Re SUBBARAYA CHETTI.

prisoner with a view to proceedings being taken against him under section 110, Criminal Procedure Code.

(ii) The remand and therefore the custody being illegal, the escape from custody was not illegal and so not an offence under section 225-B, Indian Penal Code, and consider that it should be set aside.

"Pending final orders of the High Court I have ordered the release of the accused on bail.

"The records of the cases are submitted duly indexed."

M. H. Hakeem for *the Public Prosecutor* for the Crown.

The accused did not appear either in person or by pleader.

The following Order of the Court was delivered by

TYABJI AND PHILLIPS, JJ.

TYABJI, J.—The Magistrate's Court had no power to remand the accused. Section 167 of the Criminal Procedure Code applies to proceedings under Chapter XIV and not to those under section 110: *Emperor* v. *Basya*(1). The conviction is therefore set aside and the bail bonds cancelled.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Coutts Trotter.

1915. July 16, 23 and 26 and August 27.

KARRI RAMAYYA AND OTHERS (DEFENDANTS NOS. 4 AND 5), APPELLANTS,

v.

VILLOORI JAGANNADHAN AND NINE OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 1, 3 AND 6 to 11), RESPONDENTS.*

(Madras) Proprietary Estates Village-service Act (II of 1894), ss. 5 and 10, cl. (2) —Service inam—Emoluments, partition of, whether prohibited—Alienation, validity of—Subsequent suit for ejectment—Transfer of Property Act (IV of 1882), sec. 43—Ancestral property—Property inherited by maternal grandsons—Interests, nature of.

The enfranchisement of a service *inam* under section 10, clause (2) of the (Madras) Proprietary Estates Village-service Act (II of 1894) does not destroy the rights of any member of a joint family who has a hereditary interest in it.

The alienation of a service *inam* is void and though it is subsequently enfranchised, the alienee cannot invoke the aid of section 43 of the Transfer of Property Act in his favour.

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(1) (1903) 5 Bom. L.R., 27. * Second Appeal No. 1636 of 1912.

Ramasami Naik v. *Ramasami Chetty* (1907) I.L.R., 30 Mad., 255; *Narabari Sahu* v. *Siva Korithan Naidu* (1913) M.W.N., 415 and *Bachu Ramayya* v. *Phura Satchi* (1913) M.W.N., 999, referred to.

Property which descends on daughter's sons from their maternal grandfather is ancestral property in which the grandsons take an interest by birth according to the Mitakshara law.

Cases reviewed.

SECOND APPEAL against the decree of V. V. S. AVADHANI, the temporary Subordinate Judge of Vizagapatam, in Appeal No. 475 of 1911, preferred against the decree of T. SOMA RAO PANTULU, the District Munsif of Vizagapatam, in Original Suit No. 108 of 1910.

The facts of the case appear from the judgment.

Honourable Rao Bahadur *B. N. Sarma* for the appellants.

V. Ramesam for the first respondent.

The following judgment of the Court was delivered by

SPENCER, J.—The suit was brought for the partition of a *bariki* service inam which was enfranchised in 1905 in the name of the first defendant. The contesting defendants were the purchasers from the first defendant and three of his sons by a sale deed executed in 1906. The plaintiff was a purchaser from the first defendant's elder son and two of his brothers in 1909. The brother's share in the joint family property being two-thirds and the first defendant's son's being one-fifteenth, the claim of the plaintiff was to recover eleven-fifteenths of the whole inam. He got a decree accordingly in the first Court which was confirmed in appeal.

The first question now raised is whether the defendants Nos. 2 and 3 had a saleable interest prior to enfranchisement. The short answer to this is that the sale, through Exhibit B, having been executed on 21st September 1909 subsequent to the enfranchisement, passed all the rights which they then possessed. There was a previous agreement to sell in 1906 which does not affect the question. At that date Chellamma, the mother of defendants Nos. 1 to 3, was, it is suggested, alive. The Subordinate Judge found that she died five or six years ago which comes to about 1906 or 1907. If she was alive at the time of the sale, it is argued that the defendants Nos. 2 and 3 had no right to convey the shares which were still in the holding of their mother. If the finding of the Subordinate Judge is correct, as

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SPENCER AND COUTTS TROTTER, JJ.

we must assume it to be, Chellamma was certainly not alive at the date of the sale in 1909. But reliance is placed on section 10, clause (2) of Madras Act II of 1894 which runs as follows :—

"The succession to all hereditary village offices shall devolve on a single heir according to the general custom and rule of primogeniture governing succession to impartible zamindaris in Southern India."

It is contended that this provision takes away the rights of any persons who claim any joint interest in the emoluments of the office. When the lands were enfranchised exclusively in the name of the first defendant after he had succeeded to the *bariki* appointment as the daughter's son of the original male holder, it is contended that none of his brothers retained any interest therein.

We are clearly of opinion that the effect of enfranchisement is not to destroy the rights of any members of a joint family which has a hereditary interest in the inam.

This question was fully considered in *Gunnaiyan* v. *Kamatchi Ayyar*(1), and the conclusion arrived at was, that service inams which are enfranchised are impressed in the hands of the registered holder with the same character as if they had devolved upon him as ordinary property independently of the hereditary office and the registered owner will hold them as joint family property liable to partition. Section 10, clause (2) of Madras Act II of 1894, in terms, deals with the succession to village offices which it declares to be governed by the rule of primogeniture. There is nothing in the wording of the section to affect the family title to the lands which form the emoluments of the office, although in cases where the property gets into the hands of a stranger the Act contains provision for its recovery. Such was the case dealt with in *Venkata* v. *Rama*(2). The subsequent decision in *Gunnaiyan* v. *Kamatchi Ayyar*(1) places the rights of the members of a joint family claiming an interest to a hereditary village office on a sound footing. In the present case the history of the dealings of this family with the lands to which the lower Courts have referred does not admit of any question being raised at this stage as to the hereditary nature of the inam and the mirasi rights which the family possessed in it nor can we consider what the rights

(1) (1903) I.L.R., 26 Mad., 339. (2) (1885) I.L.R., 8 Mad., 249.

of the parties would be if the family had been divided when the succession opened as there was no evidence or admission of division and the point has not been taken in the memorandum of Second Appeal.

The next question that has been raised is whether property which descends on daughter's sons from their maternal grandfather is ancestral property in which the grandsons take an interest at birth according to the Mitakshara law. If this question is answered in the negative, the first defendant's son, who is the seventh defendant, had no right to sell a one-fifteenth share to the contesting respondents and all that they can rightly claim is the two-thirds share of the defendants Nos. 2 and 3. This question was definitely answered in the affirmative in *Vythinatha Ayyar* v. *Yeggia Narayana Ayyar*(1), and the same question was answered in the negative in *Jamna Prasad* v. *Ram Partap*(2), and it is apparent from the notes to paragraph 275 in the seventh and eighth editions of Mayne's Hindu Law and Usage, that the learned author and editor felt doubts as to the correctness of the Madras decision. We have been asked to refer the matter to a Full Bench. But we do not consider that this case is of sufficient importance to warrant a reference, or that the state of the law is really in any uncertainty, so far as this Court is concerned.

It was pointed out by the learned Judges of the Allahabad High Court that, where the word "ancestral" (estate) is used in Colebrook's Mitakshara, the correct translation is grand-paternal and the word in the original text is "paternal grandfather's." They proceeded to discuss the meaning of the words "ancestral property" and decided that in the Mitakshara they were used in the limited sense of "property in which the sons acquire by birth a joint interest with their father"; and they observed: "It is a well-known rule of the Mitakshara law that property may be joint property without having been ancestral." They thus interpret the use, by the Privy Council, of the words "ancestral property" in *Venkayamma Garu* v. *Venkataramanayyamma Bahadur Garu*(3) in the broad sense of property of a joint family to which the rule of survivorship applies.

In *Karuppai Nachiar* v. *Sankaranarayanan Chetty*(4), the question again arose as to what might be regarded as ancestral

(1) (1904) I.L.R., 27 Mad., 382.
(2) (1907) I.L.R., 29 All., 667.
(3) (1902) I.L.R., 25 Mad., 678.
(4) (1904) I.L.R., 27 Mad., 300.

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property, and the Full Bench observed: "Under the Mitakshara joint family system there can be no joint family property in respect of which the male issue of the joint owners will not by birth become joint owners with their father: see *Sudarsanam Maistri* v. *Narasimhulu Maistri*(1). If, therefore, we are to understand the expression 'ancestral property' in their Lordships' judgment otherwise than in its technical sense, according to which it is property in which a son on his birth becomes an equal owner with his father, the result of the ruling will be that a species of joint family property unknown to the Mitakshara will be brought into existence." Similar observations occur in *Munuswami Chetty* v. *Maruthammal*(2) which was also a case decided by a Full Bench. It is urged that these observations are of the nature of *obiter dicta*. They may not have been necessary for the decision of the points arising in those cases, but they are sufficient to indicate a clear trend of decision by this Court in only one direction and that is in favour of grandsons taking an interest at birth in property which descends from their maternal grandfather. The Full Bench also supported their opinion by reference to certain texts in which a daughter's son is treated as being as good as a son's son for spiritual purposes. The earlier decisions in *Muttayan Chetti* v. *Sivagiri Zamindar*(3) and in *Sivaganga Zamindar* v. *Lakshmana*(4), cannot be allowed to influence our decision, seeing that they were considered and discussed in the Full Bench decision—*Karuppai Nachiar* v. *Sankaranarayanan Chetty*(5)—to which we have referred. Again it is argued that a later decision of the Privy Council in *Avar Singh* v. *Thakar Singh*(6) throws light on what they meant by the use of the word "ancestral" but we think that as their Lordships were here dealing with a case of Punjab customary law it would not be right to give the expressions employed the significance that they might otherwise bear.

The next argument put forward on behalf of the appellants is that they are entitled to remain in possession under a mortgage deed, dated 12th April 1900, until the mortgage is redeemed.

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(1) (1902) I.L.R., 25 Mad., 149 at pp. 155 and 156.
(2) (1911) I.L.R., 34 Mad., 211 at p. 218.
(3) (1879) I.L.R., 3 Mad., 370.
(4) (1886) I.L.R., 9 Mad., 188.
(5) (1904) I.L.R., 27 Mad., 300.
(6) (1908) I.L.R., 35 Calc., 1039.

This question was not raised in the written statement, nor was there any issue on the point. It is sufficient answer to this contention to say that section 5 of Madras Act III of 1895 makes it unlawful to alienate the emoluments of village offices or to encumber them in any manner whatsoever, and it was held in *Narabari Sahu* v. *Siva Korithan Naidu*(1) and in *Bachu Ramayya* v. *Phara Satchi*(2) that the alienation of a service inam was wholly void and that though the inam was at a later date, enfranchised, the alienee could not invoke section 43 of the Transfer of Property Act in his favour. These decisions follow the decision in *Ramasami Naik* v. *Ramasami Chetti*(3) and make it clear that the appellants cannot set up any right on the strength of their usufructuary mortgage as against the purchasers under a valid sale deed.

The last contention is that Rs. 10 was the figure arrived at as the mesne profits of the total holding and that, therefore, the plaintiff should not have been given a decree for mesne profits of more than eleven-fifteenths of this sum. The District Munsif stated that the plaintiff claimed at the rate of Rs. 10 a year and that the contesting defendants did not object to it, and he found accordingly that Rs. 10 a year was the sum to which the plaintiff was entitled. The appellants cannot be allowed to raise the contention that by this finding of fact the District Munsif meant that the profits from the whole holding were only Rs. 10.

The Second Appeal is, therefore, dismissed with costs.

S.V.

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(1) (1913) M.W.N., 415.
(2) (1913) M.W.N., 999. (3) (1907) I.L.R., 30 Mad., 255.