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SHRIMAL KASTURCHAND v. HIRALAL HANSRAJ

Rangnekar J.

I find from the judgment of the trial Court that that Court has recorded its findings on other questions of fact, but the appellate Court disposed of the appeal only having regard to s. 53 of the Transfer of Property Act, and, as that decision is wrong, the case must be remanded to the lower Appellate Court for disposal on merits after raising proper issues.

The respondents must pay the costs of the appeal.

Decree reversed : case remanded.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Divatia.

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November 22

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT No. 1), APPELLANT *v.* AHALYABAI BHRATAR NARAYAN KULKARNI (ORIGINAL PLAINTIFF No. 2), RESPONDENT.*

Criminal Procedure Code (Act V of 1898), s. 88—Offender absconding—Attachment of property—Offender a co-parcener in a joint Hindu family—Property vesting in offender by survivorship—Brother's widow claiming maintenance—Widow's maintenance a charge on property—Widow entitled to maintenance from property in the hands of Government.

When property belonging to an absconder charged with a criminal offence is attached by Government under s. 88, Criminal Procedure Code, 1898, it would be open to any party claiming an interest in the property to obtain a decree in a Civil Court declaring his right to the property so long as the property continues to remain in possession of Government and is not sold or otherwise disposed of by Government.

Government acting under s. 88 of the Criminal Procedure Code, 1898, are not in the same position as a purchaser for value and the fact that sub-s. 7 provides that the property under attachment, although at the disposal of Government, shall not be sold, until the claim preferred is disposed of, would suggest that the rights of persons who claim interest in the property are to be respected ; the rights need not be fixed in the form of a formal charge ; it is sufficient if they are such that they should be so fixed under the Hindu law and could not be extinguished till the property is sold for value.

*Second Appeal No. 392 of 1934.

Mussumat Golab Koonwur v. *The Collector of Benares*,[1] relied on.

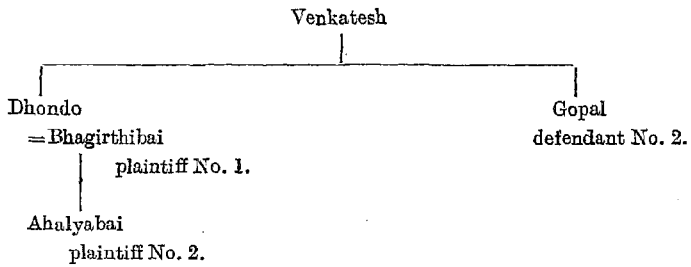
Under Hindu law an obligation of a coparcener to maintain the widow of a deceased coparcener whose share in the property he gets by survivorship is an obligation which attaches to the property and the widow is entitled as a matter of right to ask the Court to create a formal charge on the property for her maintenance.

Narbadabai v. *Mahadeo Narayan, Kashinath Narayan and Shamabai*,[2] *Adhibai* v. *Cursandas Nathu*,[3] *Yamunabai* v. *Manubai*,[4] *Devi Persad* v. *Gunwanti Koer*,[5] *Jayanti Subbiah* v. *Alamelu Mangamma*,[6] and *Veeranna* v. *Sitamma*,[7] referred to.

SECOND APPEAL against the decision of A. S. R. Macklin, District Judge, Belgaum, confirming the decree passed by G. M. Phatak, Joint First Class Subordinate Judge, Belgaum.

Suit for maintenance.

The relationship of two plaintiffs between themselves and defendant No. 2 will appear from the following genealogy :—



Venkatesh died first: after his death Dhondo and his brother Gopal continued to live as members of a joint Hindu family. Dhondo died in 1918—leaving him surviving his widow Bhagirthibai (plaintiff No. 1) and daughter Ahalyabai (plaintiff No. 2).

In 1921, Gopal (defendant No. 2) became involved in a criminal case and absconded to evade arrest. In consequence of his absconding his property was attached

[1] (1847) 4 Moo. I. A. 246.
[2] (1880) 5 Bom. 99.
[3] (1886) 11 Bom. 199.
[4] (1899) 23 Bom. 608.
[5] (1895) 22 Cal. 410.
[6] (1902) 27 Mad. 45.
[7] [1927] A. I. R. Mad. 83.

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by Government under s. 88 of the Criminal Procedure Code, 1898. In July 1929, Bhagirthibai (plaintiff No. 1) and Ahalyabai (plaintiff No. 2) filed a suit for arrears of maintenance, for future maintenance and for the marriage expenses of plaintiff No. 2. On September 25, 1930, plaintiff No. 1 died. The plaint was amended and the suit was proceeded with by plaintiff No. 2.

Defendant No. 1, the Secretary of State for India in Council, contended *inter alia* that Dhondo and Gopal were not coparceners at Dhondo's death; that the Crown was not under any obligation to maintain a widow and unmarried daughter of a coparcener when the property in the hands of the surviving coparcener was forfeited to Government under s. 88 of the Criminal Procedure Code; that if the plaintiffs had claim to the property by way of maintenance, they ought to have preferred their claims as provided in s. 88 (*6A*) of the Criminal Procedure Code; that being not done, the suit was barred under s. 88 (*6D*) of the Code; that the claim for arrears of maintenance was not a *bona fide* one; that a mother's right to past and future maintenance being a personal one was not descendable and therefore plaintiff No. 2 was not entitled to claim the same; that the Crown was not liable to pay for the marriage expenses of plaintiff No. 2.

Defendant No. 2 appeared through a pleader but presented no written statement.

The Subordinate Judge held that Dhondo died while a coparcener of his brother defendant No. 2; that the suit was not barred under s. 88 (*6D*) of the Criminal Procedure Code; that Government (defendant No. 1) which attached the property was under an obligation to pay maintenance to plaintiffs Nos. 1 and 2 and to provide for plaintiff No. 2's marriage expenses; that plaintiff No. 2 was entitled to arrears of maintenance payable to her mother, plaintiff No. 1. He therefore passed a decree against defendant

No. 1 for Rs. 1,670 for arrears of maintenance of plaintiffs Nos. 1 and 2 and for marriage expenses of plaintiff No. 2 and charged S. No. 272 (3) situated at Murgod for satisfaction of the said liability.

On appeal the District Judge confirmed the decree. His reasons were as follows :—

" The first question is whether The Secretary of State is liable for maintenance at all. I am referred by the learned Government pleader to the case of *Mussammat Durgi* v. *The Secretary of State* (10 Lahore 263) in which it was held that a wife is not entitled to maintenance from property confiscated by Government under s. 88. This case does not apply here because what is in question is not the right of a wife (who stands on the same footing as her husband) but the right of a widow and daughter when the husband is dead and no longer able to look after them himself.

Moreover, it has been held that the right of female dependent members to be maintained out of the estate prevails even against the King who succeeds to the estate by escheat. (See 4 M.I.A. 246 quoted in *Yamunabai* v. *Manubai*, 23 Bom. 608 at p. 613). The Secretary of State is therefore liable to the same extent as the owner of the property confiscated would have been liable.

The next contention put forward by the learned pleader in appeal was not raised in the pleadings. It is that maintenance is not a charge upon property until the property has been specifically charged with it, and therefore a *bona fide* purchaser for value without notice of the widow's claim for maintenance is not liable to pay that maintenance. It is contended that the Secretary of State in this case is on the same footing as a *bona fide* purchaser for value without notice of the widow's claim. It is enough to say that the Secretary of State who confiscates another person's property is obviously not in the same position as a person who buys that property for money. He takes the property at no cost to himself and it is no hardship to him to fulfil the obligations of the previous owner of the property.

The next question is whether the plaintiffs have forfeited their right to past maintenance owing to their delay in making their claim. A similar situation was discussed in the case of *Karbasappa* v. *Kallava* (43 Bom. 66). In that case the lower Court awarded past maintenance for six years in spite of the plaintiffs having withheld her claim for a long time, and the High Court on appeal by the defendant reduced the period of past maintenance to three years. But their Lordships were careful to make it clear that it is a matter entirely within the discretion of the Court and that there are no hard and fast rules as regards either the period or the amount awardable as past maintenance. From the delay in making the claim they inferred that the widow was not in actual want, and that by living with her father (as the second plaintiff did in this case also) she managed to live without the actual necessity of calling upon the husband's family to support her. That may be the case here also. It may be that the widow and her daughter had no actual want of the money because they really were maintained by plaintiff No. 1's father. But, as Beaman J. remarks in the case just quoted, 'where we find

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a Hindu Subordinate Judge treating a Hindu widow with so much liberality as in the present case, we should be very reluctant indeed to interfere and so suggest that we generally agree with the extremely harsh and rigorous attitude of the Hindu mind towards women so unfortunately situated as Hindu widows often are.' In this case the delay may be due not to the fact that plaintiffs were not in want but to their doubts upon their own legal position and to the fact that any claim that they made would have to be made against the Secretary of State, with all his resources. It would be a natural attitude to adopt, especially in view of the fact that the Secretary of State himself does actually deny the plaintiff's right to maintenance at all on legal grounds. In this respect I decline to interfere.

The next question is the position of plaintiff No. 2 with reference to the death of her mother. She has been awarded past maintenance for herself, and she has also been awarded what would have been given to her mother by way of past maintenance if her mother had not died during the pendency of the suit. It is contended by the learned Government pleader that the right to maintenance is a personal right which cannot be inherited. He appears to base this contention upon s. 6 (*e*) of the Transfer of Property Act, which says that a mere right to sue cannot be transferred. I do not see how this prohibition applies to the present case. Moreover the right to past maintenance is not a mere personal right. Paid maintenance is *stridhan* and can be inherited (see Mulla's Hindu Law, s. 129). And I do not see any logical distinction for the purpose of inheritance between maintenance which has been actually paid and maintenance which (though not actually paid) has been claimed."

Defendant No. 1 appealed to the High Court.

B. G. Rao, Assistant Government Pleader, for the appellant.

K. G. Datar, for the respondent.

DIVATIA J. This appeal has been preferred by the Secretary of State for India in Council against a decree in favour of the plaintiffs for a certain amount claimed as arrears of maintenance and for marriage allowance from the estate of one Gopal whose property had been attached by Government under s. 88, Criminal Procedure Code, by a notification in 1921 as he was absconding after being charged with a criminal offence. The first plaintiff was the widow of Gopal's undivided brother Dhondo who died in 1918 and the second plaintiff is the daughter of the first plaintiff. Their case was that both of them were entitled to maintenance and marriage expenses respectively from the joint family

property, the whole of which had become of the ownership of the absconder, the second defendant, by survivorship after the death of Dhondo; that Government had taken possession of the whole of joint family property in 1921 and it had since then remained in their possession without having been sold. The suit had been instituted in *forma pauperis* in 1929 and the plaintiffs claimed arrears of maintenance for eight years for both of them at a certain rate and expenses of the second plaintiff's marriage from the estate.

Government opposed the suit on the ground that when the property was attached after defendant No. 2 had absconded, it was entirely at the disposal of Government under s. 88 of the Criminal Procedure Code, that it became of the absolute ownership of Government, and that therefore the Crown was not under any obligation to maintain the widow and the unmarried daughter of the coparcener of a person whose property had been thus forfeited to Government. It was also contended that if the plaintiffs had any claim to the property by way of maintenance, they ought to have preferred their claim as provided for in sub-s. (*6A*) of that section, and as that was not done, the present suit was barred. Government also disputed the plaintiffs' right to the particular amount claimed by them.

Both the lower Courts have decreed the plaintiffs' right to recover maintenance and marriage expenses from Government, and have allowed certain amounts to the plaintiffs by way of arrears of maintenance and marriage expenses.

Government now appeal against that decree and reliance is placed upon sub-s. (7) of s. 88. It is contended that the words "the property under attachment shall be at the disposal of Government" mean that the property becomes of the absolute ownership of Government and that the rights of all persons interested in the property are extinguished. It is also contended that as the plaintiffs did not prefer any claim to this property, the present suit is not maintainable.

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It must be noted at the outset that the property which had been taken possession of by Government in 1921 has not still been sold by them as provided in sub-s. (7) of the section, nor have they passed an order of confiscation or forfeiture of the suit property. Government place reliance mainly on the wording of s. 88 and contend that if the plaintiffs had any interest in the property, it was extinguished on account of no claim having been preferred before the Magistrate. Now, with regard to that contention, the lower Courts have negatived it on the ground that there is nothing in this section which compels a person who claims an interest in the absconder's property to prefer his claim before the Magistrate issuing the order for attachment. All that the section says is that if any claim is preferred to or objection made to the attachment of any property, such claim or objection shall be inquired into. The right of the aggrieved person to prefer a suit without going to the Magistrate under this section has not been taken away. It is true that it is provided that if a person claiming an interest prefers a claim before the Magistrate and that claim is negatived, he can institute a suit to establish his right in a civil Court within one year from the date of the Magistrate's order. That, however, does not mean that an independent suit by that person is not maintainable. I think the lower Courts were right in taking this view, because looking to the tenor of the whole section, it seems to be the object of the Legislature that although the property was to be at the disposal of Government after it was attached, it was not to be sold until the expiration of six months from the date of the attachment or until the claim preferred under sub-s. (*6A*) had been disposed of under that sub-section. It is quite true that if no objection was raised before the Magistrate within six months from the date of the order of attachment or no stay order is brought from the civil Court after filing a suit, Government would be free to dispose of the property as they liked by

sale or otherwise, and after Government took any such step, the party who claims interest in the property may not perhaps be able to assert any right in the property. But so long as the property has not been sold by Government or otherwise disposed of, and so long as Government have continued to remain in possession of the attached property, it would, I think, be open to any party claiming an interest in it to obtain a decree of a civil Court declaring his right in the property, and if he succeeds in obtaining such a decree before Government have finally disposed of the property, that decree would be binding against Government, and the property could be disposed of subject to the rights established under such decree. It is stated in sub-s. (*6D*) that the order of attachment shall be conclusive subject to the result of a suit instituted by the person aggrieved by the Magistrate's order. But that, in my opinion, does not mean that it is not open to the interested party to obtain a decree declaring his rights before Government have proceeded to sell the property. The provision in sub-s. (*7*), that the property shall not be sold until the claim preferred under sub-s. (*6A*) has been disposed of, means that the sale is to be subject to the rights of any person interested if such rights are established by a decree. If so, why should such rights be not enforceable even if they are obtained by a decree without going before any Magistrate under sub-s. (*6A*), so long as the property has not been sold by Government ? I, therefore, agree with the lower Courts in holding that the suit is maintainable in spite of the fact that the plaintiffs did not go to the Magistrate under sub-s. (*6A*), and that the decree would be binding on the Government.

That being so, the next question is whether the plaintiffs are persons who have an interest in such property and that such interest was not liable to attachment under the section. The plaintiffs are clearly entitled under the Hindu law to have their maintenance and marriage expenses defrayed

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from the property attached. Under the Hindu law, if a coparcener takes the property of another deceased coparcener by survivorship, he takes it with the burden of maintaining the widow and unmarried daughters of the deceased coparcener. It cannot be said that this right of maintenance is merely personal in the sense that it has no reference to the property which he gets by survivorship. A distinction has been drawn in some cases between a Hindu's obligation to maintain his wife and his obligation to maintain the widow of his coparcener. It is said that his obligation to maintain his own wife is a personal obligation, while the obligation to maintain the widow of a coparcener is not personal. It means the husband is bound to maintain his wife even though he has not got any property from his father, and that his obligation to maintain his wife is independent of possession of any property, while the obligation of one coparcener to maintain the widow of a deceased coparcener whose share in the property he gets by survivorship is an obligation which attaches to that property. In other words, because he gets that property by survivorship and because his interest in the joint property is thus enlarged, he is bound to maintain the widow of the deceased coparcener who had a right to be maintained out of the property which he takes by survivorship. In that sense the property which he takes by survivorship is burdened with the obligation to maintain the widow. It may be that in the technical language it may not fall within the definition of "charge" under s. 100 of the Transfer of Property Act. This charge is a later creation by statute, but the Hindu law has always regarded the widow's right as a burden on the property. It has thus been held that the right of maintenance attaches to the property itself which is taken by survivorship. For example, in *Narbadabai* v. *Mahadeo Narayan, Kashinath Narayan and Shamabai*,[1] *Adhibai* v. *Cursandas Nathu*,[2]

[1] (1880) 5 Bom. 99.

[2] (1886) 11 Bom. 199.

Yamunabai v. *Manubai*,[1] *Devi Persad* v. *Gunwanti Koer*,[2] *Jayanti Subbiah* v. *Alamelu Mangamma*,[3] and *Veeranna* v. *Sitamma*,[4] this right of maintenance has been treated as a burden on the inheritance with the result that the widow is entitled to follow such property in the hands of the coparcener taking it. In a case under the Dayabhaga, viz. *Hemangini Dasi* v. *Kedarnath Kundu Chowdhry*,[5] the Privy Council has also stated that so long as the estate remained joint and undivided, the maintenance of mothers (who were widows there) remained a charge on the whole estate. The well known author Golápchandra Sarkar Shastri in his Hindu Law goes further and is of opinion that (p. 694) :—

"There cannot be any doubt that under Hindu law the wife's or widow's maintenance is a legal charge on the husband's estate; but the Courts appear to hold, in consequence of the proper materials not being placed before them, that it is not so by itself, but is merely a claim against the husband's heir, or an equitable charge on his estate; hence the husband's debts are held to have priority, unless it is made a charge on the property by a decree."

The result, therefore, in my opinion, is that the plaintiffs are persons who have got an interest in the attached property. Besides, such interest is not liable to attachment because, although it may not be a legal charge, Government acting under s. 88 are not in the same position as a purchaser for value. The holder of such interest for maintenance amounting as it does to a burden on the property is entitled as a matter of right to ask the Court to create a formal charge, and that being so, it cannot be attached by Government who are only concerned with confiscating the absconder's right, title and interest in the property. The case of *Mussumat Golab Koonwur* v. *The Collector of Benares*[6] proceeds on the same principle when it holds that the right of female dependent members to be maintained out of the estate prevails even against the King who succeeds to the estate by escheat. The fact that sub-s. (7) provides that the property under attachment, although at the disposal of

(1) (1899) 23 Bom. 608.
(2) (1895) 22 Cal. 410.
(3) (1902) 27 Mad. 45.
(4) [1927] A. I. R. Mad. 83.
(5) (1889) 16 Cal. 758, P. C.
(6) (1847) 4 Moo. I. A. 246.

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Government, shall not be sold until the claim preferred is disposed of, would suggest that the rights of persons who claim interest in the property are to be respected. They need not have been fixed in the form of a formal charge ; it is sufficient if they are such that they could be so fixed under the Hindu law and could not be extinguished till the property is sold for value. I do not think this result is affected by the cases of *Golam Abed* v. *Toolseeram Bera*,[1] *Mussammat Durgi* v. *Secretary of State*,[2] and *Dattaji* v. *Narayanrao*,[3] on which the appellant relies.

The result, therefore, in my opinion, would be that both the plaintiffs are entitled to the amount which has been decreed in their favour for arrears of maintenance as well as for the marriage allowance of the second plaintiff.

It was sought to be urged that the arrears claimed by the first plaintiff, who died after the suit was filed, ought not to have been decreed in favour of her daughter, the second plaintiff, because they are in the nature of a personal right. But I think that argument is erroneous. As rightly observed by the lower Court, past arrears are certainly a debt due to the person claiming it, and although whether to allow past arrears or not or what amount should be allowed is in the discretion of the Court, it cannot be said that it is not a debt due to the person claiming it and not heritable by her heir. The lower Court was right in holding that the second plaintiff was entitled to recover those arrears which were due to the first plaintiff before her death.

For these reasons, I think, the decision of the lower appellate Court is correct. It is, therefore, confirmed and the appeal is dismissed with costs.

Appeal dismissed.

J. G. R.

[1] (1883) 9 Cal. 861.

[2] (1928) 10 Lah. 263.

[3] (1922) 25 Bom. L. R. 228.