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as defined by section 2, and contemplated by section 244. Were we to consider it as a decree within the purview of section 244 an appeal from it will lie to the District Court, and the result would be to have appeals from under one and the same section to two different tribunals. We are, therefore, of opinion that the omission of clause 2 of section 312 from the amending Act of 1879 was intentional on the part of the Legislature, and that the appeal given under the Code of 1877 has been withdrawn by the amending Act. We, therefore, dismiss the appeal, leaving the appellant to whatever further course he may be advised to take, and confirm the order of the lower Court with costs.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

CHHOTIRA'M, (ORIGINAL DEFENDANT), APPELLANT, *v.* NA'RA'YANDA'S, (ORIGINAL PLAINTIFF), RESPONDENT.*

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Hindu law—Joint family—Manager—Sale of family property by manager when binding on an adult member of family absent at time of sale—Consent to such sale.

B. and C. were half-brothers and members of an undivided family. C. left his native place, and, in his absence, B. carried on the family business, and managed the family affairs. In order to raise money for the business and to provide for the marriage expenses of C.'s sisters, B. sold to the plaintiff a house which was part of the family property. On B.'s death, C. returned to his village, and refused to give up possession of the house to the plaintiff, who, accordingly, filed this suit. It was contended that B. could not sell the house so as to bind C. without his express assent.

Held, confirming the decree of the lower Appellate Court, that the sale was binding on C., who under the circumstances must be presumed to have intended that B. should continue as *de jure* and *de facto* manager to exercise such powers as the family necessities required.

THIS was a second appeal from a decision of J. B. Alcock, Assistant Judge of Khándesh.

Baldev and Chhotirám were half-brothers and members of an undivided Hindu family. Chhotirám while still a minor went away from his native place, and he remained absent after he had come of age. In his absence Baldev carried on the family business and managed the family affairs. On the 6th

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February, 1870, in order to raise money for the business and to provide for the marriage expenses of Chhotirám's sisters, Baldev sold to the plaintiff a house which was part of the family property. After Baldev's death, Chhotirám returned, and the plaintiff brought this suit against him, as Baldev's heir, to recover possession of the house. Chhotirám contended that the house had fallen to his share on a partition between himself and Baldev, which he alleged had been effected twenty years previously, and that he and his mother had been in possession ever since.

The Court of first instance rejected the plaintiff's claim. He appealed, and the lower appellate Court reversed the lower Court's decree, holding that the house had been sold for a legal necessity by Baldev as manager of the family.

The defendant preferred an appeal to the High Court, and contended that Baldev could not sell the house without Chhotirám's express assent.

Dáji A'báji Khare for the appellant :—The house was sold by Baldev without the consent of the appellant. Baldev's interest alone, therefore, passed by the sale—*Suraj Bunsi Koer* v. *Sheo Persád Singh*[1] ; *Upooroop Tewary* v. *Lálla Bandhjee Suhay*[2]. Baldev did not purport to sell the property as manager—*Trimbak Anant* v. *Gopálshet*[3]: see West and Bühler, pp. 611 and 749.

Shántárám Náráyán for the respondent :—The doctrine laid down in *Upooroop Tewary* v. *Lálla Bandhjee Suhay*[4] is commented upon in *Miller* v. *Runga Náth*[5], which lays down that under certain circumstances the consent of the absent co-parcener may be implied. Here the appellant had gone away, leaving the family property in the management of Baldev. It is, therefore, to be presumed that in selling he acted as manager. The power of the manager to alienate his as well as his co-parcener's interest, as held in the case of *Gundo Mahádev* v. *Rámbhát Bháubhat*[6], has never been doubted in this Presidency, though it has been in Calcutta. Cites *Tándavaráya Mudali* v. *Valli Ammal*[7] ;

(1) I. L. R., 5 Calc., 148.
(2) I. L. R., 6 Calc., 749.
(3) 1 Bom. H. C. Rep., 27.
(4) I. L. R., 6 Calc., 749.
(5) I. L. R., 12 Calc., 389.
(6) 1. Bom. H. C. Rep., 39.
(7) 1 Mad. H. C. Rep., 398.

Nahálchand v. *Magan Pitámbar*(1); *Bábáji Mahádáji* v. *Krishnáji Devji*(2); Mayne's Hindu Law, para. 300, p. 302. The sale was for a family necessity, and the consent of the co-parcener is not requisite.

Dáji Abáji Khare in reply:—Whether there was a necessity or not, a sale of undivided property without the consent of the co-parceners is not valid, even to the extent of the interest of the co-parcener who sells the property—*Honooman Dutt Roy* v. *Bhagbut Kishen*(3).

SARGENT, C.J.:—In this case the Acting Assistant Judge has found that Baldev was acting as manager of the united family, consisting of himself and his half-brother Chhotirám, at the time of the sale by Baldev to the plaintiff, and that there was a legal necessity for the sale. It has been contended, however, that Baldev could not, even in that case, sell the house so as to bind Chhotirám without his express assent. This raises a question on which there has been much difference of judicial opinion. In *Suraj Bunsi Koer* v. *Sheo Persád Singh*(4) the Privy Council, after stating that "at least in the case of minors, if it can be shown that the alienation was made by the managing member of the family for legitimate family purposes," it is binding on the minors, add: "It is not so clearly settled whether, in order to bind adult co-parceners, their express consent is not required." The question came before the Calcutta High Court in *Upooroop Tewary* v. *Lálla Bandhjee Suhay*(5), and Mr. Justice Mitter expressed the opinion that "where the co-parceners are all adults, the sale by one of them would not be valid unless made with the consent of the rest; but if some of them are minors, the members who are adults may make a valid alienation of the family property under the conditions mentioned in para. 29, Chapter I, section 1, of the Mitákshara." However, in *Miller* v. *Runga Náth*(6) the same learned Judge, after examining the authorities, arrived at the conclusion "that an alienation made by a managing member of a joint family cannot be binding upon his adult co-sharers, unless it is

(1) Printed Judgments for 1879, p. 332.
(2) I. L. R., 2 Bom., 666.
(3) 15 Calc. W. R. (F. B. Rul.), 6.
(4) I. L. R., 5 Calc., at p. 165.
(5) I. L. R., 6 Calc., at p. 753.
(6) I. L. R., 12 Calc., at p. 399.

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shown that it is made with their consent, either express or implied." He adds: "In cases of implied consent it is not necessary to prove its existence with reference to a particular instance of alienation. A general consent of this nature may be deducible in cases of urgent necessity, from the very fact of the manager being entrusted with the management of the family estate by the other members of the family. The latter, in entrusting the management of the family affairs in the hands of the manager, must be presumed to have delegated to the said manager the power of pledging the family credit or estate, where it is impossible or extremely inconvenient for the purpose of an efficient management of the estate to consult them, and obtain their consent before pledging such credit or estate." This leaves the question to depend mainly upon the urgency of the necessity and the inconvenience in obtaining the consent of the adult members. Mr. Colebrooke, in a note appended to the answer of the *pandit* in Vol. II, p. 345 of Strange's Hindu Law, states the rule in more general terms. "I rather consider it to be a point of evidence, what shall suffice to raise the presumption of consent, or acquiescence, than a matter on which the Hindu law has pronounced specifically."

These authorities show that no hard and fast rule can be laid down, but that in each case the conclusion as to the consent of the adult member must depend upon its own special circumstances. In the present case, Chhotirám was absent at the time of the sale, having gone away, when young, to Aurungábád to study astrology, leaving Baldev to manage the Márwári business and affairs of the family, amongst which was the providing for the marriage expenses of Chhotirám's sisters, for which, as well as to preserve the credit of the business, the Judge has found that the house was sold. Chhotirám continued to be absent after he came of age, and in so doing, must be presumed, we think, to have intended that Baldev should continue as *de jure* and *de facto* manager to exercise such powers as the family necessities required.

We must, therefore, confirm the decree with costs.

Decree confirmed.