint family properties. But her husband's interest in the family property would pass by survivorship to the other members of the family. In essence, her right to maintenance was attached to property for it is payable from out of the property of the joint family and under certain circumstances, it could be made a charge on the joint family property. As a corollary to the aforesaid state of law, it follows that the quantum of maintenance would depend upon the number of sharers in the joint family, the extent of its property and other circumstances obtaining at the time when she seeks to enforce her right'

support the view taken by the earlier Full Bench in -- 'Veerraju v. Narayanamma', (D).

As full arguments have not been addressed before me, and as it is not necessary on the facts of the present case to decide as to whether the view of Bhashyam Ayyanagari J. in -- 'Jayanti Subbiah v. Alamelu Mangamma', (E) or that of the Full Bench in -- 'Veerraju v. Narayanamma', (D) should be followed, I wish to reserve my opinion for a future occasion.

(10) The next question that arises for consideration is whether the Subordinate Judge acted rightly in allowing arrears of maintenance for a period of 12 years at Rs.200/- per year. The main argument for the learned Advocate for the appellant was that there was no demand made by the widow for maintenance and that she was consequently not entitled to any arrears whatsoever.

He invited my attention to the passage in the deposition of the plaintiff examined as P. W. 1, which is as follows:

'As I was maintained by my father when he was alive, I did not ask for separate maintenance. I asked for maintenance after my father's death about six years back. I demanded through E. Subbiah'.

The learned Advocate contended that she had not substantiated her case as to demand, as she did not examine Subbiah and that in any event, she was not entitled to arrears for more than six years as according to her the demand was made only after her father's death.

In my opinion, there is no force in the contention of the learned Advocate for the appellant. The claim to maintenance arises when it is unlawfully withheld by the members of the family. The widow is entitled to maintenance from the date of her husband's death. The law of limitation provides that she is entitled to claim arrears of maintenance for a period of 12 years. No demand and refusal are necessary to create that right.

The law on this point is well summed up by Mr. Justice Krishnana Pandalai in -- 'Sobhanadramma v. Varahalakshmi Narasimhaswami', AIR 1934 Mad 401 (H) at page 405 thus:

'The principle of this and subsequent decisions appears to be that the claim to maintenance which arises when it is unlawfully withheld is a legal right. A demand and refusal is not necessary to create the right. They are only of evidentiary value to show that afterwards the withholding must have been wrongful or that there could not be any support of the theory of abandonment or waiver. In the same way, mere non-payment of maintenance though by itself it does not

constitute the withholding wrongful is still evidence to show that the withholding was wrongful. The only legal answer to such a claim is either abandonment or waiver or such conduct on the part of the plaintiff as may have misled the defendant into thinking that such a claim would not be made thereby inducing him not to make any provision for it, especially as maintenance is a provision to be made out of the current income of the estate or to the person liable. For the rest, the discretion of the court when applied to the grant of arrears of maintenance will be found to have either been exercised in adjusting the rate at which the arrears have been awarded or in limiting the period by inference from facts of an implied waiver or abandonment or conduct such as above mentioned. the language of the authorities is not in all cases careful to make this distinction clear.'

(11) In this connection, it is sufficient if I refer to a recent decision of the Madras High Court in -- 'Nagendramma v. Ramakotayya', : AIR1954 Mad713 (D wherein all the cases bearing on this question are collected and discussed in detail. I follow the decision in -- 'Sobanadhramma v. Narasimhaswami (H)', and hold that the only legal grounds on which arrears of maintenance may be disallowed are waiver, abandonment or estoppel. The conduct of the widow must be such as to estop her from claiming arrears or lead to such an inference that she abandoned or waived her claim. In my opinion, there is no discretion left in the court either to cut down the period or reduce the amount of past maintenance.

The learned Advocate for the appellant, no doubt, drew my attention to the decisions of the High Courts of Allahabad, Bombay and Nagpur, in which it is held that there is a wide discretion exercise by the court in awarding arrears. Those decisions take into consideration a number of circumstances such as the want of the widow of circumstances such as the want of the widow during that period, the debts contracted by her for supporting herself and the oppressive result of a sudden claim for a large amount by way of arrears, If the right of the widow is a legal one and if under the law of limitation she is entitled to claim arrears of maintenance for a period of 12 years, I am unable to understand how the Courts are entitled to exercise a wide discretion in cutting down the period or the rate of arrears. If as already stated, she had waived or abandoned her claim for arrears, she might not be entitled to claim any amount. By her conduct she might have led

the co-parceners to believe that she would not claim any past maintenance and she might thereby be estopped. I, therefore, find it difficult to follow the passage in Mayne's Hindu Law, 11th Edn. at page 830 or the reasoning of the decisions mentioned in foot-note (f). The passage referred to runs as follows:

'While the right to arrears of maintenance is a legal right, the Court has a discretion to award them at lower rate than future maintenance.'

The decision of the Privy Council in -- 'Ekradeshwari Bahuasin v. Homeshwar singh', AIR 1929 PC 128 (J) does not warrant the exercise of any such discretion either in cutting down the period or the rate. If the income of the family during the period for which arrears are claimed is less than the income at the time of the institution of the suit, arrears may certainly be allowed at a lesser rate. In the present case, the respondent has not filed a memorandum of cross-objections claiming arrears of maintenance at a rate higher than that awarded by the court below.

The evidence does not disclose that the widow by living with her parents and not claiming any arrears of maintenance had waived or abandoned the claim or misled the defendants into thinking that she would not claim any arrears. Moreover, there is no plea of waiver or abandonment or estoppel in the written statement. The story that was put forward was that her claim was settled by allotting to her a thatched hut, 40 coconut trees and 15 palmyrah trees. The claim has already been found by me to be false. In the circumstances, I see no reason to disturb the decree passed by the court below in regard to the arrears.

(12) In the result, the appeal fails and is dismissed with costs. The memo of cross-objection is dismissed without costs.

(13) Appeal dismissed.

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