

(1953) 12 BOM CK 0008
In the Bombay High Court
Case No : Second Appeal No. 355 of 1950

Shivaji Ganpati Muthal and Others	Vs	APPELLANT
Murlidhar Daji Muthal and Others		RESPONDENT

Date of Decision : 01-12-1953

Acts Referred:

Limitation Act, 1963 — Section 6, 7

Citation : AIR 1954 Bom 386 : (1954) 56 BOMLR 426 : (1954) ILR (Bom) 794

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

Bench : Full Bench

Advocate : Y.V. Chandrachud, for the Appellant; R.A. Jahagirdar and M.G. Chitale, for the Respondent

Judgement

Chagla, C.J.—The facts giving rise to this Pull Bench are very few. Ganpati, who is the father of the plaintiffs, made an alienation of joint family property in 1936. At that time the joint family consisted of Ganpati and his son Maruti who was at that time a minor. Maruti left the joint family in 1942 as he was given away in adoption, but before the adoption took place the plaintiffs were born to Ganpati. The plaintiffs filed the suit to challenge this alienation and the trial Court held that the alienation was not supported by necessity. The trial Court also held that the plaintiffs were entitled to challenge the alienation and passed a decree in favour of the plaintiffs. In appeal the lower appellate Court concurred with the finding of the trial Court with regard to the necessity for the alienation, but on the question of the right of the plaintiffs it came to a contrary conclusion and dismissed the plaintiff's suit.

The matter then came in second appeal before Mr. Justice Gajendragadkar and Mr. Justice Vyas and they raised the two following questions and referred them to the Pull Bench, and the two questions are :

(1) Whether, under Hindu law, a son who is neither born nor adopted at the time of the alienation made by the father is entitled to challenge the validity of the said alienation? and

(2) If not, does he acquire the said right if at the time when he was born there is in existence another son who could have challenged the said alienation and who has not lost the said right?

A large number of authorities have been referred to us at the bar, but before we deal with them it is necessary, in our opinion, to enunciate certain principles, and having enunciated these principles, we will consider the authorities to see whether these authorities support these principles or are in any way inconsistent with them.

2. The first principle is that a person born in a coparcenary is entitled to the property which is in existence at the time when he enters the coparcenary. As it has been said, he must take the joint family property as he finds it. The second principle is that if a father alienates property and that alienation is not supported by necessity, then the alienation is not void but voidable. The question that we have to consider is, first, whether a son born after the alienation is entitled to challenge the alienation made by his father; in the second place, if he has such a right, whether that right is unlimited; and in the third place, whether there are any limitations upon that right and if so, what limitations.

It follows as a consequence from the proposition we have just stated that an alienation is not void but voidable, that an after born son has no right in the alienated property. Till the alienation is successfully challenged, the alienation is good, and therefore when the after born son enters the coparcenary, he cannot claim to take any interest in the alienated property. It is also clear that if at the date of the alienation there is a son in existence, unless he consents to the alienation, the alienation would not be binding upon him, and therefore he can challenge that alienation. It is also well settled that the alienation can be challenged within 12 years from the date of the alienation. After 12 years the right to challenge would be barred. Therefore, there is no dispute as to the right of a son who was in existence at the date of the alienation and who has not consented to that alienation to challenge the alienation.

The difficulty arises with regard to an after-born son who was not in existence at the date of the alienation. It may be suggested that as he had no right in the alienated property he would have no right to challenge the alienation. On the other hand, the right to challenge the alienation accrues to the son who was in existence at the date of the alienation, and the real question that we have to consider in this Pull Bench is whether the fact that the after-born son was in existence during the time that the son who had a right to challenge continued to remain in the joint family, gave him also the right to challenge the alienation.

3. Now, in order to decide this question we must first consider what is the nature of the right that the son has to challenge the alienation. It would be fallacious to suggest that the right of the son who was in existence at the date of the alienation to challenge the alienation is a purely personal right. A personal right is a right which enures only for the person asserting that right. When the son

challenges the alienation and if the challenge is successful and the alienated property is brought back into the joint family, the property enures not only for the benefit of the challenging son but it enures for the benefit of the whole family. Therefore, the right to challenge which Hindu law gives to a son who was in existence at the date of the alienation is not a right personal to him; it is a right which he exercises on behalf of the family; it is a right which he exercises for the benefit of the family.

If that is the nature of the right and while that right is subsisting, another son is born, does that son get the right which the elder son had to challenge the alienation? It is difficult to understand on principle why the subsequently born son should not be in a position to avail himself of the right which had already accrued to the elder son to challenge the alienation. It is perfectly true that the right to challenge an alienation constitutes one cause of action; it does not accrue every time a new son is born. It is also true that limitation runs from the date of the alienation. But the cause of action having already accrued and the cause of action subsisting when the subsequently born son comes into the family, it is difficult to understand why that subsequently born son could not challenge the alienation as much as the earlier born son.

The position would be different if the subsequently born son came into the family after the death or adoption of the earlier born son or he came into existence after the right to challenge had been barred by limitation. In such a case when the subsequently born son came into the family, he would have no right subsisting which he could avail himself of. Therefore, the question that we have to decide narrows itself down to this, viz. whether, when a father alienates joint family property and at that time he has a son who does not consent to the alienation and who has the right to challenge the alienation, and while that right is subsisting in that son and the right has not come to an end either by limitation or by his death or adoption, another son is born to the father, whether there is anything in principle which should deprive the subsequently born son of challenging the alienation.

In our opinion the answer to this question must depend to a large extent upon what view we take of the right of the son to challenge the alienation. If we take the view that the right is purely personal, that it enures only for his benefit, and that he alone can exercise it, then undoubtedly the subsequently born son could not avail himself of that right. But if we take the view, as we do, that the right is not purely personal, that the right is a right that belongs to the joint family, that it is a right, if not in joint family property, to joint family property, then on principle we must come to the conclusion that this right which was in existence when the after-born son came into the family was exercisable by that after-born son as much as it could have been exercised by the son who was in existence at the date of the alienation.

4. This Full Bench has been necessitated by a judgment of the Division Bench of this Court which has taken a contrary view, and that view is to be found in the

decision reported in -- The Gujarat Oil Mills and Manufacturing Co. Ltd. Vs. Shakarbai Motilal Patel, . In that case plaintiff No. 1 and his father who was defendant No. 2 formed a joint Hindu family and while plaintiff No. 1 was a minor his father made a certain alienation. Plaintiff No. 2 was born subsequently to defendant No. 2. The two plaintiffs then filed a suit to challenge the alienation. Plaintiff No. 1 died pending the suit. The defendants contended that the suit had abated as plaintiff No. 2 had no cause of action himself and no cause of action survived to him from plaintiff No. 1. Sir John Beaumont, Chief Justice and Mr. Justice Sen accepted the contention of the defendants and held that the suit had abated.

It will be noticed that plaintiff No. 2 was born while plaintiff No. 1 was still in existence; in other words, plaintiff No. 2 was born at a time when plaintiff No. 1 had the right to challenge the alienation, and in fact he challenged that alienation by filing a suit making his brother a party plaintiff. The learned Chief Justice held against the plaintiffs largely on the basis of a Full Bench judgment of the Nagpur High Court in -- AIR 1940 305 (Nagpur) .

The learned Chief Justice at pp. 240, 241 lays down three propositions. The first is that the cause of action to set aside an alienation not for necessity arises at the time of the alienation, and no fresh cause of action arises on the birth of a further coparcener. This, with respect, is unexceptional. The second proposition is: only a coparcener born at the time of the alienation, or those conceived and subsequently born alive, and who did not assent to the alienation, can sue to set it aside. The learned Chief Justice points out that on this question opinions differ, but according to him the matter is concluded by a decision of the Privy Council in -- AIR 1925 264 (Privy Council) and he further adds that this view is supported by the general rule that a coparcener under the Mitakshara system takes only a share in the coparcenary property as existing at his birth or adoption. The third proposition is that if a coparcener, entitled to do so, successfully challenges the alienation, his action enures for the benefit of all the members of the joint family who did not assent to the alienation. Again, with respect, that is a correct proposition.

Then the learned Chief Justice goes on (p. 240) :

" But in my view it cannot be said to follow from this that the challenging coparcener is suing in a representative capacity, at any rate, so far as relates to members not in existence at the time of the alienation. I do not see how a plaintiff in a suit can represent persons who have no right in themselves to sue."

With respect to the learned Chief Justice, he was perhaps technically right that plaintiff No. 1 could not represent plaintiff No. 2 but once he" conceded that the suit filed by plaintiff No. 1 was for the benefit of the joint family, it is difficult to understand why on the death of plaintiff No. 1, plaintiff No. 2 could not maintain the action. It would not be true to say that plaintiff No. 2 had no cause of action which would entitle him to continue the suit. As already pointed out, the cause of

action having accrued to plaintiff No. 1 who was alive at the date of the alienation, the cause of action was for the benefit of the joint family and any member of the joint family could avail himself of that cause of action.

Again, with respect, the learned Chief Justice has fallen into an error when he takes the view that plaintiff No. 2 could not continue the suit because he was not the heir or legal representative of plaintiff No. 1. The right of plaintiff No. 2 arose not out of heirship but out of survivorship, a principle well understood in Hindu law.

5. Now, we must first look at the decision of the Privy Council on which reliance has been placed by the learned Chief Justice. Turning, therefore, to the case of "Lal Bahadur v. Ambika Prasad (C)", in that case Ram Din and his brother Pateshwari were the managers of a joint Hindu family and they mortgaged certain joint family property in 1895. Ram Din had two sons Awadh Behari and Jantri Prasad. In 1895 Awadh Behari was about 13 years old and Jantri Prasad was about 3 years old. The plaintiffs in the suit were the sons of Awadh Behari. In 1904 Pateshwari and Ram Din, the managers, sold the property to pay off the mortgage debt and the two sons of Awadh Behari filed the suit in 1919 to challenge the sale, and two questions arose before the Privy Council.

One was whether the sale which the grandsons were challenging could be supported by necessity, and the other question was whether the grandsons could maintain the action. The Privy Council held that inasmuch as the sale was effected in order to discharge an antecedent debt, it was binding upon the plaintiffs, and what we have to consider is whether the Privy Council has expressed any opinion on the second question which could be binding upon us. It is perfectly true that at p. 264 the Privy Council does say that in 1895 the sons of Awadh Behari were still unborn, and they go on to observe :

" This, as will later appear, is one of the most important facts in the case. It follows from it that these two mortgage deeds have always been binding on the respondents."

Considerable emphasis has been placed upon this passage by Mr. Jahagirdar who appears for the defendants and he contends that this is a clear enunciation by the Privy Council of the law on the subject, and the law on the subject according to him is that the sons of Awadh Behari could not challenge the transaction because they were unborn in 1895.

The Privy Council poses the two questions that arose for its decision at p. 266 and we have already stated what the two questions are, and at the bottom of p. 266 their Lordships point out that

"they will deal first with the answer of substance which the appellants make to the suit. If this answer is well founded, the other issue, more technical in character and one upon which the Courts in India were actually divided, becomes academic."

Therefore, in the opinion of the Privy Council the question that really arose for decision and which had to be decided was whether the alienation could be supported by necessity. According to the Privy Council the other question really was academic, and at p. 267 the Privy Council comes to the conclusion that the sale in question was valid as against the respondents, and they finally end up by saying :

"Their Lordships, however, refrain from pursuing this matter further. They will, in agreement with the judgment appealed from, assume, without deciding, that the suit was maintainable by both respondents. Even so, for the reasons already given, it fails."

It is difficult to understand how this observation of the Privy Council on which Mr. Jahagirdar relies can be considered as a decision binding upon us. Mr. Jahagirdar says that even an "obiter" of the Privy Council is binding upon us and we cannot differ from the view expressed by the Judicial Committee. Mr. Jahagirdar is perfectly right, but we fail to see what observation the Privy Council has made on the rights of after-born sons with regard to alienation of joint family property. Excepting for stating the bald fact that the sons of Awadh Behari were unborn in 1895, there is no discussion whatever as to whether the sons who were not born at the date of the alienation had any right to challenge the transaction, or, if they had, whether there is any limitation upon that right.

It may also be pointed out that the appeal before the Privy Council was capable of being disposed of on the short question of limitation, because the sale that was challenged was of 1904 and the suit was filed in 1919. As a matter of fact that point was urged by Mr. Dunne as appears from his arguments at p. 796 (of 47 All.). But this decision in no view of the case can be looked upon as an authoritative pronouncement on the rights of after-born sons in respect of an alienation made by the father, the very question which we have to consider in this Full Bench. Whether the doctrine of overlapping applies and has any validity, has not even been referred to by the Privy Council. It is really in a subsequent decision of the Privy Council, to which we shall presently refer, that this doctrine has been adverted to.

6. Before I refer to that decision, perhaps it would be better to explain what has been called the doctrine of overlapping. As I have pointed out, in order that an after-born son should have a right to challenge an alienation he must be born at a time when there is some coparcener in existence in the joint family who has a right to challenge the alienation. There must be no gap between the existence of a coparcener who has a right to challenge and the birth of a son who enters the coparcenary subsequently. Therefore, the two lives, viz. the life of the son who has a right to challenge and the life of the subsequently born son must overlap, and that is the doctrine of overlapping which the Privy Council considered in a subsequent case in -- AIR 1945 1 (Privy Council) .

In that case the alienation was a mortgage which was of 1920 and the alienors

were one Sheo Mangal Singh and his nephew Surajpal Singh, and the coparceners who were challenging the alienation were the sons of Surajpal Singh and they were four in number, one son Sheo Pratab Singh was born in 1918, that is, he was in existence at the date of the alienation. The other three sons were born after 1920, that is, after the date of the alienation. It was held by the Courts below that the alienation was not supported by necessity, and it is rather significant to note that the appellants before their Lordships were represented by Sir Thomas Strangman and there was no appearance for the respondents, and in order to succeed it was necessary for Sir Thomas Strangman to urge that the after-born sons had no right to maintain an action for challenging the alienation.

Sheo Pratab Singh had died in 1923 and the mortgage transaction was being challenged by the other three sons who, as already stated, were all born after 1920. It is clear from the judgment of the Privy Council at pp. 3, 4 that the two defences which were set up were -- firstly, that the infant sons of Surajpal Singh were not entitled to contest the liability of the family estate as security for the mortgage debt, and, secondly, that in any case the liability was incurred in order to repay their father's antecedent debt. The Privy Council points out :

" In support of the former proposition it is asserted that a member of a joint family must be content with the family estate as he finds it at his birth or at any rate he cannot complain of anything done before the period of gestation. Upon this rule, it is admitted, there is engrafted an exception to the effect that if the child who objects to the alienation of the property comes into existence or is conceived after the alienation, but during the life of a child born or conceived before alienation, then that overlapping of the two lives enables the later-born child to contest the validity of the father's act."

Therefore, the Privy Council clearly enunciates the principle of Hindu law that a member of a joint family must take the property of the Joint family as he finds it, when he is born.

It was open to contend from that principle that no subsequently born son can challenge an alienation because the alienated property had already gone out of the joint family, and therefore the Privy Council points out that upon that principle an exception is engrafted and the exception is the doctrine of overlapping to which reference has already been made. The doctrine is clearly and succinctly set out by the Privy Council in the passage we have just referred to. Then at p. 4 their Lordships go on to observe:

"Their Lordships do not think it necessary to determine whether this limitation upon the right of an after-born child to resist the claim of an encumbrance upon the family estate correctly expresses the law in all respects."

Their Lordships here are dealing with the limitation which they have just suggested exists upon the principle that an after-born child cannot challenge an alienation, and then they go on to say that they will not consider whether this limitation is correct in all respects. In other words, it was not necessary for their

Lordships to consider whether the limitation was not as restricted and narrow as it was admitted at the Bar. On the facts of the case it was sufficient for the Privy Council to hold that there was overlapping and in view of the overlapping the after-born son had a clear right to challenge the alienation.

7. Mr. Jahagirdar contends that this is not a decision of the Privy Council at all; it is merely an admission of counsel at the Bar and the decision is based upon the admission. Now, we must take note of the fact that members of the Bar are not in a habit to make admissions of law on important points and on points which are conclusive of the case they are arguing, unless the admission proceeds on a recognition that the admission they are making is on a point of law which is established as finally and definitely settled. The Privy Council in giving its decision does accept the admission as representing settled law. The decision of the Privy Council would have been entirely different if it had not acted upon this admission, and therefore in acting upon the admission it put its own imprimatur upon the admission made at the bar. Therefore, there is much more to this decision than a mere admission made by counsel at the Bar.

If the decision did not turn upon that admission or the decision was not based upon that admission, then perhaps Mr. Jahagirdar was right that we should not attach much importance to that admission. But when that admission was necessary for the very decision of the appeal and without which the appeal would not have been decided in the manner in which it was decided, then we must attach as much importance to that admission as if it was a decision given by the Privy Council after consideration of the matter.

8. It is not as if there was no basis for the admission made by counsel in this case. In the first place, when we turn to the very judgment of the Allahabad High Court, which was the judgment appealed from, -- Surajpal Singh and Others Vs. Shri 108 Puja Pad Udit Panch Parmeshwar Panchaiti Akhara Udasi Nirwani and Another, Mr. Justice Bennett in his judgment states:

"Another point urged in regard to this question of the existence of a minor son, Sheo Pratap Singh, in 1920 was that learned counsel for the plaintiff argued that the evidence of Surajpal Singh should not be accepted where he states that this boy survived until the birth of defendant 4 and learned counsel proceeded to state that if that boy Sheo Pratap Singh did not survive until the birth of one of the existing minors, then the existing minors could not challenge the mortgage deed on the ground of want of legal necessity."

Therefore, what was being urged was that on the facts the doctrine of overlapping did not apply. To this the answer given by the learned Judge is (p. 493) :

".... This proposition is no doubt laid down in a ruling of the Madras High Court in -- (Maddali) Visweswara Rao Vs. (Maddala) Suryarao and Others, , in which it is laid down that there must be no gap between the death of one minor and the birth of the existing minors. Such a proposition has never been laid down by

their Lordships of the Privy Council or by the Allahabad High Court."

Therefore, the Allahabad High Court went much beyond the doctrine of overlapping. In the view of the learned Judges of the Allahabad High Court, even though there was no overlapping, it would still be open to a later-born son to challenge an alienation.

9. Turning to the judgment of the Madras High Court in AIR 1936 Mad 440 (P)", which is referred to in the judgment of the Allahabad High Court, it is true, as pointed out by Mr. Jahagirdar, that on the facts of the case there was no overlapping. But the learned Judges have enunciated a certain principle with regard to the right of after-born sons and this is how the principle is stated:

"An after-born son, not conceived during the lifetime of his brother, which brother was, apart from the father, the only other coparcener of the joint Hindu family, cannot sue to set aside, as being without necessity, an alienation effected by the father without the consent of the son then living."

Therefore, they qualify the disability of an after-born son by saying "not conceived during the lifetime of his brother, which brother was, apart from the father, the only other coparcener of the joint Hindu family." Therefore, it is clear that the disability which the Madras High Court imposed on an after-born son with regard to his right to challenge an alienation was confined to a case where he was born at a time when there was no coparcener in existence who had a right to challenge the alienation, and again this is made clear in the judgment of Mr. Justice Stone as he then was at p. 447:

"..... and by parity of reasoning, just as where the right of action possessed by the coparceners existing at the time of the alienation, if barred, is lost, not only by them but also by any member of the family later-born if they allowed the period of limitation to expire, so It is also lost if those persons who were in existence at the time of the alienation lost that cause of action by death before there came into existence the after-born child; for the after-born child has got no right of action in himself, no individual and separate cause of action that springs up immediately he is born, but his right to contest, if any, is derived from the right that those in existence at the time of the alienation who were not consenting had, and that right is lost to him when it is lost to them, and it is lost to them when they die, or, when they permit the period of limitation to expire."

It is clear from this observation that the view taken by the Madras High Court was that an after-born son had the same right which a son had who was in existence at the date of the alienation. It was only when that son lost the right either by death or by adoption or he permitted that right to lapse by limitation, that the right of the after-born son was lost; in other words, the right of the son to challenge the alienation and the right of the after-born son was co-extensive. Therefore, the Privy Council when it acted on the admission of counsel had the views both of the Allahabad High Court and the Madras High Court at least before them, and therefore it would not be correct to say that the admission on which

the Privy Council acted was not supported by any authority in India.

10. Sir John Beaumont has also referred in his judgment to two Allahabad cases. One is --"Chuttan Lal v. Kallu 33 All 283 (G), and the other is -- "Tulshi Ram v. Babu 33 All 654 (H). In the first case the Allahabad High Court seems to have held that a member of a joint Hindu family who was born after the alienation of the family property by another member of that family cannot question the validity of that alienation. It does appear from the facts that the doctrine of overlapping did come into play, but the learned Judges have not considered this doctrine at all & they have based the decision, as appears at p. 286, on this :

".... It seems to us to be clear that a plaintiff can question the validity of an alienation of such property only in which he had an interest at the date of the alienation. If his interest came into existence subsequently to the alienation, he cannot question the validity thereof."

As I have already pointed out, the right of a subsequently born son to challenge an alienation does not arise from his interest in the alienated property, but it arises from the fact that he can avail himself of a cause of action which had accrued to another coparcener in the family. It also appears that the decision was based on estoppel, because it is pointed out in the judgment at p. 287 that the plaintiff's father who was alive at the date of the suit never questioned the validity of the transaction. Further, it is also pointed out that as the alienation was made so far back as 1891, the presumption would be, in the absence of any evidence to the contrary, that it was made with the assent of the other coparceners then alive. Of course, if the alienation was made with the assent of the coparceners then alive, no question could possibly arise of challenging that transaction.

The other case lays down that where an alienation of ancestral property is invalid as having been made without legal necessity by one member of the coparcenary without the consent of the rest, it is open to coparceners to object to such alienation notwithstanding that they were born subsequently thereto. In this wide and general sense it is difficult to accept this proposition unless we take the view that an alienation made by the manager or the father is invalid and not void. If the alienation is invalid, then it is clear that the alienated property never went out of the coparcenary. In that view, undoubtedly, an after-born son would have a right in that property and he could challenge the alienation.

But on the facts of this case, although the learned Judges have not considered the doctrine of overlapping, there was overlapping because the facts seem to be that one Ram Sahai had two sons Boli and Sunder and Boli left two sons Babu Lal and Munshi Lal. The alienation which was in the nature of a mortgage was effected by Ram Sahai, and the two sons of Boli were born after the alienation. The suit was filed against Sunder Lal, Babu Lal and Munshi Lal by the mortgagee, and Babulal and Munshi Lal challenged the alienation. Therefore, Babu Lal and Munshi Lal were alive when the right to challenge subsisted in Sunder Lal, who

had not consented to the alienation, and therefore even on the principle that we are suggesting this decision can be supported.

11. The decision on which Sir John Beaumont placed great reliance in his decision in *The Gujarat Oil Mills and Manufacturing Co. Ltd. Vs. Shakarbhai Motilal Patel*, is the decision of the Full Bench of the Nagpur High Court in AIR 1940 305 (Nagpur) , There the alienation was" challenged by a son who was not born at the time of the alienation, but at the time of the alienation there was a son and there was clearly an overlapping of the two lives. In the decision of the Full Bench the learned Chief Justice has stated certain principles. Having stated those principles at p. 313 he winds up by saying :

"But if a son is in existence and does not consent and then another son is born; or if within the period of limitation for the bringing of a suit the son in existence dies and another son is born the position is not so plain."

But, with very great respect to the learned Chief Justice, when we look at the judgment, he has not considered the doctrine of overlapping. He has considered the question as to whether the alienation is void or voidable and he has also considered the question that the alienation constitutes one cause of action. He states his conclusions at p. 319, and one of the conclusions to which he arrives is:

"If a coparcener having such a cause of action sues he sues for the benefit of coparceners generally (other than the alienating coparcener)."

But then he follows up by saying:

"If a coparcener is not in existence when such a cause of action arises he cannot sue."

The learned Chief Justice has not considered what is the effect of the cause of action being for the benefit of coparceners generally and not for the benefit of the son in existence at the date of the alienation. Mr. Jahagirdar has drawn our attention to the fact that the learned Chief Justice considered the judgment of the Privy Council in "*Lal Bahadur's* case (C)", as having laid down the proposition that only a son in existence can challenge the alienation.

But I find that after discussion of that case at p. 314 the learned Chief Justice points out :

"I feel that this case, on the point under discussion, is not binding on us."

And all that he says is that it contains an observation that alienations are binding on the after-born to which weight must be attached because it constituted a step necessary to the conclusion that these were binding antecedent debts. It is rather curious to note that although the learned Chief Justice was a party to the decision in "*Visvesvara Rao's* case (P)", he has just made a passing reference to that decision and he has not explained how that decision was arrived at. Then there is the judgment of Mr. Justice Bose who concurred with the learned Chief Justice, and Mr. Justice Bose, with respect to him, has based his judgment upon

the view that the effect of an alienation is to bring about a notional partition and bring the alienee in as tenant-in-common who would thereupon demand the right to have the property divided by metes and bounds. With very great respect, that is not the effect of the consequence of an alienation by the father or the manager.

An alienation is looked upon as a notional partition only for one purpose and that is to determine the share that the alienee gets on the alienation taking place. But it will be erroneous to think that the effect of an alienation is to disturb the coparcenary. We have the dissenting judgment of Mr. Justice Grille, and in my opinion the learned Judge correctly states the position when at p. 321 he observes :

"..if the alienation is found to be void, or rather invalid, in respect of some of the property purported to be alienated, then a subsequent-born son is entitled to a share in that property, and, so long as the cause of action, which arises at the time of the alienation and at no other time subsists, that son has a right as personal to him as that of the deceased brother, independent of him but like him as a member of the coparcenary, to challenge the transaction."

12. In my opinion, therefore, the view propounded, by Sir John Beaumont in "Gujarat Oil Mills Mfg. Co."s case (A)", must be deemed to have been overruled by the decision in AIR 1945 1 (Privy Council) . Even otherwise, in my opinion, "Gujarat Oil Mills Mfg. Co."s case (A)", was wrongly decided.

13. We may look at some of the decisions which were referred to at the Bar. The first is a decision of the Allahabad High Court in -- Rano Dip Singh v. Parameshwar Prasad, ILR 47 AH 165, AIR 1925 PC 33 . That is a judgment of the Privy Council and really the only point it decides is a question of limitation. In that case the alienation took place in 1893 and the suit was instituted in 1920 and limitation as found by the Privy Council began to run from 1893. The suit was filed by four plaintiffs who challenged the alienation. Plaintiffs Nos. 1 and 2 were in existence at the date of the alienation, but the other two plaintiffs were born after that date.

It was conceded before the Privy Council that the suit would not be saved if brought by the first three plaintiffs alone, but what was contended was that plaintiff No. 4 was entitled to the extended period in view of his minority, and what was sought to be relied upon was Section 7 of the Limitation Act read with Section 6 of the Act, and the answer given by the Privy Council was a very simple one and that was that inasmuch as plaintiff No. 4 was not in existence at the date of the cause of action, viz. 1893, he having been born in 1900, plaintiff No. 4's birth did not create a fresh cause of action or a new starting point from which limitation should begin.

14. Then there is a judgment of the Allahabad High Court in -- "Bhup Kuar v. Balbir Sahai AIR 1922 All 342 (J). In that case the joint Hindu family consisted of the father and his son and the father executed a mortgage of some of the joint family property. Soon after the execution of the mortgage the son who was a

minor under the guardianship of his uncle filed a suit for a declaration that the mortgage was not binding on the joint family property as it had been made without legal necessity. While this suit was pending, another son was born to the mortgagor. The first son died and subsequently the mortgagee brought a suit against the surviving son for the enforcement of the mortgage. The first suit had already been dismissed.

A contention was put forward that the minor defendant was not entitled to challenge the mortgage which was executed before he was born, and the learned Judges of the Allahabad High Court took the view that it seemed to them impossible to contend that the minor defendant had no "locus standi" to challenge the validity of the mortgage deed in suit. They point out that it was quite clear that at the time the document was executed there was in existence a son of the mortgagor. It was further clear that no question of the consent of the son to the alienation could be raised, and because of this fact that there was in existence a son of the mortgagor at the date of the alienation and the minor defendant was born during the lifetime of that son, the Allahabad High Court came to the conclusion that it could not be argued that the minor defendant was not entitled to object in the suit to the validity of the mortgage.

The learned Judges further point out at p. 345 that before the previous suit was decided the minor defendant had come into existence, and had thus come to have an interest of his own in the estate, an interest which was quite distinct from that of his brother and his father. That being so, the learned Judges could not see how at the time the suit came to be decided it could be said that the minor defendant was represented by his minor brother the plaintiff, whose interest was totally distinct from his own. Therefore, the Court rejected the argument that the minor defendant was bound by the judgment of the previous suit.

15. Then there is a decision of the Madras High Court in -- "Rajah Vasi Reddi v. Lakshmi-narasimham", AIR 940 Mad 691 (K). In that case the mortgage was executed by a Hindu father on behalf of himself and his minor son and subsequently another son was born to the father. The mortgagee sought to enforce the mortgage and filed the suit against the father and his two sons. The only point that the Court decided was as to the share that the alienee got from the alienor, and what was held was that in the Presidency of Madras, an alienee from a Hindu coparcener gets the share to which the alienor is entitled at the time of the alienation undiminished by any births or deaths in the family subsequent to the date of the alienation.

The question as to whether a coparcener born subsequent to the alienation of joint family property could challenge the alienation was considered and left open. Mr. Jahagirdar has drawn our attention to the observation of Mr. Justice Venkataramana Rao at pp. 693-694 where the learned Judge observes that the decision in "Lal Bahadur's case (C)", was a direct decision on the question of the right of an after-born son to challenge the alienation. But this discussion is

concluded by the learned Judge at p. 695 by stating that

"..the scope and effect of the Privy Council decision in "Lal Bahadur v. Ambika Prasad (C)", may require consideration. But we think that, in the view we are taking of the share which the father is entitled to, it is not necessary to decide the point."

Therefore, this decision cannot be looked upon as a direct decision on the question of the doctrine of overlapping or even a direct decision as to the effect of "Lal Bahadur's case".

16. There is a more direct decision which is reported in -- Bhagwat Prasad Bahidar Vs. Debichand Dogra and Another, . That case decided that where in a joint Hindu family an alienation is made by a father without necessity and without the consent of the sons then living, it is invalid not only against them but also against any son born before they have ratified the transaction; and Mr. Justice Fazl Ali at page 102 states the law in the following terms:

"I agree with the learned author that there is nothing in the decision of the Judicial Committee in "Lal Bahadur v. Ambika Prasad (C)", to justify the view that the old Indian decisions were meant to be overruled. The principle underlying those decisions was merely this that though the unborn son had no right in the family property at the time of the alienation, yet on his birth he acquires a share in the family property as it then stands. If a previous alienation was validated by consent or failure to set it aside in time on the part of the other members of the family then in existence, the son who is born afterwards cannot question it because the alienation is no longer questionable and the property has validly passed out of the hands of the family. If, however, the alienation is still open to challenge, then it must be open to challenge by the entire coparcenary which is interested in the property and which is continually enlarged by births as it is diminished by deaths."

17. Reference was also made by Mr. Chandra-chud to the well known text book on Hindu Law by Mayne. We find, with respect to the learned author, that there are two inconsistent propositions with regard to the doctrine that we are considering. At p. 500 in the 11th edition the proposition is:

".... If the alienation was invalid he acquires a share in the whole property including the portion purported to be alienated because it was bad even at its inception and did not in law diminish the corpus of the joint family property."

This proposition is based on the assumption that an alienation is void and not voidable. But the whole discussion and debate before us has proceeded on the assumption that the alienation is voidable and not void. If an alienation is void, then really no question would arise for determination. Undoubtedly, in that event the after-born son will have an interest in the property attempted to be alienated because the property never went out of the joint family. The other proposition, which I suggest, with respect, is the correct proposition, is to be found at p. 502:

"The right to challenge an alienation is only by reason of the interest in the family property and it is a right in every member of the co- parcenary for the time being. As long as that right exists in the coparcenary, it would seem to be immaterial whether the grandson was alive at the date of the alienation or born subsequently."

18. The conclusion, therefore, I have come to on a review of the authorities and on a consideration of principles underlying Hindu law are these. If a father alienates joint family property without necessity, the alienation is voidable if there was a son born or conceived at the date or the alienation. This son has a right to challenge the alienation. This right may be lost if the son consents to the alienation. It may be lost if the son dies or is given in adoption. It may be lost by lapse of time. But if before the right is lost another son is born, this after-born son can avail himself of the right to challenge the alienation as effectively as his elder brother could have done.

Applying this principle to the facts before us, it is clear that when the alienation was made in 1936 by Ganpati, he had a son Maruti. It has not been found as a fact that Maruti consented to the alienation. Therefore Maruti had the right to challenge the alienation. While the right still subsisted in Maruti, the present plaintiffs to the suit were born and they were born before I Maruti was given in adoption. Therefore, the right which Maruti had could be availed of as effectively by the plaintiffs as Maruti himself, and therefore, in my opinion, the plaintiffs had the right to challenge the alienation.

19. The questions put to us are two, and on the facts the question which directly arises is the second question, viz., whether the after-born son acquires the right of challenging the validity of the alienation, if at the time when he is adopted or born there is in existence another son who could challenge the alienation and who has not lost the said right. That question I must answer in the affirmative. With regard to the first question, it is a larger and a wider question which raises the question whether the after-born son has an unlimited right to challenge an alienation. As I have answered the second question in the affirmative, it follows that the right of an after-born son is not an unlimited right, but it is a right circumscribed in the manner I have indicated in the judgment.

Dixit, J.

20. I agree in the answers given by the learned Chief Justice and in the reasons given in support thereof. From the cases cited at the Bar the following propositions will, I think, emerge:

(1) Under Hindu law, as administered in the State of Bombay, a father may alienate family property for legal necessity or for the payment of an antecedent debt. In such a case, a son, whether in existence at the date of an alienation or born subsequently thereto, cannot challenge the same.

(2) Where an alienation is not made either for legal necessity or for the payment

of an antecedent debt, only a son in existence (that is, either born or begotten) at the date of the alienation may, by suit, challenge it. If the challenge is successful, it enures for the benefit of himself and a son though born subsequently to the alienation.

(3) The general rule is that a son not in existence at the date of an alienation cannot challenge the alienation and he must take the family property as he finds it at his birth. To this rule, there is an exception.

(4) The exception is that if a son is born subsequently to the date of an alienation, but during the life-time of a son in existence at the date of the alienation, he may, by suit, challenge the alienation after the death of the latter or after the latter's adoption into another family. In such a case also, if the challenge is successful, it enures for the benefit of all. The exception is based upon the doctrine of overlapping of lives recognised by the Privy Council in AIR 1945 1 (Privy Council) .

(5) the exception, above referred to, will not apply where the son in existence at the date of an alienation has either ratified the alienation or

allowed the claim to challenge it to be barred by the law of limitation.

(6) The cause of action to challenge an alienation arises on the date of the alienation. There is only one cause of action and there is no fresh cause of action in favour of a subsequently born son.

(7) The alienation is not void, but only voidable,

Shah, J.

21. The facts giving rise to this second appeal which has been referred to us are few and simple. One Ganpati had a son by name Maruti. In the year 1936 Ganpati disposed of certain family properties. The alienation was not for purposes of legal necessity, nor was it for satisfying antecedent debts due by Ganpati. It was, therefore, an unauthorized alienation which was voidable at the instance of other coparceners whose interests were affected thereby. Between the years 1936 and 1942 three more sons were born to Ganpati. In the year 1942 Maruti was given in adoption in another family.

Thereafter, suit No. 114 of 1947, out of which this second appeal arises, was filed in the Court of the Civil Judge, Junior Division, at Barsi, by the three subsequently born sons of Ganpati by their next friend their mother for setting aside the alienation effected by Ganpati in the year 1936: and the question which arose for decision was whether the plaintiffs, who were admittedly not born at the time of the alienation, were entitled to institute a suit and to claim that the alienation effected by their father in 1936 in so far as it purported to convey to the transferee an inte-lost exceeding his half share in the lands was liable to be set aside at their instance on the ground that it was unauthorized.

22. It was contended that the alienation could not be set aside at their instance,

because the plaintiffs were not in existence at the date of the alienation, and under Hindu law they were entitled only to such property as belonged to the joint family at the respective dates on which they were born.

23. It may be necessary to state some of the well recognised propositions of Hindu law applicable to the Bombay State before any attempt is made to tackle the problem which has been debated before us. In the Bombay State a coparcener in a joint Hindu family without the consent of other coparceners is entitled to dispose of for consideration his undivided share in the family property, and that alienation is binding upon that coparcener. The coparcener, who is a manager of the joint family, may also dispose of the interest of other coparceners in the family property provided the disposition is for purposes of legal necessity or for benefit of the estate.

A coparcener who is a father may, besides exercising the powers of a manager, which he would normally be, also dispose of family property for satisfaction of his antecedent debts, which are not immoral or illegal. If the joint family property is disposed of either by the father or the manager of the joint family for consideration but unauthorizedly, the alienation would affect his own interest in the estate, but not the interest of other coparceners in the family. If the alienation is without consideration, it would not affect the interest even of the alienating coparcener.

24. Such an alienation is, however, not in law regarded as void, but it is voidable at the instance of those coparceners whose interest is thereby affected. The other coparceners may assent to the alienation, or may even elect not to challenge the alienation; or they may allow the period of limitation provided for setting aside the alienation to elapse, in which case the alienation cannot be challenged thereafter. The right to avoid an alienation is also recognised as a single and indivisible right, and the cause of action in respect thereof arises at the date of the alienation, and not at the date on which any new coparcener comes into existence. A coparcener in existence at the date of the alienation may file a suit for setting aside the alienation, and a subsequently born coparcener may join him in getting that alienation set aside.

But the cause of action is the cause of action which arose at the date of the alienation; and it is relying on that cause of action that subsequently born coparceners may be entitled to join the coparcener in existence at the date of the alienation in getting the unauthorized alienation set aside. Once the alienation is set aside, the right must operate in favour of all the members of the joint family, whether or not they were parties to the suit, and the property alienated would be restored to the family, and would re-acquire the character of joint family property and would be used, enjoyed and disposed of in the manner in which any other joint family property may be used, enjoyed or disposed of. These comparatively simple propositions of Hindu law in their application to the facts giving rise to this second appeal, raise questions of some complexity.

25. Admittedly at the date when the alienation was effected by Ganpati, Maruti was the only other coparcener in the family in existence, He had a right to file a suit for setting aside the alienation effected by his father Ganpati to the extent of his one half interest in the family property, but Maruti did not file a suit for setting aside the alienation, and before this suit was instituted for setting aside the alienation, he had ceased to be a member of the joint family to which the plaintiffs belong. But three other coparceners who came into existence in the joint family after the date of the alienation have filed the present suit relying upon the right which for sometime at least could have been exercised by Maruti alone; and the question is whether the plaintiffs who are born after the date of alienation are entitled to file a suit relying upon the right which arose in the year 1936 to obtain a declaration that the alienation to the extent of one half interest was not binding upon them.

26. The cases in which a suit may be instituted by a subsequently born coparcener in a joint Hindu family to set aside unauthorized alienations effected before he was born or begotten into the family may fall under four distinct heads: (i) where there is a sole surviving coparcener, and that coparcener disposes of the joint family property and thereafter another coparcener is born or begotten into the family; (ii) when a member of a joint Hindu family at the time when there is a coparcener in existence disposes of joint family property, and the coparcener who was in existence at the date of the alienation either dies or goes out of the family or otherwise ceases to be a member thereof, and a new coparcener comes into existence thereafter; (iii) when a member of a Joint Hindu family disposes of property and there is a coparcener in the family in existence, and during the lifetime of that coparcener another coparcener is born or begotten into the family and subsequently the coparcener who was in existence at the date of the alienation dies or goes out of the family, and (iv) where at the date of the alienation by a member of the family, there are coparceners existing in the family and there are other coparceners born or begotten into the family subsequent to the date of the alienation, and a suit is instituted by the coparceners who were in existence at the date of the alienation and the coparceners who were subsequently born into the family for setting aside the alienation, and after the institution of such suit, the coparceners who were in existence at the date of the alienation die or go out of the family before the date on which a decree is passed.

27. So far as the first class of cases is concerned, there appears to be no dispute that the sole surviving coparcener is entitled to dispose of the property, and there is no limitation upon the right vested in him in respect of purposes for which alienation may be effected. He may dispose of property for purposes of legal necessity or otherwise; and there being no other coparcener who is entitled to challenge the alienation, subsequent birth of a coparcener in the family does not affect the alienation made by him, even though such alienation would have been regarded as unauthorized, if a coparcener had been in existence at the date of the alienation.

28. So far as cases falling under classes 3 and 4 are concerned, it may be necessary to refer to the essential structure of a joint Hindu family and the character of the property owned by it in order to ascertain whether an unauthorized alienation effected by any of its members could to the extent to which it is unauthorized be challenged by coparceners who were born in the family subsequent to the alienation. A Hindu joint family normally consists of male members as well as their wives, sons, daughters who are not married, and the widows of the family; and the family continues so long as there is a single widow left in the family, who in the way of nature or by a fiction of law can introduce a coparcener into the family. Even the death of the last sole surviving coparcener does not put an end to the Joint family.

The property of the joint family is held by the coparceners of the family, not in their individual rights, but for and on behalf of the joint family, and every coparcener is regarded as owner of the entire property of the family subject to a similar and equal right vested in other coparceners. Such ownership of the joint family property is, however, peculiarly limited in the matter of disposition thereof according to the status which the coparcener occupies. In the State of Bombay, as I stated earlier, a coparcener in a joint Hindu family may dispose of for consideration his undivided share in the estate. But in other States, especially in the United Provinces and West Bengal, such a disposition cannot be made by a coparcener in a Joint Hindu family. So far as the father and the manager are concerned, the rights of disposition are more extensive.

When joint family property is disposed of un-authorizedly, in the State of Bombay that disposition to the extent to which it is unauthorized is voidable at the instance of persons whose interest is affected thereby; and if it is voidable, it is evident that the right to get the interest in the property which could not be disposed of restored to the joint family is of the Joint family, and not of any individual member thereof in exercise of any personal right. The necessary corollary to that is that such a right is vested in all the male members of the family, and may be exercised by any male member who belongs to the family and has a right to that property.

The right to challenge the alienation, therefore, cannot be regarded as merely "a personal right" in the sense of a right to claim damages for personal injury or a right which is limited in its enjoyment personally. The right to the property is of the joint family and can therefore only be exercised on behalf of the joint family and for the benefit of the family, and when a decree is obtained for setting aside the alienation, it enures for the benefit of the joint family. If these propositions are correct and they indicate the real nature of the right which is vested in a coparcener who attempts to set aside the alienation of the joint family property which is unauthorized, then obviously in cases falling under the third and the fourth heads, it must be held that an alienation can be set aside by a coparcener who comes into existence after the date of the alienation, provided he came into existence at a time when there was some one by whom the right to set aside

that alienation could be exercised.

29. So far as cases falling under the second class are concerned, on the facts of the present case, the question as to the right to set aside the unauthorized alienation by a subsequently born coparcener does not arise. Maruti was adopted into another family after the three plaintiffs were born, and this case falls within the third class which I have referred to earlier. There has been a conflict of opinion on the question whether a suit is maintainable by subsequently born coparceners in cases falling under the second class, viz. where a coparcener who was in existence at the date when the alienation was effected has either died or ceased to exist, whether a coparcener born or begotten subsequent to the date on which the elder coparcener died or ceased to exist in the family can institute a suit for setting aside the alienation within the period provided for instituting a suit for setting aside the alienation.

30. In a case reported in AIR 1336 Mad 440 (F) the Madras High Court has taken the view that the right to challenge an alienation comes to an end upon the death of the coparcener who was in existence at the date of the alienation, when there are no other coparceners existing at that date, and is not revived by the birth of coparceners subsequent to the death of that coparcener. The learned Judges of the Allahabad High Court have expressed the view in Surajpal Singh and Others Vs. Shri 108 Puja Pad Udit Panch Parmeshwar Panchaiti Akhara Udasi Nirwani and Another, that the view of the Madras High Court is not correct, though they observed that it was not necessary in the case before them to express any opinion on that question.

On principle it may appear that if the right to sue for setting aside an unauthorized alienation is vested in the joint family, and is exercised on behalf of the joint family, the coparcener born subsequent to the death of the coparcener who was in existence at the time of the alienation, would have a right to file a suit challenging the alienation effected, before he was born into the family, even though there has been a gap between the date of death of such a coparcener and the date of birth of the coparcener who challenges the alienation. But there is considerable force in the submission that that view would introduce a hiatus of indefinite duration during which there would be no person capable of enforcing the cause of action. On the facts of the present case it is not necessary to pronounce any opinion on the Question whether an unauthorized alienation can be set aside by coparceners subsequently born into the family when the coparcener who is in existence at the date of the alienation has died or ceased to exist before the birth into the family of other coparceners.

31. The view which I have Indicated earlier as applicable to the present case is supported also by authority. Their Lordships of the Privy Council in AIR 1945 1 (Privy Council) , where the facts were precisely the same as they are in the present case, held that subsequently born sons were entitled to challenge an unauthorized alienation effected by their father before they were born, when at the date of the alienation there was a son in existence who could have

challenged the alienation, but who died after the birth of the coparceners who challenged the alienation.

In that case the alienation was effected by Surajpal Singh and Sheo Mangal Singh in the year 1920, at a time when Suraj Pal Singh had a son by name Sheo Pratab Singh who was born in the year 1918. Sheo Fratab Singh died in the year 1923. After the year 1920 in which alienation was effected and before Sheo Pratab Singh died in 1923 three sons were born to Suraj Pal Singh; and those three sons filed a suit to set aside the alienation effected by Suraj Pal Singh and Sheo Mangal Singh on the ground that it was unauthorized. It was urged before their Lordships of the Privy Council that a member of a joint family must be content with the family estate as he finds it at his birth, or at any rate he cannot complain of anything done before the period of gestation.

But it was conceded at the Bar that that rule was subject to an exception, and the exception was that if the child who objects to the alienation of the property comes into existence or is conceived after the alienation, but during the life of a child born or conceived before alienation, then the overlapping of the two lives enables the later-born child to contest the validity of the father's act. Their Lordships observed in the course of their Judgment that they did not think it necessary to determine whether that limitation, viz. as to the overlapping of lives upon the right of an after-born child to resist the claim of an encumbrance upon the family estate correctly expresses the law in all respects. They held on the facts of that case agreeing with the view of the Allahabad High Court that the three plaintiffs were born during the lifetime of Sheo Pratab Singh, who was in existence as at the date of the alienation, and there was in fact overlapping of lives.

32. Mr. Jahagirdar" on behalf of the respondents has contended before us that even though the facts of the case in "Udasi Nirwani v. Surajpal Singh (D)", are precisely the set of facts which arise before us, that decision could not be regarded as binding for the reason that it was based upon an admission made at the Bar and that it did not proceed upon a consideration of the relevant authorities or upon any texts. It is-true that in that case counsel for the defendants did admit the existence of an exception to the general rule which he himself pleaded. But the mere fact that counsel admitted the existence of an exception, and the Privy Council proceeded upon that admission made by counsel at the Bar, would not make the judgment of the Privy Council a precedent of doubtful authority. The ultimate decision of the Privy Council was founded upon the view that there being "overlapping of the two lives", the subsequently born sons were entitled to file a suit to set aside the alienation effected by their father during the life "of Sheo Pratab but before they were born.

33. Mr. Jahagirdar also contended that the view taken by their Lordships of the Privy Council in -- "Udasi Nirwani"s case (D)", was inconsistent with an earlier decision of the Privy Council reported in AIR 1925 264 (Privy Council) . That was a case in which two Hindus filed a suit in 1919 to set aside a sale by their

grandfather of part of the property which belonged to the joint family of which they were members. The purchase price, which was found by their Lordships of the Privy Council, to be adequate, was applied to discharge mortgages executed in 1895 by the grandfather before the plaintiffs were born and certain unsecured debts which were properly incurred by him. Their Lordships held that the plaintiffs were not entitled to have the sale set aside.

In that case three arguments were advanced before the Judicial Committee on behalf of the appellants. It was contended, firstly, relying upon an earlier judgment reported in -- "Sahu Ram Chandra v. Bhup Singh AIR 1917 PC 61 (M)", that there was no antecedent debt which was to be satisfied by sale of the property and consequently the sale could not be upheld. Secondly, it was contended that the plaintiffs were not born at the date when the mortgages were made & consequently those mortgages were binding upon the plaintiffs' interests, and the remaining part of the estate could be sold validly to discharge an encumbrance binding upon the plaintiffs. Lastly, it was contended that the plaintiffs' father was alive when the suit was brought & his claim was barred three years before the date on which the suit was instituted by the plaintiffs, & the plaintiffs who claimed derivatively through him, could not file a suit because their claim must also be regarded as barred by the law of limitation.

Their Lordships of the Privy Council expressed an opinion that the debt for the satisfaction of which the property was sold was an antecedent debt; but the ultimate conclusion of their Lordships rested upon the observation that the mortgages were binding upon the plaintiffs. It is true that their Lordships of the Privy Council have several times in the course of their judgment referred -to the fact that in the year 1895 -- the date on which the mortgages were executed by the grandfather of the plaintiffs all the three plaintiffs were unborn, and they have also observed that the plaintiffs had no interest in the family property at the dates of those mortgages. But they nowhere considered the effect upon the rights of the plaintiffs of the inaction of Awadh Behari -- the-father of the plaintiffs.

If the mortgages were unauthorized Awadh Behari could have challenged the alienation. But he had not challenged it and had allowed the period of limitation to elapse. It appears that none of the authorities of the Indian Courts, which engrafted an exception upon the rule that an unborn coparcener is bound to take the property as it stands at the date of the alienation, were brought to the notice of their Lordships of the Privy Council. It is evident that the plaintiffs' father could have filed a suit for setting aside the mortgages till the year 1916. but he did not file such a suit, and if he did not file any such suit the coparceners subsequently born in the family could not have any additional right vested in them, relying upon which they were entitled to have those mortgages set aside, by a suit filed in 1919.

34. It has to be noted that only eight months before the date on which -- "Lal Bahadur's case (C)", was decided by their Lordships of the Privy Council they

had decided the case of *Rano Dip Singh v. Parameshwar Prasad*, ILR 47 AH 165, AIR 1925 PC 33, in which they had taken the view that the right to file a suit to set aside an unauthorized alienation by a father gave rise to a single cause of action and a fresh cause of action to set aside the alienation did not arise on the birth of a fresh coparcener in the family. If that was the view expressed by their Lordships of the Privy Council, it could not be assumed except for overriding reasons that shortly thereafter they were prepared impliedly to advocate in -- "*Lal Bhadur's case (C)*", a view plainly inconsistent with the one which was taken by them in the earlier case.

The decision of the Privy Council in -- "*Lal Bahadur's case (C)*", is therefore not decisive of the question as to the right of a son born subsequent to the date of the alienation to file a suit when at the date of the alienation there were coparceners who could have filed a suit to set aside the alienation, and between the lifetime or those coparceners who were in existence at the date of the alienation and the coming into existence of the subsequently born coparceners there was some overlapping.

35. There is a decision of this Court reported in *The Gujarat Oil Mills and Manufacturing Co. Ltd. Vs. Shakarbhai Motilal Patel*, which falls within the fourth class of cases which I have referred to earlier. That was a case in which a coparcener who was in existence at the date of the alienation by his father and another coparcener who was born subsequent to the date of the alienation filed a suit to have the alienation set aside on the ground that it was unauthorized. Before a decree could be passed in that suit, the elder coparcener who was in existence at the date of the alienation died, and the suit was proceeded with by the younger coparcener. It was held in that case that the right to file a suit to have the alienation set aside only vested in the elder coparcener, and he having died during the pendency of the suit and the subsequently born coparcener not being an heir or legal representative of the elder coparcener, the suit could not be decreed in favour of the former.

The Judgment of the Court in that case proceeded on the view that the right to challenge an alienation is vested in the coparcener who was in existence at the date of the alienation, and the action instituted to set aside the alienation is not a representative action, but an action for and on behalf of the coparcener in existence at the date of the alienation. It was recognised in that case that if property was obtained in the suit instituted by the elder son, the property would have enured "for the benefit of the entire family; but on the view that the suit was not instituted in a representative capacity in so far as it related to the members of the family who were not in existence at the date of the alienation, the suit was liable to be dismissed.

The second proposition set out by Beaumont C. J., in his judgment at pp, 240-241 cannot be accepted without qualifications mentioned earlier. Similarly, the second part of the third proposition that a suit instituted by a coparcener in existence at the date of the alienation is not on behalf of the joint family also

cannot be sustained.

36. I agree, therefore, with the answers proposed by my Lord the Chief Justice to the questions which have been referred to us for determination.

37. Answer accordingly.