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prior to partition against a father alone, execution cannot be levied subsequent thereto against the coparcenary property in the hands of the son.

I agree in the order proposed by my learned brother VENKATASUBBA RAO J.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Cornish.

1936. November 12.

SELLAPPA CHETTIAR AND TWO OTHERS (DEFENDANTS 3 TO 5), APPELLANTS,

v.

SUPPAN CHETTIAR AND TWO OTHERS (PLAINTIFF AND DEFENDANTS 1 AND 2), RESPONDENTS.*

Hindu law—Joint family—Manager—Alienation by—"Benefit of the estate"—Meaning and test of—Impartible estate being joint family property—Junior member's interest in—Nature of—Madras Impartible Estates Act (II of 1904), sec. 4—Holder of impartible estate governed by—Mortgage by, not for justifiable purpose—Son of holder joining in—Effect of.

The power of the manager of a joint Hindu family to alienate property of the joint family can be exercised not only in a case of need but "for the benefit of the estate". For a transaction to be "for the benefit of the estate" it need not necessarily be of a defensive character, in the sense that it is calculated to protect the estate from some threatened danger or destruction. To hold the "defensive character" to be the test would be to ignore the distinction between necessity and benefit.

Hunoomanpersaud Panday v. *Mussumat Babooee Munraj Koonweree*, (1856) 6 M.I.A. 393, and *Palaniappa Chetty* v.

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* Appeal No. 418 of 1931.

Sreemath Devasikamony Pandara Sannadhi, (1917) L.R. 44 I.A. 147; I.L.R. 40 Mad. 709, referred to.

Jagat Narain v. *Mathura Das,* (1928) I.L.R. 50 All. 969 (F.B.), approved.

In the case of an impartible joint family estate, the coparceners other than the zamindar in possession have a right of ownership. *Ramasami Naik* v. *Ramasami Chetti,* (1907) I.L.R. 30 Mad. 255, which held the interest of the coparceners to be a mere *spes successionis,* cannot, in view of the decisions of the Judicial Committee in *Shibaprasad Singh* v. *Prayagkumari Debee,* (1932) L.R. 59 I.A. 331; I.L.R. 59 Cal. 1399, and *Collector of Gorakhpur* v. *Ram Sundar Mal,* (1934) L.R. 61 I.A. 286; I.L.R. 56 All. 468, be regarded as having laid down the correct law.

When the holder of an impartible joint family estate to which the Madras Impartible Estates Act (II of 1904) applies mortgages property appertaining to the estate for a purpose not binding upon the estate and his son joins in the mortgage, the mortgage affects the life interest of the son by reason of his having joined in the transaction.

APPEAL against the decree of the District Court of West Tanjore at Tanjore in Original Suit No. 16 of 1928.

T. L. Venkatarama Ayyar for appellants.

B. Sitarama Rao for first respondent.

Other respondents were unrepresented.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO J.—This suit has been brought to enforce a simple mortgage granted to the plaintiff on 8th January 1916 (Exhibit A) by the first defendant and his father, the late Zamindar of Neduvasal, to secure the repayment of Rs. 8,300. It may be mentioned that the plaintiff was a usufructuary mortgagee under two earlier deeds executed in his favour on 16th December 1910 for about Rs. 86,000. The suit mortgage

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comprises six villages, of which four have been subsequently sold by the first defendant and his father to the second defendant by Exhibit F, dated 14th August 1919. The latter by Exhibit H, dated 1st June 1925, conveyed his interest to defendants 3 to 5, reciting in the deed that the original purchase was intended to be on their behalf.

The only persons contesting the suit are defendants 3 to 5. The first defendant, it may however be stated, originally filed a defence, but subsequently not only withdrew it but admitted the plaintiff's claim.

The villages in question are part of an impartible estate, of which the first defendant's father was the proprietor at the time the suit mortgage was granted. Defendants 3 to 5 contend that the alienation was made without legal necessity and is consequently not binding on the estate under section 4 of the Impartible Estates Act (Madras Act II of 1904). The effect of that section is that the power of the proprietor, in regard to alienating his estate or binding it by his debts, is co-extensive with that of the manager of a joint Hindu family, not being a father or grandfather ; in other words, the Act does not recognise the doctrine either of antecedent debt or of pious obligation [see *Venkatalingama* v. *Arunachellam Chettiar*(1)]. The short question, therefore, is, was the alienation made for a purpose which would have been held justifiable had it been made by a manager of coparcenary property? Before dealing with the question, we may observe (and it is conceded) that it is unnecessary to enquire

(1) (1923) 19 L.W. 132.

in this suit what interest, if any, defendants 3 to 5 have acquired in the suit property by reason of the alienations mentioned above (Exhibits F and H).

The mortgage amount of Rs. 8,300 consists of two parts :

(i) Rs. 4,892 borrowed for the purpose of redeeming from mortgage a property at Tanjore known as "Kamala Vilas" ;

(ii) Rs. 3,408 borrowed for meeting the expenses of the marriage of the late zamindar's daughter, i.e., the first defendant's sister.

In regard to the former amount, the facts are these. The late zamindar purchased a house known as "Kamala Vilas" on 26th June 1915 for Rs. 6,500. The house had been previously mortgaged and the zamindar undertook to discharge the mortgage debt. This amounted to Rs. 4,892, which sum was paid from the amount borrowed from the plaintiff. If the original purchase of the house can be justified, it follows that this part of the debt must be held to be binding. This raises the question, what is the extent of a manager's power in regard to buying property ? It is not doubted that the power of the manager can be exercised not only in a case of need but "for the benefit of the estate". This has been held in numerous cases which have followed *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*(1) ; but, as regards what is meant by the expression "the benefit of the estate", there has been a conflict of judicial opinion. One view seems to be, that unless the transaction is of a defensive character, in the sense that it is

(1) (1856) 6 M I.A. 393.

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calculated to protect the estate from some threatened danger or destruction, it cannot be said to be for the benefit of the estate. We are unable to place this narrow interpretation upon the words in question. If the true doctrine is that the "defensive character" is to be the test, the distinction between necessity and benefit disappears. For, suppose an alienation is made for raising funds to preserve some part of the estate from extinction. It is difficult to say in this instance whether the purpose is one of need or one of benefit, but there can be no doubt that the primary purpose is one of need. Suppose again, money is raised for defending the estate from hostile litigation. Here again, the question whether the purpose is one of necessity or benefit presents similar difficulty. The fact is that benefit and need are so interwoven in such cases as to make the demarcation difficult. To hold therefore that the rule of benefit should be confined only to cases where both need and benefit co-exist, would be to disregard "benefit" as affording a distinct ground of justification. In *Hunoomanpersaud's* case(1) the rule is stated with sufficient emphasis upon benefit as furnishing a further ground. Their Lordships say:

> "It (the power) can only be exercised rightly in a case of need, or for the benefit of the estate. But where in the particular instance, the charge is one which a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate."

In this passage the reference to "prudent owner" when considering the question of benefit, is not without significance. That seems to show that

(1) (1856) 6 M.I.A. 393.

their Lordships are thinking of "benefit" as something distinct from "need". Their Lordships then go on to say:

"The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."

This seems to have given rise to the view that the "pressure" and the "danger" referred to here are examples of the "benefit" mentioned. In *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi*(1) their Lordships of the Judicial Committee point out the difficulty of stating precisely what is meant by "benefit" used in this connection. The whole passage is worth quoting:

"No indication is to be found in any of them as to what is, in this connection, the precise nature of the things to be included under the description 'benefit to the estate'. It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not."

Their Lordships recognise the difficulty (we may add, possibly also the danger) of attempting a precise statement of what are included in the term "benefit". To infer from the three instances given in this passage that the transaction should be of a defensive nature does not seem warranted by the language used. These three instances are given as cases of obvious benefit, which seems necessarily to imply, far from suggesting the contrary, that cases of less obvious benefit are not

(1) (1917) L.R. 44 I.A. 147; I.L.R. 40 Mad. 709.

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to be excluded. Indeed, it could be easily conceived what strange anomalies would arise were the restricted view to prevail. To take a familiar example, where unproductive immovable property is sold with a view to the investment of the proceeds in the purchase of more suitable property, we fail to see why the sale should be condemned as not being for a justifiable purpose. Other similar cases may be supposed, in which it would be in the interests of the coparcenary to sell ancestral property with a view to make a fresh purchase. Is it to be held that a manager cannot sell the family dwelling house situated in a slum, in order to buy a fresh property intended for the future residence of the family? Again, is a manager to be debarred from selling the dwelling house in a remote village when the family for educating its children shifts its residence to a town? Or again, is it proper to hold that a manager can repair a dilapidated family house, but cannot incur a debt for the purpose of reasonably improving and enlarging it? The Full Bench of the Allahabad High Court, in a forcible and lucid judgment, repelled the theory that the transaction must necessarily be of a "defensive nature", *Jagat Narain* v. *Mathura Das*(1), and we agree with the opinion expressed there that the pronouncements of the Judicial Committee would not justify the narrower view being taken of the expression "for the benefit of the estate".

The question then remains, whether the evidence adduced here is sufficient to prove that the

(1) (1928) I.L.R. 50 All. 969 (F.B.).

purchase of the house could be said to have conferred a benefit upon the estate in the sense in which we have interpreted it. There was no attempt made to show in what circumstances or for what purpose the house was purchased. Mr. Sitarama Rao for the plaintiff relies upon the recital in Exhibit F to the effect that on its date, namely, in 1919, the zamindar and his family were actually residing in that house. Granting the recital to be evidence, it merely shows that the house was used for residential purposes ; but that is hardly sufficient. Moreover, it ought to be shown that the house formed an accretion to the impartible estate, for, if there was no intention to incorporate it, the purpose could hardly be described as justifiable. In Exhibit F it is stated that for the repair of this house, a part of the amount raised under that document was utilised. The mere fact that the money represents a portion of the proceeds of the sale of a fraction of the impartible estate raises no presumption of an intention to incorporate ; beyond that, no evidence whatsoever has been adduced. We must therefore hold that the mortgage to the extent of Rs. 4,892 was not for a purpose binding upon the estate. The transaction would, however, affect the zamindar's life interest ; but as he had died before the action, the plaintiff could derive no benefit from the alienation made by the previous holder.

This leads us to the question whether the zamindar's son, i.e., the present first defendant, by joining in the mortgage conveyed any interest to the plaintiff. Mr. T. L. Venkatarama Ayyar strongly contends, relying upon some cases of

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which *Ramasami Naik* v. *Ramasami Chetti*(1) is the most important, that in the case of an impartible joint family estate, the coparceners other than the zamindar in possession have no right of ownership. This question has been fully considered in two recent decisions of the Judicial Committee and their Lordships have with great emphasis repelled the contention that there was no co-ownership. In *Shibaprasad Singh* v. *Prayagkumari Debee*(2) their Lordships, in the judgment delivered by Sir DINSHAW MULLA, review the case-law on the point and show that the decisions proceed upon two apparently inconsistent views; one set of decisions [*Sartaj Kuari's* case(3), the *first Pittapur* case(4) and the *second Pittapur* case(5)] proceed on the view that there is no co-ownership, while the other line represented by *Baijnath's* case(6) rests upon the principle that there is a right of survivorship, which in turn is founded upon co-ownership. Their Lordships point out that the inconsistency is apparent and not real. It is the general law of the Mitakshara that regulates partible and impartible property alike belonging to a coparcenary, but in the case of impartible property, custom has superseded the general law in certain respects. As regards the right of survivorship, the general law not having been superseded by custom, that right still remains and that is what was held in *Baijnath's* case(6). To this extent the estate

(1) (1907) I.L.R. 30 Mad. 255.
(2) (1932) L.R. 59 I.A. 331; I.L.R. 59 Cal. 1399
(3) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.
(4) (1899) L.R. 26 I.A. 83; I.L.R. 22 Mad. 383.
(5) (1918) L.R. 45 I.A. 148; I.L.R. 41 Mad. 778.
(6) (1921) L.R. 48 I.A. 195; I.L.R. 43 All. 228.

retains its character of joint family property and the right of co-ownership is preserved. Their Lordships cite a passage from the judgment of Sir JAMES COLVILE in *Chintamun Singh* v. *Nowlukho Konwari*(1) where the right of the junior members is referred to as a contingent right of property, which they can part with or transfer. After full discussion, the position is thus summed up by their Lordships :

"Though the other rights which a coparcener acquires by birth in joint family property no longer exist, the birth-right of the senior member to take by survivorship still remains. Nor is this right a mere *spes successionis* similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced and surrendered. Such being their Lordships' view, it follows that in order to establish that a family governed by the Mitakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to prove an intention, expressed or implied, on the part of the junior members of the family to renounce their right of succession to the estate." ; *Shibaprasad Singh* v. *Prayagkumari Debee*(2).

What this decision lays down is the very opposite of what has been held in *Ramasami Naik* v. *Ramasami Chetti*(3). The contention was put forward that the interest possessed by the junior members, if any, was only a *spes successionis* and that contention was definitely rejected. It is noticeable that in the passage quoted above, the right of the senior member to take by survivorship is referred to as his *birth-right*, capable of being renounced or surrendered.

In *Collector of Gorakhpur* v. *Ram Sundar Mal*(4) their Lordships, in the judgment delivered

(1) (1875) L.R. 2 I.A. 263 ; I.L.R. 1 Cal. 153.
(2) (1932) L.R. 59 I.A. 331, 345, 346 ; I.L.R. 59 Cal. 1399.
(3) (1907) I.L.R. 30 Mad. 255.
(4) (1934) L.R. 61 I.A. 286 ; I.L.R. 56 All. 468.

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by Lord BLANESBURGH, re-affirm this doctrine. They first point out that *Sartaj Kuari's* case(1) and the *first Pittapur* case(2) appeared to be destructive of the rule that an impartible zamindari could be in any sense joint family property, but they go on to say that this view, apparently implied in these cases, was definitely negatived by Lord DUNEDIN when delivering the judgment in *Baijnath's* case(3). Then they make the following significant observation:

> "One result is at length clearly shown to be that there is now no reason why the earlier judgments of the Board should not be followed, such as for instance the *Chellapalli* case, *Raja Yarlagadda Mallikarjuna Prasada Nayadu* v. *Raja Yarlagadda Durga Prasada Nayadu*(4), which regarded their right to maintenance, however limited, out of an impartible estate as being based upon the joint ownership of the junior members of the family, . . ."

After further discussion, their Lordships observe that, while the power of the holder of an impartible raj to dispose of it by deed or by will remains definitely established, the right of the junior branch to succeed by survivorship on the extinction of the senior branch has also been definitely and emphatically re-affirmed; "nor must this right be whittled away; it cannot be regarded as merely visionary."

In view of these pronouncements of the Judicial Committee, we can no longer regard *Ramasami Naik* v. *Ramasami Chetti* (5), which held the interest of the coparceners to be a mere

(1) (1888) L.R. 15 I.A. 51; I.L.R. 10 All. 272.
(2) (1899) L.R. 26 I.A. 83; I.L.R. 22 Mad. 383.
(3) (1921) L.R. 48 I.A. 195; I.L.R. 43 All. 228.
(4) (1900) L.R. 27 I.A. 151; I.L.R. 24 Mad. 147.
(5) (1907) I.L.R. 30 Mad. 255.

spes successionis, as having laid down the correct law.

It is unnecessary to consider whether a member other than the zamindar in possession can, by transferring his interest, bring in a stranger, nor is it necessary to enquire whether one member can, by making a transfer, affect the interest possessed by members other than himself ; see *Ramasami Chetti* v. *Periasami*(1) dealing with the Padamattur estate in Sivaganga zamindari. For, under the Madras Impartible Estates Act, no member could make an alienation which would enure beyond his own lifetime. We have therefore here no difficulty in holding that the mortgage in question to the extent of the first item of the consideration affects the life interest of the first defendant by reason of his having joined in the transaction.

Then passing on to the next item of the consideration, namely, Rs. 3,408, we must hold that the debt to that extent was borrowed for a legal necessity. The plaintiff has deposed that the amount was utilised in meeting the expenses of the marriage of the late zamindar's daughter. That evidence stands uncontradicted.

[After discussing the evidence, his Lordship continued as follows :—]

We must therefore hold that to this extent what has passed to the plaintiff under the mortgage is the entire estate in the properties in question and not merely the life interests of the two executants, namely the late zamindar and the first defendant.

(1) (1878) L.R. 5 I.A. 61 ; I.L.R. 1 Mad. 312.

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The only contention that remains is as regards interest. We agree with the learned Judge that the stipulation in respect of it does not amount to a penalty and that the amount claimed is therefore due.

Lastly, the direction in paragraph 5 of the decree as to the passing of a personal decree, it is conceded, cannot stand and it is accordingly deleted.

In the result, for recovering Rs. 3,408 and the interest thereupon the mortgaged items can be sold, but for recovering the remaining sum, namely Rs. 4,891 with interest upon it, what can be sold is the first defendant's life interest alone in those properties, and we accordingly give judgment to that effect. The lower Court's order as to the costs of the suit will stand, three-eighths of those costs being assigned to the former amount and five-eighths to the latter.

As regards the costs of the appeal, our order is that the appellants (defendants 3 to 5) shall pay two-thirds of the plaintiff-respondent's costs. These costs also will be apportioned in the manner stated above.

In the memorandum of objections we make no order as to costs.

Time for redemption will be six months from now.

A.S.V.