

Akki Dodda Basappa Vs. Akki Mallamma and anr.

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Court : Chennai

Decided On : Oct-16-1939

Reported in : AIR1940Mad458; (1940)1MLJ204

Appellant : Akki Dodda Basappa

Respondent : Akki Mallamma and anr.

Advocate for Pet/Ap. : Mr. Narasimhachar

Judgement :

Venkataramana Rao, J.

1. This is an appeal from the decree of the learned District Judge of Bellary dismissing the plaintiff's suit for a declaration that the decree passed in O.S. No. 3 of 1928 on the file of the Sub-Court of Bellary against himself and the second defendant in favour of the first defendant is not (sic) on him. The facts are few and (sic) in dispute. 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 an 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 arrears of maintenance and

the maintenance decreed was made a charge on the property described in Schedules A and B to the decree. The decree also directed the plaintiff and the second defendant to put the first defendant in possession of the house, item 2 in Schedule C to the decree and the first defendant was to enjoy the same for her lifetime after which it must revert to the plaintiff and the second defendant. In pursuance of the said decree the first defendant was put in possession of the said house and she had been realising the maintenance in accordance with the terms of the said decree. It is alleged in the plaint that on 18th December, 1935, the plaintiff and the second defendant effected a partition between themselves and that by reason of the said partition the plaintiff was no longer bound by the said decree. The allegation in regard thereto is made in paragraph 5 of the plaint thus:

Under Hindu Law the first defendant 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 second defendant. 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 the first defendant.

2. It is alleged in the plaint that the first defendant agreed to the terms of the division by which the plaintiff was not to be liable under the decree. The main defence of the first defendant was that she was not a consenting party to the division at all and that the decree in question was obtained by her against the plaintiff and the second defendant personally as well as against the joint family properties of the family, that no partition made subsequently by the plaintiff and the second defendant without her assent would be of any avail or could have operated to extinguish the decree obtained by her. The decree of the second defendant was that in the partition effected between himself and the plaintiff he got very little property, that the major portion of the property, was retained by the plaintiff that it would be unjust to shift the burden of the entire decree on him and in any event the decree in O.S. No. 3 of 1928 continued to be binding on all the parties and could not be declared to be not binding on the plaintiff. The learned District Judge dismissed the suit on the ground that the suit was incompetent by reason of

Section 47, Civil Procedure Code.

3. In appeal it is contended by Mr. Narasimhachar, Counsel for the plaintiff-appellant, that by reason of the subsequent partition the plaintiff is no longer bound to maintain the first defendant and the said decree obtained against him must therefore be declared inoperative. He contends that as the decree is a maintenance decree, it is open to the plaintiff to institute a suit by reason of the events that happened subsequent to the date of the decree, that there was a change of circumstances which would necessitate the modification of the said decree and that it is competent to the Court to modify the same in view of the said change of circumstances. He has also urged that the partition is such a subsequent event and under the Hindu Law the obligation to maintain a widow is only from out of her husband's share and as the husband's share has now fallen to the second defendant the proper person to maintain her is the second defendant, the plaintiff's obligation having ceased with the disruption of the family. Mr. Narasimhachar has not been able to cite any authority in support of any of the contentions put forward and he frankly confesses that there is no direct authority on the point. He however contends that the recent decision of the Full Bench in *Lakshmiddevamma v. Veera Reddi* : AIR1939 Mad781 , though not a direct decision on the point would cover the present case. The exact point for decision before the Full Bench was whether the decision in *Subbarayulu Chetti v. Kamalavalli Thayaramma* : (1911)21MLJ493 or the decision in *Narasimham v. Venkatasubbamma* (1931) 62 M.L.J. 433 : I.L.R. 55 Mad. 752 was correct. Their Lordships were of the opinion that *Subbarayulu Chetti v. Kamalavalli Thayaramma* : (1911)21MLJ493 was wrongly decided and that *Narasimham v. Venkatasubbamma* (1931) 62 M.L.J. 433 : I.L.R. 55 Mad. 752 should be followed. *Narasimham v. Venkatasubbamma* (1931) 62 M.L.J. 433 : I.L.R. 55 Mad. 752 decided that:

Where the widow of a coparcener sues for maintenance after there has been a partition, she cannot enforce her right against any of the surviving coparceners except those who have taken her husband's share.

4. But Mr. Narasimhachar contends that the reasoning on which that decision was based would apply to the case in question. We are inclined to agree with him in this contention. The observations in *Lakshmiddevamma v. Veera Reddi* : AIR1939 Mad781 , on which reliance is placed run thus:

There is here a clear statement (referring to *Smritichandrika*) that the duty of maintaining the widow devolves on the persons who take the property of the deceased undivided member of the family and it is emphasised that the duty is dependent on the taking of the property.

5. But their Lordships proceed further and remark as follows:

While the family remains undivided the position is different. The property is held jointly and of necessity the amount required for a widow's maintenance has to be paid out of the estate regarded as a whole, but in no circumstances can she claim an allowance greater than the income of her husband's share in the estate.

6. It seems to us that these observations would apply to the present case. 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, that is, 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 right 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. In *Jayanti Subbiah v. Alamelu Mangamma* : (1902)12MLJ270 . Bhashyam Aiyangar, J., made the following observations which are referred to by the Full Bench with approval:

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 coparcener or coparceners, 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 coparcener, or coparceners, and 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.

7. These observations are in strict consonance with the theory of Hindu Law that when a member of an undivided family dies, his share survives to all the members of the family and every member has got an interest therein subject to the principle that so long as there is a son, a grandson and a great grandson of the deceased coparcener the share of the deceased coparcener would be taken by the son or grandson or great grandson on a partition on the principle of representation and in their absence only would the shares of the other members be augmented. As observed by West, J., in *Lakshman Ramchandra Joshi v. Satyabhamabai* (1877) I.L.R. 2 Bom. 494

The rule is a consequence of the doctrine that the right of each coparcener extending to the whole estate, it is fully owned as to every part notwithstanding the death of one of the joint tenants.

8. In fixing the quantum of maintenance the measure has always been taken to be the husband's share but as observed in *Karuppa Koundan v. Chinna Nallammal* : AIR1927 Mad1189 and also by Varadachariar, J., in *Ramarayudu v. Sitalakshamma* (1937) 46 L.W. 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. When therefore the widow has secured her right fixing her claim against the whole joint family and getting a Charge on a reasonable portion of the property the right or charge cannot be taken away from her by any subsequent partition between the members of the family. The cases relied on by Mr. Narasimhachar where the maintenance has been reduced or increased according as the circumstances of the family do not affect the question in issue at all, nor can the Full Bench decision be taken as an authority for the position that a right secured by a widow against the entire joint family by a decree of Court is taken away by a subsequent partition between 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 the second defendant 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 whose so ever's hands the properties may be. We are therefore of the opinion that the plaintiff is not entitled to the declaration sought. In view of this it is unnecessary to go into the question whether a suit is competent or not. But there is a question of fact raised by the plaintiff, namely, that the widow was a consenting party to the partition by which the plaintiff's liability came to an end and therefore by reason of the adjustment thus arrived at between all parties his liability under the decree became satisfied. This would strictly be a question under Section 47, Civil Procedure Code and cannot be gone into in an independent suit. Mr. Narasimhachar now requests that the plaint may be converted into a petition under Section 47, Civil Procedure Code. We allow the plaint to be treated as a proceeding under Section 47, in so far as the relief based on adjustment of the decree is concerned and direct the plaintiff to strike out paragraph 5 of the plaint and all other allegations in the plaint in so far as they have a bearing on the question raised in paragraph 5 which has been decided against him by this judgment. We therefore direct the District Judge of Bellary to go into the question whether the first defendant was a consenting party to the partition and agreed to take her maintenance only from the second defendant and agreed to treat the liability of the plaintiff as satisfied under the decree. It is open to the defendants to file a counter-affidavit raising such objections as they may be advised in regard to the premises. Subject to the directions given above, the appeal fails and is dismissed with costs, one set.