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to take away the right of recourse to Court, effect must be given to the intention.

For the reasons indicated we consider that section 43 of the Act does preclude the appellant from challenging the trustee's action in a Court of law. His remedy is in an appeal to the committee and we understand that such an appeal has since been filed.

The present appeal must be dismissed with costs.

N.S.

APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Krishnaswami Ayyangar.

1939, November 29.

CHERUTTY *alias* VASU AND ANOTHER, MINORS BY NEXT FRIEND NANGAMPARAMBIL IMBICHUTTY (PLAINTIFFS 3 AND 4), APPELLANTS,

v.

NANGAMPARAMBIL RAVU *alias* KUTTAMAN AND EIGHT OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu law—Maintenance—Hindu coparcener, whether entitled to sue for maintenance—Suit for partition, if necessary—Unmarried daughter of coparcener, if entitled to sue manager for maintenance.

A Hindu coparcener, whether a major or a minor, who is denied maintenance by the head of the family is entitled to sue for maintenance alone : he need not sue for partition.

Observations to the contrary in the decisions of the Bombay High Court in *Himmatsing Becharsing* v. *Ganpatsing*(1), *Ramchandra Sakharam Vagh* v. *Sakharam Gopal Vagh*(2) and *Bhupal* v. *Tavanappa*(3), not followed.

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* Letters Patent Appeal No. 98 of 1936.

(1) (1875) 12 Bom. H.C.R. 94. (2) (1877) I.L.R. 2 Bom. 346.
(3) (1921) I.L.R. 46 Bom. 435.

An unmarried daughter of a Hindu coparcener can sue the manager of the joint family for her maintenance. She is not bound to sue her father and proceed against his share only in the joint family properties.

Subbayya v. *Ananta Ramayya*(1), applied and followed.

APPEAL under Clause 15 of the Letters Patent against the Judgment of WADSWORTH J., dated 24th October 1938, and passed in Second Appeal No. 968 of 1934 preferred against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in Appeal Suit No. 176 of 1931 (Appeal Suit No. 398 of 1931, District Court) preferred against the decree of the Court of the District Munsif of Vayitri at Calicut in Original Suit No. 77 of 1930 (Original Suit No. 600 of 1929, District Munsif's Court, Calicut).

K. P. Ramakrishna Ayyar for appellants.

K. Subramaniam for first respondent.

Other respondents were not represented.

JUDGMENT.

LEACH C.J. LEACH C.J.—This Letters Patent Appeal arises out of a suit filed in the Court of the District Munsif of Vayitri by the appellants and their parents for a decree for maintenance. The first appellant is the son and the second appellant is the daughter of one Nangamparambil Imbichutty and his wife Kalyani. Both the appellants are minors. The parents and their two children constitute one of two branches of an undivided Hindu family of which the first respondent is the manager. The respondents represent the other branch and were all made defendants. The District Munsif held that the parents of the appellants were not entitled under the Hindu law to maintain a suit for maintenance, but that the appellants were, and granted them

(1) (1928) I.L.R. 53 Mad. 84 (F.B.).

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a decree. The respondents appealed to the Subordinate Judge of South Malabar, who gave judgment in their favour. The appellants then appealed to this Court. The appeal was heard by WADSWORTH J. who concurred in the decision of the Subordinate Judge. The appellants' parents accepted the decision of the District Munsif and therefore are not parties to this appeal.

The parties are Tiyyas of South Malabar and it is common ground that the questions arising in the appeal have to be decided according to the ordinary rules of Hindu law. WADSWORTH J. was of the opinion that a major coparcener can never sue for maintenance. When maintenance is denied him his only remedy, he said, is to sue for partition. With regard to a minor coparcener the learned Judge was of the opinion that a suit for maintenance might be filed, provided that he asked in the alternative for a decree for partition. It was for the Court to decide whether the appropriate relief was a decree for maintenance or a decree for partition. The learned Judge considered that the daughter of a coparcener, like her father, can never maintain a suit for maintenance against the manager of the family. He said that her only remedy is to bring a suit against her father and claim maintenance out of his properties joint and separate. Having obtained a decree she would be in a position to sell her father's share in the joint family estate in execution proceedings.

I find myself unable to concur in any of the conclusions of the learned Judge. It is true that there are statements in the latest edition of Mayne's "Hindu Law and Usage" (Tenth Edition, page 825) and in Mulla's "Principles of Hindu Law" (Eighth Edition, page 582) which support the learned Judge in his

opinion that a major coparcener cannot sue for maintenance, but they are based on certain observations of the Bombay High Court which appear to me to run contrary to decisions of the Privy Council. In passing I may mention that VARADACHARIAR and MOCKETT JJ. in *Subbayya Thevar* v. *Marudappa Pandian*(1) observed it was doubtful whether an adult son could maintain a suit for maintenance against his father when he could sue for partition, but they gave no reasons for the expression of doubt and presumably it was based on the Bombay cases.

Every member of an undivided Hindu family is entitled to be maintained out of the family estate. In *Rama Rao* v. *Rajah of Pittapur*(2) (known as the *second Pittapur* case) Lord DUNEDIN, in delivering the judgment of the Board, dealt with the question of the right of a coparcener to be maintained out of the common property. After pointing out that it was admitted on both sides of the Bar that in an ordinary joint family ruled by the Mitakshara law the junior members, down to the three generations from the head of the family, have a coparcenary interest accruing by birth in the ancestral property, that this coparcenary interest carries with it the inchoate right to raise an action of partition, and that until partition is *de facto* accomplished these same persons have a right to maintenance, Lord DUNEDIN went on to say:

> " It seems clear that this right is an inherent quality of the right of coparcenary, that is, of common property. The individual enjoyment of the common property being ousted by the management of the head of the family, they have a right till they exercise their right to divide, to be maintained out of the property which is common to them who are excluded from the management, and to the head of the family, who is invested with the management."

(1) I.L.R. [1937] Mad. 42. (2) (1918) I.L.R. 41 Mad. 778 (P.C.).

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The right to maintenance out of joint family property was dealt with again by the Privy Council in *Vellaiyappa Chetty* v. *Natarajan*(1). The question there was whether an illegitimate son of a Sudra was entitled as a member of the family to maintenance out of the joint family property in the hands of the collaterals with whom his father was joint. Sir DINSHAH MULLA in delivering the judgment of the Board pointed out

> " that the illegitimate son of a Sudra by a continuous concubine . . . is a member of the family ; that the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son ; and that where the father has left no separate property and no legitimate son, but was joint with his collaterals, . . . the illegitimate son is not entitled to demand a partition of the joint family property in their hands but he is entitled as a member of the family to maintenance out of that property."

It is here emphasized that the share of inheritance is not given in substitution of a right to maintenance. As there is a right to maintenance there must be an appropriate remedy when that right is denied. To say that the member of a joint family to whom maintenance has been denied shall cause the family to be divided and the family estate partitioned, or go without anything, is not providing an appropriate remedy for the injustice done to him. He may not want to have the family divided and it may be against his interest to have the family estate partitioned.

In view of the fact that WADSWORTH J. relied on the statements in Mayne and Mulla based on the Bombay decisions it is necessary that I should refer to them. The cases are *Himmatsing Becharsing* v. *Ganpatsing*(2), *Ramachandra Sakharam Vagh* v. *Sakharam Gopal Vagh*(3) and *Bhupal* v. *Tavanappa*(4). In *Himmatsing Becharsing* v. *Ganpatsing*(2) WESTROPP C.J.

(1) (1931) I.L.R. 55 Mad. 1 (P.C.). (2) (1875) 12 Bom. H.C.R. 94.
(3) (1877) I.L.R. 2 Bom. 346. (4) (1921) I.L.R. 46 Bom. 435.

and KEMBALL J. held that a suit for maintenance out of the ancestral estate by a Hindu son lies against his father when the estate is impartible. The Court did not decide the question of the right of a son to maintenance when he was in a position to sue for partition. The footnote to the report, however, shows that in an earlier case WESTROPP C.J. and MELVILL J. had decided that a suit by one coparcener against the other coparceners for maintenance when the estate was impartible was unsustainable, "unless indeed he were illegitimate, deformed, or idiotic, or suffering from some other disability to inherit, in which case he would not be a parcener entitled to an equal share with the other members of the family, but only a person entitled to a maintenance." It is quite clear from this observation that the opinion of the Bombay High Court was that the right to maintenance was in lieu of a right to share in the estate, but I am not aware that this opinion has been accepted by any other High Court and it appears to me that it is opposed to the principle which the judgments of the Privy Council in the *second Pittapur* case *Rama Rao* v. *Rajah of Pittapur*(1) and in *Vellaiyappa Chetty* v. *Natarajan*(2) have established. In *Ramachandra Sakharam Vagh* v. *Sakharam Gopal Vagh*(3) PINHEY J. regretted that the judgment in *Himmatsing Becharsing* v. *Ganpatsing*(4) allowed a member of a family owning an impartible estate to sue for maintenance, but the decision in that case was eventually accepted. The case of *Bhupal* v. *Tavanappa*(5) had reference to a family owning a partible estate. The plaintiff was a minor member of the family, but his father was alive and therefore under the Hindu law as

(1) (1918) I.L.R. 41 Mad. 778. (P.C). (2) (1931) I.L.R. 55 Mad. 1. (P.C.).
(3) (1877) I.L.R. 2 Bom. 346. (4) (1875) 12 Bom. H.C.R. 94.
(5) (1921) I.L.R. 46 Bom. 435.

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administered in the Bombay Presidency he could not file a suit for partition without the consent of his father. It was held that in such circumstances he was entitled to sue for maintenance because he was in the same position as if the estate were impartible. As the Bombay decisions proceed on the basis that the right to maintenance is given in lieu of a right to share, a position which has never been accepted in this Presidency, they cannot be accepted as correctly stating the law in Madras.

If a major coparcener is entitled to sue for maintenance, and I hold that he is, the right cannot be denied to a minor coparcener and there appears to me to be no support at all for the view that if he does happen to sue for maintenance he must couple with the prayer for that relief a prayer for partition.

The statement that a daughter cannot sue the manager of the family but must proceed against her own father is also unsupported by authority. On the contrary there is the Full Bench decision of this Court in *Subbayya* v. *Ananta Ramayya*(1) which shows that she is entitled to maintain a suit for her maintenance. It was there held that the right of the daughter to her marriage expenses and maintenance was based on her right to or interest in the joint family property, and not based on the natural obligation of a father to maintain his children. The contention that the liability of the joint family during the father's lifetime was only based on the father's obligation to maintain and bear the marriage expenses of his daughters, and the obligation fell upon the joint family through him, was rejected. RAMESAM J. said:

"So far as the joint family property is concerned, the obligation is that of all the members of the family, that is,

(1) (1928) I.L.R. 53 Mad. 84. (F.B.).

the father and the brothers, and it is not that it was originally the obligation of the father only and through him it has extended to the whole joint family."

I agree with the following observations of CHANDAVARKAR J. in *Naranbhai* v. *Ranchod*(1);

"Apart from authority, there is no reason, founded on sound principle, why a Hindu coparcener, who is excluded from the enjoyment of his joint rights, should be compelled at the instance of the other coparceners or strangers claiming under them and against his will to break up the joint family and forced to a suit for partition."

That would be the position if the judgment now under appeal were to stand. I have said sufficient to indicate that I consider the judgment to be against principle and authority and the appeal must be allowed.

The result is that the case will be remanded to the Court of the Subordinate Judge. His decision was based merely on the issue relating to the maintainability of the suit. There are other issues and these will have to be decided. On the record reaching him the Subordinate Judge will hear and dispose of according to law the appellants' appeal from the judgment of the District Munsif, but as their parents did not appeal from the judgment of the District Munsif the suit will stand dismissed so far as they are concerned. The appellants are entitled to their costs in this appeal and in the second appeal. They will also be entitled to the refund of the court-fees paid in the second appeal and in the Letters Patent appeal.

KRISHNASWAMI AYYANGAR J.—I am of the same opinion but shall add a few words on certain aspects of the question argued before us. The Judgment of WADSWORTH J. when analysed seems to be based upon two propositions: (i) that the right of a member

(1) (1901) I.L.R. 26 Bom. 141, 145.

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to maintenance out of joint family assets is only to be recognised where he has no right to enforce partition, and (ii) that the right of an unmarried minor daughter in a joint family to be maintained till marriage is enforceable only against the father and not against the joint family as a whole. The soundness of these propositions is open to question, as there seems to be nothing either in the texts or in the principles of Hindu law to lend support to either of them.

The learned Judge has referred in support of his decision to the statement of law contained in Mayne and in Mulla—see Mayne's Hindu Law and Usage (Tenth Edition, page 825) and Mulla's Hindu Law (Eighth Edition, page 582). While recognising that these statements reflect the view taken in Bombay he accepted them as equally applicable to Madras, as the proposition is found stated in general terms and no Madras authority to the contrary was cited before him. He did notice the decision of the Privy Council in the *second Pittapur* case, *Rama Rao* v. *Rajah of Pittapur*(1), which unambiguously recognises the right of a coparcener to be maintained out of the joint family property, but held however that it is the ordinary rule that a coparcener cannot claim maintenance if he is entitled to claim partition.

Of the three Bombay cases cited in support of the proposition, the first two, *Himmatsing Becharsing* v. *Ganpatsing*(2) and *Ramchandra Sakharam Vagh* v. *Sakharam Gopal Vagh*(3), related to a claim for maintenance by an adult son against the father. The family possessed property which was however not liable to partition, being by nature impartible. The claim

(1) (1918) I.L.R. 41 Mad. 778 (P.C.).
(2) (1875) 12 Bom. H.C.R. 94. (3) (1877) I.L.R. 2 Bom. 346.

was upheld. The right of a son to be maintained out of the impartible joint family estate is beyond question, and does not appear to have ever been doubted. Decisions of the highest tribunal and of this Court in *Maharaja of Venkatagiri* v. *Raja Rajeswara Rao*(1) have since authoritatively settled the point. It is plain, therefore, that no exception can be taken to the correctness of the actual decision of the Bombay High Court so far as it went.

The ratio of the decision in the first of these cases, *Himmatsing Becharsing* v. *Ganpatsing*(2), is to be found in the observation of WESTROPP C.J. that

> " no authority was cited . . . . to show that where a son could not enforce a partition with his father, he was prevented from suing the latter for maintenance."

To recognise a right, namely, the right of coparcenary but at the same time to deny a remedy for its infringement is an impossible position and this is what seems to have weighed with the Court. The learned Chief Justice expressly refrained from expressing any opinion as to the right of a son to sue for maintenance, where he might if he chose sue for partition. This he did in spite of the fact that an earlier decision to which he had himself been a party had laid it down that a member of an undivided family could not sue for maintenance, unless by reason of a personal disqualification he was not entitled to sue for partition. The opinion here expressed does seem to support the view which has found favour with WADSWORTH J. but, as I shall presently show, it is no longer tenable. *Ramachandra Sakharam Vagh* v. *Sakharam Gopal Vagh*(3) was a case in which the father was found to be in possession of impartible property, but not of any property in which the

(1) I.L.R. [1939] Mad. 622. (2) (1875) 12 Bom. H.C.R. 94.
(3) (1877) I.L.R. 2 Bom. 346.

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son could claim a share. MELVILL J. observed that, as a general rule perhaps, a Hindu is not bound to support a grown up son, but held that the liability existed when the family estate is impartible. PINHEY J. agreed but doubted whether it is good Hindu law to say that an adult son in an undivided Hindu family, who is suffering from no disability recognised by that law, can claim a separate maintenance from his father. In the later decision of the Bombay High Court, *Bhupal* v. *Tavanappa*(1), the son sued for separate maintenance as a coparcener in a family consisting of the father, uncle, cousin and step brother and owning joint family property which was partible. He could not, however, on the view of the law as accepted in that Presidency, enforce a partition against a father when the father was joint in estate with his own ancestor or his collaterals and against his consent. The right to partition not existing, the son was held, on the principle of the earlier decisions, entitled to sue for maintenance. In all these cases the right of the son to sue for maintenance was expressly stated to arise on account of the absence of the right to partition. The larger remedy being available, the lesser relief was denied on the footing that the primary and the only true remedy for the excluded parcener was to enforce his right to partition by suit. When this remedy is cut out by reason of a personal disqualification or otherwise, the coparcenary right ordinarily inherent in every member of the family suffers a dimunition and it then finds expression in the inferior remedy of maintenance. The right to maintenance is thus to be regarded as a substitute for the lost right to a share and is in the nature of a secondary

(1) (1921) I.L.R. 46 Bom. 435.

remedy to be granted in lieu of the primary one where it is not available. This, I think, is the rationale which underlies the decisions of the Bombay High Court. With all respect, I regret to say that such a view of a coparcener's right cannot be sustained either in principle or on authority.

It is well to remember in this connection that a right to maintenance may arise in one of three ways. First, the existence of certain specified personal relationships, independently of the possession of joint property in the person liable, may give rise to the claim. The right in this class of cases is enforceable personally against the person on whom the law casts the burden, and is based on the well-known text of Manu, that

> " the aged parents, a virtuous wife and an infant child must be maintained even by the doing of a hundred prohibited acts."

The right does not extend to remoter relations. The second and the more important ground of claim is that based not on pure relationship, but on membership in a joint family possessed of joint family property. The Privy Council has in the *second Pittapur* case, *Rama Rao* v. *Rajah of Pittapur*(1), examined the jural basis of the right in this class of cases, and declared that it is an inherent quality of the coparcenary property that it should afford the means of sustenance to all the members of the coparcenary while the family remained joint. This is clear from the following observations of their Lordships:

> " This coparcenary interest carries with it the inchoate right to raise an action for partition, and until partition is *defacto* accomplished these same persons (junior members) have a right to maintenance."

(1) (1918) I.L.R. 41 Mad. 778 (P.C.).

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The meaning of this statement is sufficiently explicit. The junior members are entitled to maintenance *until* partition out of the common property where that property is ordinary partible property. The right will cease the moment a partition takes place, for thereafter there is no common property. It will continue to subsist so long as partition does not take place, and in the case of impartible property it is incapable of being terminated. The effect of the texts on the subject is correctly stated in Mayne's Hindu Law (Tenth Edition, page 821) in the following passage:

> "The head of the undivided family is bound to maintain its members, their wives and their children; to perform their ceremonies and defray the expenses of their marriages."

Membership in the family and the existence of joint property are the only conditions to which the right is subject. The third head of claim is based on the text of Yagnyavalkya which imposes a personal disqualification by reason of some defect, such as blindness, impotency, etc. (Yagnyavalkya, ii; 140–142). The defect operates to exclude the sufferer from a share in the inheritance, but, in lieu of it, he is recognised as being entitled to maintenance. This, in my opinion, is the only class of cases in which the right to maintenance can be said to be recognised as a substitute for the right to partition with some justification, though even here the right springs from the existence of joint property subject to the burden of supporting all the members of the family whether entitled to partition or not. But even if there is no impediment to the exercise of the right to partition there can be no logical reason for compelling a member to sue for partition when the head of the family neglects to maintain him. The right of an excluded

member to sue for joint possession without being obliged to sue for partition is recognised by Article 127 of the Indian Limitation Act. From this it is to my mind clear that partition is not to be regarded as the sole remedy. Joint possession which he can seek is in most cases indistinguishable from maintenance out of the family assets, and it is therefore difficult to maintain a distinction in principle between the two. The logic of the observations of CHANDAVARKAR J. in *Naranbhai* v. *Ranchod*(1), referred to in the judgment of my Lord, appears to my mind to be indisputable.

That the true origin of the right in the second and third classes of cases is the existence of joint property, partible or impartible, scarcely admits of doubt at the present day. It seems to me to be absolutely impossible to get away from the principle laid down by the Privy Council, which is that the right of a junior member in a joint family where the family possesses property is a right which springs from the joint property itself. When the question came to be examined by the Board in a case in *Vellaiyappa Chetty* v. *Natarajan*(2), in which the claim to maintenance was advanced by an illegitimate son of a deceased member of a joint family possessing joint family property, their Lordships used language which removes all further doubt on the point. Referring to the view taken in a decision of this Court in *Ranoji* v. *Kandoji*(3) that the share of inheritance given to the illegitimate son was merely in lieu of maintenance in the case of Sudras, their Lordships made the following observations:

"On the consideration of the texts and the cases on the subject their Lordships are of opinion that the illegitimate son

(1) (1901) I.L.R. 26 Bom. 141. (2) (1931) I.L.R. 55 Mad. 1 (P.C.).
(3) (1885) I.L.R. 8 Mad. 557,

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of a Sudra by a continuous concubine has the status of a son and that he is a member of the family; that the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son; that where the father has left no separate property and no legitimate son, but was joint with his collaterals, as in the present case, the illegitimate son is not entitled to demand a partition of the joint family property in their hands, but he is entitled *as a member* of the family to maintenance *out of that property*."

(The italics are mine.)

In the Full Bench decision of this Court in *Subbayya* v. *Ananta Ramayya*(1) the basis of the right of a daughter to maintenance out of the family property was examined and it was again clearly laid down that the obligation was not personal to the father who was along with others a member of the family but that the obligation lay upon the family as a whole, that is to say, *against the family property*. The texts and the decisions were gone into and the learned Judges expressed the opinion that the right of the daughter was the surviving remnant of a larger right she once enjoyed in the joint family property.

These authorities seem to take the question beyond the region of controversy. The right of a coparcener to be maintained out of joint property is merely one of the modes in which the coparcenary right finds expression. That being so, it is not possible to agree with the view that that right is not to be exercised if there is a right to partition. There is no warrant for holding that an excluded member must either sue for partition or be content to remain without being maintained at the expense of the joint family property.

WADSWORTH J. has held that the daughter must institute a suit against the father in the first instance

(1) (1928) I.L.R. 53 Mad. 84 (F.B.).

and pursue her remedies against his share in the joint family property. This view can be understood only on the theory that the daughter's right to maintenance is based solely on the personal obligation of the father. As I have already indicated, this theory is opposed to the decision in the Full Bench case already referred to. The personal liability of the father furnishes an additional ground of claim over and above the liability of the family property. The former alone can be said to be enforceable against the father and his separate property. The latter gives rise to a right enforceable against the joint family as a whole.

N.S.

APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao and Mr. Justice Kunhi Raman.

THE OFFICIAL ASSIGNEE, MADRAS, REPRESENTING THE ESTATE OF S.N. FIRM, INSOLVENTS (SEVENTEENTH DEFENDANT), APPELLANT,

1939, November 16.

v.

NATESAM PILLAI (PLAINTIFF), RESPONDENT.*

Trust—Banking firm—Deposit of moneys in—Disposal of same to await instructions of depositor—Fiduciary relationship—Insolvency of banking firm before receipt of instructions—Depositor entitled to full amount and not merely for dividend—What circumstances will make deposit an ordinary transaction between banker and customer.

A person paid certain sums of money to a banking firm with instructions that the latter should retain the same pending further instructions from him. The banking firm became

* Appeal No. 90 of 1937.