APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Bakewell.

1913. November 20 and December 5.

MANJAYA MUDALI AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

SHANMUGA MUDALI AND SEVEN OTHERS (PLAINTIFF AND DEFENDANTS NOS. 3 TO 9), RESPONDENTS.*

Hindu Law—Joint family co-parcenary—Purchase from a co-parcener—Its effect on family co-parcenary—Alienee, not a tenant in common—One member becoming outcaste, excluded from family—Limitation Act (IX of 1908), art. 142.

When a co-parcener alienates his share in certain specific family property the alienee does not acquire any interest in that property but only an equity to enforce his rights in a suit for partition and to have the property alienated set apart for the alienor's share if possible.

Hem Chunder Ghose v. *Thako Moni Debi* (1893) I.L.R., 20 Calc., 533, *Amolak Ram* v. *Chandan Singh* (1902) I.L.R., 24 All., 483, *Narayan bin Babaji* v. *Nathaji Durgaji* (1904) I.L.R., 28 Bom., 201, *Pandurang* v. *Bhaskar* (1874) 11 Bom. H.C.R., 72 and *Udaram* v. *Ranu* (1874) 11 Bom. H.C.R., 76, approved.

The alienee cannot therefore sue for partition and allotment to him of his share of the property alienated.

Venkatarama v. *Meera Labai* (1890) I.L.R., 13 Mad., 275, *Palani Konan* v. *Masakonan* (1897) I.L.R., 20 Mad., 243, and *Ramkishore Kedarnath* v. *Jainarayan Ramarachhpal* (1913) 14 M.L.T., 163, referred to.

Such an alienee has no right to possession and no status as a tenant in common although he might have obtained possession of the property in execution of the decree against one of the co-parceners

Deendyal Lal v. *Jugdeep Narain Singh* (1877) 4 I.A., 247, *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1880) I.L.R., 5 Calc., 148 (P.C.), *Hardi Narain Sahu* v. *Ruder Perkash Misser* (1884) I.L.R., 10 Calc., 626, followed.

When a co-parcener became an outcaste and was driven out of the family, and did not enjoy family property for over twelve years, it amounted to exclusion and the right to recover his share is barred.

Per BAKEWELL, J.—The transferee only acquires an equity and it is only a right *in personam* and not a right *in rem* and the transferor remains a member of the co-parcenary until partition is effected.

The question whether a general or partial partition will lie is not one relating to the law of procedure but must be decided according to the principles of Hindu Law.

Subba Row v. *Ananthanarayana Aiyar* (1912) 23 M.L.J., 64 at p. 70 and *Iburamsa Routhan* v. *Theruvenkatasami Naick*, (1911) I.L.R., 34 Mad., 269 at p. 270, dissented from.

* Second Appeal No. 151 of 1911.

A purchaser of the interest of a co-parcener must sue for a general partition of the entire family property.

Iburamsa Rowthan v. *Theruvenkatasami Naick* (1911) I.L.R., 34 Mad., 269 at p. 274, applied.

When such purchaser fails to apply for amendment of his plaint after an issue is raised questioning the frame of the suit, his suit is liable to be dismissed.

Subba Row v. *Ananthanarayana Aiyar* (1912) 23 M.L.J., 64 at p. 70, referred to.

SECOND APPEAL against the decree of S. RAMASWAMI AYYANGAR, the Subordinate Judge of Madura, East, in Appeal No. 742 of 1909, preferred against the decree of R. ANNASWAMI AYYAR, the District Munsif of Dindigul, in Original Suit No. 642 of 1906.

The plaintiff and the first defendant are the only surviving brothers of a family of six brothers who became divided prior to 1891. The second and third defendants are respectively the sons of the first defendant by his junior and senior wives. Each of them had a full brother who died some time between 1891 and 1904. The suit properties formed the ancestral property of the six brothers originally. After family partition which took place prior to 1891, the first defendant and his four sons formed a Hindu joint family and as such owned ancestral immoveable property.

By a sale-deed, dated 10th December 1891 (Exhibit I), the third defendant, one of the sons of the first defendant, conveyed one-fifth share of certain specified ancestral immoveable property situate in Appayampatti village to one Govindan Chetty; and by a sale-deed, dated 9th December 1894 (Exhibit III), the latter conveyed the same parcels to the first defendant. About the year 1900, the first defendant succeeded by inheritance to ancestral property which had been taken by his brother under the partition made prior to 1891.

By a sale-deed, dated 31st August 1904 (Exhibit A), the third defendant conveyed a half-share of certain specified immoveable properties in Appayampatti and another village to the defendants Nos. 4 and 5, who, by a sale-deed, dated 3rd December 1905 (Exhibit B), conveyed the same parcels to the plaintiff, a divided brother of the first defendant. By a sale-deed, dated 12th November 1904 (Exhibit C), the second defendant conveyed certain shares in specified immoveable property in the same villages to one Muthusami Chetty.

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In his plaint, the plaintiff claimed as assignee from the third defendant, under the deeds (Exhibits A and B), that these properties should be divided and one-third share should be allotted to him. By their written statement the defendants Nos. 1 and 2 pleaded, *inter alia*, that the third defendant had been outcasted and excluded from the family for more than twelve years prior to the suit, and that his right to a share became extinguished by the sale under Exhibit I, and also that certain liabilities of the family should be provided for before any partition could be made.

The Court of First Instance dismissed the suit and the Lower Appellate Court allowed the 2/15 share of the properties.

The first and second defendants preferred this second appeal.

M. K. Narayanswami Ayyar and *K. B. Ranganatha Ayyar* for the appellants.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the respondents.

SANKARAN NAIR, J.

SANKARAN NAIR, J.—The third defendant, a member of a Hindu family, conveyed his one-fifth share in certain joint family properties in 1891 by Exhibit I. That interest has now vested in the first defendant, his father. Two of his brothers died, and in 1904 the third defendant again transferred all his interest by Exhibit A. At that time, on the footing that he was a co-parcener, his interest amounted to one-third. The plaintiff has acquired the rights conveyed by Exhibit A and he now seeks to recover possession.

The Subordinate Judge has held that the plaintiff is entitled to a two-fifteenths share of the properties, that is the difference between one-third and one-fifth; and this is an appeal against that decision.

The first question that is argued before us is that by the transfer in 1894 the joint tenancy was put an end to and the third defendant's first alienee became a tenant in common with the other co-parceners so far as the property alienated was concerned and that therefore by the death of the other co-parceners no interest accrued to him by survivorship; and for this the decisions of BENSON AND MILLER, JJ., in *Srinivasa Sundara Thathachariar* v. *Krishnasawmy Iyengar*(1) and of BENSON and

(1) (1912) 15 I.C., 354.

SUNDARA AYYAR, JJ., in *Subba Row* v. *Ananthanarayana Aiyar*(1), are relied upon. These judgments follow the opinion of KRISHNASWAMI AYYAR, J., in *Chinnu Pillai* v. *Kalimuthu Chetti*(2).

It is argued before us that these decisions are not sound and that the alienation of a co-parcener's interest in a portion of a joint family property does not make the alienee a tenant in common with the other co-parceners in the property so alienated. On principle it is difficult to support the proposition.

When a co-parcener alienates his share in certain specific family property, the alienee does not acquire any interest in that property. He can only enforce his rights in a suit for partition. In dividing the family properties the Court will, no doubt, set apart for the alienating co-parcener's share the property alienated if that can be done without any injustice to the other co-parceners, and such property, if it is so set apart, may be given to the alienee as the transferee of such co-parcener. But this is only an equity and the alienee is not, as of right, entitled to have the property so allotted. If such property is not so set apart, then the alienee would be entitled to recover that property which was allotted to his vendor for his share, though it may not be the property that was alienated in his favour. The property allotted will take the place of the property which has been alienated to him so far as he is concerned.

This law has been repeatedly laid down in various cases by the other High Court also. See *Hem Chunder Ghose* v. *Thako Moni Debi*(3), *Amolak Ram* v. *Chandan Singh*(4), *Narayan bin Babaji* v. *Nathaji Durgaji*(5), *Pandurang* v. *Bhaskar*(6) and *Udaram* v. *Ranu* (7). This, of course, is inconsistent with the view that the alienee acquires any interest in any specific property. The co-parcener who alienated has himself no such interest. It is difficult to see, therefore, how the alienee could acquire such an interest.

For the same reasons, it has been held by this Court that an alienee cannot sue for partition and allotment to him of his share of the property alienated [see *Venkatarama* v. *Meera Labai*(8)]

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(1) (1912) 23 M.L.J., 64 at p. 70.
(2) (1912) I.L.R., 35 Mad., 47 (F.B.).
(3) (1893) I.L.R., 20 Calc., 533.
(4) (1902) I.L.R., 24 All., 483.
(5) (1904) I.L.R., 28 Bom., 201.
(6) (1874) 11 B.H.C.R., 72.
(7) (1874) 11 B.H.C.R., 76.
(8) (1890) I.L.R., 13 Mad. 275.

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and *Palani Konan* v. *Masakonan*(1). This again is inconsistent with the view that a purchaser becomes a tenant in common with the others in the specific property alienated to him. They have not been overruled or dissented from and are inconsistent with the cases above cited relied upon by the appellants.

In *Deendyal Lal* v. *Jugdeep Narain Singh*(2), a suit was brought by a son to recover the property sold in execution of a decree against his father. The Subordinate Judge passed a decree for a moiety of the family property claimed. That decree was reversed by the Appellate Court which dismissed the suit. The High Court, however, gave the plaintiff possession of the whole of the property, not merely the plaintiff's share. In appeal before the Privy Council, their Lordships laid down the position of a purchaser in the following words: "It seems to their Lordships that the same principle may and ought to be applied to shares in a joint and undivided Hindu estate; and that it may be so applied without unduly interfering with the peculiar status and right of the co-parceners in such an estate, *if the right of the purchaser at the execution sale be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded, before the alienation of his share took place.*" In accordance with such declaration, they held that the decree which awarded possession of the joint family property was right, but they added a declaration that the purchaser was entitled to take proceedings to have his alienor's share and interest ascertained by partition; this was the principle which was subsequently acted upon by their Lordships.

In *Suraj Bunsi Koer* v. *Sheo Persad Singh*(3), their Lordships passed a decree confirming co-parceners in their possession of the joint family property including the share of the alienor subject to such proceedings as the alienee might take to ascertain the share that he obtained by means of partition. The decree assumed that till such partition the alienee did not acquire any right to possession. *Suraj Bunsi Koer* v. *Sheo Persad Singh*(3). In the judgment of the Privy Council in *Hardi Narain Sahu* v. *Ruder Perkash Misser*(4), their Lordships decided that in similar cases where the alience has got

(1) (1897) I.L.R., 20 Mad., 243. (2) (1877) 4 I.A., 247.
(3) (1880) I.L.R., 5 Calc., 148 (P.C.).
(4) (1884) I.L.R., 10 Calc., 626 (P.C.).

where the alienee has got possession of the property he should be turned out of possession of the whole of the property and that the other co-parceners should recover possession of the same subject to a declaration that the alienee is entitled to demand a partition of the share of the alienor.

These decisions negative any right of the alienee to possession and his status as a tenant in common although he might have obtained possession of the property in execution of a decree against one of the co-parceners.

So far as Madras is concerned there is no distinction in this respect between the rights of a purchaser in execution of a decree and by private alienation; and in *Ramkishore Kedernath* v. *Jainarayan Ramarachhpal*(1), which is a recent case of private alienation, the Judicial Committee pointed out that the members of a family who were not bound by the alienation were entitled to recover possession of the entire property as they were entitled to it as joint family property and desired to enjoy it as such. They also pointed out that in a suit for such possession it may be open to the Court to make the whole or any part of the relief granted to them conditional on their assenting to a partition, so far as regards the alienor's interest in the estate, so as to give effect to any right which the alienee may be entitled to, claiming through the alienor. The two Madras cases above referred to as well as these Privy Council decisions do not seem to have been considered by the learned judges in arriving at the conclusion that the alienee becomes a tenant in common of the portion of the joint family property alienated. The decisions of the other High Courts cited by KRISHNASWAMI AYYAR, J., if opposed to these decisions cannot be followed nor has the decision of the Full Bench in *Chinnu Pillai* v. *Kalimuthu Chetti*(2) anything to do with the case. It only determined the time for ascertaining the alienating co-parcener's share which passed to the purchaser. I am accordingly unable to follow the decisions relied upon by the appellants.

The other question is whether the interest of the third defendant has been lost by prescription. It is found that he became an outcaste in 1891. It is also found that he was driven out of the family and that he did not enjoy the family properties.

(1) (1913) 14 M.L.T., 163 (F.B.). (2) (1912) I.L.R., 35 Mad., 47 (F.B.).

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This is clearly exclusion, and as twelve years have elapsed since the date of exclusion, it appears to me that he had lost all his interest in the joint family property and that therefore the plaintiff did not acquire any interest under Exhibit A. The decree of the Subordinate Judge must for this reason be reversed and that of the District Munsif restored with costs in this and the Lower Appellate Court.

BAKEWELL, J.

BAKEWELL, J.—I have had the advantage of reading the judgment which my learned brother has just delivered and I entirely concur therein; since, however, we are differing from learned Judges of this Court for whose opinion I have the highest respect, I think that I should also state my reasons.

The historical development of the law relating to the property of a joint Hindu family whereby a member of the family has obtained a power of disposing of his interest in the joint property is well described by Mr. Mayne in his book on Hindu Law (paragraphs 353 to 360), and he shows that this power is contrary to the theory of the ancient Mitakshara law and is due to modern ideas and is the creature of judicial decisions.

It is clear that an ordinary member of a family cannot convey to his alienee a larger interest in the joint property than he himself possesses, and it is desirable to consider shortly the nature of that interest. It is not strictly comparable to any interest under any other branch of the law of property or of contract, still less can it be compared to joint tenancy or tenancy in common under the law of England. In *Appovier* v. *Rama Subba Aiyan*(1), LORD WESTBERY states that "according to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular individual, has a certain definite share"; and, when he speaks of the severance of a joint tenancy and its conversion into a tenancy in common, he is careful to point out that he uses the language of the English law merely by way of illustration. With all respect, I think that the learned Judges from whom we are differing by using these terms have imported from the English law some of the ideas which they connote.

If, in order to describe the development of this branch of law, it be permissible to compare it with another branch of law,

(1) (1866) 11 M.I.A., 75.

I would prefer to use the law of partnership rather than the English law of property, in the same manner in which it was used by their Lordships of the Privy Council in *Deendyal Lal* v. *Jugdeep Narain Singh*(1). A member of a joint family cannot, any more than a partner, introduce a stranger into the community; he cannot for his own benefit alienate or deliver to a stranger a particular portion of the common property, and he cannot obtain his share of that property without winding up the concern; and his interest is, therefore, a right to a share of the general assets after the common liabilities have been discharged, and not a right to a share of any specific property of the family. It has accordingly been frequently held that his remedy is a suit for the partition of the whole of the family property, and not of specific property, as is pointed out by SUNDARA AYYAR, J., in *Narayanaswami Naidu Garu* v. *Tirumala Setti Subbayya*(2).

I must respectfully dissent from the dicta of the same learned Judge in *Subba Row* v. *Ananthanarayana Aiyar*(3), and of KRISHNASWAMI AYYAR, J., in *Iburamsa Rowthan* v. *Therwenkatasami Naick*(4), that the question whether a suit for general or for partial partition will lie is "one relating to processual law and must be decided not according to any rule of Hindu Law but according to the principles of civil procedure." A suit for an account of the property of an undivided family and an enquiry as to its liabilities, that is for general partition, is necessitated by the nature of the interests of the plaintiff and his co-parceners; the circumstances of a particular case may enable this procedure to be dispensed with, but the general rule remains that each co-parcener may ask that it should be followed. It has been clearly laid down by their Lordships of the Privy Council that the purchaser of the interest of a co-sharer in a joint family estate under a sale in execution of a decree, or under a voluntary sale in the Madras Presidency, stands in the shoes of the co-sharer, and acquires the right as against the other co-sharers to compel a partition [*Deendyal Lal* v. *Jugdeep Narain Singh*(1)]; the interest which is purchased is not the share at that time in the property, but is the right which the alienor would have to a partition, and what would come to him upon the partition being made; *Hardi Narain Sahu* v. *Ruder Perkash*

(1) (1877) 4 I.A., 247 at p. 255. (2) (1913) 24 M.L.J., 79 at p. 80.
(3) (1912) 23 M.L.J., 64 at p. 70. (4) (1911) I.L.R., 34 Mad., 269 at p. 270.

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Misser(1). "The law as established in Madras and Bombay has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition." *Suraj Bunsi Koer* v. *Sheo Persad Singh*(2). It has been held that this right is not determined by the death of the alienor before partition (*ibid.*), and that the quantum of interest transferred must be taken as that of the alienor at the date of the assignment—*Chinnu Pillai* v. *Kalimuthu Chetti*(3); but there appears to be no reason why the transferor should not by appropriate words convey all such rights as he may possess, whether vested or contingent upon the death of another co-parcener in the transferor's lifetime; and the transferor obviously cannot prevent his share from being diminished by reason of the birth of a collateral co-sharer, or by legitimate payments or alienations by the manager of the family. In accordance with these authorities it has been held that a purchaser of the interest of a co-parcener must sue for a general partition of the entire family property; *Iburamsa Rowthan* v. *Theruvenkatasami Naick*(4).

Since the transferee only acquires an equity to compel a partition he has only a right *in personam* and not a right *in rem*, and the transferor remains a member of the family and retains all the rights which attach to membership, including the right to an increased share upon the death of another co-parcener. An alienation by a co-parcener of a particular item of the family property, or of a specific share in such an item, differs in some respects from an alienation of the whole or a fraction of the interest of the transferor in the general assets of the family. Since a member of a joint family has no right to a specific share of any particular property of that family, an assignment by him of such a share to a stranger conveys no interest whatever to the transferee; if, however, the grantor should subsequently become entitled to the property included in the grant, then on a well settled principle of equity which is embodied in section 43 of the Transfer of Property Act, 1882, he cannot deny the title of the transferee and is bound to make the grant effectual. The Courts have in this case also recognized the right of the transferee

(1) (1884) I.L.R., 10 Calc., 626 (P.C.). (2) (1880) I.L.R., 5 Calc., 166.
(3) (1912) I.L.R., 35 Mad., 47 (F.B.). (4) (1911) I.L.R., 34 Mad., 269 at p. 274.

to stand in the shoes of the transferor and to enforce his equity by means of a suit for the general partition of the entire family property, and in order to do equity as between the transferor and transferee will endeavour to marshall the property in such a way as, if possible, to give effect to the alienation; but this is in order to avoid a fraud upon the transferee, and this procedure will not be adopted to the prejudice of the other co-parceners.

In the present case the first defendant and his four sons in 1891 formed a joint family, and as such owned ancestral immoveable property. By a sale-deed, dated 10th December 1891 (Exhibit I), the third defendant, one of the sons, conveyed one-fifth share of specified ancestral immoveable property situate in Appayampatti village to one Govindan Chetty; and by a sale-deed, dated 9th December 1894 (Exhibit III), the latter conveyed the same parcels to the first defendant. In paragraph 5 of his written statement the first defendant stated that he made this purchase in order to avoid unnecessary litigation, and, since there is no allegation that the purchase monies were his self-acquisition, it may be presumed that the purchase was for the benefit of the family, and the effect of the conveyance Exhibit III was to extinguish the claim of Govindan Chetty under Exhibit I. Even if the deed Exhibit III could be construed as an assignment to the first defendant of Govindan Chetty's right *in personam* against the third defendant, it would merely give to the first defendant an equity against the latter which he could enforce upon a partition of the family property. In either view and in accordance with the principle above enunciated the third defendant remained a member of the family. About the year 1900, the first defendant succeeded by inheritance to ancestral property which had been taken by his brother upon a partition made sometime prior to 1891; and two of his sons died between the years 1891 and 1904. The third defendant then, as a member of the family, became entitled to an increased share both in the property situate in Appayampatti village and in property situate in Poojaripatti village.

By a sale-deed, dated 31st August 1904 (Exhibit A), the third defendant conveyed a half share of specified immoveable properties in both these villages to fourth and fifth defendants, who, by a sale-deed, dated 3rd December 1905 (Exhibit B), conveyed the same parcels to the plaintiff, who is a divided brother of the

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first defendant. By a sale-deed, dated 12th November 1904 (Exhibit C), the second defendant conveyed certain shares in specified immoveable property in the same villages to one Muthusami Chetty.

By his plaint, the plaintiff claimed as assignee from the third defendant, under the deeds Exhibits A and B, that these properties should be divided and one-third share should be allotted to him. By their written statement the first and second defendants pleaded, *inter alia*, that the third defendant had been outcasted and excluded from the family for more than 12 years prior to the suit, and that his right to a share became extinguished by the sale under Exhibit I; and also that certain liabilities of the family should be provided for before any partition could be made.

I think that the plaintiff might have maintained a suit for partition, as assignee of the interest of the third defendant in the properties comprised in the sale-deeds (Exhibits A and B); but that his proper remedy was by suit for general partition of the family properties, and that when an issue was raised by the District Munsif as to the frame of the suit, he should have applied for amendment of his plaint accordingly, and that the suit might have been dismissed upon this ground [see *Subba Row* v. *Ananthanarayana Aiyar*(1)].

I agree with my learned brother that the plaintiff's suit also fails on the ground that the third defendant's rights had been lost by prescription, and with the decree proposed by him.

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(1) (1912) 23 M.L.J., 64 at p. 70.