1870. *January* 19. *S. A. No.* 246 *of* 1869.

on the death of one of the daughters without children to her surviving sister. The question of the right of inheritance of sons and daughters on the descent of property "ex-parte materna" is alluded to, but no opinion is expressed upon it, and it is upon the question whether maternal and paternal property vests in daughters under the same or different rules of succession, that a daughter's right of survivorship to the exclusion of her deceased sister's children depends.

In the present case that question is set at rest, for there appears to be no doubt that the daughters of dancing women like the parties to the suit take the place of sons, and our decision, founded upon this view of the law, is that, in the absence of any further positive rule, daughters must be regarded as sons and held to take estates of inheritance from their mother similarly to sons under the general law of inheritance, and so regarding the parties in the present case it is clear that the 1st defendant did not, as co-parcener, acquire by the general law the right of succession to the exclusion of the plaintiff, and that the plaintiff was entitled to succeed to the share of her mother.

For these reasons we affirm with costs the decree of the Civil Court declaring the plaintiff's right to the office and to an equal share of the benefits of its endowment and perquisites.

*Special Appeal dismissed.*

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## Appellate Jurisdiction. (a)

*Regular Appeal No.* 116 *of* 1868.

VENKATACHELLA PILLAY and another ... { *Appellants (Defendants.)*

CHINNAIYA MUDALIAR ... ... { *Respondent (Plaintiff.)*

The right of a co-parcener to alienate his vested interest in the property held in co-parcenery is limited to the extent of the co-parcener's share in the particular property which is the subject of the alienation.

In a suit to recover a moiety of a village which was a portion of the joint family property and which had been sold by the managing member without the assent of the plaintiff's father and not for family purposes, the entire village being less in quantity and value than the share of the managing member.

*Held*, that the plaintiff was entitled to the relief prayed.

(a) Present:—Scotland, C. J., and Innes, J.

1870. *January* 19. *R. A. No.* 116 *of* 1868.

THIS was a regular appeal against the decree of E. F. Elliott, the Acting Civil Judge of Tranquebar, in Original Suit No. 18 of 1866.

The plaintiff sued to recover from 1st and 2nd defendants his ½ share of the village of Valuthalacudi which was illegally alienated from the family estate by his paternal great uncle Subbaraya Mudali who sold it to one Ramanuja Pillay, 1st defendant's father, in 1855, together with a moiety of mesne profits of said village from the time it came into possession of the said Ramanuja Pillay.

The plaintiff contended that, at the date of the sale of this disputed village, in 1855, Subbaraya Mudali and his nephew, plaintiff's father, Appatchi Mudali, were the sole co-parceners, and as such, were entitled each to a moiety of the family estate whereof the village formed a portion, and that while so, Subbaraya Mudali, to the prejudice of his co-parcener and without his consent or without any evident necessity for the same, sold the whole of this village, including plaintiff's portion, to Ramanuja Pillay contrary to Hindu law.

The defendants stated that the suit was barred by the Statute of Limitations; that this village was the stridhanum property of the wife of Subbaraya Mudali; that Subbaraya Mudali was of a divided family, and that the sale was admitted by the plaintiff's father, and was with his consent. They further maintained that this suit was not sustainable in point of law, because, if undivided, Subbaraya Mudali would be entitled to 150 shares of the family estate, and the village in dispute forms about a $\frac{1}{17}$th portion thereof only, and consequently about a $\frac{2}{17}$th portion of the said Subbaraya Mudali's individual share.

The issue were,—

1st. Whether the village in dispute is family property and has been sold without plaintiff's father's consent and to his prejudice by Subbaraya Mudali, or whether it is the stridhanum property of the wife of Subbaraya Mudali as contended by defendants.

2nd. Whether the sale of the whole of a village forming a portion only of the family estate, by a co-parcener, is legal and valid in law.

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Upon the first issue the Civil Judge found for the plaintiff.

Upon the second issue the Civil Judge gave the following Judgment :—

The plaintiff's vakil argues that the sale is contrary to Hindu law according to *Strange's Manual*, 1st Edition, Chapter "Alienation," paras. 154 and 155, page 28, where it is stated that an alienation by sale or otherwise is valid to the extent of the alienor's share only and hence by parity of reasoning, it would be equally invalid to the extent of the share of the other co-parcener who was a dissenting party to the sale, and that this ruling is applicable to each parcel of land and not only to an alienation beyond the gross value of the alienor's entire share, and that Subbaraya Mudali had no right to sell beyond his moiety of this particular village, and also that the rule of law in such cases as defendant's is "caveat emptor" and that if a man contracts with one who has no title who is not owner or entire owner he must suffer the consequences. In support of his arguments he refers to Rulings of the High Court in Regular Appeal No. 16 of 1864, and Special Appeal, 3rd July 1865. The former in proof of plaintiff's right of claim to a moiety of his village in particular, and the latter in proof of the rule of law of "caveat emptor."

The Court, having referred to these rulings, is quite of opinion that they are applicable to the points of this case.

The defendant's vakil argues that the sale is valid in law subject only to a deduction from his, the alienor's share, on a distribution of property, and he files Exhibits V and VI as the latest ruling on his point, which he states have been affirmed on appeal by the High Court and are in every way applicable. The plaintiff's vakil contended in reply that they are not applicable, and the Court is fully of opinion that they do not apply as they relate to a different species of case altogether, involving the validity of a gift by a father during the minority of his sons and for their benefit.

On referring to *Colebrooke's Digest of Hindu Law*, Volume *II, Book V, Chapter* 7, *Section* 1, *page* 505, in a foot-note thereunder, the Court finds embodied the force of the argument

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of the vakil for the defendants, that the sale is valid in law, and the amount alienated shall be deducted out of his share, but the Court is not prepared to admit this foot-note as a ruling at all, and especially in the face of the rulings of the High Court quoted by the plaintiff's vakil which are the latest *bonâ fide* rulings on the subject, and are in every sense applicable to the merits of this case—as ruled in Regular Appeal No. 16 of 1864, it is quite clear that the plaintiff has a right to his moiety of this village because defendants have acquired no title whatever to the same, and it is equally clear as ruled in Special Appeal dated 3rd July 1865, that the defendants have contracted with Subbaraya Mudali, who has no title to this moiety and who is not owner or entire owner thereof, and that as the rule of law is "caveat emptor," they must suffer the consequences, and that the plaintiff has a right to recover.

The defendants appealed to the High Court.

*Sanjiva Row*, for the appellants, the defendants.

*Mayne*, for the respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—This is a suit to recover a moiety of a village which was a portion of the joint family property in the enjoyment of the plaintiff's great-grand uncle Subbaraya Mudali and his brother Sabapati Mudali, the plaintiff's grandfather, and the plaintiff's father, Appachi, and was sold and transferred by Subbaraya the 1st defendant's father in 1855 after the death of Sabapati without the assent of the plaintiff's father and not for any proper family purpose. Upon the issues raised by the defence the Civil Court decided that the village was at the time of the sale a portion of the joint family property of Subbaraya and the plaintiff's ancestors and not the stridhanum property of Subbaraya's wife as alleged by the defendants. That the sale was without the assent of the plaintiff's father and not for the benefit of the family, and that the fact of the quantity of land in the village being considerably less than Subbaraya's undivided one-half share of the whole of the family lands, did not affect the plaintiff's right to invalidate the sale to the extent of the share which passed to him from his grandfather Sabapati: and thereupon the Court decreed to the plaintiff a

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moiety of the village and of the mesne profits from the time it came into the possession of the 1st defendant's father.

From that decree the defendants have appealed, and it has been urged on their behalf that the decision of the Civil Court is wrong on all the above points. With respect to the first two points which depend simply upon the effect of the evidence, it is unnecessary to do more, after the observations which fell from the Court during the argument, than express our concurrence in the conclusions come to by the Civil Court. They are, we think, the only reasonable conclusions deducible from the legitimate evidence in the case. Then, as to the last point, there appears to be no doubt that Subbaraya had the right to a moiety of the family property at the date of the sale, and that the land in the village was a good deal less in quantity and value than the moiety. And the contention on behalf of the appellant is that one co-parcener cannot object to a sale of a family property made by another co-parcener when the portion of property sold is unquestionably less in quantity and value than the share of the co-parcener making the sale in the entire property.

We are of opinion that this is an untenable objection. The decisions of this Court as to the right of a co-parcener to alienate his vested interest in the property held in co-parcenery do not go beyond establishing the validity of an alienation to the extent of the co-parcener's share in the particular property which is the subject of the alienation. And they are founded upon the principle that each co-parcener has a vested present undivided estate in his share, which he may at any time convert into an estate in severalty by a compulsory or voluntary partition, and that such estate is transferrible like any other interest in property. Further than this the title of the 1st defendant under the alienation in the present case cannot we think be carried.

The estate of each co-parcener gives him only the right to enjoy a fair proportion of the benefits of the whole family property in common with the other co-parceners. But as respects the proprietary right to the corpus of the property there is a perfect unity of title which makes the co-parcenery to some extent of the nature of a joint tenancy, and until a partition takes place the co-parceners continue seized by one

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and same title of the whole and every portion of the property alike, the law recognizing the right of one co-parcener to hold possession and manage for the joint benefit of himself and the rest.

By the sale in the present case therefore the vendor, Subbaraya, could not in our judgment transfer to the 1st defendant's father a valid title to any specifical portion of the joint family property but only to his beneficial estate as an undivided coparcener with the incidental right of partition, and it follows that the 1st defendant is not entitled to more than the moiety of the village lands which were alone the subject of the contract of sale.

This being so it was contended further on behalf of the appellant, that as the plaintiff had succeeded as heir to the share of Subbaraya in the rest of the family property, he was liable to make good to the appellant out of such share half the purchase money of the village with interest and should be decreed to pay such compensation as a condition of the recovery.

We are of opinion that this liability if it exists cannot be dealt with as a ground of defence in the present suit. Had the 1st defendant's father in making the purchase of the village been deceived by misrepresentation or dishonest conduct of any kind on the part of Subbaraya or the plaintiff's father, or had any portion of the purchase money been received by the plaintiff's father or been expended on his account or for the benefit of the joint estate, the plaintiff's legal right to possession might upon equitable grounds have been decreed subject to the refund of half the purchase money, but nothing of the kind has been shown. It is therefore only in his representative character as heir that the plaintiff can be made liable to such refund, and that liability depends, it appears to us upon whether there was an implied contract of warranty or idemnity as to the title to sell the village between Subbaraya and the 1st defendant's father. That is a question which must, we think, be left for determination in another properly framed suit, should the 1st defendant be advised that the liability exists. We give no opinion upon the point.

1870. *January* 19. *R. A. No.* 116 *of* 1869.

For these reasons we are of opinion that the decree of the Civil Court must be affirmed with costs.

*Appeal dismissed.*

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## Appellate Jurisdiction. (a)

*Referred Case No.* 1 *of* 1870.

BODI RAMAYYA *against* PERMA JANAKIRAMUDU and another.

When a District Munsif has jurisdiction to try a Suit as a Small Cause Court Judge, he cannot transfer it to the District Munsif's Court on any ground of expediency.

1870. *January* 26. *R. C. No.* 1 *of* 1870.

CASE referred for the opinion of the High Court by V. Seshiah, the District Munsif of Masulipatam, in Suit No. 269 of 1869.

The following was the case stated :—

This is an action for the recovery of the value of the ambarum (landlord's share) of produce of some Inam land amounting to 31 Rs. 4 As. for the Fusly 1279.

This case came on for hearing on the 20th December, and was adjourned till the 24th January for a further hearing.

The facts of the case are as follows :—In 1866 a suit was instituted in this Court by the renter for the recovery of the ambarum (landlord's share) of certain Inam land, wherein the defendant contended that the land in question was a Seri land, and not an Inam, and the Inamdar therefore had been included a supplemental defendant.

The whole case having been gone into was decided by me in 1869 that the land was held as an Inam and not Seri.

While an appeal is still pending in the principal Sadr Amin's Court at that station against the above decision, the present claim has been brought for the produce of the current year.

The defendants now take exception to the disposal of the suit on the Small Cause Side, which will be final notwithstanding the former decision in respect of tenure of land may be reversed by the Appellate Court.

Considering the reasons urged by the defendant's vakil, I am of opinion that the suit shall not be taken up and

(a) Present : Bittleston and Innes, JJ.