

**(1955) 12 BOM CK 0014**

**In the Bombay High Court**

**Case No :** First Appeal No's. 253 and 254 of 1950 and S.A. No. 207 of 1953

Parappa Ningappa Khaded and Another

APPELLANT

Vs

Mallappa Kallappa and Others

RESPONDENT

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**Date of Decision :** 22-12-1955

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 11

**Citation :** AIR 1956 Bom 332 : (1956) 58 BOMLR 404 : (1956) ILR (Bom) 546

**Hon'ble Judges :** Chagla, C.J.;Gajendragadkar, J;Dixit, J

**Bench :** Full Bench

**Advocate :** K.G. Datar, R.A. Jahagirdar and N.M. Shanbhag, for the Appellant;  
N.S. Annikhindi, for N.M. Hungund, H.B. Datar and G.N. Vaidya, for the  
Respondent

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## **Judgement**

Chagla, C.J.—This Pull 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 defendant 1, in favour of defendant 2, and the alienation was challenged by his son plaintiff 1 and by his step mother plaintiff 2 who was the second wife of defendant 1.

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 defendant 1.

2. 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 defendant 1? An earlier Pull Bench was constituted, the Judgment of which is reported in -- Sakarchand Satidas and Others Vs. Narayan Savla Vani and Others, , 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 Pull 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 Pull Bench. The difficulty in this case arises by reason of the fact that at the date of the alienation defendant 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 & 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.

3. 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 the 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 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.

4. 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 iniquities 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 & 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.

5. 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 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.

6. 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 Pull 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 Puller Bench, and therefore our attempt should be to adhere to whatever we have decided in the earlier Full Bench.

Turning to that Full Bench, -- *Sakarchand Satidas and Others Vs. Narayan Savla Vani and Others*, , in that case the joint family was constituted by Narayan and Jagannath who were plaintiffs 1 and 2 and the wife of the father Savla who was defendant 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 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 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 was 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-fourths share in the suit properties.

It is indeed remarkable that though the decision in -- "Shantaya v. Mallappa" AIR 1938 Bom 560 (B). was cited before us on the main point considered by us, the respondents' 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" 34 Bom LR 1325 (C), 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 an alienation takes place the share of the wife is not to be considered in deciding what passes to the alienee.

7. The next judgment on which strong reliance is placed is a judgment of Broomfield and Sen, J.T. AIR 1938 Bom 500 (B). In that case plaintiffs 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 1 and his father, mother and a step-brother who subsequently separated from the joint family, and plaintiffs 2 to 6 were born subsequent to the date of the alienation. The Court held that plaintiff 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. Broomfield J. at p. 506 says:

"The law in Bombay as settled in this presidency by Naro Gopal Kulkarni Vs. Paragowda Basagowda, (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 cor. rect 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 1, defendant 11, mother of plaintiff 1, plaintiff 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 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 1 could have alienated was only his share not augmented by the inchoate share of his wife. The learned Judge further observes:

"The plaintiffs 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 1 would have been entitled to in 1912. Defendant 11 can claim no share in this suit".

With respect, the question is not what plaintiff 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.

8. Reliance has also been placed by Mr. Datar on a Judgment given by me sitting singly and reported in -- Ramchandra Mulchand Vs. Bhagwan Gopal and Another, . In that case T 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 page 83 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 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 if the partition had taken place at the date of the alienation.

In our opinion, that decision far from helping Mr. Datar really is against his contention. 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.



9. Reference was also made to an earlier decision of this Court in -- AIR 1916 Bom 120 (D). That decision enunciates the same principle which, we have laid down in the earlier Pull Bench decision. In that case defendant 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 1, the alienee, was entitled to the half share or to the one-third share to which but for the alienation defendant 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.

10. Mr. Chandrachud has referred us to a Privy Council decision, which is rather instructive and helpful reported in -- Baboo Hurdey Narain. v. Pundit Baboo Roer Parkash", 11 Ind App 26 (PC)(F). 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 34 Bom LR 1325 (C), 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 the present, the mother's share does not pass on to the alienee and that the same must be safeguarded and allotted to her.

11. It has been urged by Mr. Datar on the strength of a Privy Council decision in -- AIR 1936 20 (Privy Council) , 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 further 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 11 IA 26 (PC) (F), to which reference has just been made.

12. 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.

13. Answer in the affirmative.