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an association within the meaning of section 4 of the Indian Companies Act, 1882. The organisers of the chitfund in question are described in the instrument as agents but the terms of the instrument taken as a whole show beyond doubt that they really occupy the position of principals or proprietors.

The answer to the question referred to us must be in the negative.

The case came on for final hearing before (Benson and Wallis, JJ.) when the Court delivered the following

JUDGMENT.—The finding of the Full Bench is that the association does not require registration under the Indian Companies Act.

We dismiss the appeal with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

1906 February 13, 14, 15, 22.

VEERA SOORAPPA NAYANI (PLAINTIFF), APPELLANT,

v.

ERRAPPA NAIDU AND OTHERS (DEFENDANTS Nos. 1 AND 4 TO 14), RESPONDENTS.*

Hindu Law—Policies—Impartible estate in the hands of a son, assets for payment of father's debts—Sale of right, title and interest which defendant alone possesses, effect of.

Impartible estate taken by a son by heritage from his father is assets for the payment of the father's debts not contracted for immoral or illegal purposes, and may be attached and sold in execution of a decree for such debts.

Muttayan Chettiar v. *Sangili Vira Pandia Chinnatambiar*, (L.R., 9 I.A., 128), referred to.

Where, subsequent to the passing of Act X of 1877, in execution of a decree against the owner of an impartible estate, such estate is brought to sale and the proclamation of sale describes the property sold as 'the right, title and interest of the defendant alone' in accordance with the form in force prior to the passing of Act X of 1877, the mere use of such words, which were omitted in the Act of 1877, does not necessarily imply that the interest sold is less than the full

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*Appeal No. 160 of 1902, presented against the decree of M.R.Ry. W. Gopalachariar, Subordinate Judge of Bellary and Salem, at Salem, in Original Suit No. 11 of 1897.

proprietary interest. That the law as then established by judicial decisions recognised only a limited interest in the owner, does not of necessity raise the implication in such cases. The nature of the debt and other circumstances may show that the full interest including that of the sons was actually brought to sale and purchased.

Abdul Aziz Khan v. *Appayasami Naicker*, (I.L.R., 27 Mad., 131), distinguished.

THE plaintiff and the first defendant were sons by different wives of the deceased Poligar of Bagalur. The deceased father of the plaintiff executed a mortgage of the Poliem in favour of Kotha Nunjappa, deceased (whose representatives were defendants Nos. 2 to 14) who sued thereon and obtained a decree in Original Suit No. 15 of 1875. In execution of the decree the Poliem was sold in 1883 and purchased by Nunjappa, and the defendants Nos. 2 to 5 sold the same to the first defendant in 1893. The proclamation of sale described the property sold as 'the privileges, the rights and interests which the said defendant alone possesses in respect of the property.' The plaintiff, claiming to be entitled by the custom of the family to succeed to the Poliem in preference to the first defendant, instituted this suit to recover the Poliem. He alleged that the Poliem, which was admitted to be impartible, was also inalienable, and that his father had only a life interest therein and that Kotha Nunjappa, who purchased under the proclamation of sale 'the right, title and interest of the defendant alone,' acquired no more than such life interest, and that he, the plaintiff, became entitled to the Poliem on the death of his father in 1885.

The Subordinate Judge found that the Poliem was not inalienable by custom or by the nature of the tenure, but was only an ordinary impartible estate; that Kotha Nunjappa purchased the full proprietary interest, and he accordingly dismissed the suit.

That portion of the judgment of the learned Subordinate Judge dealing with the contention that the Poliem was inalienable was as follows:—

"The next contention of plaintiff's vakil is that the Poliem is inalienable by virtue of its tenure. It is urged that the Poliem was originally granted by the Bejapur Kings for military services, that it continued to be held on military tenure in the time of Mussalman Rulers and finally confirmed by the British Government in consideration of past military services. The deeds of grant by the Hindu or Muhammadan Kings are not produced; but two letters of the Collector of Salem, exhibits GG and XIII contain a reference to the history of the Poliem. From these, it appears that

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the Hosur Poliem was originally granted in 1207 by Hindu Kings for services rendered to the State in battle, that in 1667, it was taken by one of the Rajahs of Mysore and Bagalur given instead, that in 1780 Tippu Sultan ejected the then Poligar and that in 1791 he was restored, but that after the treaty of 1792, he was ejected again. After the cession of the Baramahal, the Poligar, under the protection extended to him by General Harris (exhibit N) returned to his Poliem in 1799 when a settlement was made with him by Captain Graham, who issued a sannad (exhibit Q) under the date the 20th December 1799, in which peishcush was entered as canteroy pagodas 2,150-1-0. Since then, the Poliem continued in the possession of plaintiff's ancestors. Plaintiff's father, the last Poligar, enjoyed it till 1883 when it was sold in Court auction in execution proceedings of decree in Original Suit No. 15 of 1875 and it then passed to the possession of the purchaser.

"Exhibits O and P, the documents relating to the Mussalman period, do not disclose that military service was rendered by the Poligar, and there is nothing in exhibit N or Q to show that the Poliem was confirmed by the British Government in consideration of military services. It does not appear that military services were ever expected of the Poligar or that he ever rendered such services to British Government. The letter of Board of Revenue to Government, dated 5th November 1849, referred to in para. 4-A of the exhibit XIII disproves this contention. 'It cannot be said that this and similar Poliems were conferred by the British Government as personal or hereditary grants of land revenue in consideration of past services or in the way of pension or compensation, or that they were meant to be confined to the families of the grantees. The Poliems were continued or restored by the Company to their previous holders partly perhaps in reference to their former enjoyment, but chiefly as revenue and political arrangements. As regards Bagalur there is nothing in Captain Graham's sannad to show that it was restored on account of prior services or at a favourable rate of peishcush—' page 92 of the Fifth Report of the Select Committee to the House of Commons which refers to the Mysore Poligars who were found in actual possession of their Poliems or who had been ordered or obliged to retire from the country during the wars with Tippu Sultan or who had joined the standards of that Prince, states that they were freed from

all obligations of military service to the State and no longer permitted to maintain an armed force, or to exercise any independent authority. The Bagalur Poligar having been ejected a second time by Tippu Sultan some years before the British advent, there is no ground for assuming that the plaintiff's ancestors were holding the Poliem on military tenure at the time of British advent. The contention that they must be presumed to have continued to hold on military tenure therefore fails.

"In short, there is no sufficient evidence to show that the Poliem was granted by Government in consideration of past military services or for military service to be rendered, nor is there evidence that military service was rendered to the British Government.

"The contention that the Poliem is by custom inalienable seems to be equally groundless. The plaint does not allege the existence of such custom. The specific nature of the custom is nowhere stated; nor does the evidence of plaintiff's first, second and fifth witnesses, who alone speak on this point, make it clear. The plaintiff's vakil argues that the inalienability was recognized by the members of the family and that the creditors and members of the family were conscious of the inalienable character of the Poliem. Exhibit JJ, the plaint in Original Suit No. 15 of 1881, a suit by the first defendant, is said to show first defendant's consciousness of the custom. Exhibit Y recites that when the Poliem was under attachment, the plaintiff's father applied for appointment of a Receiver on the ground that 'the Poliem being in the nature of a Raj, and impartible, is not in itself liable to sale in satisfaction of the debt of a Poligar.' This is said to show consciousness on the part of plaintiff's father of the custom. The case in *Sivasubramania Naicker* v. *Krishnammal*(1) is cited in support of the proposition that such evidence is admissible to prove custom prevailing in the family. The creditor Nanjappa in his application to Government to reduce the peishcush referred to in exhibit XIII is said to have urged that the Poliem was inalienable. It is urged that in his application for attachment and sale, only the right, title and interest was sought; these are said to show consciousness of the creditor as regards the custom in question. The documents exhibits JJ and Y were both subsequent to the dispute and do not refer to any family custom. As to first defendant's suit, it is clear

(1) I.L.R., 18 Mad., 287 at p. 297.

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that this admission was made with a special object. Nor does the allegation in the petition of Nanjappa referred to in exhibit XIII disclose the existence of a family custom. A family custom to have effect must be proved to be the established rule of the family [*Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*(1)]. It must be proved to be ancient, certain, invariable, and reasonable [*Vayidinada* v. *Appu*(2) and *Price* v. *Browne*(3)]. There is no such evidence in this case. In 1818 and 1847 when the Poliem was attached in execution of decree, no objection appears to have been taken by the Poligar or other members of the family on this ground.

"Lastly, the evidence on both sides (plaintiff's Nos. 2 and 8 and defendant's Nos. 1 to 7 witnesses) discloses that in the times of plaintiff's grandfather and his predecessors, 16 villages were given as inams to near relatives besides other inams for temples and for servants. The evidence of defendant's second witness discloses that plaintiff's grandfather, Veerachoodappa, had six daughters and that certain villages were given to their husbands. In a few cases where the donee's family became extinct, the Poligar appears to have resumed the inams, but in other instances the heirs of the donees are proved to be in possession and enjoyment. These inams appear to have been given in perpetuity and not as provision for maintenance. A clause in the sannad, exhibit N, referring to the continuance of the existing inams is relied upon by plaintiff's vakil, but this in no way explains the subsequent grant of inams if the Poliem was inalienable."

Plaintiff preferred this appeal

R. Sadagopachariar for appellant.

C. Ramachandra Row Sahib for the Hon. Mr. *P. S Sivaswami Ayyar* for first to third respondents.

JUDGMENT.—In this suit the plaintiff-appellant seeks to establish his right to the Bagalur Poliem in the Salem district, and to recover possession of it with mesne profits. The plaintiff is the eldest son of the late Poligar, who died in 1885. The Poliem was sold in execution of a mortgage decree obtained against the late Poligar in Original Suit No. 15 of 1875, and was purchased in February 1881 by the mortgagee, the late Kotha Nunjappa. The defendants Nos. 2 to 14 are the representatives

(1) 14 M.I.A., 570, at p. 585. (2) I.L.R., 9 Mad., 44, at p. 46.
(3) I.L.R., 14 Mad., 420.

of this Nunjappa. The first defendant (who is a younger son of the late Poligar by a junior wife) purchased the Poliem in 1893 from the heirs of Kotha Nunjappa. Thus, the title of all the defendants depends on the validity and effect of the execution sale in 1881, and it is this which the plaintiff attacks. His case is that the Poliem was impartible and inalienable by custom and by reason of its character as a military tenure, that the late Poligar, therefore, had only a life interest in it, that only this interest could have passed and did pass to the defendants in consequence of the sale in execution, and that on the death of the late Poligar in 1885 the Poliem passed to him (the plaintiff) as his eldest son.

In the lower Court the plaintiff also pleaded that the sale was in execution of a decree obtained for a debt contracted for immoral purposes, and was, therefore, not binding on him, but there was no evidence to support this plea and it was abandoned in this Court. In point of fact the debt was mainly one that had been decreed in Original Suit No. 2 of 1837 against the plaintiff's grandfather, long before the birth of the plaintiff and to a small extent it was money borrowed by the plaintiff's father for payment of peishcush due on the estate. As to the contention that the Poliem was by custom and by reason of its tenure inalienable, we may say that there is no sufficient evidence to prove any such special custom or that the estate was held on condition of military service and was therefore inalienable. The Subordinate Judge has dealt with these questions fully and we concur in his conclusions. He has, moreover, shown that in the past considerable alienations have, in fact, taken place without objection on the part of those who would have been interested to object if the estate had been inalienable.

In these circumstances even if the plaintiff as a son were a coparcener with the late Poligar, his interest would be liable to be sold. But it is now settled law [*Sartaj Kuari* v. *Deoraj Kuari*(1) and *The Pittapur case*(2)] that the owner for the time being of an impartible estate, such as this Poliem admittedly is, has the full proprietary title, and the son has no such coparcenary interest by birth as he would have under the mitakshara law in ordinary ancestral property.

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(1) I.L.R., 10 All., 272. (2) I.L.R., 22 Mad., 383.

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The appellant, however, contends that, even if the estate were liable to alienation, the sale relied on did not, in fact, extend to more than "the right, title and interest" of the late Poligar, and that those words must be construed with reference to the law as it was then understood to be by the parties; that a long course of decisions prior to the cases of *Sartaj Kuari* v. *Deoraj Kuari*(1) and *the Pittapur case*(2) had held that an impartible estate was also inalienable, and that, in consequence, the holder of such an estate could not encumber it after his own life. The appellant argued that this was the view of all parties when the sale of the estate took place and that therefore only the life interest of the Poligar in the estate was intended to be sold and was sold. He relied on the recent decision of the Privy Council in the Kannivadi case [*Abdul Aziz Khan* v. *Appayasami Naicker*(3)].

The principle, however, laid down in that case does not affect the present case, for, the debt in the present case was as we have already seen one incurred for necessary purposes such as would bind the interest of the son even if the property were ordinary ancestral joint property of the family. Moreover, in the case of *Muttayan Chetty* v. *Sangili Vira Pandia Chinnatambiar*(4) it was laid down by the Privy Council that the estate which a son takes by heritage from his father constitutes assets by descent for the payment of his father's debts not incurred for any immoral purposes, that such an estate may be attached and sold in execution of a decree upon such a debt and the fact that it is an impartible estate does not alter the case [*Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar*(4)]. This decision was passed in May 1882, and the sale in the present case took place only in January 1883. There is no doubt but that the sale certificate (exhibit I) clearly states that the whole Poliem was sold. It was the whole Poliem which was mortgaged (exhibit VI) and exhibits Y and Z show that it was the full proprietary right in the Poliem which the judgment-creditor claimed to sell and which apparently the Court attached and intended to sell. No doubt in the sale proclamation (exhibit CC) it is stated that "the privileges, the rights and the interests which the said defendant alone possesses in respect of the property will be sold." This is

(1) I.L.R., 10 All., 272. (2) I.L.R., 22 Mad., 383.
(3) I.L.R., 27 Mad., 131; (S.C.) L.R., 31 I.L.A., 1.
(4) L.R., 9 I.A., 128; (S.C.) I.L.R., 6 Mad., 1.

the English translation of the vernacular version of the clause in the Civil Procedure Code of 1859 which required that "only the right, title and interest of the judgment-debtor should be sold." In the translations the word 'only' has been transferred so as to qualify the word defendant, instead of qualifying the phrase "right, title and interest." "No doubt at the time of the sale (1877) the Code of 1877 had just come into force, and in it the clause requiring the Court to sell "only the right, title and interest "of the judgment-debtor" was omitted, but the old practice of inserting these words as a common form continued in many Courts for sometime after 1877 and it has been frequently held that this phrase does not necessarily imply that the interest sold is less than full proprietary interest. In the present case we agree with the Court below in thinking that it was the full proprietary interest which was intended to be sold and which was sold.

The fact that, though the late Poligar died in 1885, the plaintiff did not then claim the property, and in fact, only brought this suit in 1897, indicates clearly that he did not regard the sale as one that affected only a life interest of his father.

We accordingly hold that the suit was rightly dismissed and we dismiss the appeal with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

ABBAKKE HEGGADTHI (PLAINTIFF), APPELLANT,

v.

KINHIAMMASHETTY AND OTHERS (DEFENDANTS), RESPONDENTS.*

1906. March 9, 19, 30.

Mortgage—Simple mortgage, personal liability under exists unless special contract to the contrary—absence of specific prayer in plaint no ground for refusing appropriate relief—Delay no abandonment of right-Contract Act IX of 1872, s. 74, expl., effect of.

In the case of simple mortgages, the personal liability of the mortgagor exists, unless there is a specific contract to the contrary.

Wahid-un-Nissa v. Gobardhan Das, (I.L.R., 22 All., 453 at p. 461), referred to.

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*Appeal No. 140 of 1903, presented against the decree of R. A. Graham, Esq., District Judge of South Canara, in Original Suit No. 23 of 1902.