

(1975) 11 AP CK 0005

In the Andhra Pradesh High Court

Case No : Second Appeal No. 298 of 1974

Alluri Bala Satya Krishna Kumari and Another

APPELLANT

Vs

Alluri Varalakshmi and Others

RESPONDENT

Date of Decision : 21-11-1975

Acts Referred:

Hindu Adoptions and Maintenance Act, 1956 — Section 20, 28
Transfer of Property Act, 1882 — Section 39

Citation : AIR 1976 AP 365 : (1976) 1 APLJ 253

Hon'ble Judges : Venkatrama Sastry, J

Bench : Single Bench

Advocate : M. Jagannadharao, for the Appellant; T.H.B. Chalapathi Rao, for the Respondent

Judgement

1. Plaintiffs are the appellants in this second appeal, which arises out of their suit for maintenance instituted against the respondents herein and their putative father Alluri Ramachandra Venkata Krishna Rao, impleaded as the first defendant in the suit, in the following circumstances.

2. Plaintiffs claimed to be the illegitimate sons of the first defendant, having been born respectively on 10-6-1960 and 26-8-1963. Their mother was a permanent concubine of the first defendant. Second defendant is the wife of the first defendant while the other defendants are their children. After the birth of the first plaintiff, the second defendant and the father of the first defendant, made the first defendant to execute a settlement deed on 30-6-1961 (Ex. B-9) in favour of defendants 3 to 7 in respect of plaintiff. A scheme properties and Item 1 of the B Schedule. The first defendant alone continued in possession of these properties. He executed an agreement on 4-3-1964 agreeing to give 80 cents of the land to the plaintiff's mother and also pay maintenance to the plaintiffs at the rate of Rs. 50/- each and to provide for their education. Since May 1967, the first defendant stopped visiting the plaintiff's mother. He executed again another nominal gift deed in favour of the 8th defendant on 5-7-1967 (Ex. B-8) in respect

of plaintiff B Schedule property in order to defeat and delay the claims of the plaintiffs for maintenance. Plaintiffs claimed that the first defendant is bound to maintain them, who are his illegitimate children. The first defendant's family gets an annual income of Rs. 40,000/-. Hence each of the plaintiffs claims maintenance at the rate of Rs. 75/- per month and at least Rs. 200/- per annum towards residence.

3. Defendants 3 and 4 contested the suit stating that the settlement deeds are true and valid and are binding on the plaintiffs and that they (defendants) are not liable for the suit claim. They also denied that the plaintiffs' mother was the exclusive concubine of the first defendant and the plaintiffs were born to them. The income of the properties was not Rs. 40,000/- per year as alleged by the plaintiffs, but only Rs. 3,500/- to Rs. 4000/- per year. The other defendants filed a separate written statement contending that the second defendant has a right to be maintained by the other defendants from out of the income of the family properties. In other respects they adopted the written statement of the defendants 3 and 4.

4. On the above pleadings the trial Court framed appropriate issues. On the first issue it was found that the plaintiffs' mother and the first defendant lived like wife and husband and the plaintiffs were born to them on account of the exclusive concubinage of their mother with the first defendant. On issue No. 2, it was found that the agreement dated 4-3-1964 (Ex. A-11) executed by the first defendant to the mother of the plaintiffs was true, but it was not binding on the defendants 2 to 8. On issue No. 3 it was found that the two settlement deeds Exs. B-8 and B-9 are only gratuitous transfers and they are not the result of the family arrangement as pleaded by the contesting defendants. On issue 4, it was found that the plaintiffs are entitled to maintenance at the rate of Rs. 40 per month and Rs. 100 per year towards provision for residence and that they are also entitled to a charge, but the second plaintiff, who was born subsequent to the document, Ex. B-0, cannot claim a charge over those properties. In the result the suit was decreed for the maintenance aforesaid against the first defendant with a charge against A Schedule properties and Items 2 and of B Schedule properties, so far as the first plaintiff was concerned and against the B Schedule properties only so far as the second plaintiff is concerned.

5. Defendants 2 to 8 alone preferred appeal A.S. No. 339 of 1971 before the learned Subordinate Judge, Tanuku, wherefrom it was transferred and numbered as A.S. 58 of 1971 on the file of the Subordinate Judge's Court, Kovvur. The learned Subordinate Judge, Kovvur also found that the plaintiffs are the illegitimate children of the first defendant and the two gift deeds Exs. B-8 and B-9 are gratuitous transfers. The learned Subordinate Judge however held that though the two said gifts were hit by section 39 of the Transfer of Property Act, as per Section 20 of Hindu Adoptions and Maintenance At the plaintiffs are not entitled to a claim of charge over the suit properties. The appeal was therefore partly allowed and the charge created in favour of the plaintiffs by the trial

court's decree was deleted.

6. In this second appeal preferred by the plaintiffs we are only concerned with the question as to whether the plaintiffs are entitled to a charge over the properties covered by the two gratuitous transfers.

7. It is the contention of Mr. M. Jagannadha Rao, learned counsel appearing for the appellant that the right of an illegitimate son to get maintenance is recognised by Section 20 of Hindu Adoptions and Maintenance Act and that once that right is established a charge can be created against the properties covered by such gratuitous transfers. The learned counsel has taken me through the law before and after the Act 78 of 1956. According to him the liability to pay maintenance is not only a personal one, but also a property liability even under the new Act.

8. On the other hand Mr. T.H.B. Chalapathi learned counsel appearing for the contesting defendants, argued that the right created by Section 20 is only a personal right, that the right of a wife to claim charge is different from the right of an illegitimate son and that the new Act 78 of 1956 does not contemplate creating a charge on property. He has taken me through the Sections 27 and 28 in this respect. According to the learned counsel charge can be created only u/s 28 for the defendants. If a person is not a defendant, no charge can be provided by reason of Section 39 of the Transfer of Property Act. His contention is that Section 39 of the T.P. Act would apply only to cases arising under Hindu Law prior to 1956. By virtue of the Act 78 of 1956, the law was codified law, which does not speak of any charge being created in favour of a person, who is not a defendant. Both sides have relied upon a few decisions, which will also be presently referred to deal with the claim for maintenance under the Hindu Law of a son, legitimate or illegitimate, and a wife as it stood prior to the Act 78 of 1956 and as it stands today under Act 78 of 1956.

9. According to the Hindu Law prior to Hindu Adoption and Maintenance Act, Act 78 of 1956 (hereinafter referred to as the Act) the liability of a Hindu to maintain others arises in some cases from 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 from the very 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 heirs 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 infirm 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 infirm 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 are the relatives of the deceased and who compensation 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 under this Act shall not be a charge on the estate of the deceased or any portion thereof, unless one has been created by the will of the deceased by a decree of Court, by agreement between the dependent and the owner of the estate or portion, or otherwise."

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 to receive maintenance out of an estate and such estate or any part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer is gratuitous, but not against the transferee for consideration and without notice of the right."

This section is on par with, Section 29 of the T.P. Act with only this difference, that this section applies only to a dependent, as defined u/s 21 and not to others, who are entitled to claim maintenance under this Act as envisaged by Sections 18 and 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 such cases. There is nothing in the Act excluding the applicability of

Section 39 of the T.P. Act. As 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 v. Venkayamma*, AIR 1957 A P 710 : (1956 2 Andh WR 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 u/s 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 v. 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 out of her married status. They also prohibit the alienation of properties by the husband which has the effect of depriving her and other dependents of their maintenance. They further treat her as a member of a Hindu joint family entitled to be maintained out of joint funds. The decisions of the various High Courts 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 alienee with notice of her claim"

16. Though this appeal arose out of a suit instituted prior to the Act, the rationale of the said decision applies with equal force 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 v. Krishna*, (AIR 1958 Mys 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 u/s 30 of the T.P. Act. It was also similarly ruled by Veeraswami, J, in Ramaswamy Goundar and Another Vs. Baghyammal and Others, . Such a right to maintenance of a wife cannot be defeated by a gratuitous transfer (vide Ramappa Parappa v. Gourwwa, (AIR 1968 Mys 270).

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 and 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 v. Sevuga Pandia Thevar, (1963) 2 L J 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 Benarsi Das and Others Vs. Chander Kishore and Others, that the right is only personal and legal in character and there cannot therefore be a charge u/s 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 recognised 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 u/s 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.