an estate interposed between the last male owner and the next full owner. We are of opinion that the Judge was right in holding that the intervention of two life estates does not alter the nature of the reversionary interest, which section 42 was intended to protect. His view is in accordance with the observations made by this Court in *Narayana* v. *Chengalamma*(1) and by the Privy Council in *Anant Bahadur Sing* v. *Thakurain Raghunath Kour*(2). Another objection urged upon us is that the alienation made by the first in favor of the third defendant is binding on the reversion. Both the Courts below find that the appellant, who dealt with a Hindu widow and was therefore bound to show affirmatively the legal necessity which made the alienation by her binding on the reversioners, has failed to establish such necessity. The question whether there was such legal necessity is one of fact, and we are concluded by the concurrent findings of both the Courts below.

This second appeal fails and we dismiss it with costs.

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## APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.*

BERESFORD (DEFENDANT), APPELLANT,

*v.*

RAMASUBBA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1889. August 20. October 8.

*Hindu Law—Impartible zamindari—Right of zamindar to alienate—Civil Procedure Code, ss.* 437, 464—*Regulation V of* 1804 (*Madras*), *ss.* 2, 8—*Suit by a ward of the Court of Wards—Non-joinder and misjoinder of parties.*

The holder of an impartible zamindari, governed by the law of primogeniture, having a son, executed a mining lease of part of the zamindari for a period of twenty years, by which no benefit was to accrue to the grantor unless mining operations were carried on with success, and the commencement of mining operations was left optional with the lessee. On the death of the grantor, his minor son and successor, by the Collector of the district as his next friend, (authorized in that behalf by the Court of Wards,) now sued the assignee of the lessee to have the lease set aside. The second plaintiff was the grantee from the Court of Wards (acting on behalf of the minor zamindar) of certain mining

(1) I.L.R., 10 Mad., 1. (2) L.R., 9 I.A., 53.

* Appeal No. 2 of 1889.

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rights on the same land. The defendant had executed a declaration of trust in respect of his interest in favor of certain persons who were not joined :

*Held*—

(1) per *Parker, J.*, that the first plaintiff could sue by the Collector of North Arcot as his next friend, since the Court of Wards had authorized the latter to conduct the suit :

(2) per *Muttusami Ayyar* and *Wilkinson, JJ.* (*affirming the judgment of Parker, J.*) (1) that the interests of the first and second plaintiffs not being inconsistent with each other, the suit was not bad for misjoinder ; (2) that the defendant's interests not having been shown to be hostile to those of the persons entitled under the declaration of trust, the suit was not bad for non-joinder ; (3) that the lease was not one which a managing member of an ordinary joint family governed by Mitakshara law could providently enter into :

(3) per *Muttusami Ayyar* and *Wilkinson, JJ.* (*reversing the judgment of Parker, J.*) that in the absence of evidence of any family custom rendering the zamindari inalienable by the zamindar for the time being for purposes other than those warranted by the Mitakshara law, the lease was not invalid as against the plaintiffs. *Sartaj Kuari* v. *Deoraj Kuari* (I.L.R., 10 All., 272) discussed and followed.

APPEAL against the decree of Parker, J., (sitting on the Original Side of the High Court) in civil suit No. 2 of 1889.

This was a suit by the minor zamindar of Kangundi by his next friend the Collector of North Arcot, appointed as such by the Court of Wards under Madras Regulation V of 1804, to set aside an instrument, dated 18th April 1876, and executed by the late zamindar of Kangundi, the father of the plaintiff, to one Saravana Muttu Pillai, deceased, whereby the exclusive right of mining in part of the zamindari was conveyed to the latter, on the ground that the instrument was not binding on the son and successor of the grantor. The second plaintiff was joined on the ground that the Court of Wards having repudiated on behalf of the first plaintiff, the instrument above referred to, had purported to grant to him an exclusive license to search for gold and other metals in the Kangundi zamindari. The defendant was the assignee of the rights of Saravana Muttu Pillai under the instrument of 18th April 1876, of which he (the defendant) had since executed a declaration of trust, exhibit I, in favor of certain other persons who were not joined as parties to the suit.

It was admitted that the Kangundi zamindari was impartible and was governed by the law of primogeniture. And it appeared that the grantor of the lease sought to be set aside died on 17th February 1883 leaving two sons, of whom the first plaintiff, who was born about 1869, was the eldest. The instrument of the 18th April 1876 was filed as exhibit A.

Mr. *Shaw* for defendant objected at the hearing that, under the terms of section 464 of the Code of Civil Procedure, the first plaintiff could not sue by the Collector of North Arcot as his next friend.

With regard to this objection the learned Judge said in delivering judgment:—"I overruled that objection as it appeared to me that the effect of that section is merely to prevent "any person other than some agent acting under the authority "of the Court of Wards from being admitted as next friend "to a minor whose estate has been taken under the management "of the Court. In the plaint as first presented the manager "appointed under section 8, Regulation V of 1804, was entered "as the next friend of the minor first plaintiff. That manager "was subsequently dismissed, and the Court authorized the Col-"lector of North Arcot to conduct the suit. There is nothing "in the Regulation to restrict the duty to the managers appointed "under section 8; the Collector is *ex-officio* agent of the Court, "and the direction would be perfectly legal under section 2. "The objection is merely formal, and in a similar case the Privy "Council refused to hear such an objection. *Baboo Hurdey* "*Narain Sahu* v. *Pundit Baboo Rooder Perkash Misser*(1)."

The Advocate-General (Hon. Mr. *Spring Branson*) and Mr. *Michell* for the plaintiffs argued that the lease of 18th April 1876 was improvident and was invalid as against the first plaintiff, who was already born at the date of its execution.

Mr. *Shaw* objected further to the frame of the suit on the grounds that the second plaintiff had no right to sue jointly with the first plaintiff, that the beneficiaries under the declaration of trust executed by the defendant should have been joined, and argued that the lease sought to be set aside was not invalid as against the first defendant.

Upon the question of the validity of the lease Parker, J., delivered judgment as follows:—

"The real question in the suit is whether the lease granted by the late zamindar is binding on the estate in the hands of his successor, and I am of opinion that it is not. Though the estate is an impartible zamindari, there are still rights of survivorship, *Gavuridevamma Garu* v. *Ramandora Garu*(2), and *Naraganti*

(1) L.R., 11 I.A., 26. (2) 6 M.H.C.R., 93.

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*Achamma Garu* v. *Venkatachalapati Nayanivaru*(1). The learned Advocate-General does not contend that the lease is invalid merely because it is a long lease running beyond the life-time of the grantor, for the validity of such leases if made for proper purposes beneficial to the family is well recognized. See *Mana Vikraman* v. *Sundaran Pattar*(2). But he contends that the lease was prejudicial to the interests of the family and altogether beyond the scope of the authority of the zamindar for the time being. Mr. Shaw, on the other hand, contends that the test is not whether the lease has turned out beneficially, but whether, having regard to the circumstances of the country at the time at which it was granted, it might be viewed as not at that time detrimental.

"It is further urged that the royalties agreed to be paid by Mr. Lonsdale (the second plaintiff) are similar to the terms to which defendant has agreed, and that nothing is to be gained by substituting one lessee for another.

"Not only was exhibit A granted without consideration for a term of twenty years, but there are no provisions in the document requiring the lessee to work either within a given time or at all, nor are there any provisions for the cancellation of the lease in case the concession is not worked. This is what has actually occurred. It is stated in the plaint, and the allegation is not traversed that nothing whatever has been done by the lessee; nor is he bound to do anything; and the consequence is that the successors of the grantor might be obliged to wait till 1896 before they could derive any profits from gold mining on the estate if from want of capital or want of will, the defendant neglected to utilize his concession. And this without any consideration whatever. A mere one-sided agreement it is impossible to imagine, and even judged by the test proposed by the learned counsel for the defendant the lease could not be upheld.

"There will be a decree for plaintiffs with costs declaring the lease void and for its cancellation."

The defendant preferred this appeal against the decree of Parker, J.

Mr. *K. Brown* for appellant.

The Advocate-General (Hon. Mr. *Spring Branson*) and Mr. *Kernan* for respondents.

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(1) I.L.R., 4 Mad., 250. (2) I.L.R., 4 Mad., 148.

The arguments adduced on this appeal appear sufficiently for the purposes of this report from the following judgments.

MUTTUSAMI AYYAR, J.—The first respondent is the minor zamindar of Kangundi in the district of North Arcot and the appellant is the assignee of a mining lease which was granted by the late zamindar on 18th April 1876 to one Saravana Muthu Pillai and by him transferred on 16th October 1876 to Major-General Beresford and Mr. Alexander Mackenzie. Mr. Mackenzie transferred his interest on 21st July 1877 to General Beresford, who, on 8th December 1881, executed a declaration of trust in favor of certain persons in trust for whom he agreed to hold certain shares in the lease. The late zamindar died on 17th February 1883 and the zamindari, which is an impartible estate, devolved by custom on his eldest son, the first respondent, by right of primogeniture. As he was a minor, the Court of Wards took the estate under its management on 11th April 1883; thereupon, the appellant inquired on 7th April 1886 if the Court would renew the lease for a further period of ten or twenty years. The Court of Wards repudiated the lease on 7th May 1886, but offered to consider any proposals which might be made on terms similar to those made in connection with mining leases granted by the Government. No such proposals being made, they granted a lease to the second respondent for two years to search for gold and other metals in a portion of the zamindari on 25th February 1887. The minor zamindar and the lessee of 1887 brought this suit to have it declared that the lease granted in 1876 by the late zamindar was null and void as against them. The plaint stated that the zamindari was the lessor's ancestral property, that he had two undivided sons living at the date of the lease aged seven and five years respectively, and that the lease granted by him in 1876 was invalid under the Mitakshara law as against his sons. The learned Judge in the Court below decreed the claim and considered the lease to be improvident and in excess of the late zamindar's authority as the zamindar for the time being of an impartible ancestral estate belonging to a joint Hindu family governed by the Mitakshara law. The first question argued in support of this appeal is whether the parties named in exhibit I as beneficiaries ought to have been made defendants. The learned Judge below held that there was no privity of contract between them and the minor zamindar, and that they were not necessary

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parties to the suit. In this conclusion I concur. Exhibit I only declares a trust and constitutes the relation of *cestuique trust* and trustee between the beneficiaries mentioned in it and Major-General Beresford. It is provided by section 437 of the Code of Civil Procedure that in all suits concerning property vested in a trustee, the trustee shall represent the persons beneficially interested in such property, and it shall not ordinarily be necessary to make such persons parties to the suit. But the Court may, if it think fit, order them or any of them to be made such parties. The last clause is taken from 15 & 16 Vic., cap. 86, section 42, rule 9, and beneficiaries are made parties in England when the trustee is either wholly uninterested or has an interest adverse to their interest—*Clegg* v. *Rowland*(1), *Payne* v. *Parker*(2). In the case before us, the appellant filed no written statement, nor are we referred to any averment or evidence to the effect that the appellant's interest was hostile to that of the beneficiaries. I do not consider that this contention as to non-joinder can be supported.

The next question is whether the second plaintiff was properly allowed to intervene as a co-plaintiff. It is not denied that he has an interest in the subject-matter of the suit to the extent mentioned by the learned Judge, and such interest could not take effect if the lease sought to be set aside were valid. It is not necessary that the interests of co-plaintiffs should be co-extensive, but it is sufficient if they are not inconsistent with each other. On this point also the decision appealed against is right.

Passing on to the merits, the substantial question for decision is whether the mining lease evidenced by exhibit A is binding on the minor zamindar. It was executed by his late father and purports to grant mining rights over a portion of the Kangundi zamindar for a period of twenty years. But it is so framed that no benefit could accrue from it to the lessor unless and until the lessee commenced mining operations, and there is no provision whereby the former can insist upon the latter commencing those operations at any time within that period. It was practically left to the arbitrary discretion of the lessee either to commence work or not, and the result is that nothing has been done by the lessee, though the lease was granted in 1876. The learned Judge is, therefore, well founded in holding that the transaction is not

(1) L.R., 3 Eq., 368. (2) L.R., 1 Ch. App., 327.

one which the manager of a joint Hindu family acting with ordinary care and prudence in the exercise of his qualified power of dealing with family property should conclude.

It is urged for the appellant that there was no improvidence in securing the benefit of English capital and appliances without which no mining operations could ordinarily be carried on in India. But it must be observed that the learned Judge did not take exception to granting a mining lease for that purpose, but objected to the particular transaction evidenced by document A, which was not calculated to secure the benefit suggested for the appellant within a reasonable time and has in the result failed to do so for upwards of ten years. I cannot say that the learned Judge was not warranted in finding that the transaction was not for the benefit of the joint family. His opinion is in accordance with the course of decisions in this presidency as to the disposing power of the owner for the time being of an impartible estate.

The law hitherto administered in this presidency was explained by this Court as follows in *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru*(1):—"Where property is held in co-parcenary by a joint Hindu family, there are ordinarily three rights vested in co-parceners—the right of joint enjoyment, the right to call for partition, and the right of survivorship. Where impartible property is the subject of such ownership, the right of joint enjoyment and the right of partition, as the right of an undivided co-parcener, are, from the nature of the property, incapable of existence. But there being nothing in the nature of the property inconsistent with the right of survivorship, it may be presumed that that right remains. The right to call for partition altogether disappears—the right of joint enjoyment is superseded by a right of successive enjoyment. ..... Where from the nature of the property possession is left with one co-parcener, the others are not divested of co-ownership. Their necessary exclusion from possession imposes on the co-owner in possession two obligations to his co-parceners in virtue of their co-ownership—the obligation to provide them with maintenance and the obligation to preserve the *corpus* of the estate." The Court then referred to the decision of the Privy Council in *Katama Natchiar* v. *The Rajah of Shivagunga*(2), where their Lordships declared that, in the absence of

(1) I.L.R., 4 Mad., 266. (2) 9 M.I.A., 543.

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proof of a special custom of descent, the succession to a zamindari impartible and capable of enjoyment by one member only of the family at a time is governed by "the general Hindu law prevalent in that part of India with such qualifications only as flow from the impartible character of the subject," and observed that the ownership of the co-parcener in possession was not sole was shown by the rule restraining the alienation of the *corpus* by the co-parcener in possession and by the exclusion of the widow from inheritance in the presence of undivided collateral males.

Again, in *Gavuri Devamma Garu* v. *Raman Dora Garu*(1) decided in 1867, this Court observed:—"Such usage (viz., of impartibility) does not interfere with the general rules of succession further than to vest the possession and enjoyment of the *corpus* of the whole of the estate in a single member subject to the legal incidents attached to it as the heritage of an undivided family." It was also considered then that the decision was in accordance with the observations of the Privy Council on the subject. Thus, the principle which has hitherto guided the Courts in this presidency as supported by the observations of the Judicial Committee has been this—that when an estate is shown to be impartible by custom, the general law is superseded only to the extent of excluding the right of partition and of joint enjoyment, and the Mitakshara law governs the disposing power of the co-parcener in sole possession over the *corpus* of the estate. But this view of the law was overruled by the Privy Council in the case of *Sartaj Kuari* v. *Deoraj Kuari*(2). There, the High Court at Allahabad held that unless alienability was shown to be sanctioned by custom, the general Mitakshara law restricted the power of alienation possessed by the co-parcener in sole possession of an impartible raj. Their Lordships of the Privy Council held that the eldest son, where the Mitakshara law prevails and there is the custom of primogeniture, does not become a co-sharer with his father in the estate, that the inalienability of the estate depends upon custom which must be proved or it may be in some cases, upon the nature of the tenure. The grounds of their decision are (i) that the son's right by birth under the Mitâkshara is so connected with the right to demand partition of the estate that it does not exist independently of the latter right; (ii) that when there

(1) 6 M.H.C.R., 93. (2) I.L.R., 10 All., 272.

is no right to demand partition and when the estate descends by custom to the eldest son by primogeniture, as if the property were held in severalty, that mode of succession cannot be reconciled with joint ownership which under the general law is the cause of the restraint on alienation; and (iii) that inalienability is not to be inferred as a matter of law from impartibility, but that it may be specially proved by custom. The Judicial Committee considered also the observations of the same tribunal in the *Shivagunga case*(1) and in the *Naraganti Paleiyam case*(2) on which the course of decisions in this presidency was founded, and in other cases, and further adverted to the right of the junior members of the family to be maintained out of the estate and their right of succession. Their Lordships observed that though an impartible estate may be for some purposes spoken of as joint family property, the co-parcenary in it, which under the Mitakshara law is created by birth, does not exist, and that in all the previous cases the question was as to the right of succession to the property on the death of the raja or zamindar, and that it was held that for the purpose of determining who was entitled to succeed, the estate must be considered as the joint property of the family. Referring to the remark of the Judicial Committee in the Shivagunga case, that though the zamindari was impartible, it was part of the common family property, they observed that it must be understood with reference to the question which was then before their Lordships. The decision of the Privy Council in the Allahabad case followed the decision of the same tribunal in *Raja Udaya Aditya Deb* v. *Jadab Lal Aditya Deb*(3) which was decided in 1881. We are concluded by the authority of the Privy Council, and the lease in dispute cannot be set aside on the ground that under the general Mitakshara law it is not binding on the first respondent. The Privy Council decision, however, does not operate to render alienable an impartible estate inalienable by custom or by the nature of its tenure, but it is an authority only to the extent that inalienability is not to be inferred as a matter of general Mitakshara law from impartibility. I am of opinion that before disposing of this appeal we must ask the Court below to try the question:—

Whether by family custom the Kangundi zamindari is inalien-

(1) 9 M.I.A., 543. (2) I.L.R., 4 Mad., 266. (3) I.L.R., 8 Cal., 199.

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able by the zamindar for the time being for purposes other than those warranted by the Mitakshara law.

Both parties are at liberty to adduce fresh evidence, and the finding will be returned within three months from date of the receipt of this order, and seven days, after the posting of the finding in this Court, will be allowed for filing objections.

WILKINSON, J.—The facts of this case are sufficiently set forth in the judgment of the learned Judge. Two objections have been taken to his decision: First, it is argued that all the persons mentioned in the fifth issue should have been made defendants and that the suit is bad for non-joinder of parties; secondly, it is contended that plaintiff not having proved that by law or family custom the late zamindar had not power to alienate, he could not impeach the alienation.

With reference to the first objection, the case is governed by the provisions of section 437 of the Civil Procedure Code. On the 8th December 1881 the defendant executed a declaration of trust on behalf of certain persons, who were declared to be partners and co-owners with him in the rights, benefits, and privileges of the lease. The deed set forth that the defendants held such lease with all rights, benefits, and privileges granted thereby on behalf of himself and as trustee for the several persons who were partners with him, and he covenanted at any future time at the request and costs of the said persons to convey and assign their respective shares to them. The contention in the present case being between the persons beneficially interested and a third person, the trustee sufficiently represented all the persons interested. It appears from the English cases that all the beneficiaries are necessary parties only were the trustee is wholly uninterested or has an interest adverse to the beneficiaries (*Clegg* v. *Rowland*(1), *Payne* v. *Parker*(2)). It has been held that where a trustee seeks to redeem, or in cases for partition or for sale and partition the trustee sufficiently represents the beneficiaries for the purpose of the suit. In the present case the defendant is not a bare trustee, but a co-owner and partner, and holds the lease as such and as trustee for his partners.

In support of his second contention, the learned counsel for the appellant relies upon two Privy Council cases reported at *Sartaj Kuari* v. *Deoraj Kuari*(3), and *Raja Udaya Aditya Deb* v.

(1) L.R., 3 Eq., 368. (2) L.R., 1 Ch. App., 327. (3) I.L.R., 10 All., 272.

*Jadab Lal Aditya Deb*(1). In both these cases the suit was instituted to set aside a permanent alienation made by the holder for the time being of an impartible zamindari, and it was held that unless it is shown that there is some custom which would prevent the operation of the general law empowering alienation, proof of custom that the estate descended to the eldest son is not sufficient to invalidate the alienation.

In the Allahabad case the question was as to the validity of the gift of certain villages forming part of the hereditary and impartible estate in favor of a younger wife, and it was disputed by the raja's eldest son. The raja in his defence alleged a right to make any transfer and set up transfers of every description from of old. The High Court decided against the alienation, finding against the fact and custom of alienations set up by defendant. Their Lordships of the Privy Council reversed that decision on the ground that inalienability depends upon custom which must be proved, or it may be in some cases upon the nature of the tenure. They pointed out that if there were no family custom of impartibility, the raja's power over the estate would be governed by the law of the Mitakshara, which renders the father subject to the control of his sons in regard to the immoveable estate, and that the gift would have been void. They went on to say that the property in the paternal or ancestral estate acquired by birth under the Mitakshara is so connected with the right to partition that it does not exist where there is no right to partition. They quoted with approval two Calcutta cases, *Thakoor Kapilnauth Sahai Deo* v. *The Government*(2) and *Raja Udaya Aditya Deb* v. *Jadab Lal Aditya Deb*(1), in which it was held that it was necessary for the plaintiff, who alleged that the descent of the estate was governed by Mitakshara law, and that by the usage and custom of the family the estate was impartible and descendible according to the law of primogeniture on the male heirs of the original grantee, to show that there was some custom which would prevent the operation of the general law empowering alienation. The decision was given in 1888. The other Privy Council decision was in 1881. It was there held that the owner of an estate which descends as an impartible inheritance is not by reason of its impartibility restricted to making grants or gifts enuring only for his own life,

(1) I.L.R., 8 Cal., 199. (2) 13 B.L.R., 445.

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and that the question of inalienability was one depending upon family custom, which would require to be proved.

These decisions are in direct conflict with the principle upon which the whole series of decisions in this presidency as to the right of a zamindar to alienate depends. It has been invariably held that acts and alienations by the holder of an impartible zamindari made to enure beyond his life-time will, if otherwise than *bonâ fide*, and if prejudicial to the family, be set aside. The grounds on which the decisions have proceeded are that the zamindar, though absolute owner, has only a life interest; that he is the manager of the family for the time being; that his co-parceners have rights of survivorship to the possession of the whole estate; and that the law of the Mitakshara by which each son has by birth a property in the ancestral estate, though it cannot apply so as to enable them to insist on partition, at least applies so far as to enable them to claim maintenance. But we are bound by the decisions of the Privy Council, and must hold that the alienation complained of in this suit must be upheld, unless the plaintiff can make out that there exists some family custom in restraint of alienation.

I agree to the issue proposed by my learned colleague.

[Upon the issue remanded for trial, Parker, J., returned a finding that no family custom to the effect described was proved to exist.

This appeal having thereupon come on for re-hearing their Lordships allowed the appeal and dismissed the suit with costs throughout.]