govern the devolution of his property on his death. It may seem hard that a member of the family into which the *illatam* son-in-law was taken should be ousted from the property originally belonging to that family in favor of one who belongs to another family. But that is a necessary consequence of the alienation in favor of the *illatam* son-in-law. It was competent to him or at any rate to his last surviving son who was sole owner of the property to alienate, and it must equally be an incident of the property that on the death of the last sole owner it should, in the absence of special custom to the contrary, go to his heirs according to Hindu Law.

In my opinion the decree of the Court below must be reversed and the case remanded for trial on the merits. Costs to be provided for in revised decree.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

MEKAPERUMA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

THE COLLECTOR OF SALEM AND OTHERS (DEFENDANTS), RESPONDENTS.*

1889. Jan. 14. March 5.

Revenue Recovery Act (Madras), Act II of 1864, ss. 25, 27—Regulation V of 1804, s. 20—Notice on minor defaulter—Irregularity in revenue sale.

A *mitta* consisting of an unsurveyed village, of which the plaintiffs (minors) were the registered proprietors of an undivided moiety, was brought to sale for arrears of kist and was purchased for the plaintiffs by their guardian, duly appointed under Regulation V of 1804, s. 20. The sale was subsequently cancelled; and further arrears having accrued, the mitta was attached again. Before the second attachment took place, the guardian died, and no one having been appointed to succeed him, though an application was made to the Court for that purpose, a written demand under Revenue Recovery Act, s. 25, was tendered to the plaintiffs' mother and affixed to the wall of the house on 17th January, and notice under s. 27 was served on 17th February. The sale took place in September and defendant No. 2 became the purchaser. It was admitted that a division of the village was impracticable. In a suit by the plaintiffs by their mother and next friend to set aside the sale:

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* Appeal No. 96 of 1887.

MEKAPERUMA v. THE COLLECTOR OF SALEM.

Held, since service of a demand upon the defaulter is an essential preliminary to sale, the sale was invalid so far as the share of the plaintiffs was concerned, and the sale as a whole was vitiated by the irregularity.

APPEAL against the decree of C. W. W. Martin, District Judge of Salem, in original suit No. 9 of 1884.

Suit by two minor plaintiffs, suing by their mother and next friend to set aside a sale of their undivided share in a mitta for arrears of revenue. The District Judge dismissed the suit and the plaintiffs preferred this appeal against his decree.

The *Acting Advocate-General* (Hon. Mr. *Spring Branson*) and *Subramanya Ayyar* for appellants.

The *Acting Government Pleader* (*Subramanya Ayyar*), *Bhashyam Ayyangar* and *Kalianaramayyar* for respondents.

The facts of the case and the arguments adduced on the appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Parker, J.).

JUDGMENT.—The plaintiffs' father, Mekaperuma Oodayan, was the owner of half the Senthamangalam mitta. He died in 1876 and the plaintiffs were then registered as owners of his moiety. The other sharers were defendant No. 2, who owned $\frac{1}{12}$, which he purchased in 1880; defendants Nos. 4 and 6, who jointly owned another $\frac{1}{12}$; defendant No. 7, who owned $\frac{1}{4}$, and defendant No. 8, who owned the remaining $\frac{1}{12}$.

On the death of the plaintiffs' father, one Varada Peruma Oodayan was appointed their guardian by the District Court under section 20 of Regulation V of 1804. The kist due to Government was allowed to fall into arrears, in consequence of which the whole mitta was attached and was sold on 9th March 1882 by revenue auction. It was purchased by the plaintiffs' guardian, Varada Peruma Oodayan, for Rs. 65,000, on behalf of the plaintiffs; but as he did not pay the balance of the purchase money, the sale was ultimately cancelled.

The plaintiff's guardian died on 1st December 1882, and shortly afterwards a fresh attachment of the mitta was made for the old arrears and for arrears which had accrued subsequently. At the date of this attachment no new guardian had been appointed by the District Court for the minor plaintiffs under section 20, Regulation V of 1804. The first notice under section 25, Act II of 1864, was tendered to the minors' mother on 17th January 1883, but she refused to receive it, and it was then affixed to the wall of the

house. The second notice under section 27 is said to have been served on 17th February 1883, but it does not appear in what mode service was effected. On 2nd March 1883, the Collector wrote to the District Judge suggesting that the Court should appoint a fresh guardian for the minors. From the endorsement made by the District Judge upon the letter (dated 16th July 1883), it would appear that the Judge prepared to consult the Collector as to the fitness of Subbaraya Oodayan (plaintiffs' brother-in-law) to be appointed guardian; but there is nothing to show whether any further steps were taken. At any rate when the mitta was brought to sale a second time on 14th September 1883, no fresh guardian had been appointed by the Court.

At that sale the mitta was knocked down to defendant No. 2 for Rs. 1,50,800. The plaintiffs' mother and Subbaraya Oodayan above mentioned attended the sale and bid for the plaintiffs, but their last bid was Rs. 50 less than that of defendant No. 2. It would appear that they had in hand at that time some Rs. 15,000, which was nearly double the amount of the arrears of kist due on the mitta; but plaintiffs' mother and defendant No. 2 were equally desirous that the mitta should be sold, each hoping to purchase the whole estate.

The plaintiffs' mother (the unsuccessful bidder) now sues on their behalf to set aside the sale on the ground that the whole proceedings were illegal and not binding on the plaintiffs. It is alleged among other things that the Collector (defendant No. 1) was bound to have attached the movable property of the registered holders in the first instance; that the demand notice was not served upon any properly-constituted guardian of the minor plaintiffs, nor was it legally served; that the sale of the whole mitta for so small an arrear was unnecessary and illegal; and that defendant No. 1 improperly refused to receive the arrears on the day of sale.

The District Judge overruled all the objections of the plaintiffs and dismissed the suit with costs.

The first objection taken in appeal is that under the terms of the sunnud the personal property of the defaulters should have been first sold. It appears that some of the movables of defendant No. 2 were released on his electing that the land should be proceeded against. The other proprietors had concealed their movables. This provision in the sunnud was no doubt meant to

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save landed proprietors from losing their estates for non-payment of kist if the sale of their movable properties, which could more easily be replaced, would suffice to satisfy the demands of the State; but in this instance it is clear that all the proprietors wished the estate to be sold. The reason is obvious;—one $\frac{1}{12}$ share had been bought by the defendant No. 2, a man of different caste, and it was felt on all sides that the only way to prevent constant quarrels was to allow the estate to be sold and endeavour to outbid the outsider who had thus intruded into the family estate. The defendant No. 2 on his side was equally anxious for a sale, being desirous of purchasing the whole mitta. The District Judge has, we think, shown that a division of the mitta was impracticable, nor indeed did any of the parties really desire any division.

The only sound ground on which the sale can be impugned is the absence of any demand legally served upon the minors preliminary to the sale of September 1883. The service of such demand upon the defaulter is a legal and essential preliminary to sale, and the plea that the sale of September 1883 was only a re-sale will not avail since the demand then included arrears which had accrued subsequent to the first sale and for which a fresh attachment was necessary. The District Judge held that though the Collector might have exercised a more proper discretion had he waited until the Court's guardian was appointed, he had not acted illegally in dealing with the mother, the natural guardian. For the Government it was contended that section 20, Regulation V of 1804, only threw upon the Collector the duty of reporting the case to the Judge in the first instance; that the Collector had done his duty and that Varada Peruma Oodayan had been appointed; and that though the Collector had, as a matter of courtesy and for convenience, informed the Court of the death of the guardian, he was not bound so to do. The fault, if any, it was urged was that of the District Judge.

In this view we are not able to concur. The omission of the District Court to appoint another guardian is no doubt unexplained, though possibly it may have been due to the sudden illness and death of the then presiding Judge. It would have been open, however, to the Collector to have reminded his successor of the duty which had devolved upon him, or in case of neglect to have moved this Court for a direction. But in any case it was certainly incumbent upon the Collector to see that the demand

notice was served upon some person legally entitled to represent the minor defaulters.

It is then urged that it is the usual practice of the Revenue Department to serve such notices upon the natural guardians of the minor heirs of deceased landholders, and that such notices are usually accepted as valid. No doubt this may be so, but in the case before us the procedure of section 20, Regulation V of 1804, had been actually adopted and a guardian had been appointed by the Court. The guardian had died and application had been made to the Court to appoint another guardian. The mother declined to act herself and disclaimed all right to look after the interests of the minors with reference to the mitta, and petitioned the Collector prior to the sale to undertake the management of the estate under section 28, Act II of 1864, since there was no one to look after the interests of the minors. Under these circumstances we cannot hold that the service of the demand notice upon the mother was a valid service upon the minor defaulters.

The sale of the minors' interests is therefore invalid, and this being so it appears to us that the irregularity must vitiate the whole sale. The minors are entitled to a joint undivided one-half share in a mitta which consists of a single village unsurveyed and the division of which is admitted to be impracticable. The appeal must therefore be allowed and the sale of the mitta set aside. The appellants are entitled to their costs from respondent No. 1 in this Court and the Court below, but the other respondents will bear their own costs.