

Before Surya Kant & R.P.Nagrath, JJ.

ASHOK CHOPRA - *Appellant*

versus

MEENA CHOPRA AND OTHERS *Respondents*

FAO No. 2942 of 2011

April 23, 2013

Hindu Adoption and Maintenance Act, 1956 - Family Court's Act, 1984 - S. 10 - Code of Civil Procedure Court, 1908 - S. 16, 21 - Wife and children filed suit at Hissar for maintenance and for creating charge over immovable property at Jind belonging to husband/father - Family Court Hissar decreed suit and created charge over immovable property - Husband raised main objection that creating of charge over immovable property by Family Court at Hissar in respect of immovable property at Jind is without jurisdiction - Held that no prejudice shown especially when Family Court at Hissar has jurisdiction to decide and grant maintenance - Appeal dismissed.

Held, that in *Koopilan Uneen's daughter Pathumma & others v. Koopilan Uneen's son Kuntalan Kutty dead by LRs & others*, (1981) 3 SCC 589 while interpreting Section 21 of C.P.C. it was observed that in order that an objection to the place of suing may be entertained by appellate court or revisional court, the fulfillment of the following three conditions is essential:-

- "(i) The objection was taken in the Court of first instance.
- (ii) It was taken at the earliest possible opportunity and in cases where issues are settled, at or before such settlement.
- (iii) There has been a consequent failure of justice."

It was further held that all these conditions must co-exist.

(Para 11)

Further held, that the appellant's counsel has not been able to show any prejudice or failure of justice if the Family Court at Hisar has ordered creation of charge over the immovable property situate at Jind especially when the Family Court at Hisar undisputedly had the jurisdiction to decide the maintenance suit and grant the maintenance allowance for the wife and minor children.

(Para 12)

Sudhir Mittal, Advocate *for the appellant*.

V.K. Sandhir, Advocate *for the respondents*.

R.P. NAGRATH, J.

Marriage of the appellant and respondent No. 1 was solemnized on 26.08.1997. Respondents No. 2 and 3, the minor children born from the wedlock, are in the care and custody of their mother. Marital dispute arose between the couple, leading to the institution of maintenance petition under Section 125 of Cr.P.C. and registration of a case against the appellant under Section 498-A, 406 of the IPC. Interim maintenance was granted by the Magistrate in the proceedings under Section 125 Cr.P.C. directing appellant to pay ` 400/- per mensem to each of the respondents.

(2) The respondents instituted a suit in the Family Court under Hindu Adoption and Maintenance Act, 1956, claiming award of maintenance @ ` 4,000/- per month to each of them and for creating charge over the immovable properties as the respondents apprehended that these properties would be sold in order to deprive them in enforcing maintenance. The Family decreed the suit, granting to each of respondents ` 1500/- p.m. as the maintenance allowance and further that they are entitled to recover maintenance amount by creating charge over immovable properties as mentioned in Ex. P-1 and Ex. P-3, which are copies of House Tax Assessment Register for the year 2005-06.

(3) The defendant-husband preferred this appeal to challenge the judgment and decree passed by the Family Court Hisar, where the respondent plaintiffs are residing. When the instant appeal was taken up on 07.09.2012, following order was passed:-

"During the course of hearing, learned counsel for the appellant does not dispute the decree to the extent that maintenance has been ordered to be paid to the respondent. He, however, has raised serious objections as to the creation of charge for the payment of maintenance. It is submitted that the learned trial Court could not have ordered the creation of a charge for the payment of maintenance. The reliance placed on the House Tax Assessment Register (Ex.P-1) wherein property 455/9 situated at Old Township, Jind and the Assessment Register (Ex.P-3) relating to the property mentioned therein, which is in fact in the name of the father of the appellant could not have been subjected to the creation of charge. It is submitted that in view of Section 16 of the Code of Civil Procedure, the learned trial Court had no jurisdiction to create a charge on the said properties which are situated at Jind and the suit was filed at Hissar. Besides, the property mentioned in Ex.P-1 was sold on 04.08.2006 vide sale deed (Annexure A-1) which, however, was not produced before the trial Court and had been executed after the filing of the suit on 21.07.2006. He, however, prays for time to seek instructions with regard to any other property which may be given to secure the payment of maintenance."

The appellant did not furnish any information on the above observations.

(4) The appellant having not disputed the quantum of maintenance as discussed above the decree to that extent is affirmed on this short ground. The solitary question that survives for consideration is whether creation of charge over immovable property by the Family Court at Hisar in respect of immovable property situate at Jind is without jurisdiction.

(5) We have called for the records, perused it and have heard learned counsel for the parties.

(6) In the written statement of appellant before the lower court preliminary objection was taken that civil Court at Hisar has got no jurisdiction to entertain and try the present suit. The issues that were settled by lower court are reproduced as under:-

(i) Whether the plaintiffs are having rights to recover maintenance, creating charge over commercial property No. 459/9 and No. 579/10 as well as No. 530/9 as per house tax assessment register for the year 2005-06 being ancestral property as well as to recover Rs. 4,000/- each permonth as detailed in the head note and grounds as alleged in the plaint? OPP

(ii) Whether the suit of the plaintiffs is not maintainable? OPD

(iii) Whether the plaintiffs have suppressed the material facts from the court? OPD

(iv) Relief.

(7) It is apparent from the issues framed that the plea of want of territorial jurisdiction of the lower Court was not insisted upon. The appellant also did not raise this issue any time subsequently or even at the argument stage, before the Family Court. What prejudice the appellant has suffered is not demonstrated.

(8) The other contention of appellant in the instant appeal is that the shop was already sold vide sale deed dated 04.08.2006 even before he was served with summons in the lower Court. The suit was instituted on 21.07.2006. If the appellant had sold this shop during pendency of suit he cannot raise any grievance. It is the purchaser who could come to Court

and raise such an issue. The other property is stated to be in the name of father of the appellant and it is contended that there is no proof of the property being ancestral in nature. Even on that count the appellant cannot have any grievance and only those adversely affected by creation of charge can have a separate remedy

(9) The learned appellant's counsel vehemently contends the provisions of Code of Civil Procedure would apply to the proceedings before Family Court by virtue of Section 10 of Family Courts Act, 1984. It is submitted that Section 16 of the Code provides the place of suing in respect of immovable property. It is further urged that on creation of charge over the immovable property it cannot be disposed of for rest of the life even though the appellant has deposited upto date arrears of maintenance and would continue to do so every month without default. On the other hand respondents' counsel submits that he cannot admit the above statement as according to him arrears of maintenance have not been paid for the past about one year. There is no need to go into this controversy in the instant appeal. The consequence of creating charge for recovery of maintenance is only that whenever the property is disposed of, the transaction will always be subject to charge created for recovery of maintenance. In fact the apprehension of the respondent-wife was not imaginary, as just within two weeks of institution of suit one of the property was sold.

(10) Coming to the issue of want of territorial jurisdiction for creating charge over immovable property learned appellant's counsel has relied upon the judgment of the Apex Court in *Harshad Chiman Lal Modi versus DLF Universal Ltd. and another (1)*. That was a suit for specific performance of an agreement to sell immovable property which clearly falls within the purview of Section 16 of Code of Civil Procedure and lay before the Civil Court, where subject matter was situated. That judgment will not apply to the facts of this case.

(11) In *Koopilan Uneen's daughter Pathumma & others versus Koopilan Uneen's son Kuntalan Kutty dead by LRs & others (2)*, while interpreting Section 21 of C.P.C. it was observed that in order that an objection to the place of suing may be entertained by appellate court or revisional court, the fulfillment of the following three conditions is essential:-

“(i) The objection was taken in the Court of first instance.

(ii) It was taken at the earliest possible opportunity and in cases where issues are settled, at or before such settlement.

(iii) There has been a consequent failure of justice.”

It was further held that all these conditions must co-exist.

(12) The appellant's counsel has not been able to show any prejudice or failure of justice if the Family Court at Hisar has ordered creation of charge over the immovable property situate at Jind especially when the Family Court at Hisar undisputedly had the jurisdiction to decide the maintenance suit and grant the maintenance allowance for the wife and minor children.

(13) We find no merit in the appeal, which is hereby dismissed.

A. Jain