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contention. The point has not been seriously pressed and it is unnecessary for us to decide it.

The result is that we must hold r. 6 (B) (i) framed under the Act as *intra vires* and valid.

Finding accordingly.

G. N. V.

APPELLATE CIVIL

FULL BENCH

Before Mr. M. C. Chagla, Chief Justice, Mr. Justice Gajendragadkar,
and Mr. Justice Dixit.

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Dec. 22

PARAPPA NINGAPPA KHANDER, APPELLANT (ORIGINAL DEFENDANT
No. 2) v. MALLAPPA KALLAPPA KORE AND OTHERS, RESPONDENTS
(ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 1 AND 3).*

Hindu Law—Joint family property—Alienation by father—Alienation without legal necessity—Alienee's interest when son and wife successfully challenge the alienation.

In a suit by a Hindu son for partition and separate possession of his share after setting aside an alienation of joint family property made by his father, the mother who is a party to the suit is also entitled to a share if the alienation was not for a purpose binding upon the family consisting of the father, mother and son.

Sarkarchand Satidas v. Narayan Savla,⁽¹⁾ *Shantaya v. Mallappa,*⁽²⁾ *Hushensab v. Basappa,*⁽³⁾ *Ramchandra Mulchand v. Bhagwan,*⁽⁴⁾ *Naro Gopal v. Paragouda,*⁽⁵⁾ *Pratapmull Agarwalla v. Dhanabati Bibi,*⁽⁶⁾ discussed.

Baboo Hurdev v. Pundit Baboo,⁽⁷⁾ relied on.

FIRST Appeal against the decision of N. V. Ransubhe, Esquire, Civil Judge (Senior Division).

Suit for partition and possession of plaintiffs' shares in property alienated without legal necessity.

Plaintiffs Nos. 1 and 2 being the son and wife respectively of defendant No. 1 challenged an alienation by him of the joint family property in favour of defendant No. 2 as being without legal necessity and claimed a one-third share each in the said property. The Civil Judge, Senior Division, decreed the suit awarding possession of a one-third share in the property to

* First Appeal No. 253 of 1950 with F. A. No. 254 of 1950 and S. A. No. 207 of 1953.

1. (1950) 52 Bom. L. R. 888.

3. (1932) 34 Bom. L. R. 1325.

5. (1917) 41 Bom. 347.

2. (1938) 40 Bom. L. R. 1029.

4. (1946) 43 Bom. L. R. 594.

6. (1936) 38 Bom. L. R. 328.

7. (1883) L. R. 11 I. A. 26.

each of the plaintiffs. Defendant No. 2 appealed against the decree.

The appeal came up for hearing before Bavdekar and Shah JJ. who referred to Full Bench the question as to whether plaintiff No. 2, the mother, was entitled to a share. In making the reference following judgments were delivered on July, 28, 1953:—

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Bavdekar J.—This is an appeal arising from a suit which had been filed by Mallappa Kallappa Kore and his step mother Kashava wife of Kallappa Kore for setting aside an alienation made by Mallappa's father and Kashava's husband Kallappa in the year 1945. The plaintiff alleged that the property was the property of Kallappa's father also Mallappa by name, and it devolved upon Kallappa upon Mallappa's death. The property consisted of two C. S. Nos. 3113 and 3114, and Kallappa originally mortgaged both the properties to one Mallappa Kothivale for Rs. 300. On the 13th of September 1944 Kallappa borrowed Rs. 1,000 from one Ningappa Chaugule and mortgaged to him only C. S. No. 1314. On September 9, 1944 Kallappa borrowed a further sum from Ningappa and mortgaged the same C. S. No. to him for a sum of Rs. 3,500. He sold both C. S. Nos. actually to Parappa Ningappa Khande on September 3, 1945 for a sum of Rs. 10,000. The consideration of the sale deed was a sum of Rs. 3,500 taken for the purpose of paying off the earlier mortgage in favour of Ningappa Chaugule, and the remaining sum of Rs. 6,500 taken at the time of the execution of the sale deed. It was the case of the two plaintiffs that the property being joint family property, it had to be shown that the transaction was binding upon the family before the purchaser Parappa could get a good title to it. The transaction was not for legal necessity, and consequently the two plaintiffs were entitled to avoid it. That was consequently the suit which they filed against Kallappa himself, against Parappa, the purchaser, and one Baburao Balwant Patil, a tenant of the property.

* Kallappa remained *ex parte*. The principal defences of Parappa was that the transaction was for legal necessity. Out of the transactions, the sum of Rs. 3,500 was required in order to pay off Ningappa. The rest of the amount was required for the purpose of making repairs to a motor car, upon which he spent Rs. 2,000 or Rs. 2,500. He consequently became indebted to other people including Ningappa for a sum of Rs. 8,000. At the time when the sale deed was passed, he required a further sum of Rs. 2,000 as capital for a shop in which cycle and motor parts were sold. He kept the cycle and motor parts shop for some time thereafter.

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Parappa did not admit actually that the property was joint family property, but raised the defences mentioned above in the alternative.

The learned trial Judge upon these pleadings framed an issue first of all whether Parappa proved that the property in suit was the joint family property of Kallappa and the plaintiffs. Upon this issue he recorded a finding that the property was the joint family property of the three. On the question of legal necessity, he held that Parappa had proved legal necessity only to the extent of Rs. 3,500, the debt which he owed to Ningappa. As upon that footing the sale could not be upheld, he held that the two plaintiffs were entitled to avoid it and gave them a decree for partition and separate possession of their two-thirds share in the property in suit.

Parappa has come in appeal, and the first point which has been made on his behalf is that the learned trial Judge in this case was wrong in throwing upon Parappa the burden of proving that the property in suit was the separate property of Kallappa. Now, that as a general proposition of law would be a quite correct submission to make. We notice, however, that in the present case when Parappa filed a written statement, he did not specifically deny that the property did not belong to Kallappa's father Mallappa. In any case, now that both the parties have led evidence upon an issue which had been framed, the question of burden of proof is immaterial. The plaintiffs led evidence to show that a sanad in respect of this house was issued in favour of Kallappa when he was four years old. That was in the year 1924. It is obvious consequently that the property could not have been acquired by Kallappa himself. The plaintiffs led evidence also of plaintiff No. 2 that this property was in the family at the time of her father-in-law Mallappa. But that evidence appears to be hearsay because Mallappa was dead when plaintiff No. 2 was married and came into the family of Mallappa, her father-in-law. If the property however was not self-acquired property of Kallappa, it could only have been either given to him or purchased by him, or in the alternative, he could have inherited it from someone other than his father. But no sale deed was produced. That is apart from the fact that as I have already said Kallappa could not have acquired the property at a time when he was a minor by a purchase. No gift could be made without a registered deed, and no gift deed was produced; nor was any suggestion made from whom Kallappa could have obtained the property by a gift deed. No suggestion was also made that Kallappa inherited the property from any other source. Parappa himself gave evidence, and the document which he has taken in this case mentions the property as property belonging to Kallappa. Now ordinarily one would

expect that Parappa would make inquiries when Kallappa proposed to him that he would sell the property in suit as to whether the property was Kallappa's self-acquisition, or his joint family property, because if the property was joint family property, it could only be disposed of by Kallappa for legal necessity. Now, in this case it appears that Kallappa seems to have represented to Parappa that the property was his separate property. In that case the question which would obviously arise is as to how Kallappa obtained it, and Kallappa would have been asked for a sale deed. Even if Parappa did not ask Kallappa these questions at the time of the sale deed, it is obvious that subsequently when the suit was filed he would try and find out where Kallappa would have got the property from, if it was not property which he acquired from Mallappa. In the circumstances, in our view, the probabilities undoubtedly are in favour of the property having devolved upon Kallappa on the death of his father Mallappa. The learned trial Judge was therefore right in holding that the property was the ancestral property of Kallappa and not his acquisition.

Coming next to the legal necessity, the only evidence upon the point was of Parappa himself. He said that Kallappa had in the first instance borrowed Rs. 3,500 from Ningappa. That is the amount which the learned trial Judge has found proved to have been for a purpose which is binding upon the family. But for the rest the only evidence which Parappa had to give was that after the mortgage in favour of Ningappa Kallappa had to borrow money from others for making repairs to the motor car which he was plying which cost about Rs. 2,500. There was no evidence led however as to where Kallappa got the repairs made, nor from whom he borrowed the moneys for the purpose of making repairs. Though, it has been admitted that Kallappa had got a motor car and was plying it for hire. It is obvious therefore that this story about Kallappa having borrowed moneys for the purpose of making extensive repairs to the motor car cannot possibly be accepted. The rest of the amount is supposed to have been borrowed by Kallappa for family necessities; but upon the footing that Kallappa had got a motor car, no reason has been shown as to why he should have found a necessity to borrow moneys. Kallappa was driving the car himself. In such a case, the car is a good source of income. In our view, in these circumstances, the learned trial Judge was quite right in holding that Parappa had not shown that there was a legal necessity for the transaction in suit.

In that case, the only question which arises is, what the proper order should have been. Mr. Datar, who appears on behalf of Parappa, contends that in this case legal necessity has been found to the extent of Rs. 3,500 borrowed from Ningappa. He says that in that case Kallappa being entitled to

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sell his own interest in the property for the remaining amount, we should take it that the plaintiffs' share was conveyed for the purpose of satisfying the amount of Rs. 3,500 which was due to Ningappa. In our view, that is not the correct approach in the matter. In order to show that the transaction was binding upon the family, what had to be shown was that there was legal necessity at any rate for the bulk of the money which was obtained by the sale of the property. Where that was not done, the son was entitled to avoid the sale. He could not, of course, avoid it without paying the amount for which legal necessity has been made out. But it is not Mr. Datar's contention that in this case he should be given the amount for which legal necessity has been found and the sale set aside. What he contends is that so far as the interest of Kallappa is concerned, it should be regarded as having been conveyed to the purchaser for the remaining amount, and so far as Mallappa's own interest is concerned, it should be held at any rate in part the sale was justified by legal necessity. That obviously cannot possibly be done. Immediately it is found that there was no legal necessity for the sale, the son is entitled to avoid the sale.

The next point which Mr. Datar makes has given rise to a conflict in this Court. It has been well established that in case the member of a joint Hindu family is entitled to avoid a sale effected by the manager, whether father or not, for a purpose not binding upon him, the share of the plaintiff which would be freed from the alienation would be the share to which he would have been entitled if a partition had been made at the date of the alienation. But there has been a conflict as to what was to happen when in the family there is a mother, who is not herself entitled to any interest in the property, but is entitled to a share on a partition either between her husband and her sons during the former's lifetime or between the sons after his death. In three cases of this Court the view has been taken that in such cases the mother not being a coparcener is not entitled to a share, though the question has not been discussed in any of the three cases. The first case is the case of *Shantappa v. Mallappa*.⁽⁸⁾ It appears from the judgment of Mr. Justice Broomfield at page 1039 in that case that it was conceded that the wife was not entitled to a share, because only a coparcener can challenge an alienation made by the manager. The next case is the case of *Ramchandra Mulchand v. Bhagwan*.⁽⁹⁾ In that case a joint Hindu family consisted of defendant No. 2 and his two sons the Plaintiffs. Defendant No. 2 alienated a part of the ancestral property without legal necessity by executing two mortgages in 1922 and 1925 in favour of defendant No. 1. At the dates of the mortgages the wife of

8. (1938) 40 Bom. L. R. 1029.

9. (1946) 48 Bom. L. R. 594.

defendant No. 2 was living. Defendant No. 1 filed a suit to enforce the two mortgages which ended in a compromise decree. In 1939 defendant No. 1 applied to execute the decree by filing a darkhast. In 1940 the plaintiffs filed a suit against the defendants for a declaration that the two mortgages were not binding on their share in the suit property. On the question as to what was the share of the plaintiffs which was not affected by the alienation, it was held that that would be the share to which they would have been entitled if a partition had taken place at the date of the alienation, and consequently the share was one-half.

Now, it is not quite clear from the report, but it appears that defendant No. 2's wife was dead at the time of the suit. The question as to whether in the partition which took place the wife could claim and obtain a share did not consequently arise. But there were remarks in that case which would indicate what the result would have been.

"It is perfectly true that the Hindu law does not give a right to a wife to challenge an alienation made by her husband. It is equally true that the Hindu law does not give a right to a wife to ask for partition. But the Hindu law does give the wife a share equal to her sons if there is a partition between her husband and her sons. When the sons challenge the alienation and their shares are to be determined, it is only on the basis of a partition that these shares can be determined; and, as I have pointed out, if there was a partition when the father executed the mortgages, the wife would undoubtedly have received a share and the only share that plaintiffs Nos. 1 and 3 would have received would have been one-half in the property in suit."

The next case is the Full Bench case of *Sakarchand Satidas v. Narayan Savla*.⁽¹⁰⁾ The question referred to the Full Bench in that case was only what the share of the joint family property to which an alienee would be entitled upon a suit for partition by members of the family who were entitled to avoid the alienation. The answer of the Full Bench to this question was that the share was the share to which the alienor was entitled at the date of the alienation and not at the time when the alienee asked for an equitable partition of the property. But even though that was the question, the ultimate decision was that when three sons and the mother had filed a suit for avoiding an alienation made by the father the share to which the alienee was entitled upon some of the plaintiffs at any rate being successful in avoiding the alienation was one-half, which was the share to which only two of the sons who were entitled to avoid the alienation were entitled to. Inasmuch as one of the sons was born after the alienation and was not entitled to avoid the alienation, this could only be upon the footing that the alienation could be avoided only to the extent of the share of the two sons.

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A contrary view has however been taken in two cases of this Court, the first being *Hushensab v. Basappa*,⁽¹¹⁾. That was a suit filed by a son and a mother to recover by partition and separate possession of their two-third share in the ancestral property in which the alienees from the father were parties. There is no discussion as to the wife being entitled either to avoid any alienation or being entitled to a share when it was decided in the suit which has been filed by the son that the alienation was not binding upon the family. But the share which was actually given to the plaintiffs appears to have been two-thirds and it seems to have been given on the footing that even though the mother was not entitled to sue for partition, she was entitled to a share on partition which did take place between the husband and her son whether privately or through Court.

Then we come to the decision of this Court in Appeal No. 184 of 1946. That was against a suit filed by a son and his mother against the father and alienees for partition and separate possession of their two-thirds share in the property in suit. The question then arose when the alienations were held not to be binding upon the family, what the share to which the plaintiffs were entitled was. The Privy Council decision in *Baboo Bardev Narain Saha v. Pundit Baboo Rooder Parkash Misser*,⁽¹²⁾ was then cited by the learned Judges who disposed of the appeal, and following it it was held that that case was an authority that when the right title and interest of a husband is sold in a Court sale, what was sold is the share which the husband would be entitled to take on a partition with his sons, and the interest of the wife does not pass to the purchaser. The same considerations were held to apply whether the sale was a forced sale or a voluntary sale found to be in no way binding upon the sons. The two plaintiffs were therefore held to be entitled to two-thirds share in the property which was available for partition.

Now, the view that the mother is not entitled to sue to set aside an alienation made by her husband, even though it may not be for a purpose of family necessity, proceeds upon the reasoning that she has no interest in the joint family property not being a coparcener. Now, the decision of their Lordships of the Privy Council in *Baboo Bardev Narain Saha v. Pundit Baboo Rooder Parkash Misser*,⁽¹²⁾ shows that when a father alienates his own interest what passes is the right to sue for partition and obtain his share, which would be the share to which he would be entitled if a partition had taken place at the date of the alienation. In the case of a family consisting of a father, a son and a mother, that would also be the interest of the son, so that if two separate purchasers had purchased

11. (1932) 34 Bom. L. R. 1325.

12. (1883) L. R. 11 I. A. 26.

the interest of the father and his son whether at voluntary or involuntary sales and were to sue for partition, the mother has to be made a party to the suit and would get her one-third share. That involves the conclusion that the mother has got some interest in the property howsoever inchoate, though she is not entitled to sue for partition. It is true of course that the view that the mother is not entitled to sue to set aside an alienation has been well established and ought not to be disturbed; but it is arguable that when a person who is entitled to set aside an alienation has sued both for setting aside an alienation and for a partition of the property, the mother who would have to be made a party is entitled to say that if the Court does come to the conclusion that the alienation is not binding upon the family, then there is no reason why there being a suit for partition she should not get her share in the property whose alienation is found by the Court not to be binding upon the family. The view that she cannot claim such a share seems to involve the proposition that the father is entitled to sell for a purpose not binding upon the family not only his own interest but such a inchoate interest as the mother might have got in the property. It is true that the Full Bench case of *Sakarchand Satidas v. Narayan Savla*,⁽¹³⁾ said by implication that the mother would have to be ignored; but that does not appear to have been done after the conflicting views which have prevailed in this Court in the Division Bench cases referred to above were brought to its notice. Just as there was a concession in the case of *Shantaya v. Mallappa*⁽¹⁴⁾ there probably was a concession made before the Full Bench. In any case it was assumed that the wife's share would be regarded as sold. We therefore refer to the Full Bench the following question:—

Whether in a suit by a Hindu son for partition and separate possession of his share after setting aside the alienation of joint family property made by his father, the mother who is a party is entitled to a share if the Court comes to the conclusion that the alienation is not for a purpose binding upon the family consisting of the father, mother and sons.

Shah J.—The trial Court has passed a decree in favour of plaintiffs Nos. 1 and 2 for possession of two-third share in the suit property from defendants Nos. 1 to 3 after equitable partition. Against that decree, defendant No. 2 who is an alienee of the property from defendant No. 1 has come to this Court in appeal. Plaintiff No. 2 is the step-mother of plaintiff No. 1, and defendant No. 1 is the father of plaintiff No. 1 and the husband of plaintiff No. 2. Defendant No. 2 is an alienee of a house which on the finding of the trial Court, was ancestral property of defendant No. 1. The plaintiffs filed suit No. 71 of 1949 for

13. (1950) 52 Bom. L. R. 883, F. B.

14. (1938) 40 Bom. L. R. 1029.

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a decree for possession of two-thirds share in the property by equitable partition on the allegation that sale of the property by defendant No. 1 in favour of defendant No. 2 could not affect their rights in that property.

The suit was resisted by defendant No. 2. The learned trial Judge held that the alienation did not bind the shares of the plaintiffs in the property, as the alienation was not supported by legal necessity and was not effected for payment of antecedent debts. The learned Judge therefore passed a decree in favour of the plaintiffs awarding to each of them a third share. Against that decree this appeal has been preferred.

I do not propose to deal with the evidence on the question whether the property in suit was ancestral property in the hands of defendant No. 1 and whether the alienation was supported by legal necessity or was effected to pay off antecedent debts incurred by defendant No. 1. My learned brother has dealt with the evidence in detail, and I agree with the reasons and the conclusions recorded by him on these two points.

Mr. Datar, who appears on behalf of the appellant, has contended that even if the property in suit was ancestral property in the hands of defendant No. 1 and even if the alienation was not made for legal necessity or for payment of antecedent debts, plaintiff No. 1 alone was entitled to a decree for possession of a third share and the remaining two-third share in the suit property must remain with defendant No. 2. Mr. Datar contended that the plaintiffs No. 1 alone was entitled to challenge the alienation and the plaintiff No. 2 had no such right, and therefore the Court cannot decree in favour of the plaintiffs a share larger than a third. In substance, counsel urged that even if the defendant No. 1 has unauthorisedly alienated the property of the joint family, the alienation must operate to convey his wife's interest in the property. In support of that contention we were referred to three decisions of this Court *Shantaya v. Mallappa*,⁽¹⁴⁾ *Ramchandra Mulchand v. Bhagwan*,⁽¹⁵⁾ and *Sakarchand Satidas v. Narayan Savla*.⁽¹⁶⁾ It is true that the final orders passed in the three cases support the view that where an alienation by a Hindu father of joint family property is sought to be set aside by his sons on the ground that the alienation is not made for satisfying legal necessity or for payment of antecedent debts, the alienation can be set aside only to the extent of the interest of the sons suing to set aside the alienation and the alienation cannot be set aside to the extent of the interest of their mother. In *Shantaya v. Mallappa*,⁽¹⁷⁾ it appears to have been conceded that the mother was not entitled to a

15. (1946) 48 Bom. L. R. 594.

16. (1950) 52 Bom. L. R. 883, F. B.

17. (1938) 40 Bom. L. R. 1029.

share in the suit property when the alienation by a Hindu father was set aside as unauthorised at the instance of the son. In *Ramchandra v. Bhagwan*,⁽¹⁸⁾ Chagla J., as he then was, held that in a suit for partition of joint family property, for ascertaining the shares of the sons of a Hindu who has unauthorisedly disposed of property of the family, the share that his wife may be entitled to on partition should be taken into account and the alienation may be set aside only to the extent of the shares the sons are entitled to as if actual partition took place on the date of alienation. *Sakarchand Satidas v. Narayan Savla*,⁽¹⁹⁾ is a judgment of a Full Bench of this Court. In that case no formal question was referred, but the Full Bench was invited to ascertain the shares the plaintiffs of that case were on partition entitled to. The facts which gave rise to the reference were that a Hindu father alienated joint family property in favour of defendants Nos. 1 to 5 and on that date there were in existence four members in the family, viz. the alienor, his two sons and his wife. After the date of the alienation one more son was born and the three sons and their mother filed a suit for setting aside the alienation on the plea that it was not supported by legal necessity and that it was not effected for payment of antecedent debts. The trial Court upheld the contention of the plaintiffs and passed a decree in favour of the plaintiffs for possession of four-fifths share in the property by equitable partition. It was urged in appeal to this Court that the right of the alienee in the property alienated by the Hindu father, where the alienation is not supported by legal necessity or antecedent debts, must be adjudged with reference to the circumstances which exist at the date when the alienation is effected and not as at the date when the suit to set aside the alienation was filed. The full bench was of the view that under the Hindu law when a coparcener alienates his share in joint family property, the right of the alienee is to be determined with reference to circumstances existing at the date of the alienation and not at the date when the alienee sues for equitable partition of the property. It was therefore held that plaintiff No. 3 who was born after the date of the alienation could not claim a share in the property. There was, however, no discussion in the judgment as to the right of the mother in the property, but the decree of the trial Court was modified and the plaintiffs were awarded one-half share in the property. The trial Judge had awarded to the mother one-fifth share. The final order of the full bench therefore appears to be consistent with the view that the mother was not entitled to a share in the property, and only the two sons who were in existence at the date of the alienation were entitled between them to

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18. (1946) 48 Bom. L. R. 594.

19. (1950) 52 Bom. L. R. 888.

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a half share, and that the remaining half share in the property must be deemed to have been transferred to the alienee. Even though the mother had sued for her share in the property which had been alienated, it appears to have been assumed that the alienee was entitled to retain the shares which the alienor and his wife may on partition be entitled to.

Now, these three decisions do apparently support the contention advanced by Mr. Datar. If these were the only decisions of this Court, we would be bound to hold that in the present case the plaintiff No. 2 was not entitled to a decree for her share in the property. But Mr. Jahagirdar has pointed out to us two decisions of this Court, in which a contrary view has been taken. They are *Husensab v. Basappa*,⁽²⁰⁾ and the judgment in an unreported case F. A. 184 of 1946. In *Hushensab v. Basappa*, a suit had been filed by a Hindu son and his mother for partition and separate possession of their share in joint family property against the father and the alienee from the father. The trial Court decreed two-thirds share in favour of the plaintiffs, and in appeal at the instance of the alienee the decree of the trial Court was confirmed. It was urged before the Court that Plaintiff No. 2, the mother, was not entitled to a share in the property. The Court negatived the contention and held that the trial Court was right in awarding to her a share in the property. Similarly, in *Venkatrao v. Gurubhimrao*⁽²¹⁾, on a partition of joint family property, in a suit filed by the sons against their father and the alienee, to which suit the natural mother and step-mother of the plaintiffs were parties, a share was awarded to the two mothers and the alienees were given only the interest to which alienor would have been entitled if there was a partition as at the date of the alienation, and in coming to that conclusion the Court followed the decision of the Privy Council in *Baboo Burdev Narian Shah v. Pundit Booder Parkash Misser*.⁽²²⁾

Evidently there is a conflict of decisions on the question which is of some importance. It is well settled that under the Bombay School of Hindu law a Hindu coparcener is entitled to dispose of for consideration his interest in the joint family property even if the alienation is not supported by legal necessity or purposes of the family or to discharge antecedent debts. It is also well settled that on partition between her husband and her sons or between her sons a Hindu female is entitled to a share in the joint family property; but the share is awarded to her only when actual partition by metes and bounds is effected and her ownership arises when the partition takes place and not before. A Hindu female who on partition

20. (1932) 34 Bom. L. R. 1325.
 22. (1883) L. R. 11 I. A. 28.

21. (1949) F. A. No. 184 of 1946, decided by Weston and Shah JJ., on Nov. 8, 1949 (unrep.).

is entitled to a share in joint family property cannot herself file a suit for partition except where she is entitled to claim a share under the Hindu Women's Rights to Property Act. It is also well settled, in view of the judgment of the Full Bench in *Sakarchand Satidas v. Narayan Savla*,⁽²³⁾ that the right of the alienee from a Hindu coparcener of joint family property is to be ascertained with reference to the date of the alienation and not with reference to the date on which the partition is claimed by the non-alienating coparceners. Now, if the view which has been taken by this Court in the three cases *Shantaya v. Mallappa*, *Ramchandra Mulchand v. Bhagwan* and *Sakarchand Satidas v. Narayan Savla* is to prevail, it involves the view that a Hindu coparcener by an unauthorised alienation disposes of not only his own interest in the property but also the interest to which his wife may become entitled on division of the estate between himself and his sons, and as a corollary it involves the view that he conveys by such alienation not the limited interest in the share which his wife may on division of the estate be entitled to, but an absolute interest in that share. It is true that only the sons of a Hindu are entitled to challenge an unauthorised alienation of joint family property by their father and the wife has no such right. But there is a vital difference between the rights of a son and a wife in the property of the joint family. The son acquires by birth an interest in the property of the joint family. The wife by marriage acquires no such interest; she is merely entitled to be maintained out of the property so long as it remains with the family. Her ownership in a share in the property arises when division of the property by metes and bounds takes place, and not before. The view contended for by Mr. Datar therefore involves a double fiction; (1) That the ownership of the mother, which during the subsistence of the joint family is at best inchoate and which vests in her only on actual division of the property, passes by the unauthorised alienation of the joint family property by the father to the alienee, and becomes in the hands of the alienee a present vested estate, (2) That the alienee acquires by the alienation a title in that estate which in incident and tenure is substantially different from the estate which the mother even after partition is entitled to hold.

I agree therefore that the question set out by my learned brother should be referred to a Full Bench.

The question was then heard [along with F. A. 254 of 1950 and S. A. 207 of 1953 involving the same question] by a Full Bench consisting of Chagla C. J., Gajendragadkar and Dixit JJ.

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F. A. No. 253 of 1950.

K. G. Datar, for the Appellant.

Y. V. Chandrachud, for Respondents Nos. 1 and 2.

H. B. Datar, for Respondent No. 4.

F. A. No. 254 of 1950.

K. G. Datar for the Appellant.

H. B. Datar for the Respondent.

S. A. No. 207 of 1953.

R. A. Jahagirdar with N. M. Shanbhag for the Appellants.

N. S. Anikhindi for N. M. Hungund for Respondents Nos. 1 to 3.

G. N. Vaidya for Respondent No. 4.

Chagla C. J.—This Full Bench has been constituted to decide the vexed question of the interest that an alienee takes in joint family property unauthorisedly alienated by the father, and the few facts which are necessary to state in order to decide that question are that there was an alienation by the father, who is the first defendant, in favour of the defendant No. 2, and the alienation was challenged by his son the first plaintiff and by his step-mother the plaintiff No. 2 who was the second wife of the defendant No. 2. The suit that was filed by the two plaintiffs was for partition and they claimed in the suit two-thirds share in the properties alienated by the defendant.

The question that we have to consider is, what is the share to which the plaintiffs are entitled in the property which was alienated by the defendant No. 1? An earlier Full Bench was constituted, the judgment of which is reported in *Sarkarchand Satidas v. Narayan Savla*,⁽²⁴⁾ and there it was held that under Hindu law the share of the alienee of joint family property is to be determined at the date of the alienation and not at the time when the alienee asks for an equitable partition of the property. Two conflicting views were in the field at the time the decision of that Full Bench was given. One was the view which was accepted and which has just been mentioned. The other was that the share of the alienee is a fluctuating share and is to be determined at the date when the challenge to the alienation is made and the Court must decide what the share of the alienor is at the date when the suit is filed. The second view was rejected by the Full Bench. The difficulty in this

case arises by reason of the fact that at the date of the alienation the defendant No. 1, the father, had a son alive and his wife was also alive, and the question that has been agitated at the Bar is whether the wife is entitled to any share which can be safeguarded on the alienation being challenged by the plaintiffs. The view which has been put forward with great ability and with great vigour by Mr. Datar is that on the alienation being challenged by the plaintiffs the only interest in the joint family property which can be safeguarded and which would not go to the alienee is the share of the son, that the mother has no share in the joint family property, and therefore her interest was validly alienated by her husband.

Before we deal with the authorities it would be perhaps desirable to consider the contention put forward by Mr. Datar from different aspects. The basis underlying Mr. Datar's contention is certain well accepted principles of Hindu law. The first principle is that a Hindu wife has no interest in the joint family property which she can enforce by a suit for partition. The second principle, which follows really from the first, is that if there is an unauthorised alienation of joint family property, only a coparcener can challenge the alienation and the wife not being a coparcener has no right to challenge it. As a consequence of these contentions it is urged by Mr. Datar that it is only the coparcener who challenges the alienation who can safeguard his interest in the joint family property. The challenge being made by the coparcener who has not consented to the alienation avoids the alienation and to the extent of the avoidance his interest in the joint family property cannot pass to the alienee. But the wife not being in a position to challenge the alienation and not being in a position to avoid the alienation, she cannot claim that her interest in the joint family property such as it is, has not passed by the alienation made by her husband. Although it may be true that a Hindu wife has no interest in joint family property and she has no right to challenge the alienation, it is equally true that on a partition between her husband and her sons she is entitled to a share equal to that of her son. It is the basic principle of Hindu law that a Hindu wife is protected and safeguarded on a partition taking place between her husband and her sons, and although she is not recognised as a coparcener on a partition taking place she is given almost the same right as that of a coparcener because she receives a share equal to that of her son. Although the right in the joint family property which a coparcener has is not enjoyed by the wife, it may be said that she has an inchoate right in the joint family property and that inchoate right materialises when a partition takes place when she becomes entitled to a share equal to that of her son. Broadly speaking, the question resolves itself into this. When

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a father or a *karta* of a joint Hindu family unauthorisedly alienates joint family property, is he entitled not only to alienate his own share but also the inchoate share of his wife? It must be borne in mind that the original principle of Hindu law was that a father or a *karta* could alienate joint family property only for legal necessity. If the alienation was unauthorised he could not even alienate his own share or his own interest. This original principle of Hindu law has been departed from by reason of a series of judicial decisions, but in our opinion the exception engrafted upon the original principle of Hindu law must be strictly restricted to the alienation being upheld to the extent that the alienation affects the interests of the alienor. What Mr. Datar is contending for is that not only must the alienation be upheld to the extent of the interest of the father, but also to the extent of the inchoate interest of the wife. That is a proposition which cannot be accepted either on principle or in equity or justice, and unless there is strong authority in support of such a proposition it is not possible for us to countenance it.

Another curious consequence would follow from our acceptance of Mr. Datar's contention. If a son were to file a suit for partition against his father, undoubtedly and indisputably his mother would be entitled to a share in the joint family property, but if an alienee were to sue for partition in a case where he was not given possession of the alienated property and he sued for possession and in the alternative on its being held that the alienation was not supported by legal necessity for a general partition, according to Mr. Datar in such a partition the wife would be given no share at all in the joint family property because, again according to Mr. Datar, on the alienation taking place, however unauthorised the alienation might have been, the share of the wife would be conveyed to the alienee by the husband. It is difficult to understand why, when Hindu law safeguards the share of the wife in a suit for partition by the son, Hindu law fails to safeguard her interest in a suit for partition by the alienee. Again, to put the matter in a different language, a wife's share is saved if there is an ordinary suit for partition where no question of alienation arises, but the wife loses her share if there is an unauthorised alienation by her husband. Apart from Hindu law, the ordinary principle of law is that a person can only alienate what belongs to him, something to which he has title. But the contention put forward by Mr. Datar is that when a husband unauthorisedly alienates joint family property, not only has he the right to alienate his share, a matter which is beyond dispute, but also he has the right to alienate the share of his wife. That is a proposition which runs counter not only to the principle of Hindu law but also to the basic

principle of any law. The only answer that Mr. Datar can give to these difficulties and to the obvious inequities that must result is that a valid title passes to the alienee and the alienation is valid until and unless it is avoided by a coparcener who is the only person who can challenge the alienation. In putting forward this argument Mr. Datar overlooks the distinction between the right of a person to challenge and the rights that accrue to parties on a proper and effective challenge being made. It may be true, as undoubtedly it is, that the right to challenge an unauthorised alienation is restricted under Hindu law to coparceners, but it does not follow from that that because that right is restricted to coparceners, when the challenge is properly made and the alienation is held void no right should accrue to anyone else than the challenging coparcener. What is also overlooked by Mr. Datar is that the Full Bench to which reference has just been made, has definitely laid down that in order to ascertain the interest of the alienee what has got to be determined is the interest that the alienor would have at the date of the alienation on the assumption that the joint family property was partitioned on that date. Undoubtedly, a legal fiction has been introduced in order to determine the interest of the alienee and the interest of the alienee depends upon the interest of the alienor in the joint family property at the date of the alienation on the basis of a partition. The difficulty of Mr. Datar is that he hesitates in working out in its full effect this legal fiction. What is the effect of this legal fiction? We must assume that there was a partition when the alienation took place and in this case at the date of the partition there was the father, the son and the wife. There can be no doubt that if a partition had been effected, the wife would have got a share equal to that of the son. If that be so, then the only interest in the joint family property that the father could have alienated was his share and not the share of his wife which would be a separate share assignable to her on the supposed partition.

Really two approaches are possible to this case and our attempt should be to reconcile the two positions that arise from these two different approaches and to try and reconcile them if possible in consonance with justice and equity. The one approach is the approach for which Mr. Datar has so strenuously contended that an alienation, however unauthorised, is valid until it is challenged, that the right to challenge is restricted to the coparceners, and it is only those who can challenge the alienation who can claim their share in the joint family property as not having been affected by the alienation except the share of the challenging coparceners, the rest of the joint family property being validly alienated to the alienee. The other approach is that the wife has an interest in the joint

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family property, however inchoate that interest might be, and that interest must be protected as much in a suit for partition at the instance of her son as in a suit for partition whether at the instance of the alienee or at the instance of her own son which suit has been necessitated by unauthorised alienation by her husband, and in our opinion the only way to reconcile these two approaches is to hold that although the wife has no right to challenge the alienation, although her right in the family property is inchoate and has not come into existence because there is no partition, because of the legal fiction which we have accepted her share in the joint family property cannot be alienated by her husband when the alienation is not supported by legal necessity. In other words, what the alienee gets is strictly the share of the alienor not augmented by the inchoate share of his wife. When one analyses the matter a little further, really what the alienee claims is that he is not merely entitled to the share and interest of his alienor but that he should get something more and that more is the share of the alienor further increased by the inchoate share of his wife. In our opinion, such a contention is not consistent with the principles of Hindu law.

Turning to the authorities, in the first place Mr. Datar has made a strong grievance of the fact that in effect we are trying to overrule the decision of the earlier Full Bench. Nothing is further from our minds than that. We agree with Mr. Datar that there must be finality to litigation and it is never a very seemly sight that a Court should attempt to reverse an earlier decision of a Full Bench by appointing another and even a Fuller Bench, and therefore our attempt should be to adhere to whatever we have decided in the earlier Full Bench. Turning to that Full Bench (52 Bom. L. R. 888), in that case the joint family was constituted by Narayan and Jagannath who were plaintiffs Nos. 1 and 2 and the wife of the father Savla who was defendant No. 6. There was a son subsequently born, and the three sons and the wife filed a suit to challenge the alienation by the father, defendant No. 6. The trial Court held that the alienation was not supported by legal necessity and decreed the plaintiffs' suit to recover their four-fifths share in the partition. It will be noticed that the view taken by the trial Court was that the alienees' interest was to be determined at the date of the suit because he took into consideration the share of the son who was not in existence at the date of the alienation. As we have already pointed out, we rejected the view of the trial Court and we came to the conclusion that the share of the alienee was to be determined at the date of the alienation. Having done that we awarded to the plaintiffs one-half share in the property and Mr. Datar says that we did this because we took the view that the wife's share was not to

be considered for the purpose of deciding what came to the share of the plaintiffs. As to the quantum of the share three views were possible, any one of which could have been given effect to by the Full Bench. One was the view taken by the trial Judge, viz. that the interest of the alienee was fluctuating with the interest of the alienor and on that basis the four-fifths share was given. As we have pointed out, that view was rejected. The other two views were these. One was the view contended for by Mr. Datar that the share of the alienee was the share of the father in the joint family property augmented by that of his wife, which was half, the other half belonging to the two sons. The other view was—the view which we are inclined to accept—that at the date of the alienation if a partition had taken place, not only the father and the sons would have received a share each, but the wife would also have received a share; in other words, what the father could have alienated was only one-fourth and not one-half. Consistently with that view, undoubtedly we should have passed a decree awarding to the plaintiffs three-fourths share in the property. If we had come to the conclusion that we did after hearing arguments in favour and against the two views which we have just referred, undoubtedly this decision of the Full Bench would be binding upon us. But there is no reference in the judgment at all which indicates that the point of view now put before us on behalf of the wife was ever put forward before the Court. A decision of a Full Bench, or of any Court for the matter of that, is binding provided it is a considered decision. But when a decision has been given without the pros and cons of the question being considered, it cannot possibly be urged that such a decision acquires a finality which cannot be interfered with by any subsequent decision. The manner in which the decision is arrived at at the end of the judgment almost seems to suggest that the decision was given on a concession made by counsel at the Bar. But the fact remains that the counsel for the wife never urged before us that she was entitled to a share which should be safeguarded and that the plaintiffs including the mother were entitled to three-fourth share in the suit properties. It is indeed remarkable that though the decision in *Shantaya v. Mallappa*,⁽²⁵⁾ was cited before us on the main point considered by us, the respondent's learned advocate did not appear to have challenged the correctness of the other proposition laid down in the said case in regard to the mother's share; and a contrary decision on the same point in *Hushensab v. Basappa*,⁽²⁶⁾ was not even mentioned in the arguments, and has not been considered by us. Therefore, we do not look upon this judgment as laying down that when

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25. (1938) 40 Bom. L. R. 1029.

26. (1932) 34 Bom. L. R. 1325.

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an alienation takes place the share of the wife is not to be considered in deciding what passes to the alienee.

The next judgment on which strong reliance is placed is a judgment of Mr. Justice Broomfield and Mr. Justice Sen, (*Shantaya v. Mallappa*). In that case plaintiffs Nos. 1 to 6, who were brothers forming a joint Hindu family with their father, brought a suit to set aside an alienation made by their father, which was not for payment of antecedent debts or for legal necessity. At the time of the alienation the joint family consisted of plaintiff No. 1, and his father, mother and a step-brother who subsequently separated from the joint family, and plaintiffs Nos. 2 to 6 were born subsequent to the date of the alienation. The Court held that plaintiff No. 1 only was entitled to set aside the alienation to the extent of his one-fourth share in the property alienated and that the other plaintiffs could not question its validity. Mr. Justice Broomfield at p. 1039 says:

"The law in Bombay as settled in this presidency by *Naro Gopal v. Paragouda*,⁽²⁷⁾ (to which we shall presently refer) is that the alienee gets the share which the alienor would have got if a partition had taken place at the date of the alienation."

With respect, that was laying down the correct proposition of law. Then the learned Judge goes on:

"That share would actually have been one-fourth in this case, the family consisting of defendant No. 1, defendant No. 11, mother of plaintiff No. 1, plaintiff No. 1 himself and Rudrappa. But Rudrappa who accepted the alienation in 1924 when he took his share and went out of the family has no right to challenge it, nor has the mother, defendant No. 11. It is conceded that only a coparcener can do so."

Having held that the alienee could only get the share which the alienor would have got if a partition had taken place, the learned Judge then approaches the matter from a different point of view, the point of view of the right of the mother to challenge the alienation, and again the learned Judge rightly holds that the mother had no right to challenge the alienation. But from that he draws the inference that she had no interest in the property and that in effect her husband was authorised to alienate not only his own share but also the share of his wife. With respect, we are unable to agree with this view put forward by the learned Judge. On the facts the Court should have held that at the date of the alienation what defendant No. 1 could have alienated was only his share not augmented by the inchoate share of his wife. The learned Judge further observes:

"The plaintiff who are in effect suing to evict persons who have been in possession since 1912 can take no more between them than the share to which plaintiff No. 1 would have been entitled to in 1912. Defendant No. 11 can claim no share in this suit."

27. (1917) 41 Bom. 347.

With respect, the question is not what plaintiff No. 1 would have been entitled to at the date of the alienation. The proper question the learned Judge should have asked was, what was the share of the alienor in 1912 to which the alienee became entitled by reason of the alienation? The only right that the learned Judge gave to the wife was that if the plaintiffs should partition their one-fourth share, which they had not sought to do so far, she would get the share of a son, i. e. one-seventh in that. The right of the wife was not an interest in the share which her sons got on partition, but she had an independent share in the whole of the joint family property and that share was equal to the share of the son. With respect, the incongruity of the result becomes apparent that as a result of this partition the wife got a much smaller share than what she was entitled to in Hindu law and that too from the share of the son thereby materially affecting even his share.

Reliance has also been placed by Mr. Datar on a judgment given by me sitting singly and reported in *Ramchandra Mulchand v. Bhagwan*.⁽²⁸⁾ In that case I enunciated the same proposition of law which has now been finally accepted by the Full Bench, viz. that under Hindu Law when the sons who form a joint family with their father successfully challenge the alienation of ancestral property made by the latter without legal necessity, their shares which remain unaffected by the alienation are to be determined on the basis of what these would be if there had been a partition when the alienation took place. At p. 596 of the judgment I have pointed out:

“It is perfectly true that the Hindu law does not give a right to a wife to challenge an alienation made by her husband. It is equally true that the Hindu law does not give a right to a wife to ask for partition. But the Hindu law does give the wife a share equal to her sons if there is a partition between her husband and her sons. When the sons challenge the alienation and their shares are to be determined, it is only on the basis of a partition that these shares can be determined, and, as I have pointed out, if there was a partition when the father executed the mortgages, the wife would undoubtedly have received a share and the only share that plaintiffs Nos. 1 and 2 would have received would have been one-half share in the property in suit.”

What is to be remembered is that in that case the wife was already dead and the claim was being made by the two sons and the two sons were seeking to augment their share by claiming the share of the mother. That claim was rejected by me and I pointed out that the wife would have had a share if the partition had taken place when the alienation was made, and therefore what the sons were entitled to was only the share to which they would have been entitled as of the partition at the date of the alienation. In our opinion, that decision far from helping Mr. Datar really is against his contention.

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We find it difficult to believe that on this reasoning if the wife had been a party to the suit for partition, the Court would have rejected her contention on the ground that she had no share in the joint family property and therefore that share could not be safeguarded although there was an unauthorised alienation.

Reference was also made to an earlier decision of this Court in *Naro Gopal v. Paragauda*.⁽²⁹⁾ That decision enunciates the same principle which we have laid down in the earlier Full Bench decision. In that case defendant No. 2 who was the father and the alienor alienated property when only one son plaintiff P was alive and the second son plaintiff B was an after-born son, and the rival contentions that were put before the Court were that defendant No. 1, the alienee, was entitled to the half share or to the one-third share to which but for the alienation defendant No. 2 since the birth of plaintiff B would have been entitled, and the Court accepted the principle that the share of the alienee was to be computed on the basis of the share to which the alienor would have been entitled at the date of the alienation, and therefore the alienee was entitled to a half share to which the father was entitled at the date of the alienation.

Mr. Chandrachud has referred us to a Privy Council decision which is rather instructive and helpful, reported in *Baboo Hurdey v. Pundit Baboo*.⁽³⁰⁾ The question that arose for their Lordships' consideration was, what was the right, title and interest under Mitakshara law of a father in the joint family estate which had been attached in execution of a decree for money and sold, which passed to the purchaser. At the date of the sale the father had a son and a wife, and the Privy Council rejected the contention that the interest which was purchased was the share of the father at the time of the partition, and accepted the contention that it was the right which the father would have had to a partition and what would come to him on a partition being made, and on that basis they came to the conclusion that the purchaser was entitled only to a one-third share of the father. This is exactly the principle which should govern cases of alienation. The alienee would have the right which the father would have to a partition and what would come to him upon the partition being made. Therefore, notionally and fictionally we must effect a partition and decide what share would come to the father on such a partition being made, and that is the share that would pass to the alienee. It may be added at this stage that in *Hushansab v. Basappa*,⁽³¹⁾ a Division Bench of this Court has relied on this decision of the Privy Council in coming to the conclusion that in a suit like

29. (1917) 41 Bom. 347.

30. (1883) L. R. 11 I. A. 26.

31. (1932) 34 Bom. L. R. 1325.

the present, the mother's share does not pass on to the alienee and that the same must be safeguarded and allotted to her.

It has been urged by Mr. Datar on the strength of a Privy Council decision in *Pratapmulla Agarwalla v. Dhanabati Bibi*⁽³²⁾ that the mother is not entitled to a share on the disruption of the coparcenary and that she is entitled to a share when a partition is effected by metes and bounds, and on the strength of that authority it is urged by Mr. Datar that even assuming we come to the conclusion that on a partition the wife would have a share, that share would not come into existence till the partition is made by metes and bounds. What the Privy Council laid down was that according to Mitakshara law the wife, mother or grandmother is entitled to a share when there is a partition by division of the family estate between coparceners, but she cannot be recognised as the owner of such share until the partition is actually made as she has no pre-existing right in the estate except a right of maintenance and for this that there is nothing in the Mitakshara from which it can be inferred that upon a mere severance of the joint status of the family, any of the above-mentioned females can claim a share. Now, the legal fiction that we have introduced is not the severance of the joint status of the family. If that was the legal fiction, undoubtedly it could not be said that the wife would have a share. But the legal fiction we have introduced and which must be given effect to is that there must be a notional partition, a partition must be effected, and the question that has got to be considered is who are the sharers on such a partition being effected. To that question the answer is obvious. If a partition was effected at the date of the alienation, undoubtedly the wife or the mother would have a share in the joint family property. As we have just pointed out, this legal fiction is accepted by the Privy Council in *Baboo Hurdey v. Pundit Baboo*,⁽³³⁾ to which reference has just been made.

The question framed in the referring judgment is:

"Whether in a suit by a Hindu son for partition and separate possession of his share after setting aside the alienation of joint family property made by his father, the mother who is a party is entitled to a share if the Court comes to the conclusion that the alienation is not for a purpose binding upon the family consisting of the father, mother and sons."

We answer the question in the affirmative.

Answer accordingly.

G. N. V.

32. (1936) 38 Bom. L. R. 328.

33. (1883) L. R. 11 I. A. 26.

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