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“TRANSFER OF PROPERTY ATTACHED WITH THE MAINTAINENCE”

RESEARCH PAPER

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This is to certify that this Doctrinal Research entitled “TRANSFER OF PROPERTY ATTACHED WITH THE MAINTENANCE” is a bonafide record of independent work done by Sumithra.M in a partial fulfillment of the requirement for the degree of B.A LLB(hons) in during the academic year 2012 – 2017 under my guidance and supervision in the Under Graduate Department Of Law,Saveetha School of Law Saveetha University, chennai – 117.

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OBJECTIVES:

The Transfer of Property Act, 1882 (hereinafter referred to as the ‘T P Act, 1882’) was intended to define and amend the existing laws and not to introduce any new principle. It applies only to voluntary transfers. The following may be enumerated as the objectives of the Act:

- As per the preamble of the Act, the T P Act, 1882 is to amend or regulate the law relating to transfer of property by the acts of the parties.
- The Act provides a clear, systematic and uniform law for the transfer of immovable property.
- The Act completes the Code of Contract since it is an enacted law for transfers that take place in furtherance of a contract.
- With provision for inter-vivo transfers, the T P Act, 1882 provides a law parallel to the existing laws of testamentary and intestate transfers.
- The Act is not exhaustive and provides scope to apply the principles of Justice, Equity and Good Conscience if a particular case is not governed by any provision of law.

HYPOTHESIS:

The question arises in transfer of property act of 1882 under section 39 of transfer where third person is entitled to maintenance and how it is useful to the people under Indian law.

RESEARCH METHODOLOGY:

This research is purpose to be carried out by in transfer of property act 1882 and also the status quo in the legislation under the maintenance for the third person is entitled to maintenance. The secondary data will be collected to be analyzed. Secondary data will be collected through content analyze methods where the researcher will deduct and analyze the data from various material such as book and journals which relating to the issue of maintenance and with internet sources.

LIMITATION:

Limitation on Transfer: The Act applies to transfer by the act of parties and not by application of law. Thus, its operations are limited to transfers by act of parties only except in a few cases saved by Section 39 of the Act.

INTRODUCTION:**SECTION 39: TRANSFER WHERE THIRD PARTY IS ENTITLED TO MAINTENANCE-**

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 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.

PRINCIPLE:

The maintenance of a Hindu widow is not a charge upon the estate of her deceased husband until it is fixed and charged upon the estate by a decree or by agreement, and the widow's right was, at one time, liable to be defeated by a transfer of the husband's property to a bona fide purchaser for value even with knowledge of the widow's claim for maintenance, unless the transfer had, further, been made with the intention of defeating the widow's claim. The words "*with the intention of defeating such right*" gave rise to difficulty of the proof of intention superadded to notice of right which has now been laid down as quite sufficient to protect the interest.

AMENDMENT:

Section 39 of the transfer of property act, states as follows:

“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 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.”

The above provision was amended, by the amending act 20 of 1929. Before the amendment, it was necessary to prove that the transfer was with the intention of defeating such a right. But this was taken away under the amendment. Hence, under the present section, if a person has a right to receive maintenance from the profits of immovable property and such property is transferred, the right can be enforced against the transferee, if he has notice thereof. Thus, it was not necessary for the plaintiffs to prove that the transfer was within the intention of defeating their rights. Now, the only question to be considered is, whether defendants 2 and 3, had notice thereof. Soon after the amendment of sec.39, the matter came up for consideration before the Privy Council, where it was held as follows:-

MEANING OF WORDS:

As provided under sec.39 where a third person has a right to receive maintenance, if the property is purchased with the knowledge of that right so long as it subsists that right can be enforced against transferee at any time.

The right of the maintenance holder cannot be permitted to be defeated by transfer of the property, nor can, in such a case the transferee with notice be permitted to acquire rights which are higher than those of the transferor. Therefore when it is stated in sec.39 of the Transfer of property act, “where a third person has a right to receive maintenance” it means not only the right to receive maintenance in the first instance but also the right to receive enhanced maintenance if there is a material change in the circumstances.

SECTION 28 OF THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956, HAS NOT OVERRIDDEN SEC.39 OF THE ACT:

It is not correct to say that sec.28 of the Hindu adoptions and maintenance act, 1956 has overridden sec 39 of the transfer of property act in its application to a Hindu wife in respect of her maintenance. Section 28 of the 1956 act does not purport to deal with the wife's right and is only confined to dependants and is, therefore, not exhaustive and a Hindu wife is still

entitled to rely on sec.39 of the transfer of property act which is entirely left unaffected by the 1956 act.

It is clear from the provision of sec.28 of the Hindu adoption and maintenance act, 1956, and sec.39 of the transfer of property act, that the right to maintenance in a proper case is not defeated by a gratuitous transfer by the person liable to pay maintenance.

EFFECT OF THE SECTION :

The charge is created in terms of statutory provisions contained in sec.39 of the transfer of property act. Once the court came to the conclusion that the transfer was not bona fide transfer without notice, then sec.39 of the transfer of property act should operate without hindrance. One must not overlook the effect of section.39 which is that if alienation is made of the husband's property with notice of the right of his wife to maintenance, the alienation will not affect her right in any way.

SCOPE OF THE SECTION:

It is to sec.39 of the transfer of property act that one has to look to before the transfer which affects the right to maintenance is impeached. It seems, however, to be plain that neither the texts of Hindu law nor sec.39 creates any right or interest in immovable property on the ground of maintenance. Right to maintenance and right to property are two distinctly separate things and should not be confused when one considers sub section(2) of sec.14 of the Hindu succession act. Unless, therefore, in the discharge of an obligation to maintain, any specific property is given in possession of or transferred, it cannot be validly contended that the woman has the right to the property in lieu of her maintenance.

WHAT RIGHTS PROTECTED:

The rules protect three definite rights, namely:

- A right to maintenance
- A provision for marriage
- A provision for advancement

The nature of these rights differs according to the personal law of the persons claiming them. Thus, while the Hindu widow has a peculiar place in Hindu jurisprudence, her position bears no analogy to English or Mohammedan law.

Section 39 of the transfer of property act protects the right of the widow to maintenance from her husband's share of joint family property against improvident alienations by the surviving coparceners. Where the property belonging to different owners is subject to a common charge for the maintenance of a widow, each of them is liable to contribute according to the value of the property of which he is the owner. A property or fund which is equally liable with another to pay debt should bear its just share of the debt. This rule of contribution is based on justice, equity and good conscience.

MAINTENANCE NOT A CHARGE:

The right of maintenance, even of a Hindu widow, is an indefinite right which falls short of a charge¹. It is not a charge unless it has been made a charge by decree or agreement², or unless the widow is in possession of specific property allotted for her maintenance.

In such cases, notice of the charge is sufficient to bind the transferee. However in some cases it had been held that a charge for maintenance created by decree was binding on a transferee irrespective of whether he had notice of the charge. Those decisions proceeded on the view that the effect of a charge was similar to that of a mortgage, in that it placed a limitation on the ownership of the property. Those decision , however , were not correct, for even before the amending act of 1929 it was clear that a charge did not, like a mortgage, create an interest in property, and the amended s 100 expressly en acts that a charge cannot be enforced against a transferee for consideration without notice. This section purports to deal with a right of

¹Lakshman v satyabhamabai (1877)ILR 2 Bom 494.

² Ram kunwar v ramdai (1900)ILR 22 All 326.

aintenance or the like which , not having been made a charge by decree or agreement, falls short of a charge³.

RIGHT UNDER THE AMENDED SECTION :

Under the amended section, the right of the widow is more effectively protected. It is not necessary that the transferee should be aware of an intention to defraud the widow or to defeat her right to maintenance⁴. If he is a transferee for consideration, he takes subject to the right if he has notice of it. If he s gratuitous transferee, he takes subject to the right, irrespective of whether he has notice of it. The amended section is not intended to create a charge where none existed. The effect of the amendment is to make it unnecessary for the widow to prove that the transfer was made with the intention of defeating her right.

ENHANCED MAINTENANCE:

It has been held ⁵that the right to receive maintenance protected by the section in not merely the right to receive such maintenance in the first instance, but also the right to receive enhanced maintenance in the future if there has been a material change in the circumstances.

RIGHT OF RESIDENCE:

Where, by way of settlement of disputes between the husband and the wife, property is given to the wife by the husband for her separate residence during her lifetime, it is a part of the arrangement for the grant of maintenance. Subsequent alienation by the husband cannot divest her from her possession till her death, and the transferee (from the husband) is not entitled to possession till her death. Section 39 applies to such a situation. The word maintenance in the section covers residence also.

MAINTENANCE NOT SECURED BY DECREE:

³ Ghasiram v kundambai (1941)ILR Nag 513.

⁴ Dattatreya v julsabai(1943) ilr bom 646

⁵ Kaveri v prameswari air 1971 ker 216

Under Hindu law, the maintenance of a wife by her husband is, of course, a matter of personal obligation which attaches from the moment of marriages. From the date of marriage her home is necessarily in her husband's home. He is bound to maintain her in it if she is willing to reside with him and discharge her duties. The doctrine of maintenance of a wife can be traced to the smritis, and the principal Hindu commentaries upon them. These texts enjoin a mandatory duty upon the husband to maintain his wife. It imposes a personal obligation on him enforceable by the sovereign or state. However, this does not mean that the obligation is not referred at all to his property and that he can alienate all his property and deprive his wife of the right to maintenance from the income of his property. The personal obligation on the part of the husband to maintain the wife is even wider, in the sense that his obligation will exist if he has no properties from which he could derive any income. Even accordingly to the ancient texts, the wife was supposed to be a co-owner of her husband's property, though in a secondary sense. The Hindu female's right to maintenance is a tangible right against property flowing from the relationship between the husband and wife and is recognized, and has been strongly stressed even by the earlier Hindu jurists starting from yajnavalkya to Manu .even without a charge, the claim for maintenance is doubtless a pre-existing right enforceable against the property in the hands of aliened with notice of her claim⁶.

It is not necessary that the right 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. Merely because, at the time when the settlement deed was executed, the wife had not obtained a decree for maintenance would not mean that she will not be entitled to enforce the right of maintenance against the property gratuitously transferred by the husband in favor of a transferee or a gratuitous transferee. If the husband gifted the properties in favor of the concubine without making provision for the maintenance of the wife, then the wife will be entitled to have a charge against the very properties, and enforce the same. It is not open to a husband to effect an alienation of his properties, when such alienation has the effect of depriving her and other dependants of their maintenance. A wife and children can therefore, have a charge upon the properties of the husband, and can enforce the same against a gratuitous transferee. However, if

⁶ Banda manikyam v banda venkyamma ail 1957 ap 710

the husband transfers the property with the knowledge of his wife and children the latter as such would have no claim of maintenance against the transferee.

NOTICE:

The provision as to notice marks the difference between the old section and the new, under the old section; the transferee was not bound, unless he had notice of the intention to defeat the right of the widow. Under the new section, notice of the right is sufficient to bind the transferee. If he is a bona fide transferee for valuable consideration without notice, he is not bound. Under section 3, the notice may be either actual or constructive. Andhra Pradesh high court has held that the expression ‘notice’ used should have a broad connotation, and cannot be construed literally to mean information given. Aptly, it should mean knowledge and awareness. It was held that as long as a right exists under the law, it is obvious notice to one and all⁷.

ENFORCEABILITY AS BETWEEN THE MOTHER AND THE SON IRRESPECTIVE OF NOTICE:

As a woman is entitled to maintenance not only from the husband, but also from sons who were members of a joint family, the wife has a right to ask for a charge on the entire family property irrespective of whether they had effected division between them. A son cannot plead want of notice about his mother being to get maintenance from out of the income of the joint family property. Partition can have no impact whatsoever on the mother’s right.

FAMILY DEBTS:

Under the Hindu law, debts contracted for the benefit of the family take precedence over a widow’s claim for maintenance, and if family property is alienated for the discharge of debts binding on the family, the right of the aliened overrides the right of the widow, even if he had notice of her claim maintenance⁸. However, when maintenance has been expressly charged on the property, it takes precedence over the right of an execution purchaser even though the decree was for a debt binding on the family. Although the husband’s debts may override the

⁷ C yemunav p.manohnair 2004 ap312

⁸ Lakshaman v satyabhamabai (1877)ilr 2 bom 494

widow's claim for maintenance, she has a right to challenge debts incurred by coparcener, such as a son or a brother of her deceased husband, and to enforce her rights against the property sold to pay off those debts, unless it be proved that they had been incurred for family necessity. Proper implementation is necessary to abide by the Law of the Land and ultimately to make it a grand success.

ADVANCEMENT:

Provision for advancement is unknown among Indians⁹. The rule of English law by which a child who has received an advancement must bring the amount into hotchpot in the case the father's intestacy had been omitted in the Indian Succession Act 1925; and has been held not to apply to Parsees. Among persons subject to English law, a purchase by a father in the name of a daughter is presumed to be an advancement, and not to be benami or colorable.

MARRIAGE:

Under mitakshara law, joint family property is liable for the legitimate marriage expenses of male members of the family, and their daughters, but not for the marriage of minors. Under this section as amended, a transferee having notice of such liability at the time of transfer would take subject to it.

CASE LAWS:

➤ **Siddegowda v lakkamma air 1981kant 24**

In this case Husband transferred property after coming to know that the wife was going to present a suit for maintenance. The transaction is not a bonafide transfer without notice. The wife is entitled to the benefit of this section by creating a charge on the said property without avoiding the transfer.

➤ **Tadikona v mandadapu air 1984noc(ap)**

⁹ Kerwick v kerwick (1921)ilr 48 cal 260

A wife's right to maintenance creates a charge on the properties of the husband, either self-acquired or joint family, and the same could be enforced under this section read with the sec.22 of the hindu adption and maintenance act, 1956. Thus,irrespective of the question whether the property devolved on the heirs on succession, intestate or testamentary,or on transfer inter vivoos gratuitously or for consederation , the property remains liable under the charge, the only exception being the case of a transfer without notice of such right.

➤ **Kumud v. Jatindranath**

The court construed the meaning of a residence as, a place where a person eats, drinks, and sleeps or where a family eats drinks and sleeps. Physical presence and intention in a place for a sufficient period of time are essentials of a place to be termed as a residence. Another aspect that must also be look into while deciding a place to be a residence must be the duration of stay.

CONCLUSIONS:

By virtue of judicial pronouncements and other steps, rights of property has been restored but it will become fruitful only when under lying thinking are changed, the women and other persons should emancipate themselves educationally, economically and socially for their well being only and then they can understand their rights and worth and thereafter the social upliftment of the whole community is possible. We should always remember that mother is the first teacher and mentor of his child. It is a historical fact that no society ever lived in peace until their women folk are at peace.

Although Maintenance should be gender neutral and should be applicable both for husband and wife respectively for the greater perspective of the society but still many women are being denied to claim their rights of maintenance.

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FOOTNOTES

- 1.Lakshman v satyabhamabai (1877)ILR 2 Bom 494.2.
2. Ram kunwar v ramdai (1900)ILR 22 All 326.
- 3.Ghasiram v kundanbai (1941)ILR Nag 513.
- 4.Dattatreya v julsabai(1943) ilr bom 646
- 5.Kaveri v prameswari air 1971 ker 216
- 6.Banda manikyam v banda venkyamma ail 1957 ap 710
- 7.C yemunav p.manohnair 2004 ap312
- 8.Lakshaman v satyabhamabai (1877)ilr 2 bom 494
- 9.Kerwick v kerwick (1921)ilr 48 cal 260