
(1999) 09 AP CK 0071
In the Andhra Pradesh High Court
Case No : Appeal No. 1388 of 1987

Kolasani Sivakumari and others

APPELLANT

Vs

Kolasani Sambasiva Rao and others

RESPONDENT

Date of Decision : 30-09-1999

Acts Referred:

Hindu Adoptions and Maintenance Act, 1956 — Section 23

Citation : (2000) 1 ALD 750 : (2000) 1 ALT 601 : (2001) 1 DMC 75

Hon'ble Judges : T. Ch. Surya Rao, J

Bench : Single Bench

Advocate : Mr. C. Trivikrama Rao, for the Appellant; Mr. B. Adinarayana Rao, Mr. V.L.N.G.K. Murthy, Mr. M. Ramaiah, Mr. G. Dharma Rao, for the Respondent

Judgement

1. This appeal arises out of a common judgment dated 26-9-1979 passed by the learned Principal Subordinate Judge, Guntur, in OS No.193 of 1976 and OP No.12 of 1977.

2. OS No.193 of 1976 is the suit filed for (1) partition of the suit "A" schedule mentioned properties, (2) for declaration that the alienations made in favour of the defendants 2 to 11 are collusive, nominal, (3) for recovery of maintenance to the 1st plaintiff at the rate of Rs.3,600/-per annum and Rs.2,000/- towards residence, and (4) for recovery of movable properties mentioned in the plaint "B" and "C" schedules. OP No.12 of 1977 is the petition filed by the 1st defendant-husband u/s 9 of the Hindu Marriage Act for restitution of conjugal rights against the 1st plaintiff. The appeal has been filed against that part of the judgment dismissing the claim of the plaintiffs while decreeing the suit for partition and in regard to the quantum of maintenance. OP No.12 of 1977 has been dismissed and the order has become final, since no appeal has been filed.

3. The parties can be referred to as arrayed in the suit so as to avoid any confusion.

4. Briefly stated the facts are thus :

The first plaintiff is the wife and the plaintiffs 2 and 3 are the sons of the 1st defendant herein. 2nd defendant is the younger brother of 1st defendant. Defendants 3 to 13 are the subsequent alienees. Defendants 1 and 2 together constitute a joint Hindu family which owned extensive properties. They were brought up by their paternal grandmother as their parents died during their childhood. On G. Koteswara Rao, advocate, was appointed as the guardian for the properties of defendants 1 and 2 in OP No.183 of 1960 on the file of the District Court, Guntur, and their paternal grandmother by name Mahalakshamma was appointed as the guardian for the person of the minors. The marriage of the first plaintiff with the first defendant was performed on 30th April, 1971. For the marriage expenses the father of the first plaintiff by name Nalluri Nageswara Rao advanced an amount of Rs.10,000/- on the promise to repay the same with interest at 12% per annum. At the time of the marriage the said Nageswara Rao gave to the first defendant the gold ornaments and other movable properties as described in the "B" schedule attached to the plaint. The second plaintiff was born to them, after both of them lived together for some time. In the meanwhile the first defendant was declared as major on 22-4-1972. He then took possession of lands and other properties from the property guardian, and he was also appointed as guardian of person and property of his younger brother. By then it was reliably learnt that an amount of Rs.21,000/- was lying to the credit of OP No.183 of 1960 having been deposited by the properly guardian after realising the same from the tenants. The first defendant had withdrawn the same and also several other amounts time to time from the Court for carrying on agricultural operations in the lands. There was certain outstanding dues from others to the family of the defendants and the first defendant realised those debts also. Unfortunately, the first defendant was given to bad ways and addicted to women, wine and gambling, and thus indulged in wasteful expenditure. The second defendant was declared as a major on 25-3-1974. But defendants 1 and 2 continued to be joint. The first plaintiff who became pregnant again was got admitted on 10-10-1975 in Sujata Nursing Home at Ponnur for confinement after taking away all the jewellery from her person by the first defendant. The third plaintiff was born on 11-10-1975. The first defendant took away the second plaintiff when the first plaintiff in the hospital for confinement and later he did not visit her and totally neglected her. He did not even care to bring her back to the house from her parents house as she went away from hospital to her parents house after delivery. In the meanwhile, the first defendant entered into some collusive and sham alienations with his brother the second defendant and defendants 3 to 11, without any need or necessity, either to incur debts or to alienate the lands sold away the jewellery presented to him by the parents of the first plaintiff and misappropriated the amount for his wasteful habits. He sold the jewellery mentioned in the "B" schedule to the 12th defendant. The first plaintiff, therefore, got a notice dated 18-11-1975 issued to the first defendant requesting him to make a provision for her maintenance and residence and also for return of the gold and silver jewellery presented at the time of marriage. She has also sought for the custody

of the second plaintiff. Later she filed the suit for partition and for cancellation of the alienations made by the first defendant in favour of defendants 2 to 11 and 13.

5. The sixth defendant remained ex parte in the suit. Defendants 1 and 2 filed separate written statement. Defendants 3, 4, 5 and 6 filed separate written statement. Defendants 7, 8, 10 and 11 filed separate written statement. Defendants 9, 12 and 13 filed individual written statements.

6. The first defendant while denying the allegations of addicting to vices stated inter alia in the written statement that Nageswara Rao, the father of the first plaintiff, was heavily indebted to others to the tune of R.1,00,000/- even by the date of the marriage of the first plaintiff with him, and therefore, he requested the first defendant to raise funds for him and in that connection the first defendant executed some joint promissory notes along with the said Nageswara Rao and accommodated him to the tune of Rs.40,000/-. In the meanwhile his father-in-law, the said Nageswara Rao, ventured to raise cotton crop by taking the lands on lease at Gottipadu and Gurazala villages to an extent of 30 acres. As it required heavy investment, the said Nageswara Rao requested the first defendant to raise funds at Vatticherukur village, native place of the first defendant. Therefore, the first defendant had to borrow from various creditors in his village and expended the same towards the cotton crop with fond hope that they would realise large profits and would be able to discharge the debts. But, ultimately they incurred loss in the venture. The creditors began to press him for repayment of the loans. The first plaintiff was given at the time of her marriage three acres of wet land towards pasupukunkama and when the first defendant demanded his father-in-law to execute a document in regard thereto, his father-in-law started picking up quarrels. The gold ornaments were taken away by the said Nageswara Rao himself from the possession of the first plaintiff. He then slowly poisoned the mind of the first plaintiff and got ultimately filed the present suit for partition. There was a partition in between the defendants 1 and 2 and the first defendant got a thatched house towards his share, while the second defendant got a residential terraced building. The first defendant, therefore, invested Rs.24,000/- for raising foundation and for laying the RC concrete on the foundation, and for that purpose borrowed monies from the third parties. As all the creditors were pressing him he had to alienate some of his properties in favour of the defendants 2 to 11 and 13. Therefore, all the sales have been effected to discharge lawful debts which are therefore binding on the minor plaintiffs also. It was not beneficial in the interest of the minors to partition of the joint family properties of the first defendant and the plaintiffs 2 and 3.

7. The second defendant pleaded inter alia in the statement that there was a partition by metes and bounds in between the brothers in the summer of 1973 itself and in the said partition he got the properties mentioned in the schedule annexed to the written statement filed by him. It is the plea in essence of the other defendants that the alienations made by the first defendant were for family

necessities and for discharging the antecedent debts.

8. Basing on the above pleadings the following issues have been framed by the trial Court:

- (1) Whether the partition sought for is in the interest of the minor plaintiffs ?
- (2) Whether the first defendant and second defendant have already divided the family properties, and the properties mentioned in the schedule filed along with the written statement of the 2nd defendant fell to the share of the second defendant ?
- (3) Whether the various alienations of joint family properties by the first defendant in favour of defendants 2 to 11 are binding on the plaintiffs ?
- (4) Whether the said alienations are nominal, collusive and void as contended by the plaintiffs ?
- (5) Whether the movables mentioned "B" and "C" schedules were in existence at any time and if so, whether the plaintiffs are entitled to recover them from the first defendant ?
- (6) Whether the 12th defendant is necessary party to the suit ?
- (7) To what relief?

9. The following additional issues have been framed subsequently :

- (1) Whether alienation in favour of the 12th defendant is true and binding on the plaintiffs ?
- (2) Whether the decree in OS No. 103 of 1976 is not binding on the plaintiffs ?
- (3) To what equities, if any, 13th defendant is entitled to ?

10. At the time of the trial, the first plaintiff examined herself as PW1 besides examining her father as PW2 and got Exs.A1 to A22 marked. On the side of the defendants as many as 16 witnesses were examined and the documents Exs.B1 to B83 were got marked.

11. Upon considering the evidence on record and upon hearing both sides, the Court below decreed the suit as aforesaid preliminarily for partition of the properties mentioned in the schedule and for return of 78.200 ml. grams of gold ornaments or in the alternative the value thereof and for maintenance of the first plaintiff at the rate of Rs.80/- per month from the date of suit while creating a charge on the 1/3rd share of the first defendant, while dismissing the rest of the claim. While decreeing the suit, the Court below observed that there was partition between the defendants 1 and 2 inter se and that the various alienations made by the first defendant in favour of defendants 2 to 11 and 13 are binding on the plaintiffs and they are not nominal, collusive and void transactions.

12. Having been aggrieved by that part of judgment dismissing their claims the plaintiffs as aforesaid filed the present appeal.

13. The learned Counsel for the plaintiffs has contended that all the debts have been contracted by the first defendant over a period of two to three years and most of the alienations made by defendant No.1 have been shown for discharging the debts incurred by the father-in-law of the first defendant. It has been further contended that there was no demand from the creditors, and therefore, there was no need to sell the properties and therefore the alienations are not for any legal necessity and for the benefit of the joint family. The learned Counsel for the defendants on the other hand has contended that the debts contracted by the first defendant being the kartha of the family can be avoided only on the ground that they have been contracted for illegal or immoral purposes, but not on the ground of want of legal necessity. The learned Counsel has further contended that there has been no plea or proof to establish that the first defendant has contracted all the debts for illegal and immoral purposes, and therefore, they are Avyavaharika debts.

14. The points, therefore, that arise for my determination in this appeal are :

(1) Whether the debts and alienations made by the 1st defendant can be avoided by the plaintiffs validly ?

(2) To what quantum the first plaintiff is entitled to the maintenance ?

(3) Whether the first plaintiff is entitled to recover the remaining gold ornaments ?

15. The plaintiffs filed the suit on the assumption that the defendants 1 and 2 were joint and there had been no partition of the joint family properties among them inter se by metes and bounds. That is the reason why they prayed for the partition of the plaint "A" schedule properties into six equal shares. The Court below having due regard to the evidence on the point has come to the conclusion that there has been a partition in between defendants 1 and 2. That finding is now being assailed in this appeal. The presumption is in favour of the jointness. He who pleads division by metes and bounds is obliged to establish the same. On this issue of partition among the defendants 1 and 2 inter se their plea in the respective written statements is consistent that there has been a partition. The oral evidence adduced on the point through DWs.7, 8, 9, 10 and 15 apart, the second defendant relied upon the recitals made in Ex.B3 sale deed executed by the first defendant in his favour, besides relying upon the oilier documents to show that he had been in possession and enjoyment of the properties independently and separately from the first defendant. Reliance has been placed by him in proof thereof upon Exs.B32 to B39 and B40 to B48. Much reliance has been placed by the second defendant upon Exs.A6 registered notice dated 24-11-1975 got issued by the plaintiffs. PW1 admitted in the cross-examination that the recitals made in Ex.A6, to have been true. It has been claimed in the said notice the share of plaintiffs 2 and 3 in the divided half of the first

defendant. Of course, that has been denied by PW1. But a perusal of the document shows the same. In Ex.B3 sale deed also it has been clearly mentioned about the division and separate enjoyment of the properties. Although the alienation under Ex.B3 is being challenged, but it is on a different ground for want of legal necessity. It cannot validly be said that on visualising the future litigation the necessary recitals have been incorporated in Ex.B3 mentioning the partition between the defendants 1 and 2 inter se. The recitals in regard thereto in Ex.B3 cannot, therefore, be assailed on that ground. The transaction in Ex.B3 being real, regardless of the fact whether it is the plaintiffs 2 and 3 or not, credence has to be given to the recitals made therein till the contra is shown. Lot of evidence has been adduced in proof of separate enjoyment of the properties to buttress the plea of partition between the defendants 1 and 2 inter se. The land revenue receipts under Exs.B32 to B39, the property tax receipts under Exs.B40 to B42, the levy demand notice under Exs.B43 and B44 and the fertilizer cards under Exs.B45 and B46 lend any amount of assurance to the said plea. The land ceiling declaration, the verification report and the order passed by the Tribunal accepting the declaration filed in this case as Exs.B46 to B48 respectively further support the plea of the defendants. This overwhelming documentary evidence adduced on the point would in my considered view clearly bring home the plea that there has been division of properties by metes and bounds between the defendants 1 and 2 inter se. The finding of the Court below in regard thereto is well-founded and there are no compelling reasons for this Court to interfere with the same.

16. The debts contracted and the alienations made by the first defendant are now being assailed on the premise that there has been no need or necessity for making the alienations, and therefore, they are not for the benefit of the joint family consisting of the plaintiffs and the first defendant. The said plea is now sought to be resisted on the ground that the alienations made by D1 cannot be avoided by the plaintiffs except by showing, that the debts contracted by the first defendant in discharge of which the alienations have been made, to be Avyavaharika debts. It is, therefore, appropriate and expedient here to advert to the legal position first, so that the contentious issue of fact involved can better be appreciated and adjudicated upon.

17. The learned Counsel for the plaintiffs has sought to place reliance upon two judgments of this Court. The first among the two is in *Devabhaktuni Kesavanarayana v. Challa Lakshmavadhani* 1983 (2) An.WR 403. A Bench of this Court held in the said judgment as follows :

"However, where on the date when the mortgagee files a suit for preliminary decree for sale and is not able to obtain a mortgage decree on the sons on account of absence of legal necessity or antecedent debt and where the remedy to obtain a personal decree against the father is also barred on account of the Limitation Act or any other law for the time being in force, the mortgagee can proceed only against the father's share in the joint family property in pursuance

of the mortgage decree. He cannot proceed against the son's share on the basis of the theory of pious obligation, inasmuch the remedy to obtain a personal decree against the father is barred by limitation or any other law for the time being in force."

That was a case of mortgage debt. The recitals in the mortgage deed clearly show that the money was lent under a condition that a mortgage bond would be executed later. It is obvious, that there was no antecedent debt. Further more, by the time the suit came to be filed the period of limitation for obtaining personal decree as against the mortgagor was elapsed. Therefore, no personal decree could have been obtained as against the mortgagor. Upon these twin considerations it was held that the mortgagee cannot proceed against the son's share on the basis of the theory of pious obligation. The other decision of this Court is *B. Ranga Rao v. Venkata Krishna Rao* 1995 (2) ALD 301 (DB), this Court enunciated four principles, while holding that the alienees in that case had to establish one of the two requirements, viz., (i) the transaction was in fact justified by legal necessity or for the benefit of the estate, or (ii) that the alienees in that case had made reasonable and bona fide enquiries as to the existence of the necessity and satisfied themselves that the manager was acting for the benefit of the estate. The facts in that case disclose that the plaintiff was the son of the second defendant and defendants 2 and 3 are sons of the first defendant and defendant No.4 was the son of the third defendant and the plaintiff and the defendants 1 to 4 together constituted the Hindu joint family, of which the first defendant was the kartha. It is obvious therefore that it is not a case of father manager. It may be mentioned here that the distinction between a father manager and a brother manager cannot be lost sight of. In the case of debts contracted by the father manager, the son is bound to discharge the same on account of the doctrine of pious obligation notwithstanding the fact that the debt was contracted for no legal necessity, nor for the benefit of the family. The doctrine of pious obligation has no application in the case of the brother manager. Therefore, the debt contracted by the brother manager binds the other members of the joint family only when it was for legal necessity and for the benefit of the family. The doctrine of pious obligation has no application when the debt contracted by the father was for any illegal or immoral purposes.

18. The leading judgment of the Privy Council on the point in *Suraj Bunshi Koer v. Sheo Persad Singh* 6 IA 88. The Privy Council after reviewing the fundamental principles of the Mitakshara law and the prior decisions, laid down the following propositions thus :

"firstly, that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debts, his sons by reason of their duty to pay the father's debts cannot recover that property unless they show that the debts were contracted for immoral purposes and that the

purchaser had notice that the debts were so contracted; and secondly, that the purchasers at an execution sale, being strangers to the suit, if they have no notice that the debts were so contracted, are not bound to make inquiry beyond" what appears on the face of the proceedings."

19. Another leading judgment on the point is the judgment of the Privy Council in *Brij Narain v. Mangala Prasad* AIR 1924 PC 50. The Privy Council laid down five principles in the said judgment, thus :

"(1) The managing member of a joint undivided estate cannot alienate or burden the estate qua manager except for purposes of necessity; but

(2) If he is the father and the other members are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

(3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate.

(4) Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

(5) There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead."

The vexed question about the powers of the manager and the father to bind the undivided estate was finally resolved by the Privy Council in the said judgment. The Apex Court in *Luhar Amrit Lal Nagji Vs. Doshi Jayantilal Jethalal and Others*, , relying upon the judgments of the Privy Council referred to (*supra*), enunciated the principles thus : "the sons who challenge the alienations made by the father have to prove not only that the antecedent debts were immoral but also that the purchasers had notice that they were so tainted." Ultimately the Supreme Court has summed up the deductions thus :

"The propositions in question treated an alienation made for the payment of the father's antecedent debt on the same footing as an alienation made in execution of a decree passed against him and in both cases the principle enunciated is that in order to succeed in their challenge the sons must prove the immoral character of the antecedent debt and the knowledge of the alienee. Having regard to the broad language used in stating the two propositions we do not think that a valid distinction could be made between a mortgage and a sale particularly after the decision of the Privy Council in the case of *Brij Narain*, AIR 1924 PC 50."

As regards the theory of pious obligation, the Apex Court in the same judgment held thus :

"The doctrine of pious obligation under which sons are held liable to discharge their father's debts is based solely on religious considerations; the doctrine inevitably postulates that the father's debts must be *vyavaharik*. If the debts are

not vyavaharik or are avyavaharik the doctrine of pious obligation cannot be invoked."

The Apex Court was seized on the matter once again in *Fakir Chand v. Harnam Kaur* 1967 ACJ 811: AIR 1967 SC 727. While referring to the second proposition laid down by the Privy Council in *Brij Narain's* case (supra), the Supreme Court held that it applies not only to an unsecured debt but also to a mortgage debt which the father was personally liable to pay. It was further observed in the said judgment in Para 5 at Page 730 that even where the mortgage is not for legal necessity or payment of an antecedent debt the creditor can in execution of the mortgage decree sell the estate without obtaining a personal decree against him. The son is bound by the sale unless he shows that the debt was non-existent, or was tainted with immorality or illegality. Speaking for the Bench M. Jagannadha Rao, J., as His Lordship was then in *Kesavanarayana's* case (supra) held that the above observations of the Supreme Court would not apply to cases where the right to obtain a personal decree against the father was barred by limitation or any law for the time being in force. In other words, the judgment of A.P. High Court is that the sons' shares are not liable to discharge the mortgage debt of the father unless there is a personal decree against father. The mortgagee cannot proceed against the son's share in joint family property without obtaining a personal decree against the father when it is barred by limitation.

21. The position is thus clear. The sons who assailed the debts or the alienations of the father in order to succeed must prove that the transactions are tainted with illegality or immorality and the creditors or the purchasers as the case may be had notice of the tainted nature earlier thereto. Therefore, the contention of the learned Counsel for the plaintiffs that the alienations made by the first defendant in favour of the defendants 2 to 11 and 13 must be shown to have been made for legal necessity or for family benefit merits no consideration in view of the settled position of law.

22. It is appropriate for adjudicating this matter to see whether the alienations made by the first defendant in favour of the defendants 2 to 11 and 13 for the purpose of discharging the debts contracted by him have been in any way tainted with illegality or immorality. The terminology used by the Privy Council in the two judgments referred to supra in *avyavaharika*. Mr. Colebrooke translates the expression "*avyavaharika*" as "any debt for a cause repugnant to good morals". In *Hemraj v. Khem Chand* (1943) 71 IA 171, the Judicial Committee held that the translation of the term "*avyavaharika*" as given by Mr. Colebrooke makes the nearest approach to the true conception of the term as used in the *Smriti* text, and that the term does not admit of a more precise definition. The term commonly used in decisions and text books to describe those debts of the father for which the son is not liable is "illegal or immoral". The expression was doubtless originally meant to render "*avyavaharika*" but it has come to be used as a compendious term to cover all the cases enumerated in the *smritis*. It is, therefore, expedient to use the term "illegal or immoral" purposes then

"avyavaharika" which as discussed by me supra eludes any precise definition.

23. The plea of the first defendant as can be seen from the written statement is that his father-in-law the said Nageswara Rao ventured to raise cotton on lands taken on lease at Gottipadu and Gurazala villages in the year 1973 in about a total extent of 30 acres and that the said venture needed heavy initial expenditure, and that having already lost his credit in his village the said Nageswara Rao approached him to raise further funds in Vatticherukuru village and that he had to borrow from various creditors in his village and expended the same towards the cotton crop with a fond hope that they would realise large profits to discharge all their debts and that as ill luck would have it, the venture ended in losses and that therefore the creditors began to press him to repay their loans. Can this purpose be called as illegal or immoral purpose is the moot question. It is the contention of the learned Counsel for the plaintiffs that it is obviously not for legal necessity nor for the benefit of the family. I have already adverted to the said contention of the learned Counsel supra in my judgment, obviously the debt is not for any illegal or immoral purpose although the first defendant contracted the debts according to his plea for the sake of his father-in-law the said Nageswara Rao and had to alienate the joint family properties in which he and his sons are the members the plaintiffs cannot take shelter under the plea that no pious obligation is involved in the said debt inasmuch as it is not the personal debt of the father nor the debts contracted for the benefit of the family. As understood the legal position is so clear that so long as the purpose is not tainted with the element of illegality or immorality the sons are liable under the doctrine of pious obligation. Assuming for a moment that the first defendant made all the alienations for discharging the debts of his father-in-law in which obviously he too had also an avarious interest of getting huge profits, it cannot be said under any stretch of imagination that the purpose is tainted with any illegality. Undoubtedly it is not an immoral purpose. I am of the considered view, therefore, that the debts contracted by the first defendant are not vitiated having been tainted with the element of illegality or immorality. It may be mentioned here that there has been no specific plea taken in the plaint by the appellants that the debts contracted by the first defendant and the eventual alienations made by him in favour of defendants 2 to 11 and 13 are tainted with any illegality or immorality. No attempt has been made in that regard to prove the same by adducing any evidence aliunde except the ipse dixit of PW1 who deposed that her husband was given to bad ways subsequently and was addicted to women, wine and gambling. No other evidence has been adduced in proof thereof. The voluminous evidence adduced on the side of the defendants and is that of DWs.3 to 15 clearly establish that the first defendant had contracted debts and in discharge of the debts had to alienate the properties in favour of the defendants 2 to 11 and 13. It has been the contention of the learned Counsel for the plaintiffs at this juncture that all the debts to the tune of Rs.70,000/- to Rs.80,000/- have been contracted by the first defendant in a period of two to three years from 1972 to 1975 when the first plaintiff was away from him, and

therefore, it is the contention of the learned Counsel that it is an indicia that the debts are for illegal or immoral purposes. What is required for an effective adjudication is evidence aliunde, that too, the legal evidence, and certainly we cannot base our conclusions on some conjectures or surmises. In other words proof positive is required either direct or circumstantial. It is the further contention of the learned Counsel that DW15 has been the scribe for all the transactions made by the first defendant, and therefore, the necessary collusion can be inferred from out of it. I do not see any extraordinary circumstance in it. Once DW15 is the scribe available in the village naturally one may try to prefer him for all his transactions on account of the acquaintance or the draftmanship of the farmer and that circumstances cannot be taken to mean the necessary collusion between them. So long as it is not proved that the alienations made by the first defendant are tainted with immorality, the circumstance even assuming for a moment that defendant No.1 was addicted to vices alone cannot and will not tilt the scales. The purpose of the transaction must be shown to be immoral. The evidence available on record falls far short of the required proof. Evidently, the burden is upon the plaintiffs to prove the twin considerations - that the alienations made by the first defendant are tainted with illegality or immorality and the purchasers have knowledge of the same antecedent to the transactions and having known the same have pushed through the transactions. Neither there is a plea to that effect, nor there is requisite proof in this case. Therefore, I see no reason to interfere with the finding of the Court below that the alienations made by the first defendant are valid and binding upon the 2nd and 3rd plaintiffs.

24. As regards the mortgage debts under Exs.B28 and B29, there has been no recital to the effect that the debts have been contracted for discharging any antecedent debts. But the evidence of PWs.11 and 12 clearly shows that those debts have been contracted for the purpose of constructing the house by the 1st defendant. The evidence of DWs.11 and 12 on this aspect has not been shaken in any way in the cross-examination. A combined reading of the recitals under Exs.B28 and 29 and the evidence of the mortgagees viz., DWs.11 and 12 would clearly establish that the debts covered by those documents have been contracted for a legal necessity though not for discharging any antecedent debt. By the date of the suit the right of the mortgagees to have obtained a personal decree against D1 has not been barred by limitation. Therefore, the plaintiffs cannot validly impeach those debts. A condition has been incorporated in the documents that in (he event of the debts remained undischarged even after a period of two years therefrom, the mortgagor should sell the properties upon which the security has been created under those documents. It appears, pursuant to the said recitals the properties covered by those two documents have been sold away pending disposal of the suit. Those subsequent alienations have not been challenged by bringing in the necessary amendments to the pleadings. Any way, as afore discussed, the debts covered by Exs.B28 and B29 have been contracted for a legal necessity by D1, the plaintiffs, cannot validly impeach the same.

25. In this appeal, the first appellant-plaintiff is also assailing the quantum of maintenance granted by the Court below in favour of the first plaintiff at the rate of Rs.80/- per month. Section 23 of the Hindu Adoptions and Maintenance Act is the relevant section which deals with the quantum of maintenance. According to this section, it shall be the discretion of the Court to determine what maintenance shall be awarded. In doing so the Court shall have due regard to the considerations set out in sub-section (2) thereof. Sub-section (2) ordains that the position and status of the parties, the reasonable wants of the claimant, whether the claimant is justified in living separately, the properties possessed by the claimant if any, and the number of persons entitled to maintenance. PW1 admittedly has been living separately from her husband. The petition filed by the first respondent for restitution of conjugal rights has been dismissed and the decision given therein has become final. There can, therefore, be no doubt that PW1 can legitimately claim maintenance from her husband. The quantum has been fixed by the Court below taking the income of the defendant alone is the criterion. The Apex Court in *Dr. Kulbhushan Kumar Vs. Smt. Raj Kumari and Another*, has observed that the quantum of maintenance depends upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families; a survey of the conditions and necessities and rights of the members and a reasonable view of the change of circumstances possibly required in the future, regarding being, of course, to the scale and mode of living and to the age, habits, wants and class of life of the parties. Determination of the quantum of maintenance is not left to caprice but to the exercise of sound discretion by the Court. The approach of the Court below although cannot be said as totally wrong, however, it failed to consider the necessary indicia as enjoined under subsection (2) of Section 23 and as envisaged by the Apex Court in the judgment referred to supra, more particularly the changed circumstances that might obtain in future. Having due regard to the circumstances prevailing then at the time when the judgment came to be passed in the year 1979 and having regard to the family background and status of the parties and considering the dire necessities of the first plaintiff to sustain herself in the manner befitting the dignity of the family of the first defendant, the quantum of maintenance granted by the Court below at Rs.80/- per month is certainly on low side. The rate of maintenance claimed by the first plaintiff is at Rs.300/- per month. True even at that rate in the present days one will certainly be not able to make both the ends to meet. But, it is for the first plaintiff to claim enhancement depending upon the changed circumstances and the escalation of prices. Having regard to the respective contentions and regard also being had to the indicia enjoined u/s 23(2) and the judgment of the Apex Court I am of the considered view that the quantum of maintenance if granted at Rs.200/- per month would meet the ends of justice. The judgment and decree of the Court below are to be modified to that extent.

26. On the issue of return of the movables mentioned in plaint "B" and "C" schedules, having found no evidence worth considering the Court below

ultimately proceeded to grant the relief for return of the gold ornaments weighing 78.200 ml. grams after having considered the evidence of DW16 who is the 12th defendant, the finding of the Court below on this issue is sound and well founded, and therefore, cannot be interfered with.

27. In the result, the appeal is allowed in part and the judgment and decree of the Court below are modified to the extent of granting maintenance at the rate of Rs.200/-per mouth while confirming the rest of the judgment and decree passed by the Court below. Under the circumstances, there shall be no order as to costs.