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Andhra Pradesh High Court

Case No: Appeal Suit No. 1976 of 1995

Yarlagadda Venkatappaiah	APPELLANT
Vs	
Yarlagadda Lakshmi Devi	RESPONDENT

Date of Decision: June 2, 2014

Acts Referred:

- Evidence Act, 1872 - Section 3
- Hindu Adoptions and Maintenance Act, 1956 - Section 1, 10, 11, 12, 13
- Transfer of Property Act, 1882 - Section 100, 18, 20, 21, 3

Hon'ble Judges: B. Siva Sankara Rao, J

Bench: Single Bench

Advocate: B.V. Subbaiah, Advocate for the Appellant; B. Adinarayana Rao and G. Jhansi, Advocate for the Respondent

Judgement

Dr. B. Siva Sankara Rao, J.

The appellants 1-3 are the defendants 2-4 in the suit filed by the first respondent herein as sole plaintiff, no other than wife of 1st defendant (even arrayed as 2nd respondent to the appeal-cause dismissed for default) and the defendants 2-4 are her father in law, husband''s brother and husband''s sister''s son, and the suit is for maintenance at Rs. 4,000/- per anum with 3 years arrears at same rate, Rs. 20,000/- towards residence and for costs, with charge on the plaint A & B schedule properties-in the hands of the defendants 2-4 as alienees-in 3 items + 1 item = (Item - 1: Ac. 03-00 cts out of total Ac. 08-70 cts in S. Nos. 312/1 & 2: Item-3: Ac. 00-10 cts out of total Ac. 02-54 cts in S. No. 87 and Item-2: 1/4th share in the house property with Assessment No. 627-Door No. 87 in Ward No. 6 of Kankatapalem within the respective boundaries specified and Ac. 03-00 cts in D. No. 447. Patta No. 329 full of Nurukondapadu within Bapatla Sub-Registry. Guntur District): and filed on 03-03-1987 showing plaint-C schedule only as possessed and exempt from means and permitted on contest as indigent person in OP 36 of 1987 on the file of the Subordinate Judge at Bapatla, seek to assail the judgment and decree granting

maintenance as prayed for in O.S. No. 16 of 1988 dated 26-09-1995 on the file of the Subordinate Judge at Bapatla, Guntur District.

2. Heard Sri B.V. Subbaiah, the learned Counsel appearing for the appellants (defendants 2-4 in the suit), and Sri B. Adinarayana Rao, the learned Counsel appearing for the 1st respondent (plaintiff in the suit). The appeal against 2nd respondent dismissed for default as per Court Order dated 17.12.2007.

3. The case of the plaintiff was that the 1st defendant having married the Plaintiff in or around the year, 1968, lead a happy marital life for quite some time and out of the said wedlock, two daughters (since married) having been born. The husband-1st defendant became hostile at later stage and developed illicit intimacy with one Kamala of Chirala and openly living with her for past 15 years by neglecting the plaintiff totally, not to speak even the daughters, whose marriages the plaintiff with help of her relatives cause performed, plaintiff could not file maintenance claim earlier keeping in view the marriages of the daughters that were to be performed and hoping that time and things would change him, but in-vain, that the 1st defendant got the plaint A & B schedule properties in the partition of the joint family properties between himself and his brother and father and anticipating the plaintiffs recourse the defendants colluded and cause created the documents for the properties in favour of defendants 2-4, which are not binding on the plaintiffs claim and hence the suit for the reliefs.

4. Contesting the suit claim-

(a). The case of the husband-1st defendant was that, ever since their marriage, the Plaintiff leads adultrous life with many as a prostitute, for the sake of two children born in their wedlock, 1st defendant put up with the utter depravity of her, that she has no right to seek maintenance having deserted him since, 1974; that he alienated the properties for discharge of the debts contracted by him in running the business of Tirumala rice mill, Jandrapet, as partner with Gottimukkala Appa Rao and Sheik Ismail, that it was he that performed the marriages of the two daughters and not by plaintiff and hence to dismiss the suit claim.

(b). The case of the defendants 2-4 (father-in-law-2nd defendant filed written statement and adopted by brother-in-law and nephew) was that, in their family partition in the year, 1972 the 1st defendant was given only Ac. 01-50 cts in Item-1 out of S. Nos. 312/1 & 2 and another Ac. 01-50 cts in S. No. 314, that later in the year, 1974 the 1st defendant joined as partner with Gottimukkala Appa Rao & Sheik Ismail, in Tirumala rice mill, Jandrapet and in discharge of the business loss incurred therein, he sold away his properties viz.,

Ac. 01-00cts (out of plaint B-schedule land) of the Murukondapadu and his share in the house for Rs. 16,545/- to the 2nd defendant (his father) under regd. Sale deed dt. 24-09-1979 and discharged debts of the business with the same; that 1st defendant in exchange with 2nd defendant, transferred Ac. 00-43cts of the Murukondapadu (in

B-schedule) for Ac. 00-50cts of the Kankatayapalem (in Item-1 Nos.) of 2nd defendant, that 1st defendant also sold Ac. 02-50cts of Kankataya palem (in Item-1 Nos.) to his brother-3rd defendant under regd. Sale deed dt. 16-01-1981 in discharge of debts of the business with the same; that 1st defendant also sold away his remaining property of Ac. 02-43cts (out of plaint B schedule land) of the Murukondapadu, to the defendant Nos. 2 & 3 and utilised the entire sale consideration in discharge of his debts, that all the debts discharged, borne out by vouchers obtained from most of creditors, that as the defendants desirous of keeping the ancestral property within the family, purchased the same and since purchase they are in possession and enjoyment even to the knowledge of plaintiff, that her present claim for maintenance is highly belated. It is further contended that 1st defendant and plaintiff lived together till the year, 1980 and later she deserted him by living as prostitute (this plea setup for the defence purpose is running contra to the plea of 1st defendant of plaintiff deserted him and living away since, 1974, though living as prostitute ever since marriage) and as such the plaintiff is not entitled to any maintenance, much less with any charge, for the claim over the properties already alienated for discharge of debts of 1st defendant before making the claim by plaintiff, hence to dismiss the suit claim.

5. On the strength of pleadings supra, the Trial Court on framing of the two issues, Viz., (1) Whether the plaintiff is entitled for maintenance and if so to what amount? and to what relief? and conducted trial, wherein the plaintiff examined P.Ws. 1 to 6 with no documents, viz., PW 1 is the Plaintiff, PW 2 is her nephew, PWs 3 & 4 are the daughters of Plaintiff and 1st defendant, PW 5 is the adjacent house owner and PW 6; on behalf of the defendants D.Ws. 1 to 8 having been examined viz., DW 1 is the 1st defendant, DW 2 is the 2nd defendant-father of 1st defendant, DW 3 is the 3rd defendant-brother of 1st defendant, DW 4-8 are the so called creditors of 1st defendant. The defendants cause marked Exs. B1 to B47-Viz., registration extract dated 30.05.1969, certified copy of judgment in O.S. No. 368 of 1974, certified copy of decree in A.S. No. 33 of 1976, certified copy of plaint schedule in O.S. No. 368 of 74, three receipts passed for discharging the debt dated 24.09.1979, registered sale deed dated 24.09.1979, registered exchange deed dated 05.04.1977, 12 cist receipts in the name of 2nd defendant dated 07.02.1980, 21.02.1981, 25.02.1985, 07.02.1980, 20.03.1980, 21.02.1981, 06.01.1984, 25.02.1985, 20.02.1986, 17.02.1987, 04.02. 1988, 13.05.1989, ryotwari passbook dated 26.07.1986, sale deed dated 19.09.1979, sale deed dated 16.01.1981, ryotwari passbook dated 20.08.1989, cist receipts dated 07.02.1980, 20.03.1980, 21.02.1981, 01.03.1984, 25.02.1985, 20.02.1986, 17.02.1987, 04.02.1988, 13.05.1989, 07.02.1980, 07.02.1980, 07.02.1980, 21.02.1981, 06.03.1984, 20.02.1986, two receipts bearing same date 19.09.1979, and five discharged pronotes dated 15.12.1989, 26.07.1974, 29.11.1973, 11.10.1976 and 02.05.1977 respectively.

6. The findings of the trial Court in decreeing the plaintiff''s suit against all the defendants are as follows:-

6-a. The factum of plaintiff and 1st defendant are wife and husband as per the marriage between them under Hindu Law in the year, 1968 and in their wedlock they blessed with two daughters Bala and Sujatha not in dispute. From the evidence of P.W. 1 and D.W. 3 (D. 3) 1st defendant-D.W. 1 has been living with one Kamala at Chirala. It is also proved from evidence of 1st defendant along with plaintiff sat on the planks for the marriage of their two daughters. The defence was that disputes arose between plaintiff and 1st defendant and they left the 1st defendant and efforts through parents of plaintiff not fructified and thereby there is no desertion on his part but for plaintiff left the company of 1st defendant for no reason, much less for not joined him at Chirala by saying as if he was living with one Kamala there. It is also not in dispute of 2nd defendant is father of 1st defendant and 3rd defendant is brother of 1st defendant and 4th defendant is sister''s son of 1st defendant and there were ancestral properties that were partitioned between the defendants 1 to 3 sometime after marriage of plaintiff and 1st defendant and 1st defendant did along with two partners business in rice mill. As per plaintiff, 1st defendant earned huge profits in the business. Whereas, the defendants contend that the business went in losses and incurred debts and for its discharge sold some of the plaint-A schedule properties, in favour of defendants 2 to 4 and the suit filed for maintenance with charge on the properties long after the alienations with no whisper all through and the explanation of plaintiff of waiting till daughters'' marriages is untenable. For defendants to say plaintiff lived with one Chitti, there was no averment in their written statements in this regard but for 1st defendant in his chief examination for the first time stated as if plaintiff left his company in 1974 to her parents'' place and has been residing with Chitti and he left to Chirala and staying there since 1974 and P.W. 1 also denied said suggestion put to her. So far as 1st defendant''s living with his kept mistress Kamala at Chirala is not only deposed by P.Ws. 1 to 6 but also admitted in the cross-examination of defendants 2 and 3 as D.Ws. 2 and 3.

6-b. The trial Court therefrom held at paras-9 and 10 of the judgment particularly pages 18 to 21 that the desertion of the plaintiff by 1st defendant by his living with one Kamala is proved and for attributing against the plaintiff as leading any life as a prostitute from the beginning or by deserting him much less with one Chitti since 1974 not proved and it attracts Section 18 read with Section 2-e and g of the Hindu Adoptions and Maintenance Act (for short, ''the HAM Act) for entitlement of maintenance by plaintiff against the 1st defendant.

6-c. In para-11 of the judgment, it was observed that the 1st defendant-D.W. 1 admitted of the division of properties between himself and his father and brother in 1972 and to his share 1/4th share in the house besides 6 acres of wet land fallen and he sold the same to his father, brother and nephew (D. 2 to D. 4). As per plaintiff, it is only to avoid maintenance and to defeat her right, the sale deeds are created in their name being the close relatives.

6-d. In para-12 of the judgment it was observed that no sale consideration even met undisputedly for performance of even marriages of two daughters, for no worth evidence much less a stray sentence if at all of some amount was used and the evidence of P.Ws. 1, 3 and 4 speaks it is P.W. 1''s father that met the marriage expenses of their two daughters.

6-e. At para-13 of the judgment observed as per 1st defendant-D.W. 1 evidence the rice mill business was started in 1974 and joined two partners with him and his share was only 15 paise in the business therefrom and the pronotes executed, not by him alone but with Apparao and Shaik Ismail in their starting the rice mill business and he discharged his 1/3rd share and the said persons were not even examined for saying any loss in the business to disprove the evidence of plaintiff of the business went in profits. The so called payment of decree debts by D.W. 1 with sale consideration is not proved by any part satisfaction memos if at all recorded to say there was no any discharge of decree debts from array of the sale consideration but for to say only one Jaggaiah filed O.S. No. 13 of 1980 against the 1st defendant and cause attached Ac. 2.43 cents. D.W. 5 S. Subbarao deposed that for the amounts borrowed from him by 1st defendant and other partners Apparao and Ismail, he filed suit that was decreed and 1st defendant paid Rs. 4,100/- towards his share and he passed Ex. B. 41 receipt and denied the suggestion of it is a fabricated one thereby not able to say even name of the scribe and attestors of it, further the receipt contents show not paid by 1st defendant but as if by defendants 2 and 3 contra to the evidence of D.W. 5 and he did not file any record to show any suit filed decreed and if it is decree debt of what he stated any memo filed in Court for its payment and recorded. Ex. B. 42 executed by D.W. 4 in favour of defendants 3 and 4 as receipt with regard to alleged decree towards 1/3rd share of 1st defendant-partner of the business whereas his evidence goes to show it was 1st defendant that paid Rs. 14,500/- to him and his sister-in-law Ananthamma transferred the pronote in his favour and the 1/3rd pronote debt if at all comes to only Rs. 5,000/- out of the pronote but what he claimed paid of Rs. 19,500/- and the pronote claimed as of 1975 and the alleged payment in 1979 and it is not produced to show how it is not barred by time and what was the necessity to borrow the amount and what was the necessity for defendants 2 and 4 to pay and it belies the said transaction and its genuineness for no any payment endorsement obtained and proved on the alleged pronote and Ananthamma was also not examined so also regarding Ex. B. 43 alleged payment by defendants 3 and 4 whereas, the evidence oral is otherwise and Ex. B. 41 and 42 show executed on one and same date attested by the same attestors and none of them even cause examined that also doubts said version to probabilise the plaintiff''s claim of those were created more particularly the alleged decree debts in the absence of filing part satisfaction memos and concluded at page-33 para-13 that the Ex. B. 23 transaction of sale of property by 1st defendant in favour of his brother-3rd defendant is without consideration and to defraud the plaintiff''s claim.

6-f. In para-14 it was observed that Ex. B. 8 sale deed dated 24.09.1979 by 1st defendant to 2nd defendant recitals show sale of two items for Rs. 16,500/- which speaks Rs. 100/- paid as advance and in discharge of 1/3rd share out of the amount of pronote executed jointly by 1st defendant, Apparao and Ismail of dated 01.07.1975, Rs. 5,975/- paid and towards another pronote debt of Yarlagadda Venkateshwarlu dated 17.12.1975 executed by them for the 1/3rd share of 1st defendant paid Rs. 5,779/- and towards another pronote debt of A. Subbarao dated 20.09.1979 for the 1/3rd share of 1st defendant paid Rs. 2,859/- and balance Rs. 1783/- paid in cash. The Ex. B. 8 sale is two days after Ex. B. 23 and when Ex. B. 23 is for Rs. 14,000/- and D.W. 1 stated could not say to whom out of it debts discharged of what is discussed supra of alleged payments concluded that the Ex. B. 5 to B. 7 so called receipts of Subbaiah, Ankaiah and Venkateshwarlu (D.W. 8) and the evidence in this regard of them not correlating particularly of D.Ws. 1, 2 and 8 in this regard. It was also observed that the Ex. B. 8 sale deed dated 24.09.1979 recitals show entire amount paid on 10.09.1979, the receipts showing as if on the date of sale deed belying the same.

6-g. In para-15 of the judgment is relating to Ex. B. 24 sale deed of 1st defendant to defendants 3 and 4, what D.W. 1 deposed of amount of the sale deed taken one year prior to the sale deed from them and it is for the property Jaggaiah filed O.S. No. 13 of 1980 and the property was attached before Judgment and it speaks volumes about genuineness of the alleged sale even the property attached before the judgment in a suit, without depositing any amount in Court in that regard obtaining of the sale deed and payment of the amount earlier in so called by cash and coming to Exs. B. 44 and 45 alleged borrowals from D.W. 7 Musalaiah of Rs. 19,000/- under two pronotes said to have been satisfied by the 2nd defendant the recitals of Ex. B. 24 held appears false with reference to it also more particularly in the absence of signature of D.W. 2 to show payments of Jagadeeshwari.

6-h. It was concluded therefrom at para-16 of the judgment of the plaintiff''s entitlement of charge over the suit properties for the maintenance claim to be entitled as per Hindu Adoptions and Maintenance Act and Section 39 of the Transfer of Property Act. It was observed referring to Pavayamal and Another Vs. Samiappa Goundan and Others, that under the amended section of 39 T.P. Act notice of existence of right is sufficient to bind the transferee and the notice can be constructive and as per the judgment of 1958 (1) An. W.R. 46-equally on a gratuitous transferee without even notice the maintenance claim with charge binds. Ultimately held plaintiff is entitled to maintenance with charge on the schedule properties for no bar of the right against the alienees.

7. As against said judgment and decree, the 1st defendant-husband did not file appeal and did not choose to come on record in the present appeal filed by his father, brother and sister''s son-defendant Nos. 2-4, who even impleaded him as 2nd respondent did not file process for service of summons and cause dismissed for

default.

8. The learned Counsel appearing on behalf of appellants-defendants 2 to 4, strenuously contended that the sales effected by 1st defendant were long prior to the date of suit with no claim earlier and those are for discharge of debts incurred by 1st defendant for his business and but for if at all to grant personal decree against the 1st defendant, the trial Court could not be said that they had any notice of claim and thus the provisions of Section 39 of the Transfer of Property Act would not in any way come against them and no charge as such can be fixed on such items. The main stress as sought to be laid was that the appellants had acquired the said properties under the valid registered documents when they had absolutely no notice of the claim and therefore the said items ought to have been excluded from the charge.

9. The learned Counsel appearing on behalf of respondent-plaintiff, sought to repel the said contentions on the ground that in view of the vested claim of the wife, it cannot be said that the appellants had no notice or knowledge thereof, that too being close relatives and knowledge about the plaintiff was deserted by the 1st defendant and there is a claim of her that to be filed against him and those transactions are not genuine but created against the maintenance right of her as rightly concluded by the trial Court and for this Court while sitting in appeal there is nothing to interfere.

10. In view of the rival submissions, the points that arise for consideration in the appeal lis are:

(1) Whether the plaintiff is not entitled for creation of charge over the suit properties for enforcing the maintenance claim against the 1st defendant and if so, the trial Court''s decree and judgment in creating charge over the Plaint-A and B schedule properties is unsustainable and requires interference by this Court while sitting in appeal and with what observations?

(2) To what result?

In Re Point No. 1:

11-A. Before coming to decide the point-1 formulated above of the appeal lis, it is relevant to mention the settled law in dealing with appreciation of evidence by the appellate Courts that, the 1st appellate Court must re-appreciate (appreciate afresh) the entire evidence in giving findings supported by reasons as to decide the lis and therefrom to find how far the decision of the trial court on any of its findings and conclusions are correct or incorrect, including for confirmation or reversal of said findings of the trial Court. No doubt, the burden of showing that the judgment or even a finding therein under a challenge in appeal is wrong or incorrect either wholly or in part lies on the appellant and same is also the proposition in the course of the cross-objections as the cross-objectors are at par with appellants so far as

their contentions in the cross-objections concerned, in the course of the cross-objections in shifting the burden on them, from hearing the main appeal. It is also the well-settled proposition of law that, though generally no plea, no evidence can be looked into and for no issue, no finding can be given, it is not always the static principle from the fact that even a plea not made specifically if covered by implication and evidence let in, it can be looked into and even to give finding no issue framed is of no bar to formulate a point and decide. Burden of proof in such matters, pales significance as what is necessary is party shall aware of the pleadings and evidence for the Court to give finding from the hearing covering the lis but not outside the scope vide decision reported in Bhagwati Prasad vs. Chandramaul. It was also held therein that even alternative remedy not pleaded if entitled, Court can grant it where it is appropriate to do so. In Balasankar vs. Charity Commissioner, Gujarat at para-19-it was held that, burden of proof pales significance when both parties adduced evidence and it is the duty of the court to appreciate the entire evidence adduced by both sides in deciding the lis irrespective of the traits of burden of proof, is the settled proposition with no quarrel thereon. So also on the aspect as to party proved in possession of best evidence is bound to produce the same to throw light on the lis and to unfold any truth and thereby cannot take shelter on the abstract doctrine of burden of proof saying burden not on him to prove by filing the same, as laid down NIC vs. Jugal Kishore in para-10 and in Lakhan Sao vs. Dharam Chowdhary.

11-B. It was also laid down in this regard that, the appreciation of evidence is no doubt from experience and knowledge of human affairs depending upon facts and circumstances of each case and regard had to the credibility of the witness, probative value of the documents, lapse of time if any in proof of the events and occurrence for drawing inferences, from consistency to the material on record to draw wherever required the necessary inferences and conclusions from the broad probabilities and from preponderance from the overall view of entire case to judge as to any fact is proved or not proved or disproved. Coming to the proof of facts out of the facts in issue to the extent of relevant facts as to what is meant by proved, not proved or disproved with reference to Section 3 of the Evidence Act and nature of proof in civil matters concerned, in RVEE Gounder vs. RVS Temple at paras 25-28, the Apex Court discussed that, in civil cases the proof is by preponderance of the probabilities including in suits relating to ejectment or declaration of title or for possession; and the onus shifts from initial burden on the plaintiffs if able to establish from preponderance of probabilities the entitlement, on the defendant to rebut the same including with specific claim on their part if any. It is in explaining the earlier propositions of law that, in a suit for ejectment, plaintiff shall win or lose his case only on his own strength principle, since it does not mean the onus of proof is statically always on the plaintiff or it shall never shifts on the defendant even if the plaintiff is able to establish his case from preponderance of the probability as to what is meant by proved, not proved or disproved required for the above

expressions with reference to Section 3 of Evidence Act without going into the other components of "may presume, shall presume and conclusive proof", from the very definition, proved and disproved to say not proved is when it is neither proved nor disproved, it requires considering the matters before the Court on any fact for either believes it to exist or does not exist (which is by direct evidence), or considers its existence so probable that a prudent man ought, under the circumstance of a particular case to act upon supposition that it exists or it does not exist (which is by circumstantial evidence). The Apex Court clearly held that in a suit for ejectment once plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant, it is for the defendant to discharge his onus and in the absence there of, the burden of proof lies on the plaintiff shall be held to have been discharged so as to prove the plaintiff''s title.

11-C. Before coming to decide how far the trial Court was correct or not in arriving at the findings impugned in the appeal concerned, the basic principle of law that also to be kept in mind by the appellate Court is that, where trial Court rely on facts and probabilities basing on credibility also with opportunity to observe the demeanor of the witnesses, the findings of the trial Court when based on reasons and by consideration of the contents of the documents and oral evidence and on all facts and relevant circumstances, merely because some other view is also possible, the appellate Court shall not ordinarily or casually interfere with and reverse. In case the appellate Court desires to reverse the judgment and decree of the lower Court, it should discuss the findings and set aside the same, which are contrary to law or weight of evidence or probabilities of the case or perverse, arbitrary or superficial or capricious or unsustainable either on fact or on law. Same are also the expressions in 2002 (1)-SCC-134 at para-14: 2006-SCC-120 para-(b). 2000 (5)-SCC-652 para (b) and 2000 (1)-SCC-434 at 437-k).

12. From the above general principles in appreciation of evidence and the scope of the appeal lis vis-a-vis the powers of the appellate Court, coming to the case on hand the propositions of law regarding maintenance claim of wife against husband with charge on property, entitlement and enforceability is being discussed with reference to the facts hereunder:

12-A. Out of Sections 1-30 of the Hindu Adoptions and Maintenance Act provide for maintenance read:

Section 18 of the Act reads:

(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 lifetime.

(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 of 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 her 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.

Section- 3(b) of the Act says maintenance includes in all cases provision for food, clothing, residence, education and medical attendance and treatment and in case of unmarried daughter, also reasonable expenses of and incident to her marriage.

12-B. There is no dispute in regard to the relationship between the parties. The claim in the suit is for maintenance by the plaintiff-wife as against 1st defendant-husband, with a charge sought against the Plaint A and B schedule properties on the ground that they belong to the husband-1st defendant, in impleading his father, brother and sister''s son as defendants 2 to 4 for some of the properties in their hands and they all colluded and created documents only to defeat her claim in anticipation while creating the documents. There is no worth dispute in regard to the ownership of the 1st defendant over said properties, but for to say by the defendants 2 to 4 of the same purchased by them from 1st defendant for consideration and for discharge of his business debts long before the claim laid and as such the charge cannot be created. The said claim was contested by the husband-1st defendant only on the ground that it is the plaintiff-wife, who has deserted him for no justification and she started living by prostitution almost since marriage and therefore she is not entitled for maintenance, apart from supporting the contest of other defendants and vice versa. Thus, factum of plaintiff and 1st defendant are wife and husband as per the marriage between them under Hindu Law in the year, 1968 and in their wedlock they blessed with two daughters Bala and Sujatha besides proved from evidence is not in dispute. It is also brought in the evidence that, but for 1st defendant along with plaintiff sat on the planks for the marriage of their two daughters, there is nothing to show he spent any amount in performing the marriages and it is evidence on the plaintiff''s side of father of plaintiff incurred the expenditure and cause performed the marriages of the two

daughters of plaintiff and 1st defendant. The plaintiff''s explanation for not making the claim for maintenance after desertion by husband by his living with another woman Kamala, was till performing of the marriage of the daughters she tolerated in the welfare of the daughters, thereby justifies but for if at all to say after the alienation to the date of claim whether it is barred by any law like provisions of limitation to enforce the charge subject to other merits that to be discussed later.

12-C. The case of the husband-1st defendant was that, ever since their marriage, the Plaintiff leads adultrous life with many as a prostitute, for the sake of two children born in their wedlock, 1st defendant put up with the utter depravity of her, that she has no right to seek maintenance having deserted him since, 1974. There is no pleading of him about plaintiff started living with one Chitti after 1974 while staying with her parents. It is only introduced in the suggestion to P.W. 1 and in the evidence of him as D.W. 1. There is nothing to show what is his recourse if at all really the wife ever since their marriage leading adultrous life with may as prostitute, could it be tolerated by any husband without even notice and without even filing any matrimonial claim for restitution of conjugal life with willing or for any judicial separation or desertion on that ground. He did not even worth mention but for generalization as if she has been leading adultrous life with many as prostitute ever since marriage. This wild allegation remains unproved is nothing but causing mental cruelty on the part of him towards his wife. So far as her claim from the evidence of her as P.W. 1, besides the other witnesses-P.Ws. 2 to 6 including her daughters and her father and also substantiated from the evidence in cross-examination of D.Ws. 2 and 3 (D. 2 & 3) that the husband-1st defendant-D.W. 1 has been living with one Kamala at Chirala. D.W. 1 also admitted in saying he has been living at Chirala from 1974. So far as his other defence is as if only in 1974, the plaintiff left his company to her parents and he left from his family house to Chirala and since then living there. The case of the defendants 2-4 (father in law-2nd defendant filed written statement and adopted by defendants 3 and 4-brother in law and nephew) was that 1st defendant and plaintiff lived together till the year, 1980 and later she deserted him by living as prostitute (this plea setup for the defence purpose is running contra to the plea of 1st defendant supra of plaintiff deserted him and living away since, 1974, though living as prostitute ever since marriage) and as such the plaintiff is not entitled to any maintenance, much less with any charge, for the claim over the properties already alienated for discharge of debts of 1st defendant before making the claim by plaintiff, hence to dismiss the suit claim. Apart from said inconsistent evidence and plea with prevaricating versions, cannot be given credence as rightly concluded by the trial Court from the case of the plaintiff''s entitlement to maintenance against her husband-1st defendant comes within clauses-a, b, e and g of Section 18 of the Act, needless to say said maintenance include provision for residence and medical expenses etc., as per Section 3(2) of the Act. Thereby and also for the reason that the 1st defendant-husband of the plaintiff did not choose to contest much less challenge

the decree granting maintenance against him in favour of the plaintiff that was made final, the only appeal lis by defendants 2 to 4 is impugning the granting of charge decree by the trial Court in favour of the plaintiff for the plaint A and B schedule properties in their hands by claiming as bona fide alienees for consideration from 1st defendant and those are not collusive or fraudulent transactions to defeat the claim of plaintiff as alleged.

12-D. Now coming to scope of the appeal lis supra, from contest of 1st defendant, he alienated the properties for discharge of the debts contracted by him in running the business of Tirumala rice mill, Jandrapet, as partner with Gottimukkala Appa Rao & Sheik Ismail in 1974-75. It is also the case of other defendants in the written statements that in the year, 1974 1st defendant joined as partner with Gottimukkala Appa Rao & Sheik Ismail, in Tirumala rice mill, Jandrapet and he sustained losses. There is though no dispute of the rice mill partnership business of 1st defendant during 1974-75, what the plaintiff and her witnesses deposed was there were no losses but for the business run in profits and no need to sell the properties for alleged losses. None of the defendants, particularly the 1st defendant though contested produced any business accounts of the rice mill to say it went in losses, not filed any sales tax or income tax returns, much less cause examined the so called two partners, that too when 1st defendant says his share was only of fifteen paise and the other 85 paise is of other partners, that is clear even from his cross examination evidence. If such is the case, it has to be proved for discharge of only proportionate share of jointly incurred debts and what the evidence adduced by defendants showing as if 1/3rd of debts allegedly incurred were discharged is doubtful to rely on credibility of such version as well as probative value of such receipts or vouchers or endorsements.

12-E. In saying for discharge of said business loss incurred therein, he sold away his properties, it is important to note he did not dispute the plaint A and B schedule properties fallen to his share in the partition with his father and brother as averred by plaintiff. However, even for the defendants 2-4 (father-in-law, brother-in-law and nephew) to say that, in the family partition in the year, 1972 the 1st defendant was given only Ac. 01-50cts in Item-1 out of S. Nos. 312/1 & 2 and another Ac. 01-50cts in S. No. 314, there is no even a single revenue record of mutation or Pattadar passbook or partition list or partition deed filed for saying only that extent 1st defendant got and not entire plaint A & B schedule properties, even the burden lies on the defendants 2 to 4 in proof of their contest, for 1st defendant not disputed the said plaint A and B schedule properties fallen to the share of 1st defendant in the partition for seeking to create charge by plaintiff for the maintenance claim. In para-11 of the judgment, it was observed that the 1st defendant-D.W. 1 admitted of the division of properties between himself, his father and brother in 1972 and to his share 1/4th share in the house besides 6 acres of wet land fallen and he sold the same to his father, brother and nephew (D. 2 to D. 4). In fact the under-mentioned version of defendants 2-4 of what properties fallen to the share of the 1st defendant

described as alienated belies the above version. As it is the case of the defendants in the written statements that in discharge of debts of the business loss, he sold away his properties viz., Ac. 01-00cts (out of plaint-B schedule land) of the Murukondapadu and his share in the house for Rs. 16,545/- to the 2nd defendant (his father) under regd. Sale deed dt. 24-09-1979 and discharged debts of the business with the same. In above written statement version of defendants 2-4, there is no whisper of any share given to 1st defendant in house property, but for only Ac. 01-50cts in Item-1 out of S. Nos. 312/1 & 2 and another Ac. 01-50cts in S. No. 314. The so called business debts are of 1974-75 covered by joint pronotes, nothing shown how those were within limitation for legal enforceability as pointed out by the trial court for any necessity of involuntary sale for discharge and otherwise of any suit filed, to record satisfaction therein and obtain proof and nothing filed to prove such bona fides. The 2nd defendant further to say 1st defendant in exchange with 2nd defendant, transferred Ac. 00-43cts of the Murukondapadu (in B schedule) for Ac. 00-50cts of the Kankatayapalem (in Item-1 Nos.) of 2nd defendant, that was not his written statement version referred supra. The 2nd defendant further to say that 1st defendant also sold Ac. 02-50cts of Kankatayapalem (in Item-1 Nos.) to his brother 3rd defendant under regd. Sale deed dt. 16-01-1981 in discharge of debts of the business with the same; that was also not their written statement version referred supra. For saying 1st defendant also sold away his remaining property of Ac. 02-43cts (out of plaint B schedule land) of the Murukondapadu, to the defendant Nos. 2 & 3 and utilized the entire sale consideration in discharge of his debts, that was also not their written statement version referred supra. What is their version in written statement of only Ac. 01-50cts in Item-1 out of S. Nos. 312/1 & 2 and another Ac. 01-50cts in S. No. 314 fallen to his share in the year, 1972 partition. If so how he could sell and how they could purchase anything not of him. That speaks quite inconsistent and contradictory versions by suppression of material evidence relating to partition in their custody to say what properties if not as claimed by plaintiff that fallen to 1st defendant''s share. Even to take said properties, irrespective of inconsistent pleas supra, as fallen to his share, there was no necessity of sale of entire properties supra and of those covered by plaint A & B schedule properties included therein, that too for discharge of fifteen paise share of 1st defendant in the partnership rice mill business run hardly for 2 or 3 years during 1974-76. As also pointed out by the trial court of the alleged debts discharged and borne out by vouchers obtained from most of creditors is unbelievable.

12-F. As per plaintiff, it is only to avoid maintenance and to defeat her right the sale deeds are created in their name being the close relatives. In para-12 of the judgment it was observed that no sale consideration even met undisputedly for performance of even marriages of two daughters, for no worth evidence much less a stray sentence if at all of some amount was used and the evidence of P.Ws. 1, 3 and 4 speaks it is P.W. 1''s father that met the marriage expenses of her two daughters. At para-13 of the judgment observed as per 1st defendant-D.W. 1

evidence the rice mill business was started in 1974 and joined two partners with him and his share was only 15 paise in the business therefrom and the pronotes executed, not by him alone but with Apparao and Shaik Ismail in their starting the rice mill business and he discharged his 1/3rd share and the said persons were not even examined for saying any loss in the business to disprove the evidence of plaintiff of the business went in profits. The so called payment of decree debts by D.W. 1 with sale consideration is not proved by any part satisfaction memos if at all recorded to say there was no any discharge of decree debts from array of the sale consideration but for to say only one Jaggaiah filed O.S. No. 13 of 1980 against the 1st defendant and cause attached Ac. 2.43 cents. D.W. 5 S. Subbarao deposed that for the amounts borrowed from him by 1st defendant and other partner Apparao and Ismail, he filed suit that was decreed and 1st defendant paid Rs. 4,100/- towards his share and he passed Ex. B. 41 receipt and denied the suggestion it is a fabricated one thereby not able to say even name of the scribe and attestors of it, further the receipt contents show not paid by 1st defendant but as if by defendants 2 and 3 contra to the evidence of D.W. 5 and he did not file any record to show any suit filed decreed and if it is decree debt of what he stated any memo filed in Court for its payment and recorded. Ex. B. 42 executed by D.W. 4 in favour of defendants 3 and 4 as receipt with regard to alleged decree towards 1/3rd share of 1st defendant partner of the business whereas his evidence goes to show it was 1st defendant that paid Rs. 14,500/- to him and his sister-in-law Ananthamma transferred the pronote in his favour and the 1/3rd pronote debt if at all comes to only Rs. 5,000/- out of the pronote but what he claimed paid of Rs. 19,500/- and the pronote claimed as of 1975 and the alleged payment in 1979 and it is not produced to show how it is not barred by time and what was the necessity to borrow the amount and what was the necessity for defendants 2 and 4 to pay and it belies the said transaction and its genuineness for no any payment endorsement obtained and proved on the alleged pronote and Ananthamma was also not examined so also regarding Ex. B. 43 alleged payment by defendants 3 and 4 whereas, the evidence oral is otherwise and Ex. B. 41 and 42 show executed on one and same date attested by the same attestors and none of them even cause examined that also doubts said version to probabilise the plaintiff''s claim of those were created more particularly the alleged decree debts in the absence of filing part satisfaction memos and concluded at page-33 para 13 that the Ex. B. 23 transaction of sale of property by 1st defendant in favour of his brother 3rd defendant is without consideration and to defraud the plaintiff''s claim. In para-14 it was observed that Ex. B. 8 sale deed dated 24.09.1979 by 1st defendant to his 2nd defendant recitals show sale for two items for Rs. 16,500/- which speaks Rs. 100/- paid as advance and in discharge of 1/3rd share out of the amount of pronote executed jointly by 1st defendant, Apparao and Ismail of dated 01.07.1975, Rs. 5,975/- paid and towards another pronote debt of Yarlagadda Venkateshwarlu dated 17.12.1975 executed by them for the 1/3rd share of 1st defendant paid Rs. 5,779/- and towards another pronote debt of A. Subbarao dated 20.09.1979 for the 1/3rd share of 1st defendant paid Rs. 2,859/- and balance Rs.

1783/- paid in cash. The Ex. B. 8 sale is two days after Ex. B. 23 and when Ex. B. 23 is for Rs. 14,000/- and D.W. 1 stated could not say to whom out of it debts discharged of what is discussed supra of alleged payments concluded that the Ex. B. 5 to B. 7 so called receipts of Subbaiah, Ankaiah and Venkateshwarlu (D.W. 8) and the evidence in this regard of them not correlating particularly of D.Ws. 1, 2 and 8 in this regard. It was also observed that the Ex. B. 8 sale deed dated 24.09.1979 recitals show entire amount paid on 10.09.1979, the receipts showing as if on the date of sale deed belying the same. In para-15 of the judgment is relating to Ex. B. 24 sale deed of 1st defendant to defendants 3 and 4 what D.W. 1 deposed of amount of the sale deed taken one year prior to the sale deed from them and it is for the property Jaggaiah filed O.S. No. 13 of 1980 and the property was attached before Judgment and it speaks volumes about genuineness of the alleged sale even the property attached before the judgment in a suit, without depositing any amount in Court in that regard obtaining of the sale deed and payment of the amount earlier in so called by cash and coming to Exs. B. 44 and 45 alleged borrowals from D.W. 7 Musalaiah of Rs. 19,000/- under two pronotes said to have been satisfied by the 2nd defendant the recitals of Ex. B. 24 held appears false with reference to it also more particularly in the absence of signature of D.W. 2 to show payments of Jagadeeshwari. It was concluded therefrom at para-16 and of the plaintiff''s entitlement of charge over the suit properties for the maintenance claim to be entitled as per Hindu Adoptions and Maintenance Act and Section 39 of the Transfer of Property Act. It was observed referring to Pavayamal and Another Vs. Samiappa Goundan and Others, that under the amended section of 39 T.P. Act notice of existence of right is sufficient to bind the transferee and the notice can be constructive and as per the judgment of 1958 (1) An. W.R. 46-equally on a gratuitous transferee without even notice the maintenance claim with charge binds. Ultimately held plaintiff is entitled to maintenance with charge on the schedule properties for no bar of the right against the alienees.

12-G. Now coming to correctness or otherwise of above findings of trial Court, it is just to refer Sections 26-28 of the H A M Act and Sections 100, 39 & 3 of the T P Act and the precedents on the scope of the subject in this regard.

12-G.(a). Section 26 of the Act reads: Subject to the provisions contained in Section 27, debts of every description contracted or payable by the deceased shall have priority over the claims of his dependants for maintenance under this Act.

12-G.(b). Section 27 of the Act reads: A dependant''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 the Court, by agreement between the dependant and the owner of the estate or portion, or otherwise.

Section 100 of the Act T.P. Act reads: Where immovable property of one person is by act of parties or operation of law made security for the payment of amount to a

mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee of the trust property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.

12-G.(c). These sections 26 and 27 of H A M Act have thus no application for the claim by the wife against the husband but for to a widow and other dependants of the deceased. As such, there is no relevancy of the same to the present lis, much less to appreciate any contention of the alienations are since shown for discharge of debts of husband, to be given precedence over claim for maintenance and thus not to create any charge on the suit A & B schedule properties, but for to show any other law for that contest.

So also Section 100 of the T.P. Act for not by act of parties or operation of law made security, much less for the payment of amount to a mortgage, though the wording of the Section is even transfer for consideration, once got notice bound by it like the claim under Section 39 of T.P. Act and Section 28 of H A M Act detailed below. In fact, from the above, a charge does not amount to a mortgage, as in every mortgage there is a charge but every charge is not a mortgage. The declaration in Section 100 that the provisions applicable to a simple mortgage applies so far may be to a charge does not have the effect of changing the nature of the charge to one of an interest in property. The charges that have been dealt within the Section are 1) charge created by act of parties or 2) arising by operation of law.

12-G.(d). Now coming to Section 28 of the Act, which reads that: 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 and 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.

12-G.(e). What Section- 28 of the Act referred above speaks is that, the right to receive maintenance by wife against husband may be enforced against the non-gratuitous transferee of the husband, if the transferee has notice of the right. Thus, the crux is whether there is any notice direct or constructive of the prospective claim of wife even for enforcement of charge claim even on such transferred property. It is also what Section 39 of the Transfer of Property Act, speaks below.

12-G.(f). Section 39 of the Transfer of Property Act of transfer where third person is entitled to maintenance reads:- Where a third person has a right to receive maintenance, or a provision for advancement or marriage from the profits of

immovable property and such property is transferred, the rights may be enforced against the transferee, if he has notice 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."

12-G.(g). Coming to the crux of whether there is any notice direct or constructive of the prospective claim of wife even for enforcement of charge claim against husband personally and even on such property of the husband since transferred even for consideration, irrespective of how the consideration utilised; from the combined reading Section 28 of the H A M Act and Section 39 of the T.P. Act, needless to say if the transfer was of all the family property it is nothing but improvident alienation. Said maintenance right is not only a personal one, but also a property liability. Likewise the purchaser was aware of the circumstances of the family, the transfer was subject to the right of maintenance. It is in fact not necessary that the transferee should be aware of an intention to defeat the maintenance claim. If the transferee is even for consideration, he takes subject to the right if he has notice of it or if he is a gratuitous transferee irrespective of no notice. The law is well settled in this regard from the following expressions:-

12-H. In Alluri Bala Satya Krishna Kumari vs. Alluri Varalakshmi on the liability to pay maintenance is not only a personal one, but also a property liability even under the Hindu Adoption and Maintenance Act, 1956 held as follows:

"9. According to the Hindu Law prior to Hindu Adoption and Maintenance Act, 78 of 1956 (hereinafter referred to as the Act) the liability of a Hindu to maintain others arises in some cases form the mere relationship between the parties, independently of possession of the property. In other cases it depends altogether on the possession of property. A Hindu is under a legal obligation to maintain his wife, his minor sons, including his illegitimate sons, his unmarried daughters, and his aged parents, whether he possess any property or not. The obligation to maintain them is personal in character and arises form the every existence of the relationship between the parties. In contradistinction to this liability, the liability of a Manager of a Joint Mitakshara family to maintain all male members of a family, their wives and children, is dependent upon the possession of coparcenary property. A heir is also legally bound to provide, out of the estate, which descends on him, maintenance to other persons, whom the late proprietor was legally or morally bound to maintain and the estate inherited by him or her is always subject to the obligation to provide for such maintenance. In the case of illegitimate children, the previous law provided four different types of right to claim maintenance from a Hindu father. Those four categories were (1) the illegitimate son of a Hindu belonging to one of the three higher classes by a Dasi, (2) the illegitimate son of a Sudra by a dasi, (3) the illegitimate son of a Hindu by a Hindu woman, who is not a dasi, even though he be the result of a casual or adulterous intercourse and (4) the illegitimate son of a Hindu by a non-Hindu woman.

10. The claim to receive maintenance by the above heir? or even that of a widow was never considered to be a charge upon the estate whether joint or separate until it is fixed and charged upon the estate by a decree of the court or by an agreement between the parties or by will. Hence the right could be defeated in the case of a bona fide alienation, unless the alliance had notice of such claim or the alienation was gratuitous, in which event there can be a charge created over the properties covered by such alienations.

11. Act 78 of 1956 codified the law in this respect. Section 18 deals with the maintenance of a wife. It says that a Hindu wife shall be entitled to be maintained by her husband during her lifetime. As under previous law, even now, this liability to maintain the wife arises irrespective of the possession of any property by the husband since it arises from the relationship of the parties.

Section 20 of the Act, which refers to the maintenance due to children and aged parents is as follows: "(1) Subject to the provisions of this section a Hindu is bound, during his or her legitimate or illegitimate children and his or her aged or inform parents, (2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor, (3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or property." Under this section a Hindu, be he a male or female, is bound to maintain his legitimate or illegitimate children, so long as they are minors, and his or her aged or inform parents. The only qualifications to this law enacted in sub-section (3) is that the liability to maintain the aged parents or unmarried daughters would extend only in so far as they are unable to maintain themselves out of their own earnings or property. It is therefore to be seen that under the new law also the liability of a father to maintain his children irrespective of possession of the property is still there, as it arises out of relationship. The distinction drawn by the old law in regard to the extent of an illegitimate child''s right has not been obliterated. The illegitimate child may be son or daughter.
These two sections therefore postulate a personal liability and a legal obligation on the father to maintain the illegitimate children. If the father has got property necessarily the maintenance has to come out of the property. There is no distinction in this respect between the property of the father belonging to a joint family or his separate property.

12. Section 21 of the Act defines who the relatives of the deceased are and who consequently be called his dependents. In this section also clause (viii) says that the minor illegitimate son of a deceased person, male or female, shall be a dependent. Section 22 deals with the maintenance of the dependents and Section 23 with the principles for the determination of the quantum of maintenance under this Act. Section 27 runs as follows: "A dependent''s claim for maintenance -- otherwise."

13. This section also in terms restates the law as it stood before the Act, viz., that the claim to maintenance of a person against the estate of a deceased person could not be charge on the estate unless it was created by a decree of the court, etc. Section 28 of the Act is in the following terms: "Where a dependent has a right----without notice of the right."

This section is on par with, Section 39 of the T.P. Act with only this difference, that this section applies only to a dependent, as defined under Section 21 and not to others, who are entitled to claim maintenance under this Act as envisaged by Sections 18 & 20"

For a contrast to show that these provisions of Section 39 of the Transfer of Property Act, the said section is also extracted below: "Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred ..... the right may be enforced against the transferee, if he has notice 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."

From the above sections it is evident that the right of a wife or legitimate or illegitimate children or the aged or infirm parents of a person who come within the purview of Sections 18 and 20 of this Act, is a personal right vesting in them, with a corresponding legal obligation on the person bound to maintain them as a personal obligation. There is no provision in this Act, as enacted in Section 28, that such a right can be enforced by a charge over the property of a Hindu, who is liable for the same.

Whenever such a person has a right to receive maintenance from a person, who is legally bound to maintain him and that person has immovable property, the general law enacted in Section 39 of the T.P. Act should apply to suph cases. There is nothing in the Act excluding the applicability of Section 39 of the T.P. Act to such cases. The Act no doubt made provision for a similar charge in the case of dependents. Section 4 of the Act saves the applicability of Section 39 to such cases.

14. It has been held in a number of cases that the liability to provide maintenance under a personal obligation would not exclude the right to receive maintenance from the profits of immovable property as contemplated by Section 39 of the T.P. Act.

For instance Viswanatha Sastry, J., dealing with the same aspect has very succinctly explained the law in Manikyam vs. Venkayamma - AIR 1957 A.P. 710 : 1956 (2) ANWR 1021, in the following manner: "It is true that the husband or father is under a personal obligation to maintain his wife or infant children. This does not mean that the obligation could be enforced only by sending him to jail in case of default and that the wife or infant children have no right to be maintained out of the property of the husband or the father as the case may be. The rule as to personal obligation

only emphasises the legal and imperative duty of the husband to maintain his wife and minor children irrespective of the possession of any property. Like a widow, the wife has become entitled to demand separate maintenance from her husband, has no charge on his property. Therefore a bona fide purchaser for value without notice of the claim for separate maintenance is not affected thereby. But a transferee with notice of the right of maintenance or a gratuitous transferee takes the property subject to the claim for maintenance by virtue of Section 39 of the Transfer of Property Act. 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 effectively, it could be made a specific charge on a reasonable portion of the property. If the right of maintenance is imperiled or jeopardized 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 could 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 preserve having notice of the right to maintenance. A transferee, like the appellant, 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 or the transferee under Section 39 of the T.P. Act."

15. These observations were approved by their Lordships Subba Rao, C.J. and Jaganmohan Reddy, J., (as their Lordships then were) in Chandramma vs. M. Venkata Reddi - AIR 1958 A.P. 396 and it was held at page 401 as follows:-"To summarise: 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 put of her married status. They also prohibit the alienation of properties by the husband which has the effect of depriving her and ether dependents of their maintenance. They further treat her as a member of a Hindu joint family entitled to be maintained put of joint funds. The decisions of the various High Courts show the same lien, 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 Section 39 of the Transfer of Property Act, she can enforce her right against the properties in the hands of the alienees with notice of her claim"

16. Though this appeal arose out of a suit instituted prior to the Act, the rationale of the said decisions apply with equal fore even under the law as it exists today under the Act. If in the case of a wife she can enforce the right by resort to Section 39 of the T.P. Act, there is no reason why the illegitimate children cannot resort to Section

39 of the T.P. Act when the law imposes an obligation on the putative father to maintain them.

17. If, according to the contention of the learned counsel for the respondents, it is held that a charge could be created only in favour of a dependent, who claims maintenance from the estate of a deceased person, and in other cases, no charge can be created, even if the claimant is the wife or the son, then it would amount to saying that the right of a wife to get maintenance from her husband or the son, legitimate or illegitimate from a father, is always at peril and depends upon the whimsical attitude of the person liable to pay maintenance and the alienee, even if he be a gratuitous transferee, could defeat such right. Such an intention cannot be attributed to the legislature while enacting this Act.

It is common knowledge that the right of a wife for maintenance against a husband has been the subject of a series of legislations to improve the lot of women and it cannot be expected that at the time of codification of the law, the Parliament thought it best to leave such women or son at the mercy of a delinquent husband or father, who out of spite or vindictiveness might dissipate his wealth or property bound to be maintained effectively from the profits of the said property. The progress of the law shows from stage to stage the enlargement of the rules of Hindu Law governing the right of Hindu women to maintenance. Similarly in the case of sons who are also natural sons it cannot be expected that the legislature intended that they should be exposed to such vicissitudes in the family. As in the case of dependents so also in the case of persons coming under Sections 18 and 20 of the Act, a charge can be created by the court, which was moved for the creation of such a charge.

18. It has also been held in Laxmi vs. Krishna - AIR 1958 Mysore 288, by Somnath Iyer. J., that section 28 applies only to a dependant and not to a wife or daughter and that in spite of the codification of the law, the wife is entitled to claim a charge under Section 39 of the T.P. Act. It was also similarly ruled by Veeraswami. J., in Ramaswamy vs. Bhagyammal. Such a right to maintenance of a wife cannot be defeated by a gratuitous transfer (vide Ramappa Parappa Khot and Others Vs. Gourwwa, .

19. I cannot agree with the learned counsel for the respondents that the Act does not contemplate a charge in the case of claimants for maintenance under Sections 18 & 20. There is no prohibition under those sections in the manner suggested by the learned counsel. Section 28 has operation only in regard to the dependents while Section 39, applies to others. Both of them operate in different fields and there is no conflict between those sections. When there is nothing in the Act excluding the application of Section 39 of the Transfer of Property Act to such cases, the court cannot refuse to create a charge. He has not been able to cite one decision, which has taken a view that Section 39 of the T.P. Act has been abrogated by virtue of the provisions of Act 78 of 1956. The learned counsel placed reliance

upon the decision in Sampath vs. Sevuga Pandia Thevar-1963 (2) MLJ 555. The claim in that case for maintenance was rejected because the impartible estate against which the claim was made was the separate property of the father that case cannot have therefore any application in this context. The learned counsel wanted to argue by reference to a decision in Nanak Chand v. Chander Kishore, that the right is only personal and legal in character and there cannot therefore be a charge under Section 39 of the T.P. Act. The said decision does not go to the extent of saying that no charge can be created.

20. In the present case the lower appellate Court having recognized that the two gratuitous transfers are hit by Section 39 of the T.P. Act, has deleted the charge on account of some confusion that under Section 20 of the Act no charge can be created. The said view is entirely erroneous and has to be set aside.

21. In the result the second appeal is allowed and the decree of the first court is restored with costs throughout. Leave refused. The Respondents shall pay the court-fees due to the Government in this second appeal.

22. Appeal dismissed".

12-I. In Siddegowda vs. Lakkamma-wherein by placed reliance upon the expressions in Manikyam vs. Venkayamma & Sharabanna Rudrappa vs. Basamma AIR 1962 Mysore 207, held that-where a transaction of sale of immovable property was entered into by the husband after coming to know that the wife was going to present a suit for maintenance, the same could not be said to be bona fide transfer without notice and therefore the property could be charged for ensuring payment of maintenance without voiding the sale deed.

12-J. In S. Yellamma vs. S. Anjaneyulu referring to Section 18 of the Hindu Adoptions and Maintenance Act, it was held at paras 29 & 36 that-" As noticed, Hindu wife is entitled to live separately and claim maintenance inter alia if husband is guilty of desertion and he treated his wife with cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband, if he is suffering from a virulent form of leprosy and if there is any other cause justifying her living separately. Unfounded allegations of unchastity would result in mental cruelty to Hindu wife. No Hindu wife can tolerate a husband or for that matter anybody who makes allegations of adultery or unchastity against her. Unfounded allegations by husband of unchastity would certainly cause a reasonable apprehension in the mind of Hindu wife that her life may not be safe. She has every justification to live separately and claim maintenance.

A plain reading of the provision would show that an agreement holder of immovable property on which a charge is claimed was to prove that he is a bona fide purchaser for consideration and that without notice a charge is greeted. I have already held that Ex. B. 9 agreement was executed by the first defendant in favour of second defendant when the disputes started, and the second defendant, having

paid advance on the date of execution of the agreement without informing about wife and children of the first defendant, cannot be considered as a bona fide purchaser. In the cross-examination of D.W. 1 it was suggested to him that the house which was sold and which is subject matter of Ex. B. 9 is more than Rupees one lakh. As purchaser is defendant to the suit, he cannot complain even if any charge is created on the same. It is not denied before me that though Ex. B. 9 was executed possession was not delivered to him and indeed first defendant filed another suit against the first plaintiff seeking eviction of the first plaintiff from the said property. Therefore, Section 39 of the Transfer of Property Act would not assist the second defendant. Therefore, the right of the plaintiff to receive maintenance or provision for marriage can be enforced by creating charge on the property. This point is answered accordingly".

12-K. Even the decision placed reliance upon by the appellants on burden of proof no way laid down a different proposition to the above viz., Jetty Naga Lakshmi Parvathi vs. Union of India-it was held in para-19 referring to several expressions on burden proof and in applying rules regarding burden of proof, that Court has to concentrate upon substance and effect of issues raised. An issue must be proved by party who states affirmative, but not by party who states negative. Therefore, it is incumbent on each party to discharge burden of proof which rests upon him.

12-L. Thus, it is for the defendants 2-4 claiming as alienees for consideration of the plaint A & B schedules immovable property on which a charge is claimed by plaintiff, to prove that they are not only the bona fide purchasers for consideration respectively but also that without notice of the plaintiff''s prospective claim for maintenance and for a charge to be created on the properties. In fact, it is the 2nd defendant being the father of the 1st defendant who performed the marriage of 1st defendant and plaintiff in or around 1968 and the matrimonial differences between them so also from his written statement allegations of no cordial relation for her leading unchaste life and also admitted about the 1st defendant living with a concubine at other place. Thus, he cannot say even by the time of his alleged purchase any cordial relation between the couple and there could be no prospective claim for maintenance by his daughter-in-law, so also the case with the 3rd defendant no other than another son of 2nd defendant and brother of 1st defendant having been living together and also the case with regard to 4th defendant, the daughter''s son of 2nd defendant from that close relationship. The decision relied upon by the defendants-appellants of M.P. Sheodeni kuer vs. Umashankar under Section 39 of the T.P. Act of the same intended to protect persons entitled to receive maintenance from profits of immovable property, but such right available only when the transferee has notice thereof or gratuitous and not against transferee for consideration without notice of right and the onus to prove that the defendant transferee has notice of the plaintiff''s right is on plaintiff and cannot be inferred from the fact of her husband and plaintiff''s husband were brothers. In that case, on facts it was proved that they were residing for past several

years at far off places unconnected to each other of the family relation. As per the settled law, a little change even in the facts will tilt the result and thereby in the facts too supra apart from the same is no way a precedent but for persuasive value that too not in the factual matrix.

12-M. Even of the other decision relied upon of in Shivathanu Pillai vs. Muthammapachi Amma under Section 39 of the T.P. Act of the claim of widow of deceased of the property alienated in his lifetime to a bona fide purchaser for consideration without notice to the widow''s claim for maintenance, for no claim by the time of the agreement over the properties for alienation that too only of part of the properties, for no case made out of the same is gratuitous or fraudulent to make the property liable for charge.

12-N. In Pranlal Bhagvandas vs. Chapsey Ghella is a case for maintenance and marriage expenses claim from out of joint family properties with charge and held that the said right cannot be enforced against the property alienated already for the legal necessity of the joint family by the family manager to be given precedence.

12-O. Jamiatrai v. Mt. Malan was on the facts that where husband of a widow claiming right of maintenance or residence, makes an alienation of his property or incurs debt, his widow is not entitled to claim maintenance out of the property transferred or attached in execution of a decree unless such property has already been charged with her maintenance. Similarly, she is not entitled to residence in such property. The principle is that debts contacted by late husband take precedence over the maintenance of his widow as a charge on the estate. Therefore, a purchaser of property sold to discharge the debts of a late husband in his lifetime has good title against a widow who seeks to charge the estate with her maintenance unless that has been already done or who claims a right of residence therein. The case is however different if the son or a brother of the widow''s deceased husband. In that case the widow would be entitled to enforce her right of residence against property sold to pay off those debts unless it were proved that they had been incurred for family necessity.

12-P. Muniammal vs. P.M. Ranganatha Nayagar-relied upon it was held in paras-14 and 15 that a transfer of property for a debt incurred by the husband or by father, or by the manager of family for purposes binding upon the family, prevails over the claimant''s right to maintenance even the claim had not already been made a charge on the property transferred and under Section 39 of Transfer of Property Act also if a person has a right to receive maintenance from the profits of immovable property, and such property is transferred the right cannot be enforced against a transferee for consideration and without notice of the right, nor against such property in his hands.

13. These decisions have also no application for the present facts from what is discussed supra, apart from, what is laid down by the series of judgment of this A.P.

High Court, referred supra settling the law of bona fides or purpose of utilization of consideration not criteria but for want of notice or not even of the transferee for consideration of the property of the husband to be bound for charge to the claim of wife.

14. Coming to the notice (which includes constructive), Section 3 of the T.P. Act speaks that a person said to have notice of a fact when he actually knows that fact, or when, but for willful abstention from an enquiry or search which ought to have made or gross negligence, he would have known it. The explanation and its proviso deals with registration of an instrument shall be deemed to have notice from date of registration.

15. In fact, the equitable doctrine of notice which controls unconscionable transactions is recognized under the T.P. Act including by Section 39 of it if a transfer is made of property out of it a person has a right to receive maintenance, the transferee takes subject to that right if he had notice of it even non-gratuitous, but not otherwise and said notice is actual or constructive. Express or actual notice is whereby a person acquires actual knowledge of the fact whereas constructive notice is the equity which treats a man who ought to have known a fact as if he actually does know it. If the party charged has designedly abstained from enquiry for the very purpose of avoiding notice he has no shelter of no notice. Though fraud and negligence mutually exclusive conceptions, but Courts of equity extending their jurisdiction from fraud to negligence and included gross negligence in the doctrine of constructive notice. Thus, the legal presumption of knowledge for constructive notice arises from willful abstention from an enquiry, gross negligence, registration, actual possession or notice to an agent, where parties claim of perfectly innocence no shelter from drawing the inference of constructive notice as cases of gross negligence estopps a man from denying that he had notice of a fact generally. The Apex Court in dealing with a transaction bona fide or fraudulent within the scope of Section 53 of the T.P. Act held what are the bona fide enquiries supposed to be made and on its failure how cannot be claimed as bona fide purchaser without notice in Abdul Shukoor vs. Arji paparao wherein it was held that the burden even initially lies on the creditor to say the transaction is not bona fide, it is for the debtor to prove that it is not to defeat or delay the creditor the transaction entered but bona fide and for consideration and also after due enquiry supposed to be made having been made and could not know despite.

16. The above settled propositions laid down supra also reiterated, including on the constructive notice of the prospective claim for maintenance with charge against the alienee for consideration, in C. Yemuna vs. P. Manohara-on the scope of Section 39 TP Act on right to enforce charge on the property in the hands of alienees and extent of notice even constructive under Section 3 TP Act, at paras-12-15 relying upon the Judgment of Madras High Court in Raghavan v. Nagammal, holding that-it is not necessary that the rights to maintenance should become crystallized in the

form of a decree to enable the wife to proceed against the property in the hands of the husband or his transferees--" held that-

"Even on a bare reading of Section 39 of the Transfer of Property Act, clearly it recognizes that existence of right to receive maintenance can be enforced against the transferee. Therefore, it does not contemplate that such right has to be recognized in any other manner or culled out in a form of decree before any such transfer. Nor, any demand or assertion is a precondition for enforcement.

''Notice'' expression used should have broader connotation and cannot be construed literally to mean an intimation given. Aptly, it should mean knowledge and awareness. As long as a right exists under the law, it is obvious notice to one and all. Any claim made through legal process is only an enforcement of such right.

Further, the object of the provision is to safeguard the rights of a woman towards maintenance. Where one seeks to enforce such right, any transfer made is subject to such recovery. Therefore, it has to be held that since the documents in favour of the appellants are much prior to the present claim, it cannot be said that the items covered thereunder cannot be proceed against for charge towards maintenance by the wife.

It is relevant to note the definition clause as provided for under Section 3 of the Transfer of Property Act, wherein the expression "a person, is said to have notice" is defined as of a fact when he actually knows that fact, or when but for willful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it. The explanation as provided thereunder sufficiently and amply makes the situation very clear that the said expression takes in all such knowledge which would have been well within its know of. Thus, in its legal sense notice can be termed as an information concerning a fact actually communicated to a party by an authorized person, or actually derived by him from a proper source, or else presumed by law to have been acquired by him, which information is regarded as equivalent to knowledge in its legal consequences . It therefore follows that the notice is the making something known, of what a man was or might be ignorant of before. Hence, knowledge of any fact would put a prudent man upon inquiry.

In the circumstances, the expression ''notice'' used under Section 39 of the Transfer of Property Act has to be read along with the definition clause as contained in Section 3 thereof which could only lead to a conclusion that where a person is fully aware of the existing rights of the parties and more so where such transferee is a member of the family, it cannot be said that he is not aware of the rights of the other members or persons forming part".

On facts held that as per Section 39 of the Transfer of Property Act that the section contemplates that where any transfer is affected for consideration, the right to claim maintenance can be enforced against such transferee unless he has no notice of

such right. Admittedly, the appellants are not total strangers, but they are part and parcel of the same family. The appellants are the sisters of the husband of the respondent-plaintiff and thus they cannot possibly plead total ignorance. Further, in regard to the right of maintenance is concerned, it is now well established that such right exists the moment a woman gets married to husband and continues to remain. Merely because, no claim is made in any format or no suit is filed, nor any decree is obtained, would not either affect such right, nor can it be said that the claim only comes into being on the date of filing of such suit. Any claim for maintenance in a Court of law is only in pursuance of an existing right as contemplated under the law.

17. lt is the contention by the counsel for appellants by placing reliance upon the expression of Apex Court in Shri Ravinder Kumar Sharma vs. RFA 757/2002 16 State of Assam, that in the absence of cross-examination of the witness by the adverse party, rule of justice requires that the party cross examining must put the crucial and important part of his case to the witness of the other side in his cross-examination and if no question is put to the witness in the cross examination with regard to a certain fact challenging the same, then such fact has to be presumed to be true. No doubt there is no quarrel on the proposition but for to say whether there was any pleading in this regard and in the absence of which, merely because the attention of the said stray sentence of the witness, inadvertently not drawn attention while cross-examination to put a question on it by itself does not amount to admission but for to read the entire evidence as a whole to cull out such is the admission or not from non-testing by cross-examination of said sentence. Here, there nothing worth to say no material cross-examination of the defendants'' witnesses by plaintiff to take anything as admission that too in the factual matrix the burden on the defendants to establish lack of notice of the prospective claim of plaintiff being close relatives and not strangers. Further, so far as the alienation in favour of defendant No. 4 concerned, it is not separate and independent but combined with 3rd defendant from the 1st defendant both are his uncles, appears through even 2nd defendant-the father of defendants 1 and 3 and grandfather of 4th defendant and even the 4th defendant resides away to the defendants 1 to 3, since it is not independent but combined and notice of 3rd defendant is equally deemed notice to 4th defendant from the combined transaction entered by them thereby he cannot take a shelter against drawing constructive notice of the prospective claim of the plaintiff against the 1st defendant of their relation as man and wife admittedly known to them so also their strained relationship, when law entitles therefrom under Section 18 of the HAM Act referred supra with Section 39 of the T.P. Act, to claim maintenance with charge over the property. Thus, prudence requires on their part at least to intimate the plaintiff of their prospective purchase if not also of meeting a provision from sale consideration for said maintenance otherwise to indicate her relinquishment of charge over the property prospectively for ever to make her a co-executant of the documents or even at least as attestor by

referring the purpose of her attestation so also the daughters of plaintiff and 1st defendant even by then unmarried for they also having claim for maintenance and marriage expenses as such still the defendants none can pretend bona fides and lack of notice of the prospective claim of plaintiff for maintenance with charge over the properties while they were entering to purchase even for alleged discharge of debts, as it is not any involuntary Court sale for any auction purchaser but so called voluntary sale which the plaintiff claims even a collusive and fraudulent to defeat her prospective right and the tenor of the contention and evidence of the defendants 1 to 4 sailing together almost as detailed supra is an indication of the same as inferred to the said reasoned conclusion of the trial Court and as such for this Court while sitting in appeal there is nothing to interfere either on facts or on law. Accordingly, point-1 is answered.

Point No. 2

18. In the result, appeal is dismissed with no costs. Consequently, miscellaneous petitions. If any, pending in this appeal shall stand closed.