

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO (OS) No. 270/2004**

RESERVED ON :October 1st, 2008

% DATE OF DECISION : January 16, 2009

RADHIKA NARANG & ORS. Appellants
Through: Mr. Y.P. Narula, Sr.
Advocate with
Mr. Sanjoy Gosh and
Mr. Aniruddha
Choudhary, Advocates.

Versus

KULDEEP NARANG & ANR. Respondents
Through: Mr. C.A. Sundaram,
Sr. Advocate with
Mr. Shailen Bhatia,
Advocate for R-2.

CORAM:
HON'BLE MR. JUSTICE MUKUL MUDGAL
HON'BLE MR. JUSTICE MANMOHAN

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the digest? Yes

J U D G M E N T

MANMOHAN, J:

1. The Appellant daughter-in-law has filed the present appeal against the order dated 16th November, 2004 passed in Suit No. 1225 of 2003 whereby the learned Single Judge while deciding a preliminary issue has held that the plaint does not disclose a cause of action against the father-in-law (defendant No. 2/respondent No. 1 herein) and has deleted him from the array of parties.

2. Learned Single Judge while reaching the above conclusion has held that by virtue of Sections 18 and 19 of the Hindu Adoption and Maintenance Act, 1956 (hereinafter to be referred as the 'said Act'), a daughter-in-law during the life time of her husband had no right to seek maintenance from her father-in-law and further in view of Section 4 of the said Act, the Old Customary Law which entitled a wife to seek maintenance from co-parcenary property was no longer available. The learned Single Judge concluded that the question of defendant No. 2/respondent No. 1 herein being 'karta' or his obligation to perform duties as 'karta' did not arise in the present case and he was neither a proper nor a necessary party and further that he had been improperly joined.

3. At the outset, Mr. Y.P. Narula, learned senior counsel for the Appellant submitted that the learned Single Judge failed to appreciate that the present suit was a composite suit for maintenance and residence not only on behalf of the wife but also on behalf of the minor children. In this context, he referred to the cause title of the suit itself which stated “**SUIT FOR MAINTENANCE AND SEPARATE RESIDENCE UNDER SECTION 9 CIVIL PROCEDURE CODE READ WITH SECTION 18 AND 20 OF THE HINDU ADOPTION & MAINTENANCE**

ACT, 1956 & FOR PERMANENT AND MANDATORY INJUNCTION.”

4. Mr. Narula submitted that the minor children acquire an independent right of ownership by birth in Hindu co-joint parcenary property and until partition, each member has co-ownership over the said property and a co-parcener can seek maintenance from such property. In this context, he relied upon the observations of the Apex Court in ***Controller of Estate Duty Vs. Alladi Kuppuswamy reported at (1977) 3 SCC 385*** wherein it has been held as under:-

“Thus analyzing the ratio of the aforesaid case regarding the incidents of a Hindu coparcenary it would appear that a Hindu coparcenary has six essential characteristics, namely, (1) that the lineal male descendants up to the third generation acquire an independent right of ownership by birth and not as representing their ancestors; (2) that the members of the coparcenary have the right to work out their rights by demanding partition; (3) that until partition, each member has got ownership extending over the entire property conjointly with the rest and so long as no partition takes place, it is difficult for any coparcener to predicate the share which he might receive; (4) that as a result of such co-ownership the possession and enjoyment of the property is common; (5) that there can be no alienation of the property without the concurrence of the other coparceners unless it be for legal necessity; and (6) that the interest of a deceased member lapses on his death and merges in the coparcenary property.”

5. He submitted that in the impugned judgment there was no discussion with regard to the minor children's right to claim maintenance against their grandfather as well as co-parcenary property in the control of defendant No.2/respondent No.1 as 'karta'.

6. Mr. Narula submitted that in view of the averments in the plaint it could not be concluded without a trial that the plaint did not disclose a cause of action against defendant No.2 / respondent No.1 herein. In this context learned Senior Counsel for Appellant referred to the following averments in the plaint which are being reproduced hereinbelow for ready reference:-

"4. The Plaintiffs further submit that the Defendant No. 2 is the head of the Narang Joint Hindu family, an extremely well known wealthy family of Delhi. The Narang Family owns various business and movable and immovable assets, including properties No.3, currently used as an office & No. 5, Dr. G.C. Narang Marg, Delhi, in which the Plaintiff No. 1 started living with the Defendant No. 1 after her marriage and was living there till the day she was forced to leave the said matrimonial house on 25.2.2003, as mentioned above. Both the properties have a common enclosure and are situated in approx. 4.73 acres of land which interalia also contain a swimming pool, gardens including a huge vegetable garden, a temple, servants quarters etc.

5. The Defendant No. 1 is the managing director cum CEO of Eastern Medikit Ltd., of which company he is the virtual owner. The defendant No. 1 also controls various other companies the details of which are given hereinafter. The Defendant No. 1 earns huge profits from these companies and

spends more than Rs. 5 lacs per month. The Defendant No. 1 controls and has major shareholdings in the following family companies in which his father is also involved:

- i. Eastern Medikit Ltd.
- ii. Eastern Connections Ltd.
- iii. Asuma Medical Ltd.
- iv. Asuma Research Ltd.
- v. International Systems Pvt. Ltd.
- vi. Vital Tooling Pvt. Ltd.
- vii. Indeco Engineering Pvt. Ltd.
- viii. Eastern Securities Ltd.

It is relevant to mention that the Plaintiff No. 1 is also a shareholder in all these companies. However the Defendant No. 1 has kept the control of the companies with him and has denied to share profits etc. with the Plaintiff No. 1.

8.....The Defendant No. 2 is the Karta and the Head of the Narang's joint family, and is liable to maintain and provide for the maintenance of the Plaintiffs out of the joint family income and assets, which he is controlling jointly with Defendant No. 1. The Plaintiff No. 3 is the minor daughter of the Plaintiff No. 1 and Defendant No. 1 and she is entitled to be maintained from the assets & income of the joint family till she gets marriage. The Defendants are also liable to provide for her marriage expenses as per the status of the 'Narang family'.

9. The Plaintiff No. 1 submits that the Defendant No. 1 has acted dishonestly and has written letters to the Plaintiff No. 1 wrongly, stating that the house at 3 & 5, Dr. G.C. Narang Marg, Delhi belongs to his father. In fact, the said property is an ancestral property and the Defendants are holding the same in a fiduciary capacity and for the benefit of all the Plaintiffs, and the mother of Defendant No. 1. The said Defendant No. 1 is adverse to the interest of his minor children as he is denying the rights of his

own minor children in the ancestral joint family properties.

10. The Plaintiffs submit that the properties at 3 & 5, Dr. G.C. Narang Marg are the ancestral properties of the 'Narang Family' acquired by Sir G.C. Narang, the great grandfather of Defendant No. 1 who used to live in Pakistan before partition. After partition, he came to India and acquired properties situated at 3 & 5 Dr. G.C. Narang Marg, Delhi, which comprises of a land area of 4.75 area."

13. The Plaintiff No. 1 submits that the Defendants are controlling a number of Private & Public Limited Companies, the list whereof is annexed hereto as **Annexure-C**. The grandfather of Defendant No. 2 (Sir G.C. Narang) owned Sugar Mills, which has been the source of funds for the Narang family for three generations. A number of companies have been started by Narang family at different times to structure or re-structure their respective rights and to suit their Tax planning. In the said companies the majority share-holding has always been with the Narang family and, therefore, the Defendants are liable to disclose the assets of the said companies and their respective share-holdings in the said companies. The Plaintiff No. 1 has also been holding shares in some of the companies and she is entitled to the said shares as her absolute property and as owner thereof."

40. The Plaintiff No. 1 submits that after her marriage, she has lived in 5, Dr. G.C. Narang Marg, Delhi. The said house is a joint family property and the Plaintiffs have a right in the said property. It appears that on account of his dispute with Plaintiff No. 1, the Defendant is now alleging that the said house is the property of his father only. The Plaintiff No. 1 submits that the said conduct of the Defendant is not in the interest of his son, who are members of the HUF, to which the said property belongs. The Plaintiff No. 1 submits that to set up a false defence to the claim of maintenance of the Plaintiffs, the Defendant has started pleading poverty and has started addressing the correspondence from an alleged rented house situated at IC 2nd Floor, B.D. Estate, Delhi-110 054

and is refusing to accept correspondence at the said Dr. G.C. Narang Marg. Keeping in view the said conduct of the Defendant, which is adverse to the interest of the minor children of the parties, the Plaintiffs reserve their right under Order 2 Rule 2 CPC to seek partition of the joint family properties. The said property is situated on 4.75 Acres of land or more. The said property is ancestral and not self-acquired of the Defendants. The Defendant No. 1 has always driven in foreign cars of selected makes, but to set up a false defence, he is now representing that he is riding a Maruti Esteem. The Plaintiffs submit that to ascertain the net worth of the Defendants, the credit card records of the Defendants for the last 3-4 years would show that the Defendants are fabricating records and are making false statements to deny to the Plaintiffs their legitimate rights to maintenance.”

(emphasis supplied).

7. Mr. Narula submitted that at this stage the test to be applied was that of Order 7 Rule 11 CPC and, therefore, a plaint could only be dismissed even if all the allegations made in the plaint are believed to be true and correct but the plaintiff is held not entitled to any relief on the basis that it either discloses no cause of action or the relief is barred by law. In this context he relied upon observations of a Coordinate Bench of this Court in “**Ravi Singhal and others Vs. Manali Singhal and Others**”, reported in **2000 Volume VII AD (Delhi) 773** wherein it was held as under :-

“21.....To enable the Court to reject the plaint on the ground that it does not disclose a cause of action where the plaint is based on a document, the

Court is entitled to consider the said document also and to see if on conjoint reading thereof a cause of action is disclosed. However, validity of the document cannot be considered at this stage. In asking the Court to decide an issue whether the plaint discloses a cause of action or not, the defendant must be taken to admit, for the sake of argument, that the allegations of the plaintiff made in the plaint are true -modo et forma- in manner and form. The power to reject the plaint under this clause can be exercised only if the Court comes to the conclusion that even if all the allegations are proved, the plaintiff would not be entitled to any relief whatsoever.....”

8. Mr. Narula further submitted that the said Act is not an exhaustive law relating to maintenance amongst Hindus. He stated that under Hindu Law a person had a right to seek maintenance in a two-fold manner i.e. firstly, due to existence of a particular relationship and secondly, due to possession of property like co-parcenary property. He submitted that while the first obligation is personal in nature and arises on account of a relationship; the other obligation arises on possession of co-parcenary property and it is not confined to a particular relationship which casts an obligation to maintain. In this context he relied upon a judgment of the Hon'ble Supreme Court in ***Kamalammal v. Venkatalakshmi Ammal reported in AIR 1965 SC 1349*** wherein it has been held :-

“.....That might indicate that it would not be violent inference to hold that the disqualified heir had still some interest however little it might be in the

property, for surely it is the proprietary right that gives him the right to maintenance. It might be noticed that under the Hindu law the liability to maintain others arises in a twofold 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, and unmarried daughters and aged parents. Here the obligation is personal and is brought into existence by the relationship. In the other category are those where the liability is dependent on the possession of coparcenary property. Assuredly the liability to provide for the maintenance of the disqualified heir under the Hindu law would fall under the latter category also i.e. it is not confined to the particular relationships which cast the obligation to maintain. Thus a brother would have to be maintained out of the joint property where he is disqualified from claiming partition. No doubt, the texts deny him the right to partition but that is not the subject-matter of the discussion here. If the right to be maintained is traceable to his right to the property in which he is excluded from participating in full, it would not be a violent inference to hold that he has an incipient and vestigial interest in that property which is not capable of being asserted against other coparceners, but when there is none entitled to enjoy it as coparcener, blossoms into a full right....."

(emphasis supplied).

9. He also relied upon the judgment of the Bombay High Court in the case of ***Krishna Madhav Ghule and Ors. Vs. Padminibai Mohan Ghule reported in 1977 Maharashtra Law Journal*** wherein it was held as under :-

"12. What remains is the point which has been referred to above with regard to the power of the Court to create a charge on the joint family property in favour of the plaintiff. Mr. Naik, the learned

counsel for the defendants, contended that law of maintenance is now governed by the provisions of the Hindu Adoptions and Maintenance Act. He relied on the provisions of section 4, sections 18 and 19 of the Act and contended that Hindu wife is entitled to be maintained by her husband during her life time and the father-in-law's liability commences only after the death of her husband. He also referred to the definition of the word, "dependents" and contended that, that definition will come into operation only when determining the liability of the heirs of the deceased Hindu. But it must not be forgotten that the Hindu Adoptions and Maintenance Act is not exhaustive of the law relating to maintenance amongst Hindus.

13. It is an Act to amend and codify the law relating to adoptions and maintenance amongst Hindus; but having regard to the provisions of section 4 it must be held that only in so far as there is some express enactments in the Act, that the Act can be said to be exhausting in regard to such express provisions. There is no provision in the Hindu Adoptions and Maintenance Act relating to the right of a coparcener's wife to be maintained out of the coparcenary property. Such a right was part of the old Hindu Law. The manager of the joint Mitakashara family is under a legal obligation to maintain all members of the family, their wives and their children. (See Manusmriti Chapter 9, section 108; Naradasmriti Chapter 13, sections 26,27, 28 and 33, Mulla's Hindu Law, 13th Edition 1974 para 543 page 591).

14. Obligation to maintain these persons arises from the fact that the Manager is in possession of the family property (See Kamlamal v. Venkatlaxmi). The Hindu Adoptions and Maintenance Act has no doubt provided for the personal liability of the husband to maintain his wife and the liability attached to the property inherited by the heirs in so far as dependents are concerned. The Act has not made any provisions regarding the maintenance of the wife of a coparcener. Therefore, the old principles of Hindu Law in this behalf continue to

apply. The statutory right of maintenance given under section 18 avails to the wife against her husband whether he has or has not any property. It is the personal liability of the husband to satisfy this right. As long as the family continues to be joint the coparcenary must be held to possess the property belonging to the husband and hence all its members are also liable to maintain the plaintiff.

15. It is also well settled that when a coparceners wife has a right of maintenance it can be made the subject matter of a charge on the property of the coparcenary by a decree of the Court. Mr. Naik, submitted that the right of maintenance can be enforced by the wife only in respect of the share of the husband. But the share of the husband cannot be ascertained unless there is a partition under Hindu Law. The essence of a coparcenary is unity of ownership in the whole body of coparceners.

16. According to the true notion of an undivided family governed by the Mitakashara Law while it remains undivided it cannot be predicted by the joint and undivided member of the family that he and/or any particular member has a definite share, 1/3rd or 1/4th. The right of each coparcener until a partition takes place, consists in the common possession and common enjoyment of the coparcenary property. There is a community of interest and unity of possession between all the members of the family. Hence the entire joint property is liable to be subjected to a charge for the maintenance of the plaintiff as the wife of one of the coparceners. The decree passed by the lower Court is, therefore, in accordance with law."

(emphasis supplied).

10. He further submitted that a Coordinate Bench of this Court in the case of **Ravi Singhal and others Vs. Manali Singhal and**

Another reported in 2000 VII AD (Delhi) 773 has held as under:-

“The Hindu Adoptions and Maintenance Act, 1956, is not exhaustive on the law relating to maintenance among Hindus. It is an Act to amend and codify the law relating to adoptions and maintenance among Hindus.

Section 4 of the Act gives overriding effect to the provisions of the Act. However, a codifying statute does not altogether obliterate the old law with respect to the matters for which provision is not made in the Act. The prior law ceases to have effect to the extent laid down in that Section. As an inevitable corollary it also follows that in respect of matters for which no provision is made in the Act, the old law must continue to remain applicable.”

(emphasis supplied).

11. On the contrary, Mr. C.A. Sundaram, learned senior counsel for the Respondent submitted that the test of Order 7 Rule 11 CPC was not applicable to the present case as the learned Single Judge had deleted Respondent No. 1 from the array of parties after deciding a preliminary issue. Mr. Sundaram stated that the Appellant’s argument proceeds on an erroneous basis that there is a co-parcenary property. He submitted that in view of the averments in the written statement and the failure of the Appellant/plaintiff to lead any evidence, it could not be presumed that there is any Hindu Undivided Family and the respondent No. 1/defendant No. 2 was a ‘karta’ of said Hindu Undivided Family. In this context, learned Senior Counsel for

Respondent No.1 referred to and relied upon the following para in the said Respondent's written statement:

“F. The answering Defendant also states at the outset that there is no Narang Joint Family. Such and entity does not exist. The answering Defendant is making a responsible statement which is in consonance with income tax and other records. The Plaintiff No. 1 is fully aware that there is neither an Hindu Undivided Family nor any property belongs to the said Hindu Undivided Family. The two buildings discussed in the plaint being No. 5, Dr. G.C. Narang Marg, Delhi and No. 3, Dr. G.C. Narang Marg, Delhi are not owned by any Hindu Undivided Family. The Plaintiff No. 1 has made vague, incorrect and irresponsible statements.”

(emphasis supplied).

12. On a demurrer, Mr. Sundaram, learned senior counsel for the Respondent submitted that a daughter-in-law whose husband is alive has no legal right to claim maintenance from her father-in-law. He further submitted that matter relating to grant of maintenance are now exclusively governed by the provisions of the said Act. In this context he referred to Sections 3(b), 18 and 19 of the said Act which read as under:-

“3. Definitions.- *In this Act,*

(b) Maintenance include-

(i) in all cases, provision for food, clothing, residence, education and medical attendance and treatment,

(ii) in the case of an unmarried daughter, also the reasonable expenses of an incident to her marriage.....

18. Maintenance of wife.- (1) *Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her life time.*

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance-

(a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or willfully neglecting her.

(b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband.

(c) if he is suffering from a virulent form of leprosy.

(d) if he has any other wife living.

(e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere.

(f) if he has ceased to be a Hindu by conversion to another religion.

(g) if there is any other cause justifying living separately.

(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

19. Maintenance of widowed daughter-in-law.-

(1) A Hindu wife, whether married before or after the

commencement of this Act, shall be entitled to be maintained after the death of her husband by her father-in-law.

Provided and to the extent that she is unable to maintain herself out of her own earnings or other property or, where she has no property of her own, is unable to obtain maintenance-

(a) from the estate of her husband or her father or mother, or

(b) from her son or daughter, if any, or his or her estate.

(2) Any obligation under sub-section (1) shall not be enforceable if the father-in-law has not the means to do so from any coparcenary property in his possession out of which the daughter-in-law has not obtained any share, and any such obligation shall cease on the re-marriage of the daughter-in-law.”

13. He further submitted that the liability of maintenance of a married wife, during subsistence of marriage, is on the husband and it is his personal obligation. He stated that the obligation of the father-in-law to maintain a daughter-in-law arises only when the husband has died and as in the present case, the husband was alive the Appellant could not seek any relief against the defendant No. 2/respondent No. 1. Mr. Sundaram submitted that in view of overriding effect of the said Act, any prior custom, Hindu Text or Rule which obligates a father-in-law to maintain his daughter-in-law is no longer valid. In this context learned Senior Counsel for the Respondent referred to and relied upon **Mulla Principles of Hindu Law** wherein it has been stated :-

*“.....The right to claim maintenance from the father-in-law – in the circumstances stated above – is further conditional upon the father-in-law having in possession coparcenary property out of which the widowed daughter-in-law had not obtained any share. The right to claim maintenance envisaged in sub-s (2) can be enforced even if the daughter-in-law, though entitled to claim a share of the joint family property does not choose to do so
It is implicit in the rule laid down in this section that a daughter-in-law whose husband is alive has no right, moral or legal, to claim maintenance from her father-in-law.....”*

(emphasis supplied).

14. Learned Senior Counsel for the Respondent also relied upon the judgment of the Apex Court in ***Vimlaben Ajitbhai Patel Vs. Vatslaben Ashokbhai Patel reported in (2008) 4 SCC 649, at page 659.*** The relevant portion of the said judgment is reproduced hereinbelow for ready reference :-

“21. Maintenance of a married wife, during subsistence of marriage, is on the husband. It is a personal obligation. The obligation to maintain a daughter-in-law arises only when the husband has died. Such an obligation can also be met from the properties of which the husband is a co-sharer and not otherwise. For invoking the said provision, the husband must have a share in the property. The property in the name of the mother-in-law can neither be a subject-matter of attachment nor during the lifetime of the husband, his personal liability to maintain his wife can be directed to be enforced against such property.....

23. Sections 4 and 28 of the Hindu Adoptions and Maintenance Act read as under:

“4. Overriding effect of Act.—Save as otherwise expressly provided in this Act,—

(a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus insofar as it is inconsistent with any of the provisions contained in this Act.

* * *

28. Effect of transfer of property on right to maintenance.—Where a dependant has a right to receive maintenance out of an estate and such estate or any part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right or if the transfer is gratuitous; but not against the transferee for consideration and without notice of the right.”

24. Section 4 provides for a non obstante clause. In terms of the said provision itself any obligation on the part of in-laws in terms of any text, rule or interpretation of Hindu Law or any custom or usage as part of law before the commencement of the Act, are no longer valid. In view of the non obstante clause contained in Section 4, the provisions of the Act alone are applicable. Sections 18 and 19 prescribe the statutory liabilities in regard to maintenance of wife by her husband and only on his death upon the father-in-law. Mother-in-law, thus, cannot be fastened with any legal liability to maintain her daughter-in-law from her own property or otherwise.”

(emphasis supplied).

15. Mr. Sundaram submitted that the judgment of Bombay High Court in Krishna Madhav Ghule was no longer good law as it was contrary to the above judgment of the Hon'ble Supreme Court.

16. In rejoinder Mr. Narula once again reiterated that a wife's right to claim maintenance against a co-parcenary property was not taken away by statutory codification. He submitted that the judgment of Hon'ble Supreme Court in Vimlaben Ajitbhai Patel was under the Domestic Violence Act and it in no manner overruled either Krishna Madhav Ghule or Ravi Singhal's judgment. In any event, he submitted that the children's right to claim maintenance against co-parcenary property had not been dealt with in the judgment of Vimlaben Ajitbhai Patel (Supra).

17. We are not impressed by Mr. Sundaram's argument that in view of the averments in the written statement and the failure of the Appellant/plaintiff to lead any evidence it has to be presumed that there is no Hindu Undivided Family. Firstly, we find that the learned Single Judge has struck off the Respondent No. 1/defendant No. 2 from the array of parties on the basis of a decision rendered on a preliminary issue which could only be an issue of law and that too if it relates either to jurisdiction or to a legal bar to the maintainability of the suit. In this context, it would

be useful to refer to Order 14 Rule 2 of Code of Civil Procedure which states as under :-

[2. Court to pronounce judgment on all issues –

(1) Notwithstanding that a case may be disposed of on preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to—

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.]

18. In our opinion, a preliminary issue cannot be decided by presuming all the averments in the plaint to be incorrect on the basis of a mere denial in the written statement. In the present case if all the averments in the plaint are presumed to be correct at this stage of the proceedings, as it should be, then it cannot be concluded that there is no Hindu Undivided Family. Secondly, we find that that in any event the onus of leading evidence on the said issue was on the Respondent No. 1/defendant No. 2 and not on the Appellant/plaintiff. In our opinion for failure of the Respondent No. 1/defendant No. 2 to lead evidence, the

Appellant/plaintiff cannot be penalised. The preliminary issue as framed by learned Single Judge is reproduced hereinbelow :-

*“Whether plaint does not disclose a cause of action against defendant No. 2 and whether defendant No. 2 is liable to be struck off from the array of parties?
OPD”*

(emphasis supplied).

19. We may mention that under the Code of Civil Procedure a person may be joined as Defendant if any right to relief is alleged to exist against such a person. In the present case, the Appellants/plaintiffs have sought the following relief in their suit :-

(aa) A decree for Perpetual Injunction be passed against the Defendants restraining the Defendants from selling their assets as per the list filed with the Suit to ensure payment of maintenance to the Plaintiffs.

(a) A decree of maintenance be passed in favour of the Plaintiffs and against the Defendants, awarding Rs. 1.75 Lacs (One lac seventy-five thousand only) per month and appropriate orders be passed, securing the payment of the maintenance amount against/ from the assets of the Defendants.

(b) A decree be passed against the Defendant No. 1 and Defendant No. 2, directing them to provide for separate residence to the Plaintiff No. 1 and her children as per the status of the family and as per the lifestyle to which the Plaintiffs have been used to.

(c) A decree for Mandatory Injunction be passed, directing the Defendants to provide for an appropriate car and driver for the use of the Plaintiffs, as per the status of the family.

(d) A decree for Mandatory Injunction be passed against the Defendants to provide for and pay the

school fees of the children directly to the School of the Plaintiffs 2 to 4 and also to pay for all other school expenses, which the school may demand from the Plaintiffs.

(e) Costs of the suit be also awarded to the Plaintiffs.

(f) Any other order or direction that this Hon'ble Court may deem fit and proper in favour of the Plaintiffs."

(emphasis supplied)

20. From a perusal of the plaint and specially paragraphs extracted hereinabove it would be apparent that the unrebutted averments in the Appellant's plaint certainly disclose a cause of action against the Respondent No. 1/defendant no. 2. The only way by which the Respondent No. 1 can be deleted at this stage from the array of parties is if the Courts were to find that there was a legal bar to the maintainability of the suit itself. During the course of arguments Mr. Sundaram has primarily argued that the Appellants/plaintiffs have no right to claim maintenance against the Respondent No. 1/defendant No. 2. However, from perusal of reliefs claimed in the plaint, we find that the Appellants/plaintiffs have claimed not only maintenance but also perpetual injunction restraining both the Defendants from selling their assets as per list attached to ensure payment of maintenance to the Appellant/plaintiff. In the plaint, in particular in paragraph Nos. 5, 8, 13 and 40 it has been specifically averred that the Appellant's husband along with his father owns and

controls various assets and companies and now the husband is alleging these assets and companies belong to his father namely Respondent No. 1/defendant No. 2. In this connection what assumes importance are the observations of another learned Single Judge of this Court, in the present suit itself, that the conduct of the Plaintiff's husband namely Defendant No. 1 was not fair and that he had failed to disclose his true and correct income. Some of the relevant observations of the learned Single Judge while deciding I.A. No. 6493 of 2003 dated 16th February, 2006 are reproduced hereinbelow for ready reference :-

..... The conduct of the husband has not been quite fair in these proceedings. Firstly, he has failed to disclose the true and correct income and there is no whisper in the pleadings of the fact that he has interest in different companies. These facts were admitted by him only during his examination before the Court under Order 10 CPC. The defendant No. 1 has also stated in his statement that he has no burden of maintaining his elder son as all expenses of education, living, travelling and other luxuries of the life are being borne by the grand parents. The son does not live with the father..... Non-applicant ought to have disclosed all correct facts without reservations so as to make it convenient for the Court to determine the extent of maintenance, which should be granted by the Court to the applicants.

Truthfulness of a party is not only a pre-requisite for claiming a relief in equity but is the very essence of any legal proceedings. The conduct of the party in such proceedings is another relevant factor which has to be taken into consideration by the Court. The defendant has withhold his true income and has not correctly stated the facts which were within his personal knowledge. A clear

attempt has been made not to disclose varied interests of the husband in various companies. The immovable property owned by the family where the husband and wife were living together and their standard of living in that place are sufficient indication of the standard of living and status which the parties enjoyed before departure of the wife from the matrimonial home.....

.....it will be equitable to pass certain interim directions, particularly keeping in mind that the husband has not stated correct facts and has attempted to withhold his true and correct income, interest in various companies and the properties, which are owned and possessed by him. Consequently, the following interim directions are issued..... :

(emphasis supplied)

21. Though the said order had been challenged by the Appellant/plaintiff, the observations of learned Single Judge regarding the conduct of Defendant No. 1/husband and son of Defendant No. 2 have attained finality inasmuch as the same were not challenged.

22. Consequently, keeping in view the prayers in the suit, specially prayer (aa) and the averment that the husband has a substantial interest in the properties and companies owned jointly with his father namely Respondent No. 1/defendant no. 2 as well as the finding of learned Single Judge in the order dated 16th February, 2006 that the Defendant No. 1 has not disclosed his true and correct income, we are of the view that the Defendant

No. 2 should not have been deleted from the array of parties at this stage.

23. We are further of the opinion that if the Appellant/plaintiff had failed to implead the respondent No. 1/ defendant No. 2 as a party, the Court on its own could have impleaded respondent No. 1/ defendant No. 2 as a party by invoking the principles of Order 1 Rule 10 of Code of Civil Procedure as the said defendant was a necessary and proper party, whose presence would have helped the Court in determining the real matter in dispute namely as to whether there was any joint Hindu Undivided Family property or as to whether the husband had any share in the properties or companies owned by Respondent No. 1/defendant No. 2 or by the alleged Hindu Undivided Family or as to whether husband had transferred any of his interest in any of his properties or companies in favour of Respondent No. 1/defendant No. 2 to frustrate the claim of the Appellants/plaintiffs.

24. We also find substance in the Appellant/plaintiff's plea that there is no discussion in the impugned judgment with regard to minor children's right to claim maintenance against their grandfather as well as alleged co-parcenary property in the control of the Respondent No. 1/defendant No. 2 as Karta. In

fact, the learned Single Judge has not dealt with the aspect of Section 20 of the said Act.

25. Though Mr. Sundaram submitted that the minor grandchildren have no right to claim maintenance against their grandfather as well as co-parcenary property, we are of the view that in view of Hon'ble Supreme Court's judgment in Controller of Estate Duty (Supra) referred to hereinabove, the children by birth acquire an independent right of ownership in co-parcenary property and as a consequence of such ownership, the possession and enjoyment of the property is common. Neither the impugned judgment nor any of the judgments referred to by Mr. Sundaram deal with the right of minor grandchildren to claim maintenance against their grandfather as well as co-parcenary property. In any event, even if there is no co-parcenary property as alleged by Mr. Sundaram, the minor children and the Appellant would be entitled to seek injunction against the Defendant No. 2 from selling his assets in which Defendant No. 1 has either any shareholding or ownership, as one of the major allegations in the plaint is that the Defendant No. 1 is controlling and owning a large number of assets along with his father namely Respondent No. 1/defendant No. 2.

26. As far as demurrer plea advanced by Mr. Sundaram is concerned, we are of the view that learned Single Judge though referring to a part of the case law cited by the Appellants/plaintiffs, has not dealt with the same. We are of the opinion that in view of a Coordinate Division Bench's decision in Ravi Singhal's case that the said act is not an exhaustive law relating to maintenance amongst Hindus, learned Single Judge on the day he pronounced the impugned judgment could not have reached the conclusion in law that he did. Mr. Sundaram has sought to rely upon subsequent Hon'ble Supreme Court's decision in Vimlaben Ajitbhai Patel Vs. Vatslaben Ashokbhai Patel (Supra) to contend that Ravi Singhal and Krishna Madhav Ghule were wrongly decided and stood overruled by the subsequent aforementioned Supreme Court's judgment. We find that subsequent Hon'ble Supreme Court's judgment does not expressly overrule either the earlier Bombay or our own Division Bench's judgment. We are further of the opinion that this issue needs to be decided first by the learned Single Judge as any decision rendered by us would deprive either the Appellants/plaintiffs or Respondents to a right of appeal and moreso when we are of the view that Respondent No. 1/defendant No. 2 could not have been deleted at this stage of the proceedings.

27. Consequently, in the light of the observations made herein above, the present appeal is allowed and the impugned judgment is set aside.

MANMOHAN, J

MUKUL MUDGAL, J

January 16, 2009
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