of the ambiguity of the expression used, to give effect to a view which would upset what has been considered by the commercial community as the law for such a long period. They will, therefore, humbly advise His Majesty to dismiss the appeal with costs.

Viscount Dunedin

Solicitors for appellant: Messrs. *Lattey & Dawe.*

Solicitors for respondent: Messrs. *T. L. Wilson & Co.*

A. M. T.

APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Murphy.

1928
November 19

RAGHO WALAD TOTARAM, MINOR, BY HIS NEXT FRIEND AND GUARDIAN KALU WALAD SAPADU (ORIGINAL PLAINTIFF), APPELLANTS *v.* ZAGA EKOBA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu Law—Powers of Hindu father as manager of minor son's estate—Alienation of such estate when binding upon minor—"benefit or necessity," meaning of.

The power of the manager of an infant heir to charge an estate, not his own, is under the Hindu law a limited and qualified power. It can be exercised rightly in case of need or for the benefit of the estate.

Hunoomanpersaud Panday v. *Mussumat Babooee Munraj Koonweree*,[1] followed.

Per *Patkar, J.*:—"The touchstone of a manager's authority is necessity. It appears, therefore, from the decided cases that the benefit to the estate was to be of a protective character, and that necessity involved some notion of pressure from without, and that the benefit to the estate would not include an alienation of the property for the purpose of investing the proceeds so as to yield a better return and would not imply vast powers of management which might amount to an authorization to embark on speculative ventures."

Palaniappa Chetty v. *Deivasikamony Pandara*,[2] *Vishnu* v. *Ramchandra*,[3] *Venkatraman* v. *Janardhan*,[4] *Inspector Singh* v. *Kharak Singh*,[5] referred to.

*Nagindas Manekla*l v. *Mahomed Yusuf*,[6] explained.

APPEAL under the Letters Patent, in Second Appeal No. 283 of 1926 against the decision of the District Judge at Jalgaon, in appeal No. 199 of 1925.

The property in dispute, a field situate at Shelave in the Parola Taluka, Khandesh District, was inherited

*Appeal No. 56 of 1926 under the Letters Patent.

(1) (1856) 6 Moo. I. A. 393 at p. 423.
(2) (1917) L. R. 44 I. A. 147.
(3) (1923) 25 Bom. L. R. 508.
(4) (1927) 29 Bom. L. R. 1522 at p. 1529.
(5) (1928) 50 All. 776.
(6) (1921) 46 Bom. 312.

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by the minor plaintiff from his maternal grandfather. Daga Ekoba, in 1918 when the plaintiff's mother died. The plaintiff and his father were residents of Datana in Shindkheda Taluka at some distance from Shelave. The plaintiff's father, finding it inconvenient to manage the property, sold it for Rs. 1,500 to defendant No. 1, and his house for Rs. 500 to defendant No. 2, and thereafter paid Rs. 2,000 to one Zipru for some land at Datana measuring 13 acres and yielding an annual income of Rs. 225. No sale-deed was passed by Zipru in favour of the plaintiff's father, but on payment of the Rs. 2,000 to him out of the total purchase price of Rs. 2,800, the possession of the land at Datana was transferred to the plaintiff's father. The plaintiff, a minor, filed this suit for a declaration that the sale-deed by his father to defendant No. 1 for Rs. 1,500 was not binding on him and for possession of the property together with mesne profits. Both the lower Courts held that the sale was for the benefit of the minor, and therefore binding on him, the lands in suit having yielded an income of not more than Rs. 40, whereas, by virtue of the arrangement made by the plaintiff's father, an income of Rs. 225 from the field purchased from Zipru was secured for the minor and his father. The plaintiff appealed to the High Court. On this appeal being dismissed, he filed a further appeal under the Letters Patent.

W. B. Pradhan, for the appellant.

V. D. Limaye, for the respondents.

PATKAR, J.:—In this case the plaintiff, a minor, brought a suit for a declaration that the sale-deed, Exhibit 31, passed by his father, Totaram, to defendant No. 1 for Rs. 1,500 on November 22, 1918, was not binding on him and for possession of the property together with mesne profits.

The property in suit situate at Shelave in the Parola Taluka originally belonged to the plaintiff's maternal grandfather Daga Ekoba. On his death his widow, the plaintiff's grandmother, inherited the property and subsequently it devolved on her daughter Vedibai, the plaintiff's mother. On Vedibai's death in 1918, the plaintiff inherited it as her son. Totaram, the plaintiff's father, was managing the plaintiff's property which fetched a rent of Rs. 40 a year. The plaintiff and his father are residents of Datana in Shindkheda Taluka at some distance from Shelave. The plaintiff's father found it inconvenient to manage the property. He, therefore, sold it for Rs. 1,500 to defendant No. 1, and his house for Rs. 500 to defendant No. 2, and paid Rs. 2,000 to one Zipru who owned a land at Datana measuring 13 acres and yielding an annual income of Rs. 225. No sale-deed was passed by Zipru in favour of the plaintiff's father, but as Rs. 2,000 were paid to him out of the total consideration of Rs. 2,800, the possession of the land at Datana was transferred to the plaintiff's father.

Both the lower Courts held that the sale in favour of defendant No. 1 by the plaintiff's father was for the benefit of the minor, and therefore, binding upon him as the plaint lands were yielding an income of not more than Rs. 40, and by virtue of the arrangement made by the plaintiff's father an income of Rs. 225 from the field purchased from Zipru was secured for the minor plaintiff and his father. It was alleged on behalf of the plaintiff that the sale was effected by the plaintiff's father for meeting the expenses of his second marriage, but the allegation was held not proved by both the lower Courts.

It is urged on behalf of the appellant that the property belonged exclusively to the minor plaintiff, and his father had no right to alienate the property except for

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necessity, and that the lower Court erred in holding that the sale-deed was binding on the minor plaintiff on the ground that out of the proceeds of the sale of the land in suit and the proceeds of the property belonging to the father, another property was purchased by the father and the transaction was beneficial to the minor.

The power of the manager of an infant heir in respect of an estate, not his own, is a limited and qualified power, and the limits of this power have been laid down by the Privy Council in the case of *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree.*[1] It was held by Knight Bruce, L. J. (p. 423) :—

"The power of the Manager for an infant heir to charge an estate not his own, is, under the Hindoo law, a limited and qualified power. It 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 that 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. 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."

In that case money was borrowed for payment of arrears of land revenue, and it is clear that no greater benefit could accrue to an estate than to save it from extinction by sequestration. The principle applicable to the manager of an infant heir was extended by the Privy Council to alienations by a widow, and to transactions in which a father, in derogation of the rights of his son under the Hindu law, alienates the ancestral family estate : see *Baboo Kameswar Pershad* v. *Run Bahadoor Singh*[2] and also to the authority of the *Shebait* of an idol's estate in *Prosunno Kumari Debya* v. *Golab Chand Baboo*,[3] where it was held that the person so entrusted must of necessity be empowered to do what may be required for the service of an idol and for the benefit and preservation of its property, at least to as great a degree as the manager

[1] (1856) 6 Moo. I. A. 393 at p. 423. [2] (1880) L. R. 8 I. A. 8 at p. 11.
[3] (1875) L. R. 2 I. A. 145 at p. 151.

of an infant heir. Their Lordships of the Privy Council have not stated in precise terms the meaning of the words "benefit to the estate." The point, however, arose in *Palaniappa Chetty* v. *Deivasikamony Pandara*[1] where their Lordships, after referring to these cases, observe (p. 155) :—

"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."

With reference to the argument in that case that the idol would be benefited by a transaction which put at the *shebait's* disposal a sum capable of being profitably used, their Lordships observe (p. 156) :—

". . . . attractive and lucrative as moneylending may be in India, it is needless to point out that a Shebait would not be justified in selling debottar land solely for the purpose of getting capital to embark in the money-lending business. And no authority has been cited giving any countenance to the notion that a shebait is entitled to sell debottar lands solely for the purpose of so investing the price of it as to bring in an income larger than that derived from the probably safer and certainly more stable property, the debottar land itself."

Mayne in his Hindu Law (9th Edition), at page 476, observes :—

". . . The terms 'necessity' and 'benefit to the estate' have been used side by side. It is obvious that anything which is a necessity to the estate must be of benefit to it. But the term 'benefit' would seem to import something positive done to enlarge or improve the estate, not a merely negative act such as the discharge of debts or the averting of disaster. In fact, the decided cases all relate to acts which were clearly dictated by necessity, to secure the preservation of the estate."

In *Radha Pershad Singh* v. *Mussamut Talook Raj Kooer*[2] it was held that a contract made by a guardian without authority did not bind the minor and that even if it was desirable that the minor should have any

[1] (1917) L. R. 44 I. A. 147. [2] (1873) 20 W. R. 38.

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benefit, such as increase to a very small income from some undertaking or enterprise, e.g., obtaining a lease of certain rents, that circumstance was not sufficient to constitute a necessity for the mother and guardian to mortgage the minor's ancestral property with a view to secure such benefit. In *Ganap v. Subbi*[1] it was held that a permanent alienation of immoveable property by a widow could only be justified on the ground of necessity which involved some notion of pressure from without and not merely a desire to better or to develop the estate, for this last implied vast powers of management which in practice would not be easily distinguishable from an authorization to embark upon speculative ventures. In *Vishnu* v. *Ramchandra*[2] it was held that the manager of a joint Hindu family can justify the sale of joint family property only for necessity, that he cannot justify it merely on the ground that the sale at the time appeared to be advantageous, and that such a sale is not binding on the minor coparceners. In *Venkatraman* v. *Janardhan*[3] it was held that there was no general power in a Hindu father to alienate joint property in any way he liked for anything that might be of general benefit to the family, whether or no there was any necessity. To use the language of Pontifex J., in *Pursid Narain Sing* v. *Honooman Sahay*,[4] referred to in the case of *Doulut Ram* v. *Mehr Chand*,[5] the touch stone of a manager's authority is necessity. It appears, therefore, from the decided cases that the benefit to the estate was to be of a protective character, and that necessity involved some notion of pressure from without, and that the benefit to the estate would not include an alienation of the property for the purpose of investing the proceeds so as to yield a better return, and would not imply vast

(1) (1908) 32 Bom. 577.
(2) (1923) 25 Bom. L. R. 508.
(3) (1927) 29 Bom. L. R. 1522 at p. 1529.
(4) (1880) 5 Cal. 845 at p. 852.
(5) (1887) L. R. 14 I. A. 187 at p. 196.

powers of management which might amount to an authorization to embark on speculative ventures. In *Nagindas Maneklal* v. *Mahomed Yusuf*[1] it was held that the term "necessity" must not be strictly construed, and the benefit to the family may, under certain circumstances, mean a necessity for the transaction, and that regard must be had to the word कुटुंबार्थे used in Mitakshara, Chapter 1, section 1, paragraphs 28 and 29, and the expression used must be interpreted with due regard to the conditions of modern life. The case of *Palaniappa Chetty* v. *Deivasikamony Pandara*[2] is not considered in the case of *Nagindas Maneklal* v. *Mahomed Yusuf*,[1] and the latter case is not considered in the subsequent decisions in *Vishnu* v. *Ramchandra*[3] and *Venkatraman* v. *Janardhan*.[4]

The general rule is derived from the text of Vyas referred to in Mitakshara, Chapter 1, section 1, clause 27, incapacitating the father from alienating the property without the consent of the sons. An exception to it is laid down in the following placita 28 and 29 and the text attributed to Brihaspati by Vivad-Ratnakar: "Even a single individual may conclude a donation, mortgage or sale, of immoveable property, during a season of distress, for the sake of the family, and especially for pious purposes." The meaning of this text is explained thus: While the sons and grandsons are minors, and incapable of giving their consent or doing similar acts, or while the brothers are so and continue unseparated, even one person, who is capable, may conclude a gift, hypothecation, or sale, of immoveable property, if the calamity affecting the whole family requires it, or for supporting the family, or for performing indispensable duties such as the obsequies of ancestors. See Stoke's Hindu Law page 376 and

(1) (1921) 46 Bom. 312.
(2) (1917) L. R. 44 I. A. 147.
(3) (1923) 25 Bom. L. R. 508.
(4) (1927) 29 Bom. L. R. 1522.

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Gharpure's translation page 180. The exceptional powers are to be exercised, according to the text, especially on three occasions: आपत्काले, that is, in the time of distress; कुटुंबार्थे, that is, for the sake or benefit of the family; and thirdly धर्मार्थे, that is, for pious purposes. The meaning of these terms is explained by Mitakshara. "Time of distress" is explained as referring to a distress which affects the whole family; "for the sake of the family" is explained as "for its maintenance"; and "pious purposes" are described as indispensable acts of duty such as the obsequies of the ancestors. The explanation of the text of Brihaspati by Mitakshara is by no means to be considered as exhaustive, and may be treated as illustrative and interpreted with due regard to the conditions of modern life. It is doubtful, however, if the text relating to the power of alienation of joint family property would apply except by analogy to the right of the father to alienate as guardian the separate property of his minor son. In the case of *Nagindas Maneklal* v. *Mahomed Yusuf*[1] the family house was in such a dilapidated condition that the Municipality required it to be pulled down. Though the family was in fairly good circumstances and it was not necessary to sell the house, it was held that the agreement of sale by the adult co-parceners was binding on the minor co-parceners on the ground that they had wisely decided to get rid of property which was in such a state as to be a burden to the family. In *Shankar Sahai* v. *Bechu Ram*[2] it was held that any act for which the character of "legal necessity" or "benefit to the estate" can be claimed must be a defensive act, something undertaken for the protection of the estate already in possession, not an act done for the purpose of bringing fresh property in possession and

(1) (1921) 46 Bom. 312. (2) (1924) 47 All. 381.

which may or may not be successful under the chances attendant upon litigation. A different view was, however, taken by the Allahabad High Court in *Jagmohan Agrahri* v. *Prag Ahir*[1] where the father of a joint Hindu family sold a portion of the family property which was inconveniently situated and was not sufficiently profitable, and employed the proceeds in the extension of the family business which was not of a speculative character, it was held that the transaction was legitimate and could not be upset. A similar view was also taken in another case, *Jado Singh* v. *Nathu Singh*,[2] where it was held that it is impossible to give a precise definition of what is benefit to the estate. The term may be held to apply to such a transaction as the sale of an inconveniently situated, incumbered and unprofitable property, and the purchase in its stead of other property which was undeniably a sound investment. In a recent decision of the Allahabad High Court in the case of *Inspector Singh* v. *Kharak Singh*[3] the question was discussed fully and it was held that it was not open to a father to raise money on the security of the family property in order to start a new business, even if the new business was likely to bring large profits to himself and through himself to his sons.

In the present case, the property belonging to the minor was situated at some distance from the village where the minor and the father were staying, and yielded an income of Rs. 40 a year. The property of the minor was sold for Rs. 1,500, and the father sold his own property for Rs. 500, and purchased another property for Rs. 2,800 situated at their own village and yielding an income of Rs. 225. The sale-deed was not passed in favour of the plaintiff's father, but

(1) (1925) 47 All. 452. (2) (1926) 48 All. 592.
(3) (1928) 50 All. 776.

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the consideration of Rs. 2,000 out of Rs. 2,800 was paid to Zipru who handed over possession of the newly purchased property to the father. The property belonging to the minor sold by the father did not belong to the joint family of the plaintiff and his father. It was the separate and absolute property of the minor who inherited it from his maternal grandfather. It would not have been liable to be attached and sold in execution of a decree for the debts of the father. The minor, therefore, loses his absolute property immune from any liability to pay his father's debts, and instead does not even get any sale-deed in his name, but a contract of sale is passed in the name of the father for property worth Rs. 2,800 and the possession is transferred to the father. The father, unless he pays the full amount, would not have complete title to the property, and on payment of the balance of the purchase money and execution of a sale-deed in his name, the father would be able to sell the property without the consent of the minor plaintiff. It would also be liable for the debts of the father. We think, therefore, that the transaction which was effected by the father was not for the benefit of the minor, nor was it brought about by any necessity or any pressure on the estate. Even giving an extended meaning to the words "benefit to the estate," we do not think that the transaction in suit entered into by the father is really either for the benefit of the estate or for the benefit of the minor. On the contrary we think that the alienation was detrimental to the real interest of the minor plaintiff. We think, therefore, that the view taken by both the lower Courts is wrong.

We would, therefore, reverse the decrees of both the lower Courts, and send the case back for decision on the merits. The costs of this Court and of the lower Courts to abide the result.

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MURPHY, J. :—The suit was brought on behalf of a minor plaintiff, by his next friend, for a declaration that a sale of some of the minor's property by the minor's father did not bind the minor, and for possession of the property and mesne profits.

The property sold consists of a field, inherited by the minor as his separate property from his maternal grandfather through his mother, who has since died, and it was sold for Rs. 1,500 to defendant No. 1.

The relevant facts are that the minor plaintiff's father owned a house and the minor this field, in the village of Shelave, while they lived at a place called Datana some miles away. In the circumstances the minor's father, thinking to better his estate, sold his house for Rs. 500 and the minor's field for Rs. 1,500 and entered into a contract to buy another field at Datana, where he lives, for Rs. 2,800. Raising Rs. 2,000 by the two sales just mentioned, he agreed to pay Rs. 2,800 for the new purchase and was given possession, the formal deed of sale being intended to be executed when the balance of the purchase money was forthcoming.

The contention that the sale was in order to raise money for the minor's father's second marriage has been found not to have been made out, and both the lower Courts have upheld the sale as having been effected for the benefit of the minor's estate. Whether it was actually for the minor's benefit, or not, is the question we have to answer in the appeal.

The facts on which the lower Courts' conclusions are based are, that the field at Shelave being far from the minor's father's residence, gave occasion for difficulties in cultivation. It could not be farmed directly, but had to be let to strangers at the low rental of Rs. 40 per annum, and being in possession of persons having no permanent interest in it, it was liable to be neglected, and to suffer in value in consequence.

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As against this, it is pointed out that the transaction has enabled the minor's father to carry out a profitable purchase of land in his residential village, yielding an annual income of Rs. 225 in which the minor plaintiff would have a proportionate share, giving him a larger income than Rs. 40; in addition to whatever further share he might have in it as his father's son. The argument is plausible, but I think all is not as fair as it sounds.

It must be remembered that these people are peasants, whose ideas of a trust are not those of a lawyer, or such as would be commonly recognized in a city such as Bombay. There is no likelihood of any separate accounts being kept for the benefit of the trust property, and once it has become inextricably mingled with the father's property, the probability that it will ever be separated from it and handed back to the minor, to whom it belongs, short of a suit for partition, is very remote.

Moreover, the transaction itself is not a very satisfactory one. There is no completed sale recognizing the minor's interest in the purchase, and though it is perhaps true that an agreement to sell coupled with the delivery of possession may be a good defence in a suit for possession by the vendor, it is not the best available.

The full price also has not been paid, and there is no security among people of this class, that it ever will be. In any case, I am not satisfied that the father has not undertaken to pay more than he can, and if this is so, the transaction will inevitably end in another suit, in which the newly acquired land may be attached and sold, or probably mortgaged, and in the course of which the minor's interests are likely to be lost sight of.

Taking all the circumstances into consideration, I believe that, apart from the fact that there was no real necessity for the sale, the transaction is one which in all human probability is unlikely to eventuate to the minor's separate profit, and most probably will lead in some form or other to the ultimate loss of the inheritance from his mother.

This being so, it is clear that it is not a transaction which should be upheld by the Courts as it has been, on this ground.

The second point arising is one of law.

The main principle involved is that the guardian of the property of a minor has not an absolute but a limited power of disposal of the estate, under the Hindu law. The test is, that this power may only be exercised in cases of necessity, and where its exercise will be for the benefit of the estate. What is to be looked to is the danger to be averted, or the benefit to be conferred in the particular instance under consideration. This has been laid down by their Lordships of the Privy Council in the leading case of *Hunooman-persaud Panday* v. *Mussumat Babooee Munraj Koon-weree*,[1] and the principle has been followed in other analogous cases, such as *Baboo Kameswar Pershad* v. *Run Bahadoor Singh*[2] and *Prosunno Kumari Debya* v. *Golab Chand Baboo*.[3]

In the present appeal there is on the facts no question of any necessity for the sale, and if justified at all, this must be on the ground of "benefit to the estate." It is obvious on the one hand that one of the limits must be transactions of a speculative character, such as might possibly turn out profitably, but contain an appreciable element of risk. On the other hand, where there is

(1) (1856) 6 Moo. I. A. 393. (2) (1880) L. R. 8 I. A. 8 at p. 11.
(3) (1875) L. R. 2 I. A. 145.

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margin of income allowing of an improvement in the estate by the use of some of the surplus together with what might be raised by the sale of a small portion for the purpose of acquiring more property and extending the estate, a sale might possibly be justified. In saying this, I am not laying down a rule but merely indicating circumstances which might justify the sale of a minor's estate by the guardian of his property.

But as I have already stated in discussing them, the facts here are not of this character. The effect of the guardian's transaction has been, to amalgamate what was the minor's separate and distinct property with that of the father, in such a way as to make it difficult for the minor to obtain his separate share, should he ever wish to do so, and the probabilities are, as I have shown, that if this sale is allowed to stand, the minor will be involved in litigation and his property will thereby be jeopardized.

I agree that the sale was effected for no necessity, and that it is unlikely to result in any benefit to the minor's estate. It must therefore be set aside.

Decree reversed.

B. G. R.

APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Murphy.

1928
November 22

GOPALJI UMERSEY (ORIGINAL DEFENDANT), APPLICANT *v.* DEVJI NARANJI THAKAR (ORIGINAL PLAINTIFF), OPPONENT.*

Bombay Rent (War Restrictions No. 2) Act (Bom. VII of 1918), section 17 (1) (a)—Premises, meaning of—Bombay Rent (War Restrictions No. 2) Act (Bom. II of 1918), section 2 (1) (b) (ii)—Effect of failure to annex to the plaint copy of Controller's order—Presidency Small Cause Courts Act (XV of 1882), section 41.

The defendant was a monthly tenant of the plaintiff since 1916-17, occupying a room on the second floor of the plaintiff's house in Bombay, at a rent of Rs. 7. This rent was subsequently raised to Rs. 17, which the defendant was unwilling to pay. The plaintiff accordingly filed a suit in ejectment in the Court of

*Civil Revision Application No. 292 of 1927.