of lots Nos. 2 to 5 are entitled to be maintained in possession. The defence of Bhogilal has been that he is a transferee from Bai Suraj. It has been urged that in the decree in the suit of 1922 there was a declaration that the sale to defendant 1 was void and that no title had passed to him thereunder and that therefore the defendants cannot deny that the plaintiffs had a title in 1922. But that was a decision of a Second Class Subordinate Judge who had no jurisdiction to try the present suit. Consequently, that decree would not operate in this suit as res judicata under S. 11, Civil P. C. It is important to note that in the pleadings in this suit beyond a recital of that decree of 1922 there is no suggestion that the sale to defendant 1 was not operative to convey the rights of Bai Suraj on the ground that it was a sham and colourable sale. From the issue framed, it appears no such claim was made in the trial Court. It is not therefore open to the respondents to urge for the first time in this appeal that we should consider the question of the validity of the sale on the evidence available or give a fresh opportunity to the plaintiffs to lead additional evidence on the point.

On the above grounds the appeal must succeed so far as lots Nos. 2 to 5 are concerned. It is therefore unnecessary to consider the plea that the provisions of O. 2, R. 2, Civil P. C., constitute a bar to this action against defendant 1 inasmuch as the plaintiffs could have in the suit of 1922 claimed to recover possession. In the result we allow this appeal, and reverse the decree of the trial Court except in regard to the property comprised in lot No. 1. With regard to the property in that lot the decree of the lower Court is maintained. In other respects the claim of the plaintiffs to possession is dismissed. In view of the partial success of the defendant-appellant we direct that he alone shall get half the costs throughout from the plaintiffs. The cross-objections are dismissed with costs.

S.G./R.K. *Appeal partly allowed.*

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BROOMFIELD AND MACKLIN JJ.

Shanmukhappa Gurulingappa and others — Appellants.

v.

Rudrappa Golappa Malli — Respondent.

Cross First Appeals Nos. 149 and 222 of 1936, Decided on 13th October 1938.

(a) Hindu Law—Alienation—Father—Subsequently born son—Alienation by sole surviving coparcener cannot be objected to by son born to or adopted by him subsequently.

A sole surviving coparcener is entitled to dispose of the coparcenary property as if it were his separate property by sale or mortgage without any legal necessity or to make a gift of it, and a son born to him or adopted by him subsequently cannot object to such alienations made by his father. [P 267 C 1, 2]

(b) Hindu Law—Debts—Coparcener—Debts incurred by sole surviving coparcener are not binding on son adopted in the coparcenary subsequently, unless contracted for nccessary purposes or benefit of the family.

When the coparcenary consists of a sole surviving coparcener and his deceased brother's widow, the former's interest in the coparcenary property is liable to be diminished by the adoption of a son by him or by his brother's widow and hence it is only the debts incurred by him for necessary purposes and for benefit of the family that would bind the estate and he cannot alienate the family property in satisfaction of his private debts when he ceases to be solely entitled. The question whether the debts are binding on the coparcener who subsequently comes into the family by adoption depends simply on whether they would have bound him if he had been a member of the family when they were contracted and if the alienation takes place after the family once again becomes a coparcenary in the true sense, legal necessity, or family benefit or bona fide inquiry into these matters must be proved in the ordinary way ; and in the absence of such proof the newcomer's share will not be bound: *A I R 1927 Mad 676, Rel. on; 33 All 272 (P C) ; A I R 1914 P C 136 and AIR 1927 P C 56, Ref.* [P 268 C 2]

(c) Costs—How awarded.

Costs may be awarded to each successful defendant on the aggregate value of all the property which is the subject-matter of the suit : *A I R 1925 Bom 432, Foll.* [P 270 C 2]

S. R. Parulekar (in No. 149), Dr. B. R. Ambedkar, G. R. Madbhavi and K. R. Bengeri (in No. 222)—*for Appellants.*

Dr. B. R. Ambedkar and G. R. Madbhavi (in No. 149) and D. R. Manerikar, B. M. Kalagate, S. B. Jathar and K. J. Kale (in No. 222) —

for Respondents.

Broomfield J.—These are cross-appeals in a suit for partition and possession of a half-share in the suit properties. There was a Hindu joint family consisting of Rudrappa and his two sons Shiddappa and Gurappa. Shiddappa had no son. Gurappa had sons, Golappa and Gurulingappa. Shiddappa adopted Golappa as his son. Soon after this adoption he died. Golappa, the adopted son, died in 1908 and soon after that Gurappa died. From 1908 to 1929 Gurulingappa, defendant 1 in the suit, his mother Channavva and Golappa's widow Iravva, defendant 7, lived together as a

joint family. The plaintiff was adopted by Golappa's widow in 1929. Defendant 1 while he was the sole surviving coparcener alienated a number of the family properties, some to his wife Ningavva, defendant 8, some to the other defendants in the suit. After the adoption of the plaintiff he alienated other properties in satisfaction of debts previously incurred by him. This suit was brought to recover a half-share in all the properties.

The trial Court held that the alienation in favour of defendant 2, which was prior to the adoption, was valid and binding on the plaintiff. The alienations to defendants 3 and 4 were subsequent to plaintiff's adoption but they also were held valid because they were made to satisfy a mortgage which was prior to it. The alienation in favour of defendant 5 was held binding as it arose from a debt contracted prior to the adoption and that in favour of defendant 6 was upheld because it was held to be in respect of a debt incurred for the family business. On the other hand, the alienation in favour of defendant 8, which was prior to the adoption of plaintiff, was held not binding, the learned trial Judge apparently taking the view that the transaction was not intended to take effect as a gift. The alienation to defendant 9 was prior to the adoption and held binding. The alienation to defendant 11 was subsequent to the adoption but nevertheless held binding by the trial Court for reasons similar to those on which the decision in defendant 5's favour was based.

Plaintiff in his appeal, First Appeal No. 222, has challenged only the findings in respect of the alienations to defendants 5, 6 and 11. Defendant 8 in her appeal, First Appeal No. 149, has challenged the finding that the alienation to her does not bind the plaintiff. The case raises some novel and difficult questions of Hindu law. The position could not have arisen prior to the decision of the Privy Council in 60 I A 25,[1] because according to the view of the law accepted before that case, the adoption of the plaintiff would not have been valid. This case therefore falls to be decided mainly on first principles. It is well settled that a sole surviving coparcener is entitled to dispose of the coparcenary property as if it were his separate property. He may sell or mortgage the property without legal necessity or he may make a gift of it. If a son is subsequently born to him or adopted by him, the alienation, whether it be by way of sale, mortgage or gift, will nevertheless stand, for a son cannot object to alienations made by his father before he was born or begotten. The alienations which took place prior to the plaintiff's adoption are not now challenged in the appeal. But it is contended on plaintiff's behalf that on his adoption he obtained a coparcenary interest in all the properties. Defendant 1 had no longer an unfettered right to deal with them and he became simply an individual coparcener and could not alienate more than his own share. It is further argued that on the assumption that he could be regarded as manager of the family after plaintiff's adoption, the alienees are bound to prove necessity for the alienations, or at least that they made a proper inquiry as to the existence of necessity and that no such necessity or inquiry has been proved in the present case.

Mr. Manerikar, who appeared for the alienees, defendants 5 and 11, put his argument in this form. He said that although defendant 1 was the sole surviving coparcener, the joint family was not extinct and the property must be regarded as being all the time coparcenary property. After the plaintiff's adoption, according to him, defendant 1 became automatically the manager of the family; and apart from that he contended that the power to alienate possessed by the sole surviving coparcener includes the power to incur debts which will bind the estate. As regards the first proposition, the property was coparcenary property before the plaintiff's adoption in the sense that defendant 1's interest in it was liable to be diminished by the adoption of a son by him or by Golappa's widow. But that does not carry us very far. As to the second proposition, defendant 1 was not necessarily the manager of the family. That must depend on the circumstances of the case; and of course the manager can only alienate for family purposes. Mr. Manerikar's third proposition, if it means that any debts incurred will bind the estate, is in my opinion not sound. As the property was in a sense coparcenary property, it is probably true to say that debts contracted for necessary purposes and for the benefit of the family would bind the estate. But the fact that the sole surviving coparcener can alienate the properties at a time when he is solely entitled

1. Bhimabai v. Gurunathgouda Khandeppagouda, (1933) 20 A I R P C 1=141 I C 9=60 I A 25=57 Bom 157 (P C).

can hardly justify the conclusion that he can alienate them when he has ceased to be solely entitled in satisfaction of his private debts. It seems to be opposed not only to Hindu law but to all principles of law and equity that a man should be able to sell what does not belong to him in satisfaction of obligations incurred by himself alone for his own purposes.

Mr. Jathar who appeared for the alienee, defendant 6, urged that in view of the evidence as to the state of the family it may be assumed that the debts were incurred for family purposes. That aspect of the case I will deal with separately. His further argument was that it is not necessary to prove that the debts were of that kind. When the plaintiff came into the family by adoption, he became entitled to his share of the assets but also became liable for his share of the liabilities of the family. If there is a debt which is binding on the estate represented by defendant 1, it is not necessary to prove legal necessity, and it was even contended that under the circumstances of this case defendant 1's personal debts, for whatever purpose contracted provided they were not immoral or illegal, are binding on the family. Mr. Jathar said in fact that there is no basis for any distinction between personal debts and individual debts in the case of a sole surviving coparcener and that a business started by a sole surviving coparcener must be regarded as a family business in which a subsequent adoptee becomes a partner.

I find myself unable to accept these arguments. The proposition that an adopted son must take his share of the liabilities of the family is sound, but it begs the question. It is not correct to say that plaintiff in a case like this would necessarily become entitled to the assets of defendant 1. Any coparcener may have separate acquisitions, a separate business and private debts. The position of a sole surviving coparcener is the same in that respect. On this particular point there happens to be a direct authority in 50 Mad 582.[2] That was a case where a Hindu, who had no coparceners, built a house out of his self-acquisitions on an ancestral site of little value. Subsequently, he adopted a son with whom he lived in the house. A creditor of the son claimed a share in the house, but it was held that the father was solely entitled to the superstructure and to a half of the site and the son's creditor was entitled to attach and sell the son's half share only in the site and not the superstructure. Defendant 1 in this case had a ginning factory. If that business had prospered, the plaintiff, it appears, could not have claimed any share. That being so, there is no reason why he should be subject to all the liabilities incurred by defendant 1, for instance liabilities arising out of a new business. There is no analogy with the case of a son and no question here of any pious obligation on plaintiff's part to pay the debts of defendant 1.

There is no reason that I can see why the case should differ from the ordinary one where there are several coparceners. It is obvious that if defendant 1 had had another brother and the two of them had conducted a private business, having nothing to do with the family property, the after adopted son of a deceased coparcener would not have been liable. I can see no principle on which a case like the present can be decided, except this, that when a sole surviving coparcener contracts debts but does not alienate the family property to pay them or create any charge on the property in respect of them, the question whether the debts are binding on a coparcener who subsequently comes into the family (he not being a son of the sole surviving coparcener and not therefore under a pious obligation to pay them) must depend simply on whether they would have bound him if he had been a member of the family when they were contracted. That is to say, when an alienation takes place after the family has once again become a coparcenary in the true sense, legal necessity or family benefit or bona fide inquiry into these matters must be proved in the ordinary way, and in the absence of such proof the new coparcener's share will not be bound.

In the case of the alienations to defendant 11, a point is made of the fact that a decree was obtained against defendant 1 after the date of plaintiff's adoption. Defendant 1 borrowed Rupees 700 from one Virappa on a promissory note in 1927. After the adoption Virappa sued defendant 1 and got a decree which was assigned to defendant 11. One of the properties claimed in the present suit was attached and ultimately has been sold by auction and purchased by defendant 11. It has been argued that the decree against defendant 1 binds the plaintiff and that therefore the pur-

2. Periakaruppan Chetty v. Arunachalam Chetty, (1927) 14 A I R Mad 676=102 I C 290=50 Mad 582=52 M L J 571.

chase by defendant 11 also binds him. But why should this be so? No doubt there may be cases [as for instance 38 I A 45,[3] 41 I A 216[4] and 54 I A 122[5]] where the manager represents the whole family in litigation and a decree against him binds the whole family even though he has not been expressly sued as a manager. But whether the manager can properly be said to represent the family depends on the circumstances of the case, and when, as here, it is a matter of dispute both whether defendant 1 was in any real sense the manager of the family and whether the transactions which led to the litigation had anything to do with the family at all, I do not see how it can possibly be held that the decree against defendant 1 concludes the matter against the plaintiff. He was an adult, about twenty-four, at the time of the adoption. He says he never lived with defendant 1 and there is no evidence that he did, and no evidence of any relations between him and defendant 1 from which his consent to the decree against the latter could possibly be inferred. In my view the decree and the court sale are binding on the plaintiff if the debt of defendant 1 is binding on him but not otherwise.

In the case of all three alienations therefore the question is whether they can be justified on the ground of legal necessity or benefit to the family or on the ground that proper inquiry was made by the alienees. Before dealing with the particular alienations, I may refer briefly to the evidence, such as it is, as to the position of the family and the nature of defendant 1's activities. Plaintiff, who is not of course a disinterested witness, says that defendant 1 had an income of Rs. 4000 or Rs. 5000 a year, was not leading a good life, used to keep prostitutes and started a ginning factory and a dramatic company. The ginning factory was not a big concern; it resulted in losses, and latterly defendant 1 had a flour mill from which he maintained himself. The plaintiff's father Ningappa says that defendant 1 used to keep women and wasted his money. He started a "drama" and also had a ginning factory. This witness obviously knows very little about the matter. Plaintiff's adoptive mother Iravva merely says that defendant 1 had a ginning factory but did not trade in cotton otherwise. These are the plaintiff's witnesses and they are not worth very much. But the burden of proof, as I take it, is on the alienees, and it is noteworthy that it does not seem to have been even suggested to these witnesses that the ginning factory was a family business or that the liabilities incurred by defendant 1 had anything to do with the family needs.

Defendant 2 in his evidence says that defendant 1 sold his property to pay off debts incurred through losses in the cotton trade, ginning factory and home farm. But he has admitted that he does not know to whom defendant 1 actually owed the debts or how the money which defendant 1 received from him was utilized. The evidence of defendants 3 and 4, witness Premchand Marwari and witness Basappa, proves that defendant 1 had mortgaged some of his lands for Rs. 10,000 and also borrowed money from defendant 4 and that he paid off these debts by selling lands to defendants 3 and 4. The mortgage took place before plaintiff's adoption and these alienations are admittedly binding on him. This evidence is relied upon as showing indirectly that defendant 1 was in embarrassed circumstances and therefore under the necessity of borrowing even for the needs of the joint family. But no such conclusion is justified by what the witnesses say. Defendant 3 merely says that defendant 1 had a big business and many debts. Premchand, from whose firm Rs. 10,000 were borrowed, apparently knows nothing and at any rate says nothing about the purpose of the loan. Defendant 4 says vaguely that defendant 1 borrowed from him for household difficulties and that he had a home farm and trade and a ginning factory. Basappa says that defendant 1's income was Rs. 3000 or Rs. 4000, that there was no debt in his father's time and that defendant 1 incurred debts owing to losses in the home farm and trade and ginning factory. It appears however that he has no personal knowledge of these matters and he does not know if there was any trade in the time of defendant 1's father. It would be impossible to hold on this evidence either that there was any family business — the ginning factory and the cotton trade appear to have been private speculations of defendant 1 himself — or

3. Kishen Parshad v. Har Narain Singh, (1911) 33 All 272 = 9 I C 739=38 I A 45=8 A L J 256 (P C).
4. Sheo Shankar Ram v. Jaddo Kunwar, (1914) 1 A I R P C 136=24 I C 504=41 I A 216=36 All 383 (P C).
5. Ningangowda v. Bansangowda, (1927) 14 A I R P C 56 = 101 I C 44 = 54 I A 122=51 Bom 450 (P C).

that apart from business losses and possible extravagance there would have been any necessity to incur debts for the purposes of a joint family consisting only of defendant 1 and his wife and two other women.

We may look now at the facts connected with the three alienations which are in dispute. Defendant 1 borrowed Rs. 4600 from one Vaidya in June 1927 on a promissory note. In June 1930, Vaidya filed a suit and got some property attached. Defendant 1 then mortgaged some of his land to defendant 5 for Rs. 2500 and paid off Vaidya. But he could not repay defendant 5 and in January 1931, he sold to him one of the suit lands for Rs. 5000, of which Rs. 2200 were in cash. Vaidya's son, Gurunath, has been examined. He proves, the debt and the satisfaction of it and that is all. The plaint in Vaidya's suit, Ex. 172, says nothing about the purpose of the loan. In the sale deed to defendant 5, Ex. 169, the only relevant recital is that the sum of Rs. 2200 in cash was taken "to pay off debts of others." Defendant 5 merely says that defendant 1 wanted the money which he lent on mortgage to pay off Vaidya, that he pressed defendant 1 for the payment of the mortgage debt and that defendant 1 wanted Rs. 2200 for household difficulties, the nature of which he does not know. He admits that he did not inquire how many lands defendant 1 had or what his income was, and it does not appear that he made any inquiries at all. The Judge says it was quite prudent on the part of defendant 1 to satisfy Vaidya's debt by borrowing money elsewhere and that the suit sale to defendant 5 was necessary and binding on the plaintiff. These transactions may or may not have been prudent and necessary from defendant 1's point of view. He had got himself into such difficulties that he may very probably have seen no alternative. But they cannot be said to be binding on the plaintiff except on what seems to me the untenable hypothesis that any debts whatever contracted by defendant 1 would be binding upon him.

The sale deed to defendant 6, dated 15th February 1930, purported to be for a consideration of Rs. 10,000. It recited that defendant 1 owed Rs. 5200 to Virbhadrayya Shivappa and Rs. 2800 to Virbhadrappa Kasyappa and that Rs. 2000 were taken in cash for petty debts. Defendant 6's son who has been examined deposes that the two creditors were paid off and produces a receipt signed by one of them. The Judge says that the debts were incurred for articles required for running the ginning factory. I can see no evidence of this. Defendant 6's son does not say so, nor is there any recital to that effect either in the sale deed or the receipt. Moreover, there is no evidence that the ginning factory was a family business. I have already mentioned the circumstances which led to the alienation to defendant 11 and expressed the opinion that the decree in execution of which defendant 11 purchased is binding on plaintiff if and only if the original debt of Virappa was binding upon him. There is no evidence whatever as to the purpose for which this money was borrowed by defendant 1. The only reason given by the trial Judge for holding this alienation binding on the plaintiffs is that the debt was prior to the adoption.

Applying the principle which seems to me to govern the case, viz., that the alienations in favour of defendants 5, 6 and 11 affect the plaintiff's interest in the properties only if the debts to satisfy which they were made would have been binding upon him if he had been a member of the family at the time when they were contracted, I think the only possible conclusion is that his undivided half share in the property is not affected by any of them. There is no evidence to justify the conclusion that the debts in question were incurred for family necessity or family benefit or that either the persons lending the money or the alienees made any inquiry in that connexion. I hold therefore that plaintiff succeeds in his appeal as against defendants 5, 6 and 11.

There was a subsidiary point raised as to costs. Costs have been awarded to each successful defendant on the aggregate value of all the properties. It is argued that they should have been calculated according to the interest of each defendant in the properties. But on this point 27 Bom L R 692[6] is against the appellant, and I think the trial Court is right. Then as to the appeal by defendant 8, defendant 1 by a registered deed of gift dated 17th August 1929 transferred two fields and two houses to defendant 8, his second wife. The deed recites that it was in consequence of an agreement made at the time of the marriage. As this alienation was prior to the adoption, it is prima facie valid and binding on the plaintiff. But the trial Judge apparently doubted

6. Laxman v. Saraswati, (1925) 12 A I R Bom 432=89 I C 211=27 Bom L R 692.

whether there was any intention to make a gift at all, and learned counsel for the plaintiff, who naturally supports this view, argues that the case is governed by S. 81, Trusts Act. But it is difficult to see what there is in the attendant circumstances which is inconsistent with an intention on defendant 1's part to dispose of the beneficial interest in these properties. It appears that defendant 8 got possession of the lands which were duly transferred to her name in the Record of Rights. The plaint itself recites that they are in her possession. There has been no visible change in the possession of the houses, but as defendant 8 is living with her husband that is only to be expected. There is nothing in the pleadings or the evidence to support the hypothesis that this was a benami transaction, and Ill. (d) to S. 81, Trusts Act, is against the appellant's argument. I think defendant 8's appeal also must succeed.

The result is that both appeals will be allowed. The plaintiff will get his costs in proportion to the claim which has been allowed in both Courts from defendants 5, 6 and 11 and will pay the costs of defendants 2, 3, 4 and 9 in both Courts, one set for defendants 2, 3 and 4 and one set for defendant 9. Defendant 8 will get her costs throughout. The decretal order of the trial Court will be modified by substituting the words "defendants 2, 3, 4, 8 and 9" for the words "defendants 2, 3, 4, 5, 6, 9 and 11" in the first sentence thereof. The inquiry as to mesne profits directed by the trial Court will be in respect of mesne profits from the date of suit till recovery of possession or three years from the date of this decree, whichever event first occurs.

S.G./R.K. *Appeals allowed.*

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WASSOODEW AND SEN JJ.

Kusum Krishnaji Panse and others — *Plaintiffs* — Appellants.

v.

Krishnaji Anant Panse—Defendant — Respondent.

First Appeal No. 152 of 1936, Decided on 10th November 1938, from decision of First Class Sub-Judge, Satara, in Suit No. 1039 of 1934.

(a) Hindu Law — Joint family — Manager— He is protected in incurring expenses on marriages of daughters of male members *(Obiter)*.

Ordinarily the expenses of marriages of daughters of male members of the family are provided out of the joint family funds and the manager is protected in incurring expenses on that account : *11 Bom 605, Rel. on.* [P 274 C 1, 2]

(b) Hindu Law—Maintenance and marriage — Obligation of father to maintain and marry his daughters — Nature explained — Daughters taken away from care and custody of father against his wishes — Claim of daughters for maintenance and marriage expenses cannot be enforced against person or property of father whether inherited or self-acquired.

It is the natural and legal duty of the father to maintain his unmarried daughters independently of the possession of any property, and after his death the daughter becomes entitled to be maintained out of his estate in the hands of his heirs. That right extends to the joint family property in the hands of the surviving coparceners after the father's death. In regard to marriage a father is bound in the discharge of his moral duty to marry his daughter, and that obligation is independent of the possession of any property. The right of the daughter to claim provision for marriage expenses can be enforced against the father's heirs in possession of his estate and against the joint family property in the hands of the surviving co-parceners. But during the father's lifetime a daughter cannot succeed in securing provision for her marriage expenses from the father either out of his personal property or the ancestral property in his sole possession. The obligation which the Hindu law imposes on the father to maintain and marry his daughter must exist only where the reciprocal duty is observed by the daughter, that is, when she submits to the care and custody of the father and obeys him in all respects. So long as it is not demonstrated that the father is in some way incompetent to maintain and look after the interests of his children a Court of law cannot enforce the claim of a refractory daughter against the father either by executing its decree against his person or property whether inherited or self-acquired. Nor can it be said that a Hindu father, notwithstanding the latter's competence to take care of the daughter and superintend her education, can be compelled to make provision in invitum for her maintenance even if she is kept out of his protection and custody. [P 275 C 1 ; P 276 C 1, 2]

(c) Costs — Suit by next friend — He can be directed to bear personally costs both of minor plaintiff and defendant if suit is not for benefit of minor — Appeal by minor against order of costs — Next friend need not file separate appeal.

The Court has power to direct the next friend to bear the costs of the suit personally of both the minor plaintiff and the defendant if it finds that the suit is not for the benefit of the minors : *11 Cal 213, Rel. on.* [P 276 C 2]

Where the minors themselves have made a grievance in their appeal memorandum against the order of costs it is not necessary that the next friend in such cases should file a separate appeal against costs. Moreover, under the provisions of O. 41, R. 33, Civil P. C., the powers of the Appellate Court are wide enough to permit of interference with the order passed in regard to costs. [P 276 C 2]

L. P. Pendse — *for Appellants.*

K. N. Dharap — *for Respondent.*

Wassoodew J.—This is an appeal from the decree of the First Class Subordinate