

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.01.2019

PRONOUNCED ON : 18.01.2019

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1823 of 2004

1.Thorrathaiyammal
2.Chinnakanniammal
3.Samakkal

...Appellants/Plaintiff

Vs

1.Saliyammal
2.Kanakammal
3.Geethabai
4.Renuka
5.Sathiyamarayanan
6.Bakthavatchalam
7.Kalyani
8.V.E.Akbar Ali

.... Respondents/Defendant

(R5 name amended as per order of the Court,
dated 12.08.2005 made in CMP. 12065/2005)

(R8 impleaded as per order of this
Court, made in CMP.No. 2880/07 in
SA.No. 1823/2004 dated 20.11.2007)

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree in A.S.No.26/1996 on the file of the learned Subordinate Judge, Tirupattur dated 23.03.2004 in reversing the well considered judgment and decree in O.S.No.686/1981 on the file of the learned Additional District Munsif, Tirupattur dated 28.04.1995.

For Appellant : Mrs.V.Srimathi

For Respondent : Mr.S.Subbiah, Senior Counsel
for Mrs.Elizabeth Ravi

JUDGMENT

The appellants herein are the legal representatives of the original plaintiff Lingammal. The case of the plaintiff is that she is the legally wedded wife of one Mogu @ Samundi Gounder.

The marriage took place 25 years ago as per the Hindu Customs and Rites at Madapalli Village, Thirupathur Taluk. The present appellants are her children born through the said wedlock. While the marriage between herself and the first defendant was subsisting, the first defendant married the second defendant - Saliammal against law and started treating the plaintiff cruelly. In the year 1977, the first defendant drove her out from the matrimonial home and failed to maintain her. The first defendant attracted towards the second defendant, living with her happily, neglecting the plaintiff. It is also averred in the plaint that the plaintiff has come to know that her husband along with the second defendant had colluded with the third defendant and consequent to the collusion, the second defendant had filed a maintenance suit and got a decree in her favour. In the Execution Petition, to satisfy the decree, the property of the first defendant has been brought to auction sale, in which, the third defendant has become a successful bidder and purchased the schedule mentioned property, for a very low price. The first and third defendants are close friends and the suit is a collusive suit. The execution proceeding is a bogus one. It does not bind the plaintiff. Hence, the plaintiff has prayed the following reliefs:-

- a) Permitting the petitioner to sue as in forma pauperis,
- b) Directing the 1st respondent to pay to the petitioner a sum of Rs.450/- per month towards the maintenance,
- c) To create a charge over the 1st schedule properties for her life time for the payments,
- d) Declaring the decree in O.S.No.34/76 of District Munsif Court, Tirupattur, is null and void and not binding upon this plaintiff,
- e) Restraining the 3rd respondent or his partymen possession the "A" schedule properties mentioned in this plaint till the disposal of the suit,
- f) To are costs of the suit."

2. In the written statement, filed by the second defendant - Saliammal, she had denied the allegations made by the plaintiff regarding the claim of the plaintiff. The alleged marriage between the plaintiff and the first defendant denied. The marital relationship between the plaintiff and the first defendant does not subsist. The plaintiff and the first defendant got divorced as per the caste custom. The first defendant married the second defendant in or about the year 1947 and her marriage with the first defendant is valid in law.

3.A suit in O.S.No.34/1976 was filed by the second defendant against the first defendant for arrears of maintenance and future maintenance @ Rs.100/- per month and to create charge over the properties described in the schedule. The said suit was decreed. The appeal preferred by the first defendant as indigent person was rejected and the matter attained finality. Subsequent to the dismissal of the unnumbered appeal preferred by the first defendant, the second defendant filed execution petition for the realisation of maintenance amount, in which, the first defendant's property was sold in public auction. The third defendant was the successful bidder. After the confirmation of the sale, the possession was delivered to the third defendant on 22.04.1980.

4.One Sumithra, in collusion with the first defendant filed a suit to set aside the sale held pursuant to E.P.No.89 of 1978 in O.S.No.34/1976. The said suit was rejected. Having failed in his attempt, the first defendant has set up the plaintiff as if she was married the first defendant earlier to the second defendant. The plaintiff has no locus standi to file suit claiming maintenance from the first defendant. When there is a finding by a competent Court in the earlier proceedings, that the marriage between the first defendant with the second defendant is valid and binding, the prayer for declaring the said decree as null and void, is not sustainable, either on fact, or on law. The trial Court has framed the following issues:-

1.Whether the plaintiff marriage with the 1st defendant took place about 35 years back as per Hindu rites and customs at Madapalli village and gave birth to 3 daughters ?

2.Whether the 1st defendant married the defendant as a second wife in 1953 without the knowledge of the plaintiff unlawfully ?

3.Whether the plaintiff was illtreated and away by the 1st defendant in 1977 and she is living with her eldest daughter's house ?

4.Whether the first defendant failed to maintain the plaintiff from 1977 ?

5.Whether the first defendant filed O.S.No.34/1976 against first defendant and obtained maintenance decree in order to defraud the plaintiff right and maintained ?

6.Whether the sale infavour of third defendant by first defendant executed only to defraud the plaintiff's claim ?

7.Whether the plaintiff is entitled to

create a charge over the 'A' schedule properties ?

8.Whether the charged property 'A' schedule brought on court auction and delivered the same to the court auction purchaser third defendant on 22.04.1980 ?

9.Whether the suit as framed is not maintainable ?

10.Whether the decree passed in O.S.No.34/1976 is null and void ?

11.To what other relief is the plaintiff entitled ? "

5.Three witnesses on behalf of the plaintiff and two witnesses on behalf of the defendants were examined. On the side of the plaintiff, the voters list of the year 1975 was marked as Ex.A.1. On the side of the defendants, 5 exhibits were marked.

6.The trial Court declared the judgment and decree passed in O.S.No.34/1976 as null and void on the ground that the plaintiff in the present suit was a necessary party and without impleading her, the decree has been obtained affecting her right of maintenance and created a charge over 'A' schedule of property towards the maintenance. The trial Court has also fixed Rs.450/- as maintenance per month. Aggrieved by the said decree and judgment passed by the trial Court, allowing the suit, the appeal was preferred by the defendants. Pending suit, the first defendant died and pending first appeal, the third defendant died. Hence, they are represented by their legal representatives.

7.In the appeal, the First Appellate Court has formulated the following points for determination:-

"(1)Whether the marriage between the first defendant and the defendant is valid under Hindu Marriage Act, 1955 ?

(2)Whether the decree passed in O.S.No.34/1976 and execution of the decree in E.P.No.89/1978 resulting in delivery of possession to the third defendant is valid or not ?

(3)Whether the suit filed by Lingammal is barred by the principle of res judicata, in view of the earlier decree passed in O.S.No.34 of 1976, on the file of the learned District Munsif, Thirupathur ?

(4)Whether the judgment and decree of the trial Court in O.S.No.686 of 1987 dated

28.04.1995 is liable to be set aside ?

(5)Whether the appeal is liable to be allowed ?

(6)What other reliefs, the parties are entitled to ?”

8.The First Appellate Court on appreciating the pleadings and evidence placed by the respective parties, has pointed out that the plaintiff Lingammal has pleaded that the first defendant married the second defendant in the year 1953. It is further averred in the plaint that the second defendant was the fourth wife of the first defendant. When the plaintiff herself has admitted that the marriage between the first defendant and the second defendant took place in the year 1953 itself, the said marriage cannot be held as a invalid marriage since, bigamous marriage was held to be void only pursuant to enactment of Hindu Marriage Act 1955 which came into force on 18.05.1955. Saliammal being a legally wedded wife of Samundi Gounder/the first defendant, is entitled for maintenance from her husband and to file the suit, claiming maintenance and create charge over the property of the first defendant in lieu of maintenance. Therefore, her petition filed as in forma pauperis and taken on file in O.S.No34/1976 is in accordance with law and the judgment and decree passed in that suit is binding on all parties. The third defendant who had purchased the suit property through Court auction to satisfy the maintenance decree cannot be denuded of his title and right over the property which he has bonafidely purchased through Court auction.

9.The First Appellate Court considering the fact in issue involved in the earlier maintenance suit (O.S.No.34/1976) filed by the second defendant against the first defendant, and the present maintenance suit filed by the plaintiff against the first defendant has held that the subsequent suit filed by Lingammal is barred by the principle of res judicata. Therefore, the First Appellate Court has set aside the decree passed by the trial Court. Consequentially, the suit was dismissed. Further, the First Appellate Court has also pointed out that seeking maintenance from the husband is a personal right and it could not be inherited. Since, Lingammal, the plaintiff died pending appeal, the right of Lingammal cannot be inherited by her legal representatives.

10.Aggrieved by the reversing judgment, the present second appeal has been filed by the legal representatives of the plaintiff Lingammal. At the time of admission of this second appeal, this Court has formulated the following substantial question of law:-

"1.Whether the lower appellate court is right in holding that the suit instituted by the appellant is barred by resjudicata, when she is not claiming any right through the 1st defendant but against him ?

2.Whether the lower appellate Court is right in holding that the marriage between the 1st defendant and 2nd defendant is valid, especially when the marriage had taken place in 1953, after the promulgation of the Madras Bigamy Prohibition Act, 1949?

3.Whether the decree in O.S.No.34/1976 binding upon the plaintiff, when she is not a party to the proceeding ?

4.Whether the purchase of the property by the 3rd defendant in a Court auction sale binding upon the plaintiff, when the decree itself is not valid and opposed to public policy and void abinitio as it has the foundation on an illegal relationship "

11.The learned counsel for the appellants would submit that the earlier suit was filed by the second defendant against the first defendant is a collusive suit. To defeat the right of the plaintiff who is the legally wedded wife of the first defendant, the earlier suit was filed. Before the trial Court, the plaintiff has established that it is a collusive suit and the sale of the suit property through Court auction is not binding on the plaintiff, since she was not arrayed as party to the said suit. The decree passed in O.S.No.34 of 1976 and the pursuant execution of the said decree is non est in the eye of law and will not bind the plaintiff. While the trial Court has rightly held so, the First Appellate Court has reversed the finding, as if, the earlier suit is hit by the principle of res judicata.

12.The learned counsel for the appellant would submit that the First Appellate Court has miserably failed to understand that in the earlier suit, the plaintiff is not a party. Even though both the earlier suit and the present suit are for maintenance, seeking maintenance by one wife will not perse bar the other wife to claim maintenance if she could establish her right. Therefore, the First Appellate Court erred in holding that the suit is barred by res judicata.

13.Further, it was contended by the learned counsel for the appellants that, when there was promulgation of the Madras Hindu (Bigamy Prevention and Divorce) act 1949 and admittedly, the marriage between the first defendant and the second defendant took place only in the year 1953, the said marriage is not a

valid one, which the First Appellate Court has not given due consideration. Therefore, the learned counsel for the appellants would submit that while the trial Court has rightly declared the decree passed in the earlier suit in O.S.No.36 of 1976, is not binding on the plaintiff and the Court auction sale in favour of the third defendant is not valid, the First Appellate Court without proper appreciation of the law has wrongly reversed the finding.

14.Per contra, the learned counsel for the respondents would submit that the suit, as framed itself, is misconceived. While the trial Court has failed to appreciate the law and facts properly in the light of the pleadings and evidence the First Appellate Court has rightly interfered the erroneous judgment of the trial Court and dismissed the suit by allowing the appeal.

15.The very basis of the suit is that the plaintiff is the wife of Mohu @ Samundi Gounder/the first defendant and he has failed to maintain her. So the plaintiff she is entitled for maintenance and consequently to create charge over the suit property. However, the plaintiff herself, in her deposition, has admitted that till the life time of her husband, she was taking care of her husband and she did the final rites of her husband. Her husband was taking care of her, till his life time and she was living in her husband house and conceded that it is not correct to say that her husband driven her out from the marital home. This is specific admission of the plaintiff that her husband was taking care of her till his death. While so, the cause of action to file maintenance suit does not exist.

16.In addition, the learned counsel for the respondents would also submit that the decree passed by the competent Court for recovery of maintenance can never be declared as null and void even assuming that the plaintiff was not arrayed as a party in the maintenance suit filed by the second defendant. It is contended by the learned counsel for the respondents that seeking maintenance from the husband is a lawful claim which was agitated by the second defendant through Court of law and got a decree in her favour. The plaintiff who claims herself as another wife of first defendant, if really, deprived of maintenance, she would have approached the Court independently which she did not do till the execution of the maintenance decree filed by the second defendant and the suit property sold to the third defendant. The suit itself the ill design of the first defendant to deprive the second defendant and also the court auction purchaser, the third defendant and their lawful right. The first defendant had set up a suit for maintenance through the plaintiff without cause of action. The plaintiff has admitted in the cross examination that, she was properly maintained by the first defendant till his life time. Therefore,

the First Appellate Court has rightly dismissed the suit which requires no interference.

17.Considering the factual aspect, the pleadings and the admission made by the plaintiff in her deposition, this Court is in total agreement with the submission made by the learned counsel for the respondents. From the admission, the plaintiff has exposed herself that her ulterior intention in pursuing the suit was to nullify the earlier decree passed by the competent Court in favour of the second defendant. Admittedly, she had been maintained by the first defendant till his life time. The very basis for the suit for maintenance as in forma pauperis has got shakened by her own admission. When the foundation of the case itself proved to be fake, the consequential reliefs cannot be granted. Further more, the second defendant had independently established her right to get maintenance from the first defendant and had succeeded in the legal process. Merely by making scandalous allegations against the second defendant, without placing any record to show that the plaintiff married the first defendant and that marriage was prior to the marriage of the second defendant with the first defendant, the claim for maintenance is not maintainable. Just to defeat the lawful right of the second defendant and the third defendant who is the bona fide purchaser in the Court auction, the present suit has been laid by the plaintiff. The trial Court erroneously allowed the suit. The error has been rightly pointed out and reversed by the First Appellate Court.

18.Before claiming any right to create charge over the husband property in lieu of maintenance, the plaintiff ought to have prove the subsistence of marriage, failure of maintenance and existence of any property owner which, the charge could be created. When all these facts have been proved by the second defendant in the earlier suit filed by her, none of the facts have been proved by the plaintiff, in the present suit. To analyse the present case, it is useful to extract the relevant provisions of the Hindu Adoption and Maintenance Act 1956, which are read as follows:-

"21. Dependents defined- For the purposes of this Chapter "dependents" mean the following relatives of the deceased

(i) his or her father;
(ii) his or her mother;
(iii) his widow, so long as she does not remarry;

(iv) his or her son or the son of his predeceased son or the son of a predeceased son of his predeceased son, so long as he is

a minor; provided and to the extent that he is unable to obtain maintenance, in the case of a grandson from his father's or mother's estate, and in the case of a great-grandson, from the estate of his father or mother or father's father or father's mother;

(v) his or her unmarried daughter for the unmarried daughter of his predeceased son or the unmarried daughter of a predeceased son of his predeceased son, so long as she remains unmarried; provided and to the extent that she is unable to obtain maintenance, in the case of a grand daughter from her father's or mother's estate and in the case of a great-grand daughter from the estate of her father or mother or father's father or father's mother;

(vi) his widowed daughter; provided and to the extent that she is unable to obtain maintenance-

(a) from the estate of her husband; or

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

(c) from her father-in-law or his father or the estate of either of them;

(vii) any widow of his son or of a son of his predeceased son, so long as she does not remarry; provided and to the extent that she is unable to obtain maintenance from her husband's estate, or from her son or daughter, if any, or his or her estate; or in the case of a grandson's widow, also from her father-inlaw's estate;

(viii) his or her minor illegitimate son, so long as he remains a minor;

(xi) his or her illegitimate daughter, so long as she remains unmarried.

.....

27. Maintenance when to be a charge- A dependent's claim for maintenance under this Act shall not be a charge on the estate of the deceased or any portion thereof, unless one has been created by the will of the deceased, by a decree of court, by agreement between the dependent and the owner of the

estate or portion, or otherwise.

28. Effect of transfer of property on right or maintenance- where a dependent 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.

19. Yet another provision which enables a dependent to create charge over the property of the husband is Section 39 of the Transfer of Property Act, which reads as under :-

"39. Transfer where third person is entitled to maintenance.-Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immoveable property, and such property is transferred, 1[***] the right may be enforced against the transferee, if he has notice 2[thereof] or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands."

20. A reading of the above provisions clearly indicate that for creating charge on the property, first of all the plaintiff should establish the right to receive maintenance. As pointed out earlier, the plaintiff herself admits that in her deposition, that her husband was maintaining her till his life time. So, the reason for filing the maintenance suit is very obvious. As pointed by the second defendant the suit has been laid only to defeat the lawful right and interest of the second defendant for recovering the maintenance and the lawful right of the bona fide court auction purchaser of the property. So, it is not the collusion between the first and second defendants which has led to court auction sale of the suit schedule property but it is the collusion between the plaintiff and the first defendant to defeat the right of the second and third defendant which has led to file the subsequent suit.

21. When occasion arose for this Court to analyse the law relating to right of an Hindu Wife for maintenance against her

husband under Hindu Law, this Court in Raghavan and another v. Nagammal and another (Air 1979 Madras 200) has held as below:-

"8. Under Hindu Law the maintenance of a wife by her husband is of course a matter of personal obligation which attached from the moment of marriage. From the date of her marriage her home is necessarily in her husband's house. He is bound to maintain her in it she is willing to reside with him and discharge her duties. If she quits him of her own accord, either without cause or on account of such ordinary quarrels as are incidental to married life in general, she can set up a claim for separate maintenance.

Under S. 2 of the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, a Hindu married woman is entitled to separate residence and maintenance from her husband on grounds stated therein. The doctrine of maintenance of a wife can be traced to the smritis and the principal Hindu commentaries upon them. These texts enjoin a mandatory duty upon the husband to maintain his wife. The duty does not depend upon the husband possessing any property. It imposes a personal obligation on him enforceable by the Sovereign or State. However when it is stated that there is a personal obligation on the part of the husband to maintain the wife it does not mean that the obligation is not referred at all to his property and that he can alienate all his property and deprive his wife of the right to maintenance from the income of the property. In fact the exact meaning and scope of the personal obligation on the part of the husband to maintain the wife is even wider in the sense that his obligation will exist even if he has no properties from which he could derive any income....."

22.As the facts of the case goes to show that the plaintiff has neither proved the marriage between her and the first defendant nor proved his failure to maintain. Contrarily, she admitted that, the first defendant maintained her till his life time. So, the cause of action to file a suit for maintenance does not exist. Further more, no charge upon a property which

the husband himself had no right can be created. More so, when the alienation of the husband property was pursuant to the Court auction sale to the satisfaction of a maintenance decree passed by a competent court.

23. Though it is alleged in the plaint that the first and second defendants have colluded to defeat the right of the plaintiff, the evidence before this Court proves otherwise. Therefore, this Court finds there is no merit in the second appeal.

24. In the result, the Second Appeal is dismissed. The judgment and decree passed by the First Appellate Court is confirmed. There shall be no order as to costs.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

Jbm

To

1. The Subordinate Judge,
Tirupattur.
2. The Additional District Munsif,
Tirupattur.
3. The Section Officer,
V.R. Section, High Court,
Madras. (2 copies)

+1cc to Mr.V.Raghavachari, Advocate, S.R.No. 3605

+1cc to Mr.Elezibeth Ravi, Advocate, S.R.No. 3910

KAN(CO)
GN(13/03/2019)

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