
UNRESTRICTED ALIENATION OF COPARCENARY PROPERTY BY KARTA IN MITAKSHARA LAW

Dr. Pooja Agrawal, Mangalayatan University, Jabalpur

Mitakshara School of Law:

The concept of Coparcenary Property in Hindu Law is governed by two major Schools of law: Mitakshara and Dayabhaga School.¹ As the title suggests, this paper focusses only on the Mitakshara School. The reason for this is that Dayabhaga School and its norms are not widely practised and therefore are not of as great an interest as Mitakshara School and its norms are.

Hindu Coparcenary:

Under Mitakshara Coparcenary norms, rights in the joint Hindu family property are acquired by a coparcener by birth. The right to property passes by survivorship to the other members of the family. A Hindu coparcenary is a much narrower body than a Hindu Joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property, these being sons, grandsons and great-grandsons of the holder of the joint property for the time being.² However, after the passing of the Hindu Succession (Amendment) Act of 2005, this coparcenary has been expanded to include the daughter of a coparcener as a coparcener with rights equal to those of her male counterparts.³

The estate of every Hindu family is presumed to be joint. However, this presumption of jointness is stronger in case of a joint family consisting of a father and his children or brothers and sisters together, than in the case of cousins or distant relatives, etc.⁴ A Hindu joint family must have joint property to form a coparcenary.

Alienation:

Alienation includes any disposal by the father, karta, coparcener or the sole surviving

¹ Sir Dinshah Fardunji Mulla, Satyajeet A. Desai (ed.), "Hindu Law", 21st ed., page 57.

² Narendranath v Commissioner of Wealth tax, AIR 1970 SC 14.

³ Hindu Succession (Amendment) Act, 2005, Section 3.

⁴ Indranarayan v Rupnarayan, AIR 1971 SC 1962; Kanhaiya Lal v Devi Dayal, AIR 1936 Lah 514; See also, S D Mitra, M R Mallick (ed.), "Co-ownership and Partition", 8th ed., page 21.

coparcener of a part or the whole of the joint family property by an act or omission, voluntary or involuntary, intended to take effect at present or in the future.⁵ It can be of two types: Voluntary and Involuntary.⁶ Involuntary alienation means alienation of property in execution proceedings as ordered by a Court or in service of a debt. Alienations made in the form of gifts, through wills, or through the sale or mortgage of property.⁷

Alienation, if it were an unchecked activity, would put too much power into the hands of one member of the family, and that too with respect to property which he is not the sole owner of. Even if the person in question is the oldest and wisest person of the family, there is no guarantee that one person can always get all the decisions right, or even that all the decisions are taken for the interest of the whole coparcenary and not an individual. Thus the ancient texts imposed several conditions upon this power, which we shall learn about presently. With so many forms and types of transactions that a Hindu joint family can enter into, and the various different routes the joint family's future may take, alienation makes for a very interesting study. The various forms which the power of alienation can take and which members of a joint Hindu family covers in a blanket manner all of the intricacies of alienation that one needs to understand. Limitations of the power of Alienation are but a corollary to the meaning and extent of the power itself and hence did not merit a separate question or even separate studies.

Karta's powers of Alienation

The joint nature of Hindu family property and the karta's power to manage this property are generally recognized concepts. Their way of life, with all their religious concepts and their beliefs, is the reason for these concepts and the powers vested in the senior member of the family. As such, the powers of alienation vested in the karta are based on the same basic rules as in the ancient texts.⁸

The law regarding powers of the karta or manager to alienate joint family property has been held to be analogous to that of a manager of an infant heir, and their Lordships in the landmark judgment of *Hunoomanpersaud Panday v Mussumat Babooee*⁹ discussed the extent and nature of the powers of alienation of a manager. In this case the alienation made by a widow for the

⁵Hari Singh Gour, "The Hindu Code", 6th ed., page 586.

⁶Dr. Paras Diwan, "On Hindu Law", 2nd ed. 2007, page 291.

⁷Ibid.

⁸Sir Dinshah Fardunji Mulla, Satyajeet A. Desai (ed.), "Hindu Law", 21st ed., page 369.

⁹*Hunoomanpersaud Panday v Mussumat Babooee* Munraj Koonweree, (1856) 6 MIA 393.

interest of her minor son was challenged. While the instant case was that of a mortgage, their Lordships made it clear that the same principles would be applicable even in the case of a sale or gift. Three conditions under which alienation would be valid were stated. They are:

- 1) In the case of a legal necessity, corresponding to the ancient condition of *Apatkale*;
- 2) For benefit of the estate, similar to the concept of *Kutumbharthe*; and,
- 3) For religious purposes, i.e. *Dharmarthe*.

The Privy Council in its decision laid down principles which are still relevant in deciding cases of invalid alienation:

“The power of the manager for an infant heir to charge an estate not his own is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in the case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded.... Their lordships think that the lender is bound to inquire into the necessities for the loan and to satisfy himself as well as he can with reference to the parties with whom he is dealing that the manager is acting in a particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge and they do not think that, under such circumstances, he is bound to see to the application of the money.”¹⁰

The validity of the law as explained in the *Hunoomanpersaud* case¹¹ has been confirmed by the Supreme Court in the *Sunil Kumar v Ram Prakash*¹² case in 1988 and more recently in the *Subodhkumar v Namdeo*¹³ case in 2007.

¹⁰Ibid, para. 26.

¹¹Ibid.

¹²Sunil Kumar and Anr.v Ram Prakash and Ors., AIR 1988 SC 576.

¹³Subhodkumar and Ors.vBhagwantNamdeoraoMehetre and Ors., AIR 2007 SC 1324.

The above reproduced excerpt from the *Hunoomanpersaud* case explains the boundaries of the karta's powers. Within these bounds, he can alienate the joint family property even without the consent of the other coparceners. This is because the karta's power to alienate in exceptional circumstances as stated above, while open to challenge before a court on the ground that the circumstances do not satisfy the requirement to justify an alienation, cannot be taken away by refusal of permission by any other coparcener.¹⁴ This is because to grant such a power of refusal to the coparceners would cripple the karta's powers and in situations of emergency it will become impossible for him to do what is best for the family as a whole if one or more of the coparceners decide to get in his way. The coparceners will always have the recourse of challenging the alienation in a court and thus there is no breach of their rights.

Thus the karta or manager has the power to dispose of coparcenary property in situations of distress (under debt, court order etc.), for the purpose of benefit of the family (maintenance, education and marriages of members etc.) and for religious purposes (performing *Shraddhas* and the like); all of which fall under *Apatkale*, *Kutumbarthe* and *Dharmarthe* respectively.¹⁵

A brief discussion on each of these follows:

Benefit of the Estate:

The courts have not given a set definition of the concept of benefit of estate, which affords it modifiability and expandability to include any act which might benefit the family.

The first exposition of the expression "for the benefit of the estate" was found in the case of *Palaniappa v Deivasikamony*,¹⁶ where the judges observed, "No indication is to be found in any of them (ancient texts) as to what is, in this connection, the precise nature of things to be included under the descriptions 'benefit of the estate' The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundations, these and such like things would obviously be benefits."

¹⁴Sunil Kumar and Anr.v Ram Prakash and Ors., AIR 1988 SC 576, para. 4; Jujhar Singh v Giani Talok Singh, AIR 1987 P&H 34.

¹⁵Mst. Kasturi Adabasia and Ors.v Bishnu Dandasena and Ors., 70 (1990) CLT 335, 1990 (2) OLR 561.

¹⁶(1917) 44 IA 147.

The Supreme Court later added its own observation as to what constitutes benefit, in the case of *Balmukund v KamlaWati*,¹⁷ in the following words:

*“for the transaction to be regarded as for the benefit of the family it need not be of a defensive character. In each case the court must be satisfied from the material before it that it was in fact such as conferred or was reasonably expected to confer benefit on the family at the time it was entered into.”*¹⁸

Where a land yielding no profit was sold and a different piece of land was purchased,¹⁹ and where property was alienated to raise money for renovations to the hotel which was the family business,²⁰ the transactions were held to be for the benefit of the estate.

Legal Necessity:

Similar to “benefit of estate”, the courts have refrained from giving a set definition to the concept of legal necessity so as not to limit it to a watertight compartment.²¹ It has been recognized by the Supreme Court in *K.C. Kapoor v Radhika Devi*²², that there is no reason to put a restricted interpretation on the word ‘necessity’.²³

The shastric conditions which the concept of legal necessity i.e. *Apatkale* essentially covered were situations of distress and emergency like floods, famines, fire, war etc. However, it has been recognized under modern law that necessity may extend beyond that due to modern conditions of living and thus it is no longer to be understood as what is absolutely indispensable but would be regarded as proper and reasonable.²⁴

Some examples of situations which courts have held to be covered by legal necessity are:

- a. Payment of government revenue and debts payable out of family property;
- b. Maintenance of coparceners and members of their families;

¹⁷AIR 1964 SC 1385.

¹⁸Ibid, para 11.

¹⁹AIR 1979 All. 65.

²⁰AIR 1978 AP 37.

²¹Dr. Paras Diwan, “Modern Hindu Law”, 15th ed., page 302.

²²K.C. Kapoor v Smt. Radhika Devi (Dead) by Lrs. and Ors., AIR 1981 SC 2128.

²³Ibid, para 14.

²⁴Dr. Paras Diwan, “Modern Hindu Law”, 15th ed., page 302.

- c. Marriage expenses of male coparceners and their daughters; and,
- d. Performance of necessary funeral or family ceremonies;
- e. Costs of necessary litigation in recovering or preserving the estate;
- f. Costs of defending coparceners against litigation.²⁵

In addition to the above, sale for fulfilling tax obligations incurred by the family business²⁶ and sale of property to migrate to a new place for better living²⁷ have also been held as falling under legal necessity.

Indispensable Duties or Religious Duties:

The third ground upon which the authority of the manager or karta to make an alienation of family property rests is where the indispensable duties such as the obsequies of father and the like require it. “And the like” may include rituals and religious duties like *shraddha*, *upanayana* and performance of necessary *samskaras*. Performance of marriage of family members is both an indispensable duty as well as a legal necessity.²⁸

In the case of *GangiReddi v TammiReddi*,²⁹ the Bombay High Court held that “a dedication of a portion of the family property for the purpose of a religious charity may, according to Hindu law, be validly made without any instrument in writing, even if it be an appropriation of some landed property, and the act of the karta of the family would be valid if assented to in any way, however informally, by the other members of the family. Such an appropriation may even (if the property allotted be small as compared with the total means of the family) be made by the karta without consent.”³⁰ “But the appropriation or alienation must be made by the manager by an act inter vivos, and must not be an alienation de future by will.”³¹

In the case *Lakshmi Narasamba v T. Sundaramma*,³² wherein it was held that it is an

²⁵Sir Dinshah Fardunji Mulla, Satyajeet A. Desai (ed.), “Hindu Law”, 21st ed., page 378; See also, *Dukhdayibai & Ors. v Matibai & Ors.*, 2012 (4) CGBCLJ 262.

²⁶*Mukesh Kumar v Harbans Waraiah*, (Col), AIR 2000 SC 172.

²⁷*Vanimissati v Jayavarapu*, AIR 1995 AP 105.

²⁸Dr. Paras Diwan, “On Hindu Law”, 2nd ed. 2007, page 272.

²⁹*GangiReddi v TammiReddi*, 1927 (29) BOMLR 856.

³⁰*Ibid*, para 12.

³¹*Ibid*, para 13.

³²*T.A. Lakshmi Narasamba v T. Sundaramma and Ors.*, AIR 1981 AP 88.

indispensable duty to maintain family members, including daughter in law, out of the coparcenary property, and that in case the said property is transferred, even if to a stranger, the duty passes along with the property.³³

The lack of case law since 1980, as well the general paucity of case law on this subject from even before then, suggests a decline in the application of this principle. Some reasons for this may be the general decline in joint family systems, the transition of various duties from this sphere to the sphere of legal necessity, as may be seen in case of the obligation to maintain family members and due to the decline in religious charity in general.

Alienations by the Father

The powers of alienation vested in the father are, in many respects, greater than those of the karta. Apart from the powers of a karta, which a father generally enjoys because of being the eldest male of the family, fathers under Mitakshara law have the power to alienate property in the form of a gift, or in payment of antecedent debts, not incurred for immoral purposes.³⁴

Gifts of love and affection:

The Supreme Court in the recent case of *Baljinder Singh v Rattan Singh*,³⁵ discussed in some detail the law as applicable in the context of gifts of love and affection. While a gift by a coparcener of his undivided interest in coparcenary property is void unless made with the consent of the other coparceners, the father's power to make a gift from ancestral property, out of love and affection, as long as it is within reasonable limits, has been fully recognized.³⁶ If the gift is not within reasonable limits it may be declared void by a competent court.³⁷ Such a gift by a father has also been held as being within the meaning of "pious purposes" by the Supreme Court.³⁸

Thus a gift made by a father would be valid, however, a gift made through a will was held invalid in *Mahadeo v Ganeshram*³⁹ as a coparcener, even the karta, loses his or her claim on the

³³Ibid, para 24.

³⁴Sir Dinshah Fardunji Mulla, Satyajeet A. Desai (ed.), "Hindu Law", 21st ed., page 401.

³⁵Baljinder Singh v Rattan Singh, (2008) 16 SCC 785; 2008 (6) ALLMR (SC) 413.

³⁶Ibid, paras 18-20.

³⁷Paramma v Chikarangappa, AIR 1989 Kant 63.

³⁸Thimmaiah and Ors. v Ningamma and Anr., AIR 2000 SC 3529a, R. Kuppayee v Raja Gounder, AIR 2004 SC 1284, para 16.

³⁹Mahadeo and Anr. v Ganeshram and Ors., AIR 1928 Nag 308.

joint family estate on their death.

Antecedent Debt:

The father of a joint Hindu family may sell or mortgage the joint family property including the son's interest therein to discharge a debt contracted by him for his own personal benefit, and such alienation binds the sons, provided:

- a) The debt was antecedent to the alienation;
- b) It was not incurred for an immoral purpose.⁴⁰

This right was upheld in *Sunil Kumar v Ram Prakash*⁴¹ case, where it was discussed in some detail. In fact, the Rajasthan High Court, in *Digvijay Singh v Sant Ram*,⁴² which was decided in 2014 itself, recognized the power of the karta or father to dispose ancestral property in payment of antecedent debts.⁴³

Coparcener's right of alienation

Under the shastric law no coparcener could dispose off his share without the express consent of the other coparceners. "Whether kinsmen are joint or separate they are equal as regards immovable property. Since a single one of them has no power in any case to make a gift, sale or mortgage of it."⁴⁴

The law has shifted quite a bit from the archaic position. The Supreme Court in *ThammaVenkataSubbamma v ThammaRattamma*⁴⁵ discussed in detail the position of the law with regards to alienation of property by way of gifts. It stated that gifts made by any one coparcener of joint family property, even if only their own undivided share, was void until and unless it was with the consent of the other coparceners. It also stated that the reason for this is

⁴⁰Sir Dinshah Fardunji Mulla, Satyajeet A. Desai (ed.), "Hindu Law", 21st ed., page 467.

⁴¹Sunil Kumar and Anr. v Ram Prakash and Ors., AIR 1988 SC 576, para 27.

⁴²Digvijay Singh & Ors. v Sant Ram & Ors., 2014 (1) CDR 201 (Raj).

⁴³Ibid, para 43.

⁴⁴Hari Singh Gour, "The Hindu Code", 6th ed. 1996, page 595.

⁴⁵ThammaVenkataSubbamma (dead) by LRs. v ThammaRattamma and Ors., AIR 1987 SC 1775.

to prevent breakdown of joint families.⁴⁶ This ratio was recently applied in *R.Kuppayee v Raja Gounder*,⁴⁷ *Baljinder Singh v Rattan Singh*⁴⁸ and in *K.C. Laxmana v K.C. Chandrappa*.⁴⁹

The law with regards to sale of undivided interest in coparcenary property by a coparcener is divergent depending on which state one refers to. In Bombay, Madras and Madhya Pradesh, a coparcener need not take consent from the other coparceners to sell his undivided interest in coparcenary property.⁵⁰ In other states, like West Bengal, Uttar Pradesh, Bihar and Punjab, alienations, even if made for consideration, are void if consent of the other coparceners was not obtained.⁵¹

With regards to alienation in favour of any of the coparceners, it has been held that such an alienation will take effect not as an alienation but as a renunciation of property and will not work only in favour of the desired alienee coparcener but each and every coparcener.⁵²

Under the codified law, Section 30 of the Hindu Succession Act, 1956, a coparcener may dispose off his share in the family property by will. This has also been upheld by the Supreme Court.⁵³

Alienation by sole surviving coparcener:

The ownership of coparcenary property is with the coparceners, who can, by collective consent, choose to dispose off the whole of the coparcenary property in a manner of their choosing, subject to maintenance rights.⁵⁴ Similarly, a sole surviving coparcener can sell or mortgage the property without legal necessity or even gift it as he likes, only subject to maintenance rights of family members.⁵⁵

⁴⁶Ibid, paras 12-14.

⁴⁷ *R. Kuppayee v Raja Gounder*, AIR 2004 SC 1284, para 16.

⁴⁸ *Baljinder Singh v Rattan Singh*, (2008) 16 SCC 785; 2008 (6) ALLMR (SC) 413.

⁴⁹ *K.C. Laxmana S/o Chinnegowda v K.C. Chandrappa Gowda and Ors.*, AIR 2009 Kant 112.

⁵⁰ *Sir Dinshah Fardunji Mulla*, Satyajeet A. Desai (ed.), "Hindu Law", 21st ed., page 455; *Dr. Poonam Pradhan Saxena*, "Family Law Lectures Family Law II", 3rd ed., page 186.

⁵¹ Ibid.

⁵² *Thamma Venkata Subbamma (dead) by LRs. v Thamma Rattamma and Ors.*, AIR 1987 SC 1775.

⁵³ *R. Kuppayee v Raja Gounder*, AIR 2004 SC 1284, para 16.

⁵⁴ *Sir Dinshah Fardunji Mulla*, Satyajeet A. Desai (ed.), "Hindu Law", 21st ed., page 454; *Dr. Poonam Pradhan Saxena*, "Family Law Lectures Family Law II", 3rd ed., page 184.

⁵⁵ *Ramalingam v Ramalakshmi*, AIR 1958 Mad 228.

Legal Recourse in case of invalid alienation

If the father, karta, coparcener or sole surviving coparcener oversteps their power in making the alienation, it can be set aside by any other coparcener who has an interest in the property, by applying to a competent court for the same.⁵⁶

As had been stated before, it is open to the coparceners to challenge alienations made by the karta or father on the grounds that they do not fulfil any one or more of the prerequisites for a valid alienation even though they cannot in the first instance stop it from taking place.⁵⁷

Only those coparceners who had been conceived at the time of the transaction, i.e. they were in existence, are competent to challenge the alienation. Any coparcener born afterwards is barred from doing the same.⁵⁸ A transaction not for legal necessity, or benefit of estate, or not undertaken with the consent of the other coparceners will be voidable.⁵⁹

The following lines from *Sunil Kumar v Ram Prakash*⁶⁰ case throw light on the rights of coparceners with respect to illegitimate alienations:

“...the law raises no presumption as to the validity of his (karta's) transactions. His acts could be questioned in the Court of law. The other members of the family have a right to have the transaction declared void, if not justified.... If the alienation is found to be unjustified, then it would be declared void. Such alienations would be void except to the extent of manager's share in Madras, Bombay and Central Provinces. The purchaser could get only the manager's share. But in other provinces, the purchaser would not get even that much. The entire alienation would be void. [Mayne's Hindu Law 11th ed. para 396].”⁶¹

Burden of Proof:

The law as laid down in the *Hunoomanpersaud case*⁶² by the Privy Council, whose comments have been reproduced in Chapter II above, clearly places the burden of proof with

⁵⁶ThammaVenkataSubbamma (dead) by LRs. v ThammaRattamma and Ors., AIR 1987 SC 1775, para 11-13.

⁵⁷Sunil Kumar and Anr.v Ram Prakash and Ors., AIR 1988 SC 576, para. 4; Jujhar Singh v GianiTalok Singh, AIR 1987 P&H 34.

⁵⁸Guramma v Mallappa, AIR 1964 SC 510; Sant Ram v Mohinder Singh, AIR 1994 HP 109.

⁵⁹Ibid; See also Thimmaiah and Ors. vNingamma and Anr., AIR 2000 SC 3529a.

⁶⁰Sunil Kumar and Anr.v Ram Prakash and Ors., AIR 1988 SC 576.

⁶¹Ibid, para 24.

⁶²HunoomanpersaudPanday v MussumatBaboocMunrajKoonweree, (1856) 6 MIA 393, para 26.

regards to the necessity for the sale on the alienee. This position has been subsequently reiterated by the Supreme Court⁶³ and other courts as well.⁶⁴

The alienee has a very difficult and heavy burden set upon him by the courts, which renders it very difficult for him to enjoy property which he has bought by paying fair consideration and after probably a lot of difficulties which any purchaser of property faces due to the sheer number of government procedures to follow. He is required to prove the validity of the alienation. He is required to show that there was actual necessity to alienate on the part of the coparcener who alienates the property in question. He is required to prove the fact of his due diligence and responsible enquiry as to the facts justifying the alienation as well as the transferor's ability to transfer the said property to him. He is required to prove the competency of the alienator with respect to the transaction and the time when it took place. He is to show the fact that the necessity of the alienator could not be satisfied by any other means.⁶⁵

As has been laid down by certain decisions, the alienee is not allowed to rely on recitals made in the transfer deed by the alienator.⁶⁶ He has to ascertain the truth of the recitals himself. Moreover, he has to prove his own honest intentions and that he had no role in any mismanagement the alienator may have committed with respect to the joint family estate. He is also required to prove that he paid a fair price for the transfer.

Needless to say, not only is this a heavy burden, it is also a skewed and unfair burden. To ask the alienee to ascertain the facts stated in the transfer deed is to ask him to distrust at first sight the transferor, which is absurd. Also, the law effectively asks of the alienee information which no person can be expected to have on others, unless they enter into a detailed and almost maniacal scrutiny of the other, which might lead to various discomforts and even harassment of both the parties involved.

Why is it that the burden to prove the validity of the sale falls solely on the alienee, when at the time of the sale the alienator has been given the free reign to blatantly mislead the alienee? And how is the transferee expected to enquire into details of necessity of the transfer

⁶³Smt. Rani and Anr. v Smt. Santa BalaDebnath and Ors., AIR 1971 SC 1028 and Gangadharan v JanardhanaMallan and others, AIR 1996 SC 2127.

⁶⁴Sahodra Bai and Ors.vDeshraj Singh and Others, MANU/MP/2347/2013.

⁶⁵Dr.Poonam Pradhan Saxena, "Family Law Lectures Family Law II", 3rd ed., page 181.

⁶⁶Sreeramulu v ThandanaKrishnayya, (1942) 2 Mad LJ 452.

and the application of money by the transferor when he is a third party, and in most cases completely unconnected to the issue?

Finally, the time it would take the alienee to prove or disprove in accordance with the law laid down, the claims of the transferor, is simply unjustifiable, especially considering that the same burden, if placed also or exclusively on the transferor, may be satisfied in but a fraction of the time. Granted, the transferor may have a vested interest and decide to mislead the transferee, but that should still not make the transferee liable for the fault and mischief of the transferee. Moreover, in the absence of an initial burden on the coparceners of the transferee to show why the sale in question should be declared void or voidable, this law is a tool of oppression to be abused by the transferee in collusion with his family members against unsuspecting and innocent third parties.

Alienee's Rights and Remedies

A transferee receiving an undivided share from the coparcener in a joint family property generally steps into the shoes of the transferor and becomes entitled to ask for partition and thus obtain his share in the coparcenary property.⁶⁷ However, he is not entitled to seek possession and enjoyment of the subject matter property along with the other coparceners though earlier cases in high courts recognized instances where he might do so.⁶⁸

The alienee of a specific property or of the undivided interest of a coparcener in such property has on a general partition, an equitable right to have his share in that property assigned to him.⁶⁹ However, there may be cases where it is inequitable or impracticable to do so, and in such cases the alienee is entitled to recover from the alienor, property of an equivalent value out of the properties allotted to the alienor for his share in substitution of the property alienated.⁷⁰

The alienee may also have a right to mesne profits depending on his right to possession. In *SidheshwarMukherjee v. Bhubneshwar Prasad*⁷¹ the Supreme Court has held that the purchaser of the share of a coparcener is entitled to the possession of the property he has

⁶⁷MamidiVenkataSatyanarayanaManikyala Rao v Mandela Narasimhaswami, AIR 1966 SC 470.

⁶⁸JagdishDutt&Anr.vDharam Pal & Ors., AIR 1999 SC 1694.

⁶⁹SethuRamalinga v Veeraswami, AIR 1971 Mad 174.

⁷⁰Padmanabha Pillai v Abraham, AIR 1971 Ker 154.

⁷¹Sidheshwar Mukherjee v Bhubneshwar Prasad Narain Singh and Ors., AIR 1953 SC 487.

purchased with effect from the date when the specific allotment was made in his favour, not from the date when he first purchased an unspecified share in the coparcenary property. The Supreme Court followed its own judgment once again in *K.P. Ramamurthi v. Govindaswami Mudaliar*.⁷²

The alienee also has the right to sue for specific performance, though the performance will only be in a limited sense. In *Kartar Singh v. Harjinder Singh*,⁷³ the Hon'ble Supreme Court held that where the shares are separable and a party enters into an agreement even for sale of share belonging to other co-sharer, a suit for specific performance was maintainable at least for the share of the executor of the agreement, if not for the share of other co-sharers. It was further observed: "As regards the difficulty pointed out by the High Court, namely, that the decree of specific performance cannot be granted since the property will have to be partitioned, we are of the view that this is not a legal difficulty. Whenever a share in the property is sold, the vendee has a right to apply for the partition of the property and get the share demarcated." The same was recently relied upon by the High Court of Patna.⁷⁴

An important legislation to look at with regards to the alienee's rights is the Partition Act, 1893. This act governs situations where an alienee of a jointly owned or coparcenary property files a suit for partition. Section 2 of this act empowers the courts to order a sale of the subject matter property instead of a partition of the same where it feels this may be better, when a party to the suit makes a request before the court to this effect. Section 3 empowers the court to order a valuation of the property and direct its sale, where possible, to any of the coparceners still having an interest in the property, thus allowing the joint family property to stay within the family. Section 4 lays down provisions specifically with regards to the dwelling house of the family, in which a share is owned by a stranger. Subsequent sections deal with the finer points relating to these transactions. The applicability of the Act is not in question as it was recently relied upon by the Supreme Court in *Ram Karan Gupta v J.S. Exim Ltd.*⁷⁵

Another Act which needs to be covered is the Transfer of Property Act, 1882. Section 44 of Transfer of Property Act runs as follows:

⁷²*K.P. Ramamurthi and Ors. v V. Govindaswami Mudaliar and Ors.*, AIR 1982 SC 84.

⁷³*Kartar Singh v. Harjinder Singh*, AIR 1990 SC 854.

⁷⁴*Babu Harendra Prasad Singh v Sudhakar Prasad Singh and Ors.*, MANU/BH/1123/2010.

⁷⁵ *Ram Karan Gupta v J.S. Exim Ltd. and Ors.*, AIR 2013 SC 24.

“Where one of the two or more co-owner of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor’s right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or the common or part enjoyment of the house.”

The section now applies to Hindus by virtue of the Transfer of Property (Amendment) Act, 1929, which omitted the words ‘Hindu or Buddhist’ in the concluding part of Section 2 of the principal Act.

The High Court of Kerala, in the 2009 case *RamanandaMallya v Anasuya Bai*⁷⁶ discussed in detail the concepts of Hindu coparcenary, the powers of the karta, the rights of a purchaser at court auction of a part of joint family estate, etc. wherein it applied Section 44 of the Transfer of Property Act, 1882 to limit the rights of the alienee. It held that even if in the court auction sale the entire right in coparcenary property was purported to be sold, what the auction purchaser could claim is only the right which the judgment-debtor had in that property. If the judgment-debtor had entire right in the property, the auction purchaser would get the entire right in the property. On the other hand, if the judgment-debtor had only a fractional share, the auction purchaser could only claim right over that fractional share and nothing more. The auction purchaser will get only that right which the judgment-debtor had in that property.⁷⁷

While the Section 44 of Transfer of Property Act was not applied in the present case, the rationale of the learned judges is the same as that behind section 44.

Conclusion

After an overview of the concepts of joint family property and Hindu coparcenaries the

⁷⁶ *RamanandaMallya, K. v K. Anasuya Bai and Ors.*,ILR2009(2)Kerala230.

⁷⁷ *Ibid.*

powers of alienation vested in the karta of a Hindu coparcenary, and enumerates the three situations, namely, legal necessity, benefit of the estate and indispensable duties, in which alienation by the karta even without consent from the other coparceners is valid. The usage of indispensable duties as a valid defence for alienation has become extinct in modern times due to the changes in the lifestyle of people.

The powers of alienation of the father, which are in some respects wider than those of the karta are mainly valid in two situations, which are when the father makes a gift of a relatively small portion of the coparcenary property to a blood relative out of love and affection, and when he makes an alienation to settle an antecedent debt, which must not have been taken for an immoral purpose.

The other coparceners' rights of alienation, which are largely dependent on consent of the other coparceners, be it for the purpose of making a sale or a gift. However, recent developments which allow alienations even without the consent of the other coparceners, as by testamentary disposal, have also been covered.

It is clear that a coparcener cannot prevent alienation by the karta, even if unjustified, and can only challenge it subsequently by applying to a competent court. However, this does not mean that the alienation in question is presumed to be valid. In case of a challenge to the alienation made as above, the burden of proof lies on the alienee. There are various stringent requirements to be fulfilled by the alienee to ensure that the alienation is held valid.

While the alienee has no clear right to jointly possess property with the coparceners of a joint Hindu family to which he or she is a stranger, the right to sue for partition has been vested into the alienee to be able to take his share and utilize it as soon as the legal process may allow.

While it is very well that the karta has a right to alienate property in an emergency so as to prevent greater harm to the coparcenary, seeing as how the younger generation tends to be more educated and aware of changes in practices as well as legal recourses that may be beneficial to the family property, it would be advisable to no longer allow a single person to handle the running of the business, as that can lead to circumstances where a wrong decision may not be identified till it is too late, or even, in cases of accidents, illnesses or other indispositions, to a break in the smooth running of the estate. The limitation of not being able

to challenge an alienation made by the karta until after it is done needs to be relooked at in light of the fact that property can change hands very quickly in the present times, and thus by the time an alienation is challenged more than just two parties may become embroiled in a suit.

With regards to the burden of proving the validity of an alienation, it is pertinent to remark that the difficulty and the unfairness of the way the burden is to be discharged. It is felt that there is a need to shift the burden, at least for initial stages of the arguments before the court, onto the party challenging the alienation, so that they make more than just a blanket allegation with regards to the alienation. Moreover, greater and specified liability should fall on the transferor to provide the transferee with all relevant information. Furnishing false information must make the transferor directly liable to the other coparceners instead of punishing a third party for his dishonesty. There is a need to crystallize the law as regards the alienee's rights and perhaps a need to redefine his or her rights with respect to joint possession so as to clarify the position of the law with regards to the same.