

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

CMPMO No.542 of 2018

Reserved on: 28.09, 2020

Decided on: 05.10.2020

Kubja Devi

....Petitioner

Versus

Chhape Ram

.....Respondent

Coram

The Hon'ble Ms. Justice Jyotsna Rewal Dua, Judge

¹ *Whether approved for reporting? Yes.*

For the petitioner: Mr. Anup Rattan, Advocate.

For the respondent: Mr. Maan Singh, Advocate.

(Through Video Conferencing)

Jyotsna Rewal Dua, Judge

Application moved under Order 39, Rules 1 and 2 of the Code of Civil Procedure (CPC) for restraining the defendant from alienating, transferring and for creating charge over the suit land, has been dismissed by the learned trial Court. The order has been upheld by the learned Appellate Court. Being aggrieved, petitioner-plaintiff has moved this petition under Article 227 of the Constitution of India.

2. Facts.

2(i). Suit was instituted by the plaintiff-wife seeking declaration that suit land is ancestral property owned and

¹ *Whether reporters of Local Papers may be allowed to see the judgment?*

possessed by the defendant-husband and charge be created over this property for the maintenance claim of the plaintiff. Decree for permanent prohibitory injunction was also prayed for restraining the defendant from transferring, alienating and creating charge over the suit land.

2(ii). Plaintiff claimed to be the legally wedded wife of the defendant, having solemnized a marriage with him in the year 1994. The couple has a son stated to be living with the plaintiff. Due to marital discord, plaintiff started residing with her father since the year 1998. It has been further submitted that an application for grant of maintenance etc. has been moved by the plaintiff under Section 12 of the Protection of Women from Domestic Violence Act, 2005, which was stated to be pending consideration before the Court of learned Judicial Magistrate 1st Class, Manali. Apprehending that in order to defeat her maintenance claim, the defendant might sell the suit land in favour of other persons, instant suit for declaration and injunction has been filed. In the plaint, it has been asserted that the suit land is ancestral property owned and possessed by the defendant, who has no right to alienate the same without there being any legal necessity.

Alongwith the plaint, an application under Order

39, Rules 1 and 2, CPC has also been moved for restraining the defendant from alienating, transferring and creating charge over the suit land.

2(iii). The defendant, in his written statement, admitted the plaintiff to be his legally wedded wife and asserted that she had left his society on her own about 17-18 years ago without any reason. The defendant expressed his willingness to accept the plaintiff back in his home. Allegations of cruelty/desertion were denied. Defendant admitted filing of an application by the plaintiff under Section 12 of the Protection of Women from Domestic Violence Act, 2005, but denied award of any maintenance amount to her. Defendant also denied threatening the plaintiff with sale of suit land, rather he stated that he had himself asked his son to cultivate and manage the suit land. Defendant also denied ancestral nature of the suit land. Plaintiff's application for injunction was also opposed on similar lines.

3. Learned trial Court after noticing that as per plaintiff, the suit land was ancestral, relied upon **1988 (2) SCC 77**, titled **Sunil Kumar and another Versus Ram Prakash and others**, wherein it was held that a coparcener has no right to get an injunction against *Karta*. Relying upon this judgment, it was held that in the instant case, defendant

was *Karta*, therefore, he has legal right to alienate ancestral property in case of legal necessity. Plaintiff has no right to pray for injunction restraining the defendant from alienating the suit land. It was observed that plaintiff has remedy of challenging alienation of coparcenary property by *Karta* on the ground that alienation was not for legal necessity. The order passed by learned trial Court dismissing plaintiff's application, was affirmed in appeal by the learned First Appellate Court.

4. Learned counsel for the petitioner contended that both the learned Courts below misdirected themselves in treating the civil suit as one filed by a coparcener to restrain and injunct *Karta* from alienating the suit land, whereas the civil suit was a case instituted by the wife for creation of charge over the property of her husband in lieu of maintenance and, therefore, permanent prohibitory injunction for restraining the defendant was also sought for. In support of this contention, reliance was placed upon the following para of **(1997) 3 Supreme Court Cases 99**, titled ***V.Tulasamma and others Versus Sesha Reddy (dead) by***

LRs:-

"62. We would now like to summarise the legal conclusions which we have reached after an exhaustive considerations of the authorities mentioned above on the question of law involved in this appeal as to the

interpretation of Section 14(1) and (2) of the Act of 1956. These conclusions may be stated thus:

(1) *The Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognized and enjoined by pure Shastric Hindu law and has been strongly stressed even by the earlier Hindu jurists starting from Yajnavalkya to Manu. Such a right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognizing such a right does not confer any new title but merely endorses or confirms the pre-existing rights....."*

Whereas learned counsel for the defendant on the strength of **(1998) 2 SCC 77, Sunil Kumar and another Versus Ram Prakash and others**, argued that plaintiff cannot seek injunction against *Karta* with respect to ancestral property.

5. V. Tulasamma's (supra) was a case where properties were acquired by the appellant under a compromise in satisfaction of her right of maintenance. It was held that it is Sub-section (1) and not Sub-section (2) of Section 14, which would be applicable and, hence, the appellant must be deemed to have become full owner of the properties notwithstanding that the compromise prescribed a

limited interest for her in the properties.

Regarding maintenance claim of wife viz-a-viz creation of charge over husband's property, it will be appropriate to refer here to following paras from a judgment of Madras High Court in **Kannan Vs. Maragathammal, Second Appeal No.654 of 2003**, decided on 28.06.2003, 2012 (3) LW 632:-

70. Added further, this Court quotes the decision Chandramma v. Maniam Venkatareddi and others AIR 1958 Andhra Pradesh at p.396, wherein it is held as follows:-

The Hindu Law Texts and the important commentaries impose a legal personal obligation on a husband to maintain his wife irrespective of his possession of any property, whether joint or self-acquired. They recognise the subordinate interest of the wife in her husband's property arising out of her married status. They also prohibit the alienation of properties by the husband which has the effect of depriving her and other dependants of their maintenance. They further treat her as a member of a Hindu joint family entitled to be maintained out of joint funds. The decisions of the various High Courts tow the same line, recognise her subordinate interest in her husband's property and enforce his personal obligation by creating a charge on his properties either self-acquired or ancestral. A wife, therefore is entitled to be maintained out of the profits of her husband's property and, if so, under the express terms of S.39 she can enforce her right against the properties in the hands of the alienee with notice of her claim. AIR 1947 Mad. 376, Dissented from. AIR 1957 Andh.Pra. 710. Approved. Case law discussed. (Para 39)

71. In Banda Manikyam v. Banda Venkayamma and others AIR 1957 Andh. Pra. at p.710 it is held as follows:-

The Hindu Married Women's Right to Separate Residence and Maintenance Act is intended to enlarge and liberalise the rules of Hindu Law governing the rights of a Hindu Woman to

maintenance from her husband in the contingencies therein specified. The Act does not curtail or cut down the right of maintenance conferred either by the Hindu Law or by S.39 of the Transfer of Property Act. It does not affect the right of a wife to have payment of her separate maintenance secured by a charge on her husband's properties in his hands or in the hands of his gratuitous transferee if, under any other law, she has such a right. (para 3) Though the right of the wife to separate maintenance does not form a charge upon her husband's property, ancestral or self-acquired, yet, when it becomes necessary to enforce or preserve such a right effectively, it can be made a specific charge on a reasonable portion of the property. If the right of maintenance is imperiled or jeopardised by the conduct and dealings of the husband or father with reference to his properties, the Court can create a charge on a suitable portion thereof, securing the payment of maintenance to the wife or children. Such a charge can be created not only over the properties in the hands of the husband or father but also over properties transferred by him either gratuitously or to persons having notice of the right to maintenance.

A transferee (in this case, the mother) who joins in a fraudulent and clandestine arrangement for defeating the right of maintenance binding on the conscience of the transferor and who pays no consideration for the transfer by her son in her favour, takes the properties subject to that right. The property in her hands is legally chargeable with the payment of maintenance to the wife and children of the transferor under S.39 of the Transfer of Property Act. Case Law Re: AIR 1947 Mad. 376 Dissent from (para 14).”

At present, only the application under Order 39, Rules 1 & 2, CPC seeking injunction against the defendant for restraining him from alienating the suit land, has been adjudicated upon. In the instant case, plaintiff is living separately from her husband since the year 1998. She has moved an application for grant of maintenance under the

Protection of Women from Domestic Violence Act, 2005. No such order awarding any maintenance under the Act has been placed on record of the case. Act of 2005 also contains adequate safeguards for enforcement of the orders awarding maintenance amount. Plaintiff has herself pleaded that defendant being *Karta* of the family, has right to alienate the suit land in case of legal necessity. Nature of suit land as per plaintiff is 'ancestral property'. Her son is not a party to the civil suit instituted by her in 2017 seeking creation of charge over the suit land and for injuncting the defendant (*Karta*) from alienating the suit land alleged by her to be ancestral property. Charge as yet has not been created over the suit land towards maintenance of the plaintiff. Plaintiff has every right to take recourse to legal remedies in case of alienation of ancestral property by *Karta*, which is not out of legal necessity.

For the forgoing reasons, no interference is called for in the concurrent orders passed by the learned Courts below in dismissing the application moved by the petitioner-plaintiff seeking to restrain the respondent-defendant from alienating the suit land. The petition, therefore, being devoid of merits, is dismissed. It is, however, clarified that the above observations are only for the adjudication of instant petition

and shall have no bearing on the merits of the main case. Parties through their respective counsel are directed to appear before the learned trial Court on 27.10.2020. Records of the learned Courts below be returned forthwith. Pending miscellaneous application(s), if any, also stands disposed of.

Jyotsna Rewal Dua
Judge

October 05, 2020
(Himalvi)

High Court of HP