

**Devayee Vs. S. Ramaswami and anr.**

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**Court :** Chennai

**Decided On :** Jun-28-1976

**Reported in :** AIR1977Mad162; (1977)1MLJ80

**Judge :** Kailasam, C.J. and ;Balasubrahmanyam, J.

**Acts :** Provincial Insolvency Act - Sections 27, 28, 28(2), 34(1) and 34(2); [Hindu Adoptions and Maintenance Act, 1956](#); [Code of Civil Procedure \(CPC\), 1908](#) - Sections 60

**Appeal No. :** S.A. No. 2085 of 1974, decided by Division Bench on order of reference made by Sethuraman J. on 27-4

**Appellant :** Devayee

**Respondent :** S. Ramaswami and anr.

**Judgement :**

1. This second appeal, having been referred to a Bench by Sethuraman J., comes up before us. The wife of the first defendant filed a suit for maintenance. The allegation in the plaint is that on 13-2-1971, the first defendant beat her, took away her jewels and drove her away from the house. She claimed 11/2 pothies of paddy and 11/2 pothies of cholam every year, in addition to Rs. 100 towards her other expenses. She also claimed that she was entitled to reside in a portion of the house belonging to the first defendant. She further claimed that she was entitled to a charge over the plaint schedule property for securing due payment of the

maintenance. Before the filing of the suit, the first defendant had filed I. P. 29 of 1971, on the file of the Sub-Court, Salem, and was adjudged as insolvent. The properties of the first defendant had vested with the second defendant, Official Receiver of Salem. In the insolvency proceedings, the properties of the first defendant were ordered to be sold in I. A. No. 2 of 1972 on 7-7-1972. Hence, the plaintiff impleaded the Official Receiver also as the second defendant. The first defendant allowed the suit to proceed ex parte. The second defendant filed a written statement, in which the main objection was that the suit was barred under S. 28(2) of the Provincial Insolvency Act, in that the claim for maintenance was a debt provable in s insolvency, and that as the suit was filed without the sanction of the Insolvency Court, the suit was not maintainable and should be dismissed.

2. The trial court, on the question as to whether the suit is maintainable, following the decision of this court in *Ranganayaki Ammal v. Rajagopalaswami*, 1940-2 Mad LJ 239 = (AIR 1940 Mad 951) held that the claim for maintenance was a debt provable in insolvency and as such the suit was not maintainable. On appeal by the plaintiff, the District Judge agreed with the trial court and held that the suit was not maintainable. The appellate Judge also relied on the above said decision of this court reported in *Ranganayaki Ammal v. Rajagopalaswami*, 1940-2 Mad LJ 239 = (AIR 1940 Mad 951). The learned appellate Judge expressed the view that when once it is held that maintenance is a debt within the meaning of S. 28(2) of the Act, it would necessarily follow that a suit for maintenance with a claim for a charge over the properties of the insolvent can not be entertained without the sanction and leave of the Insolvency Court. The wife preferred a second appeal to this court, and while referring the matter to a Bench, Sethuraman J. has stated that the two contentions made by the learned counsel for the appellant were (1) that the courts below were wrong in assuming that there was a debt in the present case which was provable in insolvency; and (2) that in any event the salary earned by the first defendant as a teacher does not vest in the Official Receiver to the extent of at least Rs. 200, so that it would be open to the plaintiff to proceed against that salary for the purpose of enforcing her right to maintenance and that to that extent the leave of the insolvency court is not necessary as the property does not wholly vest in the Official Receiver. The learned Judge after referring to the decisions reported in *Hanibabeebi v. Syed Munurdeen*, AIR 1939 Mad 183;

Mohammed Ali Methabhai in re AIR 1930 Bom 144, Ranganayaki Ammal v. Rajagopalaswami, 1940-2 Mad LJ 239 = (AIR 1940 Mad 951) and Hemavathiamma v. Kumaravelu, AIR 1968 Mys 11, held that the matter was not free from difficulty and none of the decisions considered the question as to whether the suit could be filed at any rate with reference to the assets which did not vest in the Official Assignee or the Official Receiver. As it was not clear from the decisions as to whether the debt was one provable in insolvency, the matter was referred to a Bench by the learned Judge.

3. The decision which the courts below found binding on them is Ranganayaki Ammal v. Rajagopalaswami, 1940-2 Mad LJ 239 = (AIR 1940 Mad 951). The facts as given in the headnote disclose that a suit was filed by the mother and unmarried sisters of the insolvent to recover arrears of maintenance on the charge of the family properties and also for recovery of future maintenance on the charge of the same family properties. The defendant in the suit was adjudged an insolvent before the suit was filed and the properties vested in the Official Receiver. Leave of the Insolvency Court was not obtained. The learned Judge stated that it could not be disputed that the claim for marriage expenses arrears of maintenance, lump sum on account of residence and clothing for the mother was a claim for debts proveable in insolvency and that this was about 90 per cent of the claim put forward in the suit. Even as regards the claim for future maintenance, the learned Judge observed, having reference to the language of S. 34(2) of the Act, that he was not satisfied that it was not a debt proveable in insolvency. On the basis that the debt was one proveable in insolvency the learned Judge came to the conclusion that the plaintiff being a creditor, to whom the insolvent was indebted in respect of a debt provable under the Act was forbidden by S. 28(2) of the Act, to bring any suit against him without the leave of the insolvency court. In this view, the learned Judge held that the suit was not maintainable and dismissed it. One other decision which needs to be referred to before we deal with the provisions of the Act is Hanibabeebi v. Syed Nanurdeen, AIR1939 Mad 183. In that case, the wife obtained a decree against her husband in 1932, awarding her mahar and maintenance. The husband was adjudicated insolvent in 1933. In 1934, the wife filed an execution petition for arrears of maintenance which were then due for the arrest of the husband. It was held that S. 34(1) of the Act did not apply and part of

the debt at least having been incurred before the adjudication, it was provable in insolvency and that the decree-holder could not proceed to execute the decree without the leave of the insolvency court. King J. in that case held that at any moment a wife, who is a decree-holder under a decree of this kind, can come to the Insolvency Court and say that her husband is indebted to her in a fixed sum and that, therefore, S. 3(1) which says that a debt is not provable in insolvency because the debt is incapable of being fairly estimated cannot possibly apply to a claim of this kind. This decision, it may be seen, is applicable to cases where a decree has already been obtained. The learned Judge himself proceeded to express some doubt as to the date on which the wife may make the application or the date upto which she may calculate her arrears. But the learned Judge did not express any opinion on this point.

4. Coming to the provisions of the Act, S. 27 relates to an order of adjudication, S. 28 states the effect of an order of adjudication. S. 28(2) is relevant and is extracted in full:--

"28(2). On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the court and on such terms as the court may impose."

5. The result of making an order of adjudication is that the whole of the property of the insolvent vests in the court or in the Receiver and becomes divisible among the creditors. The result of such vesting is that except as provided in the Act, no creditor, to whom the insolvent is indebted in respect of any debt provable under the Act shall, during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt or commence any suit or other legal proceeding, except with the leave of the court and on such terms as the court may impose. The said sub-section makes it clear that the creditor to

whom the insolvent is indebted has no remedy except as provided for under the Act. It is necessary to consider whether a claim for maintenance on the facts of this case is a debt provable under the Act. The effect of the sub-section is that no proceeding can be taken by the creditor in respect of a debt provable under the Act against the property of the insolvent without the leave of the Insolvency Court. We are now concerned with the question whether the present claim is a debt provable in insolvency. If so, the creditor cannot commence suit or other legal proceeding. As to what is a debt that is provable in insolvency S. 33 provides that the creditors of the insolvent in respect of debts provable under the Act shall tender proof of their respective debts by producing evidence of the amount and particulars thereof and the court shall determine the persons who have proved themselves to be creditors of the insolvent in respect of such debts and the amount of such debts respectively, and shall frame a schedule of such persons and debts. The proviso is very relevant and it states that, if, in the opinion of the court, the value of any debt is incapable of being fairly estimated, the court may make an order to that effect and thereupon the debt shall not be included in the schedule. The proviso, therefore, excludes debts, which are incapable of being fairly estimated, from being included in the schedule. It is further made clear in S. 34(1) which specifies which are the debts that are not provable under the Act, S. 34(1) runs as follows-

"34(1) Debts which have been excluded from the schedule on the ground that their value is incapable of being fairly estimated and demands in the nature of unliquidated damages arising otherwise than by reason of a contract or a breach of trust shall not be proveable under this Act."

It specifically refers to and excludes debts that will not be included in the schedule under the proviso to S. 33(1), S. 34(2), starts by saying 'Save as provided by sub-s. (1) all debts and liabilities.....'. The words 'save as provided by sub-s. (1) occurring in sub-s (2) of S. 34 would obviously mean that it does not relate to the debts which are referred to in sub-s. (1). So far as the claim for maintenance is concerned, Chap. III of the [Hindu Adoptions and Maintenance Act, 1956](#), deals with the maintenance of wife and dependants. S. 18 of that Act particularly deals with the right of the wife to maintenance. S. 23(2) gives a guideline for determining

the quantum of maintenance. It provides that 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; and the number of persons entitled to maintenance under the Act. It may also be observed that the amount of maintenance would vary and would depend upon various circumstances. For instance, the husband may become poor and lose his properties. It may be that the wife may become unchaste or there may be additions to the family. In some cases, after some time the husband and wife may live together. Therefore, the claim to maintenance is incapable of being fairly estimated and will squarely fall under the proviso to S. 33(1) and S. 34(1) of the Provincial Insolvency Act, as being a debt which will have to be excluded from the schedule on the ground that the value is incapable of being fairly estimated. In the view, S. 28(2) becomes inapplicable and, therefore, a suit for maintenance is not barred under S. 28(2). In *Ranganayaki Ammal v. Rajagopalaswami Naidu*, 1940-2 Mad LJ 239 = (AIR 1940 Mad 951) the learned Judge was of the view that even as regards claim for future maintenance, with reference for future maintenance, with reference to the language of S. 34(2) he could not consider it as a debt not provable in insolvency. We are unable to accept this view. As pointed out by us, S. 34(2) applies only to debts which are not covered under S. 34(1). A claim for maintenance which is incapable of being fairly estimated, falls under S. 34(1).

6. Before we conclude, we would like to refer to two decisions which were brought to our notice. In *Mohamed Ali Mithabhai in re* AIR 1930 Bom 144, a Bench of the Bombay High Court was dealing with the question as to whether a Magistrate had jurisdiction under S. 488, Crl. P. C., to pass an order for maintenance in favour of the wife, as the decree which she had obtained in a civil court, has become inexecutable owing to the pendency of the insolvency proceeding against the husband. The court took the view that arrears of maintenance decreed by the civil court would be a debt which could be proved in insolvency, but future payments could not be proved in insolvency as they were incapable of valuation and might cease at any moment if the husband and wife decided to live together. Another case to which our attention was drawn is *Hemavathiamma v. Kumaravelu*, AIR

1968 Mys 111. In that decision the court held that a decree of a civil court passed against the husband for maintenance of his wife is not a debt within the meaning of the Act and it cannot form the basis of adjudication of the husband as an insolvent. The learned Judge further observed that the entire salary or personal earnings of an insolvent after an adjudication does not vest in the Receiver, but only so much of the salary or personal earnings as are not except from attachment under S. 60, C. P. Code. Salary to the extent of just Rs. 200 and one half of the remainder is exempt from attachment under S. 60(1)(i) of the Code. The learned Judge, therefore, held that if the salary of an insolvent is only Rs. 200, it will be entirely his and not a paisa out of it will vest in the receiver for distribution among his creditors. Under S. 28(5) of the Provincial Insolvency Act, the property of the insolvent shall not include any property which is exempted by the Civil Procedure Code and is not liable to be attached. Whatever remedy the wife may have to proceed against the salary to the extent permitted under S. 60 C. P. Code is not taken away by the Insolvency Act. But at this stage, it is not necessary for us to go into the other questions, for, it is sufficient for the disposal of this case to hold that the suit is maintainable. In what manner she will have to proceed after a decree is obtained we refrain from expressing any opinion.

7. In the result, we allow the second appeal, set aside the judgments of the courts below and direct the trial court to take up the suit on file and dispose it of according to law as expeditiously as possible. There will be no order as to costs.

8. Appeal allowed.

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