
(1975) 01 GUJ CK 0002
In the Gujarat High Court
Case No : First Appeal No. 809 of 1969

Vilas Vasantrai Shastri

APPELLANT

Vs

Vasantrai Vishnu Shastri and Others

RESPONDENT

Date of Decision : 23-01-1975

Acts Referred:

Citation : AIR 1976 Guj 17 : (1976) 1 GLR 158

Hon'ble Judges : J.M. Sheth, J;A.N. Surti, J

Bench : Division Bench

Advocate : G.C. Patel, for the Appellant; K.H. Kaji, for the Respondent

Judgement

Surti, J.—This appeal is directed against the judgment and decree passed by the learned Civil Judge, (Senior Division). Navsari, in Special Civil Suit No. 23 of 1968. By the aforesaid, decree the learned Civil Judge. (Senior Division). Navsari directed inter alia that the appellant-plaintiff's suit for a declaration pertaining to sales in favour of respondents Nos. 5 and 6 be dismissed. He, however, declared that the mortgage in favour of the respondent No. 7 is not binding to the appellant-plaintiff and respondent No.2. The learned Civil Judge also held that the appellant-plaintiff had half share in the family properties except those properties alienated in favour of respondents Nos. 5 and 6. He also directed that suitable arrangements to be made for the maintenance and marriage expenses of respondent No. 3. He appointed the Commissioner to effect the partition and gave certain directions for taking accounts and for submitting his report. The operative portion of the judgment of the trial Court in this behalf is as follows :-

"1. The suit of plaintiff for a declaration pertaining to sales in favour of defendants Nos. 5 and 6 is dismissed.

2. The mortgage in favour of defendant No. 7 is here by declared not binding to the share of plaintiff and, defendant No. 2.

3.The Plaintiff has 1/3rd share in the family properties except those alienated to defendants Nos. 5 and 6.

4. It is hereby ordered that the partition of the family properties shall be effected by Shri G. V. Patel. Pleader who is appointed a Commissioner to effect the partition. The Commissioner shall propose what suitable arrangement should be made for the maintenance and marriage of defendant No. 3. in doing so he will take into consideration the observations in course of this judgment.

5. Defendant No. 1 shall submit before the Commissioner the accounts of income and expenses etc. Pertaining to the joint family properties from 1952. The Commissioner shall submit his report pertaining to the liabilities and assets etc. for consideration for the final decree. The Commissioner shall take possession of the properties and shall submit his proposal for interim arrangement for maintenance of plaintiff and defendants Nos. 1, 2 and 3.

6. Plaintiff shall deposit Rs. 150 (Rs. One hundred and fifty only) in the first instance towards expenses which the Commissioner may incur.

7. Considering the fact, and circumstances revealed parties shall bear their own costs be paid up by him.

8. A preliminary decree shall be drawn up accordingly.

2. In the appeal before us the only grievance of the appellant-plaintiff is that the learned trial Judge was in error in not granting the declaration pertaining to sales in favour of respondents Nos. 5 and 6 (original defendants Nos. 5 and 6).

3. Now in order to understand the grievance of the appellant-plaintiff a few facts relevant for the disposal of the appeal may be stated in brief.

4. The suit was filed on behalf of the minor plaintiff by his maternal uncle Gajanand Vishwanath Junnarkar as next friend of the minor. In the suit the father the mother and the sisters of the plaintiff are impleaded as defendants Nos. 1 to 4. Defendants Nos. 5, 6 and 7 are the alienees of the properties belonging to "the Hindu Undivided Family" (hereinafter referred to as "H. U. F.") formed of the plaintiff and respondents Nos. 1 to 4.

5. In substance it was the case of the plaintiff that his grandfather Vishnu Anna Shastri became the owner of properties mentioned in para 4 of the plaint by virtue of the partition deed dated 27th January 1887 between his grandfather Vishnu Anna Shastri and his brother Vasudev Anna Shastri. It was the case of the Plaintiff that the said properties belonged to the H. U. F. It was also the case of the plaintiff that the Properties mentioned at Items Nos. 2 and 3 in paragraph 4 of the plaint were transferred in favour of defendant No. 5 evidenced by a bogus document dated 17th October, 1958 Ex. 57 by one Maganlal Hargovandas Soni. It was alleged that at the relevant time defendant No. 5 was knowing that the said Maganlal Hargovandas Soni had got executed by defendant No.1 a bogus document in his favour on 7th April, 1951 evidenced, by Ex. 64 and that the said transaction had taken place during the lifetime of defendant No. 1's father Vishnu Anna Shastri. The plaintiff attacked the said alienation of 1951 on the following grounds:

(1) That defendant No. 1 had no authority in law to execute the said document dated 7th April, 1951 in his capacity as the Karta of the H. U. F. as defendant No. 1's father was alive at the time of the said alienation:

(2) That the said alienation was not for the benefit of the family and was not occasioned as a result of any "legal necessity or for the benefit of the estate" of the said H.U.F.

6. In this view of the matter the plaintiff alleged that the alienation in favour of defendant No. 5 is also illegal as :

(i) Defendant No. 5 was knowing about the interest of the plaintiff in the said alienated properties;

(ii) The transaction was illegal for want of consideration:

(iii) That defendant No. 5 was knowing that defendant No. 1 was incurring debts because of his gambling habits.

We may mention at this stage that the appellant-plaintiff was already in his mother's womb on 5th September, 1952 and was born on 8th March 1953, whereas the document dated 7th April, 1951 evidenced by Ex. 54 was executed by defendant No. 1 when the father of defendant No. 1 was alive. We may also mention at this stage that defendant No. 1's father died in September 1952 at the age of 95 years. At this stage we may also mention the case of the plaintiff against defendant No. 6. He alleged that the document dated 6th November, 1962 evidenced by Ex. 69 and executed by defendant No. 1 in favour of defendant No. 6 was illegal as the said transaction was effected without any legal necessity for the H. U. F. as the family was already having a monthly rental income of Rs. 520/-. It was alleged that defendant was knowing that the property mentioned at Item No. 5 of Paragraph 4 of the plaint alienated by the document Ex. 69, was the property of the H. U. F. It was alleged that it was not necessary to incur any debts for the educational expenses, of the plaintiff or the marriage expenses of the members of the family. It was also alleged that defendant No. 6 was knowing that the plaintiff and defendants Nos. 2 to 4 were residing at Baroda and that defendant No. 1 indeed in gambling habits and that with a view to defeat the rights of the plaintiff defendant No. 6 in collusion with defendant No. 1 got executed bogus document Exhibit 69 purporting to show that the consideration for the same is Rs. 8,999/- whereas in fact the document Ex. 69 was executed without any consideration. It was alleged, that the necessary sanction was also not obtained from the Court as the said transaction was affecting the rights of the plaintiff, who was a minor at the relevant time.

7. It is not necessary for us to set out the other details mentioned in the plaint for the disposal of the present appeal.

8. Defendants Nos. 1 to 4 in essence and substance supported the appellant-plaintiff by their written statements Exs. 6, 7 and 8.

9. Defendant No. 5 resisted the suit by the written statement. Ex. 13. In substance he contended: (1) that the suit should be dismissed as Maganlal Hargovandas Soni was not joined as a party to the suit. (2) that defendant No. 1 was managing the properties of H. U. F. during the lifetime of his father during the year 1951 as his father was old and invalid; (3) that a sum of Rs. 7,995/- was paid to Maganlal Hargovandas Soni as the amount of consideration for the document Ex. 57; (4) that the suit was filed by the plaintiff in conclusion with other defendants; (5) that the necessary alterations were made by him subsequent to the alienation in the properties alienated; (6) that taxes of the same were paid by him; (7) that he was using the property as a tenant prior to the execution of Ex. 57.

10. Defendant No. 6 resisted the suit by written statement Ex. 15. He contended that the plaintiff had filed the suit in collusion with defendants Nos. 1 to 4 to defeat his rights. He raised the contentions viz :

(a) That the suit was barred by law of limitation:

(b) That the suit is bad for joinder of parties and, misjoinder of causes of action.

(c) That the monthly income of rent from H.U.F. property was much less than Rs. 520/- and hence it was not possible to maintain the members of H. U. F. or to save any amount from the income of rent. He stated that in the year 1939 the rental income of H. U. F. was Rs. 80/- per month, whereas in the year 1947 the monthly rental income was Rs. 210/-. He therefore contended, that it was not possible to maintain the members of the said H. U. F. from the said income and hence for maintenance and the marriage expenses of the members of the H. U. F. it was necessary to incur debt. He stated that because of the said, legal necessity, on 6-11-1962 the document. Ex. 69 was executed by defendant No. 1 in his favour for the consideration of Rs. 8,999/-. In this view of the matter he submitted that the suit should, be dismissed against him.

11. The learned Civil judge after raising the necessary issues at Ex. 31 and recording the evidence passed the aforesaid decree partially accepting the case of the plaintiff and partially dismissing the plaintiff's case in regard to the alienation of H. U. F. properties in favour of defendants Nos. 5 and 6. It is under these circumstances that the present appeal is filed by the plaintiff.

12. No cross-objections are filed in this appeal.

13. The learned trial Judge took the view that Maganlal Hargovandas Soni is a necessary party to the suit, who alone is competent to say whether the alienation of the year 1951 was for legal necessity or what inquiry was made by him in that behalf about the existence of the same. Under the circumstances, he took the view that as Maganlal Hargovandas Soni was not made party to the suit, he dismissed the suit against defendant No. 5. He also took the view that the accrual of the cause of action for filing the suit arose on the date of the alienation (Ex. 64) i. e. 7th April 1951 and as the suit was not filed within 12 years

thereafter. Ex. 64 cannot be challenged. However, he took the view that the suit in so far it challenged the transaction in favour of defendant No. 5 by Maganlal is concerned is within the prescribed period of limitation. He took the view that unless Ex. 64 is set aside, the purchase of properties by defendant No. 5 cannot be impeached. He also took the view that the suit against defendant No. 6 was filed within the Period of limitation but the transaction evidenced by Ex. 69 dated 6th November 1962 was effected for the legal necessity and the benefit of the H. U. F.

14. In course of the hearing of the appeal. Mr. G. C. Patel, the learned advocate appearing on behalf of the plaintiff has raised the following contentions.

(1) That when defendant No. 1 executed the document dated 7th April, 1951 evidenced by Ex. 64 in favour of Maganlal Hargovandas Soni, defendant No. 1's father was alive and hence defendant No. 1 had no authority of law or otherwise and was legally incompetent to execute the document in regard to any H. U. F. property. In substance the contention was that at the relevant time the senior most member of the H. U. F. viz. defendant No. 1's father was the senior most member of the H. U. F. and was "KARTA" or the manager of the H. U. F. and hence the impugned alienation evidenced by Exhibit 64 is illegal, void and of no consequence.

(2) That assuming that defendant No. 1 was the manager of the said H. U. R. even then, the said alienation evidenced by Ex. 64 was effected without any legal necessity for the H. U. F. or without any benefit to the estate of the H. U. F. or for the payments of antecedent debts of the H. U. F. and hence the said alienation is illegal and not binding to the Plaintiff.

(3) That the Plaintiff who was born on 8th March. 1953 was in existence in his mother's womb on 5th September. 1969, when the plaintiff's grand-father was alive. On that day the plaintiff's grand-father one of the coparceners of the said H. U. F. had a right in law to challenge the said alienation dated 7th April. 1951 evidenced by Ex. 64 and, hence by reason of the doctrine of overlapping the Plaintiff is having a right to challenge the said alienation effected on 7th April, 1951.

(4) That the plaintiff could challenge the said alienation within a period of 12 years after the alienation took the possession of the property in question in the year 1954 and hence the Period of limitation for challenging such an alienation would start from the date on Which the alienation took the possession of the property. In this behalf it was urged that the suit was filed on 9th August. 1968 and the same was filed in time as the plaintiff is entitled to get the benefit of Section 6 of the new Limitation Act of 1963.

(5) That no legal or valid consideration had been passed by Maganlal Haragovandas Soni in favour of defendant No. 1 for effecting the transaction on 7th April 1951 in respect of the property mentioned, in Ex. 64 and hence Ex. 64 is not a bona fide alienation.

(6) That no legal or valid consideration had been passed by defendant No. 5 in favour of Maganlal Hargovandas Soni for the impugned alienation on 17th October, 1958 evidenced by Ex. 57 and hence the same is illegal void and of no consequence.

(7) That in regard to the aforesaid alienation in the year 1951 the learned trial Judge erred in holding that as Maganlal Hargovandas Soni was the necessary party and the suit should not have been dismissed against defendant No. 5 on that count.

(8) That the alienation dated 6th November 1962 evidenced by Ex. 69 by defendant No. 1 in favour of defendant No. 6 was effected without any legal necessity and without receiving any consideration from defendant No. 6 and hence Ex. 69 was illegal void and of no consequence.

These were the only contentions raised by Mr. G. C. Patel in course of the hearing of the appeal and now we proceed to dispose of the same.

15. Dealing with the first contention raised by Mr. Patel, we may state that it was the case of defendant No. 5 in his written statement. Ex. 13 that defendant No. 1 was managing the affairs of the H. U. R. and that the father of defendant No. 1 was invalid prior to his, death in September, 1952. In this behalf the evidence of Gajanand Vishwanath Junnerkar, Ex. 23 is that he had knowledge Pertaining to the documents in favour of defendants Nos. 5, 6 and 7. This witness in his cross-examination on behalf of defendant No. 2 no doubt deposed that defendant No. 1's father used to manage the family properties till his death but when cross-examined on behalf of defendant No. 3 the witness deposed in categorical term that defendant No. 1's father was in management of the Properties till 1950. He also, deposed that when municipal taxes under Ex. 54 were paid in October, 1944 defendant No. 1's father was about 75 to 77 years of age. On this point Shakuntla, Ex. 48, the mother of the plaintiff (original defendant No. 2) tried to support the plaintiff's case by deposing that her father-in-law used to collect the rent and after his death her husband collected rent. She also, stated that all taxes and electric charges were paid by her father-in-law but she also stated that her father-in-law had considerably bent from his waist since about 15 to 20 years. She denied the suggestion that defendant No. 1 as the manager of H. U. F. properties had filed suits for possession of H. U. F. properties against defendants Nos. 5 and 6. It is important to note that on this point defendant No. 1 would have been the best witness, but he did not enter the witness box in course of the hearing of the suit.

16. In this behalf the evidence given by defendant No. 5 is of considerable assistance to arrive at a correct conclusion, He stated that in 1948 a suit was filed by defendant No. 1 against him and it was compromised whereby the rent was increased from Rs. 45/- to Rs. 67-25ps. In substance he stated that he was knowing defendant No. 1's father who was physically very weak due to old age and had bent forward through waist and, was deaf. He also stated that his vision

was also not good. He stated that, that was the condition of defendant No. 1's father 3 or 4 years before his death. He also deposed that the work of collecting rent, repairs etc- was done by defendant No. 1. He also stated that since 1943 due to the ill-health of defendant No. 1's father defendant No. 1 did all the management and that in the year 1943 defendant No. 1's father was aged; about 85 years and the same is also supported by the death certificate of defendant No. 1's father produced at Ex. 41. He also deposed that the alienation effected in the year 1951 by defendant No. 1 was effected by him as "The head" of H. U. F.

17. The aforesaid evidence of defendant No.5 is also supported by the evidence of Ishwarlal Hargovandas Ex. 63. the attesting witness to Ex. 64. This witness in terms deposed that the management of the properties was entrusted to defendant No. 1 by his father 15 or 20 -years before he died. Witness Chhotubhai Ranchhodii Desai. Ex. 65. had received Rs. 3,500/- from defendant No. 1 being the amount paid to him and he also deposed that the management of H. U. F. and the properties thereof was done by defendant No. 1 as, defendant No. 1's father was very old. This witness in the cross-examination of the plaintiff rated that he had lent money to defendant No. 1 as Karta of the joint family. On behalf of defendant No. 5, witness Vithaldas Dayaram. Ex. 66 aged about 84 years was examined and he deposed that since about 8 to 10 years before the death of defendant No. 1's father defendant No. 1's father was keeping indifferent health and was not able to move out nor could do any work and had entrusted the management of the properties to defendant No. 1. This evidence is also supported by the evidence of defendant No. 6 who also stated that in the year 1967 defendant No. 1's father was about 75 to 80 years and had bent in waist could not hear and was not doing any management and. that defendant No. 1 used to manage the properties.

18. Having regard to the aforesaid trustworthy evidence it is clearly established that when defendant No. 1 executed the document dated 7th April, 1951 evidenced by Ex. 64 in favour of Maganlal Hargovandas Soni defendant No, 1 was managing the affairs of the H. U. F. during the lifetime of his father who died in September, 1952.

19. That brings us to the discussion on the second contention raised by Mr. Patel. In substance the submission was that the document Ex. 64 dated 7th April, 1951 was executed by defendant No. 1 in favour of Maganlal Hargovandas Soni without any "legal necessity" for the H. U. F. or without any "benefit to the estate of the H.U.F." or for making any payments in regard to the antecedent debts incurred by the H. U. F.

20. The recitals in the document Ex. 64 dated 7th April 1951 may be mentioned here. It is clearly stated in Ex. 64 that a sum of Rs. 6,500/- was paid by Maganlal Hargovandas Soni to defendant No. 1 for the following particulars.

(1) Rs. 3580/- for paying antecedent debt of Chhotalal Ranchhodii Desai (Ex.

58). (2) Rs.1538-50ps for paying and discharging the antecedent debts of the father (of def NO.1) and to pay and discharge the miscellaneous debts. (3) Rs.1381-50ps. for house-hold expenses. ----- Rs. 6500-00ps. Total -----

It was also mentioned in the said document, Ex. 64, that the possession of the alienated properties was handed over by defendant to Maganlal Hargovandas Soni.

21. Now it is well settled that recitals of legal necessity in mortgages or deeds of sale executed by a, father or the manager and admissible in evidence but are not of themselves evidence of such a necessity without substantiation by evidence aliunde. They may be corroborated by representation made by the borrower. But the recitals are the admissions of the manager and they also amount to a representation about the need of the family W where owing to the length of time it is impossible to produce other evidence they have evidentiary value also.

22. Our attention was also invited to the document dated, October 17. 1958. Ex. 57 executed by Maganlal Hargovandas Soni in favour of defendant No. 5. It is significant to note that defendant No. 1 has attested Ex. 57. As stated in the documents Ex. 57 defendant No. 5 purchased the right title and interest of Maganlal Hargovandas Soni in the concerned alienated properties as mentioned in Ex. 64.

23. Now apart from the aforesaid recitals contained in Ex. 64 there is voluminous oral evidence to prove that in the year 1951 there existed the "legal necessity" of the H. U. F. justifying the transaction evidenced by Ex. 64. In this behalf witness Chhotubhai Ranchhodhi Desai. Ex. 58 stated that defendant No. 1 paid to him Rs. 3,500/- and some more amount 15 or 17 years back, This witness deposed that the aforesaid amount of Rs. 3,500/- was lent by him to defendant No. 1 in his capacity as Karta of H. U. F. The aforesaid, recitals in Ex. 64 substantially corroborate the evidence of the witness. The evidence of Gajanand also discloses that the family was maintained only "from the month1v rental income from the properties of H. U. F. and only rent was all along their source of maintenance. The evidence of Shakuntala (plaintiff's mother) Ex. 48 shows that the educational expenses of the plaintiff were borne by the maternal uncles of the plaintiff. She stated that the monthly rent was Rs. 150/- from the year 1939. She also deposed that her 50 tolas of gold ornaments and all the silver utensils were sold between the years 1939 to 1951-52, She also deposed that the repairs to the H U. R properties were done after 1951. Her evidence also discloses that the family had to run two establishments and defendant Na. 1 used to send, Rs. 120/- to her at Baroda. In clearest terms, she admitted at due to bad financial position plaintiff was staying with her brother. The evidence of defendant No. 5 also shows that in the year 1950-51 the total rental income was Rs. 150/- per month. He also deposed that the family had to pay electric charges from that amount and the family had to incur debts In case of sickness or marriage. In 1955 the family had to repair the staircase of the terrace and that two stair-

cases, one of R. C. C. and one of wood were required to be placed. He stated that the total expenses for the said work came to about Rs. 5.500/- to Rs. 6.000/-. He also stated-that the plaintiff was staying with his maternal uncle and that the family had to pay to him Rs. 55/- for plaintiff's lodging charges. He stated that the financial position of the H. U. F. was always very poor and defendant No. 1 had to file suits against the tenants for the recovery of rents. He stated that he was knowing defendant No. 1 from the year 1943 and he had no means to incur expenses on occasions like the demise in the family or the marriage in family or for the repairs of H. U. F. He also deposed that during the sickness of defendant No. 1, defendant No. 1 had incurred the debts. Ishwarlal Hargovandas Ex. 63 one of the attesting witnesses to Ex. 64 also supports the case of defendant No. 5 in this behalf and stated that defendant No. 2 the mother of the plaintiff was seen in him many times and she used to tell him, that she was having great difficulty in her maintenance. Defendant No. 6 also supports the case of defendant No. 5. Defendant No. 6 was a tenant in the H. U. F. property since the year 1937. He stated that the repairs to H. U. F. properties were done in the years 1947 and 1957. He also stated that defendant No. 1 sustained losses in coal business and family purposes defendant No. 1 had to incur debts. He stated that the H. U. F. was having the income of rent to the extent of Rs. 100/- to Rs. 250/- between the Years 1943 and 1957. He stated, that H. U. F. properties were repaired by defendant No. 1 after having taken the loan from Chhotalal (Ex. 57). Witness Babulal P. Shah, Ex. 85. deposed that he is an advocate and was residing in the H. U. R property. He stated that defendant No. 1 had to file suits against the tenants of H. U. F. for the recovery of rent. Navnitlal Maganlal Soni defendant No. 7 also stated inter alia that it was true that sometimes defendants Nos. 1 and 2 were in need, of money for expenses for the family.

24. Thus on a careful consideration of the aforesaid evidence which in our opinion is trustworthy we are convinced that the impugned alienation evidenced, by Ex. 64 dated. 7th April. 1951 was effected on account of legal necessity of the H. U. F. for the benefit of the estate of the H. U. F. and for payments of antecedent debts incurred for the family. In this view of the matter we do not see any substance or merit in the second- contention, raised by Mr. Patel.

25. The third contention of Mr. Patel was that the plaintiff who was born on 8th March. 1953 was in existence in the mother's womb on 5th September, 1952 when the plaintiff's grandfather was alive. On that day i.e. on 5th September 1952 the plaintiff's grandfather one of the coparceners, of the H. U. F. had, a right in law to challenge the impugned alienation evidenced by Ex. 64 dated 7th April. 1951 and hence by reason of the doctrine of overlapping the Plaintiff has a right to challenge the said alienation.

26. The reported decision of the Full Bench in Shivaji Ganpati Muthal and Others Vs. Murlidhar Daji Muthal and Others, explains the doctrine of overlapping Chagla. C. J. observed in para 6 as follows :-

"It would, be better to explain what am 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 fami1v who has a right to challenge the alienation. There must be no gap between the existence of a coparcener who has a fight to challenge and the birth of a son who enters the coparcener 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."

27. In the case of Mahadu Ukarda v. Tulsabai (1957) 50 Bom LR 1117 . Justice Mudholkar observed while referring the case in, Shivaji Ganapati Muthal and Others Vs. Murlidhar Daji Muthal and Others, has observed as follows:-

"In that case it was held that where a cause of action to challenge an alienation by the father has accrued to a son then existing a subsequently born son is also entitled to challenge that alienation as much as the earlier born son provided that the right of the earlier born son had not become barred prior to the birth of the subseaut1v born son by reason of the death or adoption of the earlier born son or by reason of the fact that the right of the earlier born son had before the birth of the subsequently born son become barred by limitation. It may however be pointed, out that even according to the Full Bench the right to challenge an alienation constitutes one cause of action and that no fresh right accrues to the son subseaut1v born. It is also accepted by the Full Bench that limitation runs from the date of alienation and not from the date on which the son who could challenge the alienation is born."

28. In this behalf we may also usefully refer to the reported decision of the Rano Dip Singh v. Parameshwar Prasad, ILR 47 AH 165, AIR 1925 PC 33 . A few facts of that decision may be stated in brief. The suit out of which the appeal arose was instituted on 23rd June, 1920 by the four sons of the sixth defendant Thakur Prithi Singh claiming possession of the village described in the plaint. The plaintiffs and their father were a Joint Hindu Family governed by the law of the Mitakshara, and it was the plaintiff's case that the village was the ancestral property of the joint family. On 3rd June. 1893, the plaintiffs' father purported to sell the village to Manjee Ram who was represented in this suit by his descendants, defendants Nos. 1 to 5. The seventh defendant claimed as a mortgage from defendants Nos. 1, 2 and 5. It was the contention of the Plaintiffs that the sale was not binding on them as it was not made for legal necessity and on this ground they claimed a decree for possession. It was thought necessary to consider whether the suit was barred by limitation, and for that purpose the dates at which the several plaintiffs were born became important. In that case plaintiff No. 1 was born on 23rd August 1886 Plaintiff No. 2 on the 4th August. 1891: Plaintiff No. 3 on 1st October 1897, and Plaintiff No. 4 on 30th November, 1900. From the said facts it is clear that first and second plaintiffs were in existence at the date of the sale but the other two Plaintiffs were born after its

completion. The time from which the period of limitation began to run had throughout been treated as the 3rd June, 1893 on the assumption that the alienees then took possession of the property within the meaning of Article 126 contained in the First Schedule to the Indian Limitation Act. 1908.

29. Now the prescribed period of 12 years from this date expired in 1905, but the plaintiffs contended that limitation was saved by Section 7 of the Limitation Act read with Ss. 6 and 8. Sir Lawrence Jenkins in course of the judgment observed as follows:-

"It is conceded that the suit would, not be saved by these sections if brought by the first three Plaintiffs, alone: but it is contended that the fourth Plaintiff is entitled to the expended period for which the sections provide and that the suit is therefore not barred by limitation. Both the Courts in India have decided adverseIv to this contention.

The cause of action arose on the 3rd June. 1893 and it is from that date that the Period of limitation is to be reckoned, The fourth plaintiffs, subsequent birth on the 30th November, 1900 did not create a fresh cause of action, or a new starting point from which limitation should be reckoned.

To the contention that by the cited section the period of limitation is extended for three years from the cessation of the fourth plaintiff's minority the answer is that by their express terms this extended period can only be claimed by a person entitled to institute the suit at the time from which the period of limitation is to be reckoned. The fourth plaintiff does not come within this description, for at that time he was not in existence. He therefore, is not entitled to the three years" extension and his suit is consequently barred."

30. Our attention was also invited to the reported decision in Seshamma v. Venkayya AIR 1957 AP 386. Viswanath Sastri, J. in Para 3 of the judgment observed as follows :-

"That an improper alienation of joint family property by a father or manager can be set aside at the instance of an after-born coparcener provided there was in existence at the date of the alienation some coparcener who could challenge it and he had not consented to the alienation or ratified it before the after-born son was begotten."

31. In Sri Venugopalaswamy Varu Temple Vs. Visweswara Prasad and Another, , in Paragraph 9 of the judgment it is observed as follows:-

"That an after-born son can, under certain circumstances sue to set aside his father's alienation of ancestral Property is not disputed. The law seems to be now fairly settled that a son born in a joint Hindu familv acquires by birth interest in ancestral Property but does not acquire any interest in any right to sue. The cause of action -accrues on1v on an alienation and only when the purchaser takes possession under the alienation. See Article 126 now Article 109 of the (new) Limitation Act. It would be a mistake to think that a new cause of

action occurs upon the subsequent birth of a son in the family. The after-born son does not acquire a fresh cause of action and consequently a fresh period of limitation does not start from the date of his birth. In this case, the time from which the period of limitation is to be reckoned is the date of the transfer and taking of possession under it by the purchaser. When he was not born on the day of the transfer he could not be said to be suffering from any disability on the date and eventually cannot take any advantage of Section 6, Limitation Act. It will thus be clear that a subsequently born son has the same cause of action which accrued to another coparcener a part "from the father who made the alienation and who was living at the time of alienation."

32. In *Guramma Bhratar Chanbasappa Deshmukh and Another Vs. Malappa*, the Supreme Court observed as follows in paragraph 13 of the judgment :-

"A coparcener whether he is natural born or adopted into the family acquires an interest by birth or addition, as the case may be, in the ancestral Property of the family. A managing member of the family has power to alienate for value joint family Property either for family necessity or for the benefit of the estate. An alienation can also be made by a managing member with the consent of all the coparceners of the family. The sole surviving member of a coparcenary has an absolute power to alienate the family property as at the time of alienation there is no other member who has joint interest in the family. If another member was in existence or in the womb of his mother at the time of the alienation the power of the manager was circumscribed as aforesaid and his alienation would be voidable at the instance of the existing member or the member who was in the womb but was subsequently born, as the case may be unless it was made for purposes binding on the member of the family or the existing member consented to it or the subsequently born member ratified it after he attained majority. If another member was conceived in the family or included therein by addition before such consent or ratification his right to avoid the alienation will not be affected."

33. Our attention was also invited to Articles 270 and 271 of Mulla's Hindu Law. 14th Edition. Article 270 of Mulla's Hindu Law provides inter alia as follows:-

"An alienation may also be set aside at the instance of any coparcener who though born subsequent to the date of alienation, was in his mother's womb at the date of alienation: the reason is that under the Hindu law a son conceived is, in many respects equal to a son born."

"In alienation of joint family property made by a father there being no male issue in existence at the date of the alienation, is valid though made without legal necessity. Such an alienation cannot be objected to by a son born after the date of the alienation on the ground that it was made without legal necessity. But an alienation made by a father who has sons then living not being one for legal necessity or for payment of an antecedent debt, if made without their content, may be set aside by one of those sons-partially or wholly according to the "state

in which the question arises."

Article 271 of Mulla's Hindu Law provides inter alia as follows-

"The period of limitation for setting aside an alienation by a father of joint family Property is twelve years from, the date when the alienee takes possession of, the property (Limitation Act, 1908. Schedule 1, Article 126). If however the alienee has not taken possession the only right of the son will be to obtain a declaration that the deed of alienation is invalid and the limitation prescribed was six years under Article 120 of the old Limitation Act. A similar provision is incorporated in Article 109 of the New Limitation Act.

The cause of action in a suit to set side the father's alienation arises when the alienee takes possession of the property. The Period of twelve years is therefore to be counted from that date. That is the material date not only as regards the suit of a son in existence at the date, but also the suit of a son not in existence at the date. The extension of three years given by Section 6 of the Limitation Act cannot be availed of by the son & not in existence at the time of the alienation.

Article 271-A provides as follows :-

"A suit by a Hindu to set aside an alienation of joint family property made before his birth by his grandfather without any justifying necessity is governed not by Article 126 but by Article 144. But the same Principles apply if the suit is brought more than 12 years after the date of alienation it is barred."

34. Mr. Patel also invited our attention to the decision in Bindeshri Upadhyaya and Others Vs. Sital Upadhyaya and Others, . In that case a suit was brought by the plaintiffs for a declaration that a certain mortgage-deed executed on 22nd May 1915 by their father defendant No. 1 in favour of defendants Nos. 2 and 3 is invalid on the ground that then father executed the deed without legal necessity and that the property being an occupancy holding could not be transferred under the provisions of the Tenancy Act. The defendant had raised a plea that the suit was barred by limitation. The trial Court having applied Article 126 Limitation Act, found that the suit was maintainable as it was brought within 12 years of the date of the alienation impugned. In first appeal the District Judge held that Article 126 was not applicable in as much as the Plaintiffs were not asking for Possession but only for a declaration. The point which was argued before the High Court was that the lower appellate Court was wrong in refusing to approve Art. 126 of the Limitation Act. It was contended that Article 126 will approve even though the alienee does not get possession of the mortgaged property in cases where the interest actually mortgaged was not capable of physical Possession. The said Proposition was not accepted by the High Court. Mr. Patel submitted that in where the alienee does not get the possession of the alienated property the provisions of Article 126 of the Old Limitation Act equal to Article 109 of the New Limitation Act cannot be made applicable.

35. In Chintaman Balwant Dharmadhikari Vs. Bhagvan Ganapati Mankeshwar, .

Fawcett. Av. C. J. observed as follows:-

"Article 126 has frequently been applied in such cases. A recent instance is the case of Rano Dip Singh v. Parameshwar Prasad, ILR 47 AH 165, AIR 1925 PC 33 where the Privy Council applied that article to the case. But undoubtedly that article contemplates the case of an alienation where the alienor has taken possession of the property because limitation only runs from the date when the alienor so takes possession. It is only when such possession has been taken that any cause of action accrues to the plaintiff so far as Article 126 is concerned "

36. Mr. Patel also invited our attention to Sections 26 and, 27 (1) of Baroda Hindu Nibandh which provides as follows:

26 (1) Karta kone kahevo: (Ka) Sahabhagispaiki koipana eka-

(1) Kutumbani milakatano valhivata shake chhe, tatha

(2) Beeja shakhaso pratve, kutumbana vahevar chalavi shake chhe:

(kha) ava Sahabhagine Karta Kahe chhe.

(2) Karta thavana pitana hakka vishe Je avibhakta kutumba fakta pita. mata tatha putro maline thavelu hova teva kutumbama Pita kavadesar reete nalavak na hova to. kutumbana karta tarike karna karavano teno hakka chhe.

He also invited our attention to Section 27 (1) of Baroda Hindu Nibandh

27 (1) Sahabhagi sarnmati apaya a samartha hova tyare kartana kava krutvo, sarnavika milakatane bandhankaraka ganya: Vastutah athava kavadesar reets vyavahar karnar eka athava vadhare sahabhagi. beeja sahabhagio (ka) sagir howathi kiwva (kha) eetar karanathi.

Sarnmati apava asamartha hoya tyare, tevi sammati leedha vagar neeche janavela krutyo Paiki koi krutya kare to temate avibhakta kutumbani samayik milakatamano asarnartha hitasambandha ja- wabdar ganashe:-

(1) Avibhakta kutumbana,

(a) (1) Kavada. Agar

(2) jarurivat karan matena. Kinva

(aa) avibhakta kutumbani samayik milakatana kavada matena tarnarn vvava har;

(2) avibhakta kutumbana bharanposhan mate jarurivatana vvavahar:

(3) avibhakta kutumban samayik milakatana rakshana tatha vahivat matena iarur te vvavahar:

(4) avashva dharmakrivao:

(5) sahabhagiona tatha sawashritnaluna vigere dharmik sanskar matena Jarur te vvavahar:

Khulasao:- Sammati apaya asmartha sahabhagini jat upar ke agavi milakata, uparaya vavavaharathi koi jawabdhari pade che ema. samaivau nahi.

37. Mr. Patal also invited our attention to B. B. Mitra's Limitation Act. 14th Edition. Page 420. On that page under the caption "when time runs" it is stated that the Legislature has clearly fixed an overt and patent fact. namely the taking of Possession of the property by the alienee as the event from which the period has to be calculated so as to avoid as far as Possible the difficult question as to the notice. The cause of action accrues when the alienee takes Possession, and no new cause of action arises m the death of the plaintiff's father.

38. We have carefully considered the aforesaid authorities and the provisions of law Pointed out to us from Articles 126 and 144 of the Old Limitation Act equivalent to Articles 109 and 65 respectively of the New Limitation Act. We have also seen Section 6 of the Limitation Act. Section 6(1) of the Limitation Act, 1963 provides as follows:-

"6 (1). Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the prescribed Period is to be reckoned a minor or insane or an idiot he may institute the suit or make the application within the same period after the disability has ceased as would otherwise have been allowed from the time specified therefore in the third column of the Schedule."

Section 9 of the New Limitation Act provides as follows:-

"9. Where once time has begun to rim, no subsequent disability or inability to institute a suit or make an application stops it :

Provided that where letters of administration to the estate of a creditor have been granted to his debtor the running of the period of limitation for a suit to recover the debt shall be suspended while the administration continues."

39. In view of the aforesaid doctrine of "overlapping". It is clear to us that in the instant case, defendant No. 1's father was in existence in the H. U. F. who had a right to challenge the alienation evidenced by Ex. 64 dated 7th April. 1951. It is equally clear to us that the Plaintiff was in existence in the mother's womb in September. 1952 when defendant No. 1's father was alive. Therefore the two lives viz. the life of defendant No. 1's father who had a. right to challenge and the life of the plaintiff in the rnother's womb overlay. In the context of these facts the plaintiff had a right to challenge the impugned alienation of year 1951.

40. Me next contention of Mr. Patel was that the plaintiff could only challenge the said, alienation within a period of 12 years after the Plaintiff took possession of the properties alienated. In the instant case Mr. Patel submitted that Maganlal Hargovandas Soni took the possession of the alienated Properties in the year 1954 when the Plaintiff was a minor and hence he was under a legal disability to file the suit challenging the impugned alienation. Mr. Patel submitted that in view of this the suit wliich was filed on 9th August. 1968 was filed in time.

40-A. In order to appreciate the contention of Mr. Patel we looked at the "Plaint Ex. 1. No specific averment is set out in the plaint indicating that Maganlal Hargovandas Soni took the possession of the alienated Properties in the year 1954. The only allegation in this behalf is contained in para 12 of the Plaint and, that averment is that the cause of action -to file the said suit had arisen on 19th February 1968 when the plaintiff came to know about the suit alienations. Now it is well settled that it is the duty of the plaintiff to show as to how the suit is filed within a Period presented by law limitation by stating clearly the facts in the plaint. In the instant case no such averments: are set out in the Plaint.

40-B. But apart from the absence of the relevant averments in the plaint we also saw the written statement Ex. 6 given by defendant No. 1 but the same is also silent as to when the alienee Maganlal Hargovandas Soni took the Possession of the alienated properties. Defendant No, 1 could have been the best witness but as stated earlier he did not enter the witness box to give evidence Defendant No. 2 the mother of the plaintiff and defendants No& 3 and 4 the sisters of the plaintiff are also silent about the same in their respective written statements. The alienee Maganlal Hargovandas Soni is not a party to the suit nor he has been examined as a witness in the case. Even on reading the written statement Ex 13 of defendant No. 5 it is difficult for us to come to the conclusion, as to when the alienee Maganlal Hargovandas Soni took the possession of the alienated Properties. Such a contention does not arise from the pleading of the parties. In this behalf the necessary issue was not raised before the learned trial Judge. The Parties did not focus their attention on this aspect of the matter and hence it is not possible for us to agree or accept the said submission of Mr. Patel in the instant case however the impugned alienation evidenced by the document dated 7th April, 1951 clearly shows that the Possession of the alienated properties was given to, the alienee, Maganlal Hargovandas Soni on that day. But assuming that the suit was filed in time even then it must fall against defendant No. 5 as we have already taken the view that the alienation evidenced by Ex. 64 was effected for the legal necessity of the H. U. F. for the benefit of the estate of the H. U. F. and for payment of antecedent debts of the family. Mr. Patel also, submitted that no consideration was Passed by the alienee Maganlal Hargovandas Soni for the alienation of the H. U. F. Properties in the year 1951 in favour of defendant No. 1 but in view of the clear recitals contained in Ex. 64 and the evidence of Chhotalal Ranchhodii Desai. Ex. 58 it is not possible for us to agree or accept the said submission of Mr. Patel.

41. Mr. Patel then submitted that defendant No. 5 did not Pay any consideration to Maganlal Hargovandas Soni for effecting the transaction evidenced by Ex- 57 dated 17th October. 1958. On this point we are having the unimpeachable evidence of defendant No. 5 who deposed that he Paid to Maganlal Hargovandas Soni a sum of Ra. 7.995/- for effecting, the said transaction and the contents of Ex. 57 corroborate the same. In this view of the matter there is no substance in this submission of Mr. Patel.

42. Mr. Patel then submitted that the learned trial Judge was in error in dismissing the plaintiff's suit for the reasons mentioned in the earlier part of the judgment as Maganlal Hargovandas Soni was a necessary party to the suit. Mr. Patel is right in his submission, No doubt. Maganlal Hargovandas Soni would have been a proper party in the suit but on that count the learned trial Judge should not have dismissed the plaintiff's, suit against defendant No. 5.

43. We may mention here that Defendant No. 5 in his evidence at Ex. 56 deposed that when he had Purchased the alienated property in the year 1958 from Maganlal Hargovandas Soni defendant No. 1 had attested the document Ex. 57 in his favour and further stated in his presence that defendant No. 1 had signed the document Ex. 64 dated 7-4-1961 in favour of Maganlal Hargovandas Soni which provides in terms that the possession of the alienated property was given to him in the year 1951. Defendant No. 1 could have objected, to such a recital in Ex. 64 if the Possession of the alienated property was not given to the alienee in the year 1951. No such plea was taken in the written statement of defendants Nos. 1 to 4 and defendant No. 5 was not cross-examined on this point by defendant No. 2. In this view of the matter we cannot agree with the submission of Mr. Patel that the Possession of the alienated Property was given to, the alienee Maganlal in the year 1954.

44. These were the only contentions raised by Mr. Patel for attacking the legality of the alienation in favour of defendant No. 5 and as we do not find any substance in the same, we agree with the ultimate conclusion arrived at by the learned trial Judge in this behalf.

45. That brings us to the attack of Mr. Patel on the alienation effected by defendant No. 1 in favour of defendant No. 6 evidenced by Ex. 69 dated 6th November. 1962. His main attack was on two grounds viz:-

- (1) That the impugned-alienation was effected without any legal necessity and
- (2) That defendant No. 6 did not pay to defendant No. 1 any consideration for effecting the said alienation.

46. The impugned alienation evidenced by Ex. 69 is dated 6th November, 1962 and is executed by defendant No. 1 on behalf of himself and on behalf of the minor for the receipt of consideration of Rs. 8,999/-. It is stated in the said, document that the transaction was effected for the legal necessity and, for the benefit of the estate of the family. It is significant to note that the mother of the plaintiff defendant No. 2 attested the said document. Witness Nanubhai Bhimbhai. Ex, 79. also attested the same and he fully supports the case of the alienee defendant No. 6 in his evidence.

47. In this behalf our attention was drawn to the second important document M. 28/3 which is a receipt bearing the same date i.e. 6th November, 1962 passed by defendant No. 1 and defendant No. - 2 in favour of defendant No. 6 showing that the aforesaid payment of Rupees 8.999/- was made by defendant No. 6 to

defendant No. 1. Defendant No. 6 In terms, deposed in Ex. 68 that he was knowing the signature and writings of defendants, Nos. 1 and 2 and he had, seen them writing Ex. 28/3. He also deposed that minor Shakuntala the sister of the plaintiff was Present when the consideration was paid. In view of this evidence the learned trial Judge ought to have exhibited Ex. 28/3. We hereby take the view that the contents of Ex. 28/3 are duly Proved by the aforesaid evidence and the same is ordered to be exhibited as Ex. "A" in the appeal. Ex. 28/3 states inter alia for the said alienation had taken place for the benefit and the interest of the family. This also clearly proves that the plaintiff's mother defendant No. 2 was not only an attesting witness to Ex. 69 but she knew the contents and the purpose of the impugned alienation fully. We may mention once again at this stage that Ex. 28/3 is addressed by defendants Nos. 1 and 2 to defendant No. 6 and it is stated therein inter alia that a sum of Rs. 8,999/- was received by defendant No. 1 from defendant No. 6.

48. But apart from the aforesaid documentary evidence Exs. 69 and 28/3 (now marked Ex. "A" in the record of the appeal) there is overwhelming oral evidence to Drove that the aforesaid alienation took place because of the legal necessity of the H. U F. Now it is ail admitted fact that the daughter of defendants Nos. 1 and 2 married in Februarv 1963 i.e. to say within three months after the execution of the impugned alienation Ex. 69. Defendant No. 2 in terms deposed that defendants Nos. 5 and 6 did attend the marriage of her daughter. The aforesaid evidence does disclose that even in the year 1962 the family was having the monthly rental income of Rs. 250/-. The evidence also shows that it was difficult for the family to defray expenses on occasions like marriage demise repairing the property of H. U. F. Payment of antecedent debts or for the sickness of the members of the family. The aforesaid evidence also shows that the Plaintiff had to stay with his maternal uncle and that he had to pay to him Rs. 55/- per month for his login-a-charges. The evidence also shows that the family had to run two establishments viz. one at Baroda and one at Navsari. The aforesaid evidence also shows that defendant No. 2 was telling Ishwarlal Ex. 63 that she was having difficulties in maintaining the family.

49. In this behalf we may refer to the evidence of Gajanand Vishwanath Junnarkar Ex. 42 who deposed inter alia that he did not pay any money to his sister defendant No. 2 at the time of the marriage of defendant No. 2's daughter" in February. 1963. He staled that the marriage was performed with economy. In this behalf it is significant to note that the plaintiff's mother defendant No: 2, deposed that in regard to the marriage expenses her brother and relatives had helped her for expenses. She also deposed that the marriage expenses were only to the extent of Rs. 200/-.

50. In this behalf we May refer to the evidence of defendant No. 5 who deposed that for the marriage of Mrunnalani, he defendant No. 6 Bansilal Desai Bhaiibhai Mulla and others had been to Baroda. He also deposed that the marriage was performed in pomp and not in simplicity. He stated that financial Position of

defendant No. 1 and his family was always very poor and that defendant No. 1 had to file suits many times to recover rents from the tenants. He also deposed that he knew defendant 2 since 1943 and he had no means to defray expenses on occasions of demise in family or marriages in family or for repairs to properties etc.

Defendant No. 6, Navnitrai. Ex. 68 deposed that defendants Nos. 1 and 2 had told him that they would require money for the marriage. He also deposed that some 8 or 10 days Prior to the transaction of the impugned alienation defendants Nos. 1 and 2 had told him that the alienated Properties would be sold to him. He also deposed that he told them that he would make inquiries as to whether there would be any marriage of defendant No. 4 or not. He also deposed that the consideration for the impugned alienation was fixed at Rs. 9,000/- He stated that he had withdrawn money from his family account in the Dena Bank and that he had withdrawn a sum of Rs. 11,00,00/-. He also deposed that he had purchased the alienated Properties by the impugned alienation dated 6th November 1962 for Rupees 8,999/-. The evidence of this witness is duly corroborated by the contents of Ex. 69 and Ex. 2813 (now marked Ex. A in the record of the appeal).

51. On behalf of defendant No. 6 witness Nanubhai Bhimbhai, Ex. 79 was also examined. This witness is the attesting witness to Ex. 69. The witness deposed in clear terms that something like Rs. 8,000/- was paid (by defendant No. 6) to defendant No. 1 in the office of the Registrar. He also deposed that the payment was made in presence of defendant No. 2 the mother of the plaintiff. He stated that defendants Nos. 1, 2 and 6 were saying to him that the aforesaid amount was to be spent for the marriage of the daughter of defendant No. 1. In cross-examination the witness deposed that when defendant No. 6 paid the money to defendant No. 1, defendants Nos. 1 and 2 both counted money. Defendants Nos. 1, 2 and 6 were talking interest that the aforesaid amount was required for the marriage of defendant No. 1's daughter. He also stated that, the talk about the aforesaid money being taken for marriage of the daughter was going on, when execution and attestations were being done on Ex. 69.

52. We are also having the evidence of defendant No. 7 at Ex. 88 and even defendant No. 7 also deposed inter alia that it was true that sometimes defendants Nos. 1 and 2 were in need of money for expenses.

53. Thus on a careful reading of the aforesaid oral evidence we are convinced that the impugned alienation Ex. 69 was effected, by defendant No. 1 for legal necessity viz. for the marriage expenses of the daughter of defendant No. 1 and for other family expenses. In this behalf as stated above the oral evidence of the aforesaid witnesses is duly corroborated by the contents of Ex. 69 and Ex. 28/3 (Ex. A of the record of the appeal). On reading the said evidence, we are also convinced that in the instant case defendant No. 6 did Day to the defendant No. 1 the amount of consideration as mentioned in Ex. 64 and Ex. 28/3, As a result of the said discussion, we are convinced that there is no substance or merit in the submission made by Mr. Patel that the alienation dated 6th November, 1962

evidenced by Ex. 69 by defendant No. 1 in favour of defendant No. 6 was effected without any legal necessity or without receiving any consideration.

54. These were the only contentions raised by Mr. Patel for attacking the legality of the alienation dated 6th November. 1962.

55. We have carefully considered all the submissions made by Mr. Patel and there is no substance or merit in any of his submissions.

56. In the result the appeal is dismissed with costs. As the appeal is filed in forma pauperis a copy of the decree be sent to the Collector for recovering the requisite amount of court-fees.

57. Appeal dismissed.