(1965) 03 KL CK 0020

High Court Of Kerala

Case No: A.S. 135 of 1960

Leelavathy Amma		APPELLANT
	Vs	
Varghese Mathai		RESPONDENT

Date of Decision: March 9, 1965

Citation: (1965) KLJ 972

Hon'ble Judges: C.A. Vaidialingam, J

Bench: Single Bench

Advocate: G. Viswanatha Iyer and T.N. Subramonia Iyer, for the Appellant; Mathew Muricken for Respondents, for the Respondent

Final Decision: Dismissed

Judgement

C.A. Vaidialingam, J.

In this appeal on behalf of the plaintiffs appellants Mr. T. N. Subramonia lyer learned counsel for the appellants and Mr. G. Viswanatha Iyer learned counsel who continued the arguments of Mr. T. N. Subrarnonia Iyer attacked the judgment and decree of the learned Subordinate Judge, Mavelikara dismissing a claim made for declaration of title and of their being in possession of the properties in O. S. 123/56. The plaintiffs 4, 5, 6 and 7 are the children of one Krishnan Asari and the 8th plaintiff is their mother being the widow of Krishnan Asari. Plaintiffs 1, 2 and 3 are the children of the 6th plaintiff and his wife Parvathi who died in or about 1114 and 9th plaintiff is the son of the 4th plaintiff. All the plaintiffs had a common case that they want a declaration of their title to the suit property to be established and also their claim being in possession of the properties being affirmed.

2. The case of the plaintiffs appears to be more or less one and indivisible namely that the transaction evidenced by Ext. D4 dated 2-3-1104 is devoid of consideration and a decree passed on the basis of such a document Ext. D4 in O. S. 516/1112 Munsiff''s Court, Chengannur is also not binding and valid so far as the plaintiffs are concerned. The further claim was that though the auction purchasers claimed to have obtained delivery of the properties in execution of the decree in O. S. 516/1112,

nevertheless actual possession of the properties has not passed from them and that they have also in any event even on the assumption that the auction purchaser obtained any title on the basis of the decree in the said suit have completed title to the properties by adverse possession.

3. They also raised a contention that the purchase by the first defendant from the court auction purchaser in execution of the decree in O. S. 516/1112 is also not supported by consideration and therefore the first defendant cannot claim any rights on the basis of the purchase evidenced by Ext. Dl.

4. The defence was that the transaction evidenced by Ext. D4 is valid and binding as against the plaintiffs and that the decree obtained in O. S. 516/1112 has also been lawfully and legally obtained by the decree-holders in the said suit as against the plaintiffs and therefore the latter have no right to challenge the same. It was also alleged that in execution of the decree in the said suit the auction-purchaser had obtained actual delivery of the properties as early as 17-7-1115 evidenced by Ext. D2 and ever since has been in continuous possession and enjoyment of the property in his own right and that later on it was purchased by the first plaintiff under Ext. Dl. After the said purchase the first plaintiff also claims to be in possession and enjoyment of the properties. On all these grounds they contested the claim of the plaintiffs either of having title in the suit properties or of their being in possession of the properties notwithstanding the proceedings evidenced by the decree in O. S. 516/1112.

5. At this stage it may be mentioned that some trouble seems to have arisen between the parties according to the plaintiffs when the first defendant attempted to take possession of the properties on the basis of his purchase under Ext. Dl which led to the parties having to figure before the criminal court. The plaintiffs no doubt urged that the criminal court upheld their possession as will be seen from the order of the Magistrate Ext. D. The defendants on the other hand, pointed out that the order of the Magistrate was reversed by the Travancore-Cochin High Court by its judgment Ext. D8 wherein it has been categorically held that the plaintiffs had lost in possession that they had of the property by the delivery in execution of the decree in O. S. 516/1112 as early as 17-7-1115. The plaintiffs also asked for setting aside the order of the Travancore-Cochin High Court Ext. D8 affirming possession as resting with the defendants.

6. The case of all the plaintiffs was a common one that they challenged the transaction evidenced by Ext. D. 4 as having been executed without consideration and not binding on the family and the decree passed upon the said document and the further proceedings in execution of such a decree are not valid and binding on them.

7. It may also be stated that plaintiffs 1 to 3 claim some special rights on the basis of a document styled as Stridanam Kuri, executed by the 6th plaintiff and his father

Krishnan Asari in favour of the brother-in-law of the 6th plaintiff evidenced by Ext. A, dated 28--6--1100.

8. It is now necessary to set out the circumstances under which the decree in O. S. 516 of 1112 came to be passed. Curiously the plaintiffs did not ask for any declaration or relief for setting aside the transaction evidenced by Ext. D4 or for setting aside the decree and the other execution proceedings following the decree in O. S. 516 of 1112. They proceeded on the basis that they are entitled to ignore all these documents as well as proceedings of court and want a declaration of their title and possession to be established by the court.

9. The plaintiffs 4 to 8 executed a chitty hypothecation bond under Ext. D4 dated 2--3--1104. The properties comprised in the said document is of an extent of 1 acre 11 cents. The total consideration for this document is about Rs. 150/-.

10. On this basis of this chitty hypothecation bond a suit was instituted by the mortgagee as O. S. 516 of 1112, Munsiff''s Court, Chengannur. There is no controversy that plaintiffs 4 to 8 were some of the defendants therein. There were also certain other defendants probably who are then members of the plaintiffs'' family.

11. Though it is represented by Mr. T. N. Subramonia Iyer that so far as the 9th plaintiff is concerned going by the age given in the plaint he must have born even on the date of Ext. D4. But nevertheless 9th plaintiff was also not made a party in O. S. 516 of 1112. Ultimately a decree was passed on 9-3-1938 in O. S. 516/1112 a copy of which decree is Ext. B. That decree permitted the realisation of the amounts from the defendants mentioned therein as well as from the properties comprised in the litigation which itself was the subject of mortgage under Ext. D4. The defendants claim to have obtained delivery of the properties through court on 17-7-1115 evidenced by Ext. D2 and it is a claim of the court auction purchaser that after the said delivery was effected in his favour he was enjoying the properties by leasing the same. The first defendant has purchased the property from the court auction purchaser under Ext. Dl on 22-7-1121.

12. Though the Magistrate upheld the claim of the plaintiffs being in possession by his order Ext. B1 that order was set aside in revision by the High Court under Ext. D8. The decision of the High Court is in favour of the defendants being one rejecting the claim of the plaintiff being in possession. It is to get rid of this order a declaration is asked for in the plaint. Ext. A is again dated 28-6-1100 executed by the 6th plaintiff and his father in favour of the brother-in-law of the 6th plaintiff. The special right that is claimed in brief on the basis of Ext. A is that in respect of the Stridanam amount Rs. 115/- that was received by the 6th plaintiff and his father at the time of marriage of one Parvathy with the 6th plaintiff they had executed a charge on the suit properties conferring certain rights on the brother of the wife and the 6th plaintiff on the basis of which plaintiffs 1 to 3 now claim certain rights.

13. The learned Subordinate Judge has considered the question as to whether the plaintiffs are entitled to ask for a declaration regarding their title to the suit properties and also of their being in possession of the properties.

14. So far as title to the properties is concerned, it is the view of the learned Subordinate Judge that the parties are bound by the execution of the document Ext. D4 which was for purposes binding on the family and that one of the executants of the said document Ext. D4 was the 4th plaintiff who was at the material time the manager of the family. The family itself is governed by Hindu law and inasmuch as the document was for purposes binding on the family and inasmuch as the 4th plaintiff the manager of the family though along with others was a party to the decree in O. S. 516/1112 it is the view of the learned Subordinate Judge that the decree obtained in the said suit namely Ext. B is also binding on-the plaintiffs.

15. The learned Judge considers the question as to how far a mortgage transaction evidenced by Ext. D4 as well as a decree based upon it passed in O. S. 516/1112 is binding on plaintiffs 1 to 3 and the 9th plaintiff. So far as these parties are concerned it is the view of the learned Judge that their respective fathers were on the party array and therefore the transaction evidenced by Ext. D4 as well as the decree based upon that Ext. B is valid and binding as against them also.

16. There is no discussion as to what exactly are the rights if any of the plaintiffs 1, 2 and 3 who were alive on the date of the institution of the suit O. S. 516/1112 and as to their not being impleaded as parties in the suit. Nor is there any elaborate consideration as to what exactly is the effect of 9th plaintiff not being stated to be represented by his father as a guardian in either the transaction of mortgage Ext. D4 or in the proceedings connected with the suit O. S. 516/1112.

17. Regarding the claim made on the basis of Ext. A the learned Subordinate Judge is of the view that a charge may have been created in favour of the brother-in-law of the 6th plaintiff but he was not put in possession of the property.

18. The learned Judge no doubt adverts to the fact that the 6th plaintiff and his father have received the Stridanam amount of Rs. 115/- and if plaintiffs 1 to 3 are entitled to get the amount it is open to them to proceed as against the properties of their father or as against the remaining joint family properties. The learned Judge disbelieves the evidence on the side of the plaintiffs and ultimately accepts the claim made by the defendants that actual delivery was taken by the court auction purchaser on 17-7-1115 as is evidenced by Ext. D2 in execution of the decree in O. S. 516/1112. Then the learned Judge considers certain other minor matters that were in controversy and I do not think it necessary to advert to those matters. Ultimately the learned Judge has come to the conclusion that the transaction evidenced by Ext. D4 as well as the proceedings connected with O. S. 516/1112 are binding on the plaintiffs and as the plaintiffs 1 to 3 are not entitled to claim any special rights

under Ext. A and on the finding that the plaintiffs are out of possession of the property from 17-7-1115 the learned Judge dismissed the plaintiffs'' suit. It is the dismissal of this suit by the learned Subordinate Judge that is under attack by Mr. T. N. Subramonia Iyer.

19. In this court in fairness it must be stated that Mr. T. N. Subramonia Iyer realised the considerable difficulty that he will have to face in attempting to satisfy the court that the very tall claim made by all the plaintiffs together including plaintiffs 4 to 8 who were actual parties to the execution of Ext. D4 and to the proceedings connected with O. S. 516/1112 and to establish their claim that all these proceedings are not binding as against those parties. But the learned counsel urged in the alternative that even if this court does not accept his client''s case that the transaction evidenced by Ext. D4 and the proceedings connected with O.S. 516/1112 are not binding on plaintiffs 4 to 8 also, nevertheless the learned counsel pointed out that a different approach will have to be made when considering the claim of plaintiffs 1, 2, 3 and 9.

20. The learned counsel urged that a reference to the mortgage Ext. D 4 as well as to the proceedings connected with O. S. 516/1112 will clearly show that their respective fathers namely the 4th plaintiff and the 6th plaintiff have not purported to act on behalf of the family as such or on behalf of their minor children. The learned counsel pointed out that the document Ext. D4 has been executed by the individual members of this family and the 4th plaintiff has not purported to execute the same as manager of the family. The learned counsel further pointed out that at the time when O. S. 516 of 1112 was instituted plaintiffs 1 to 3 were also born. Nevertheless, the plaintiff in that suit did not implead those persons as parties in that litigation. Nor has he impleaded even the 4th plaintiff as the manager of the joint family comprising of his son, his brothers and the children of his brother namely 6th plaintiff. The claim made by the plaintiff in O. S. 516/1112 is only an individual claim as against the various defendants who were made parties in that litigation and it was only such a claim that was accepted and a decree passed as against the individuals mentioned therein. Therefore the learned counsel pointed out that inasmuch as the 4th plaintiff has not been impleaded as a manager of the family and in view of the further fact that plaintiffs 1 to 3 and 9 were not also added as parties in O. S. 516/1112 the transaction evidenced by Ext. D4 as well as the decree passed in O. S. 516/1112 can only have force and effect so far as the shares of the actual executant of the document Ext. D4 is concerned. That is, according to the learned counsel the shares of plaintiffs 1, 2, 3 and 9 are not in any way affected either by the mortgage Ext. D4 or by the decree in Ext. B. Therefore the learned counsel pointed out that even if the plaintiffs'' entire claim that the decree in O. S. 516/1112 is not binding as against all the plaintiffs is not accepted nevertheless plaintiffs 1, 2, 3 and 9 are entitled to have a preliminary decree passed by this court recognising their right to have a declaration of their title in respect of their share of the properties and possession granted by this court. No doubt, the learned counsel

has also pointed out that if Ext. D4 had been executed by the 4th plaintiff as manager of the family and if the 4th plaintiff has been impleaded as the manager in O. S. 516/1112 the position may be different. In such a case the learned counsel pointed out it may be open to the defendants to take up the position that the manager of a Hindu undivided family is competent to represent the other members and that the separate impleading of the other junior members of the family is unnecessary because a decree obtained as against the manager will be binding as against all the other members of the family. The learned counsel pressed for the claim of plaintiffs 1, 2, 3 and 9 being considered separately from the claim of the other plaintiffs.

21. The learned counsel also pointed out that the evidence of P.W.3 who has practically given the go-by to the case of the defendants of their enjoyment of the property on the basis of a lease in favour of P. W. 3 should have been accepted by the learned Subordinate Judge.

22. The special claim that was made by plaintiffs 1, 2 and 3 on the basis of Ext. A and which was rejected by the trial court was again reiterated by the learned counsel for the appellants on the ground that a perusal of Ext. A will clearly show that a charge has been created on the suit properties. The reasoning of the learned Judge that no charge has been created and that no rights have accrued on the basis of Ext. A to the plaintiffs 1, 2 and 3 the learned counsel pointed out, is absolutely fallacious. Therefore all that the learned counsel stressed at any rate is that the claim of the plaintiffs 1, 2, 3 and 9 should have been considered separately and adjudication made on the lines indicated above.

23. The entire stand taken by the learned counsel for the plaintiffs-appellants is controverted by Mr. Mathew Muricken learned counsel for, the contesting respondents namely defendants. The learned counsel quite naturally pointed out that so far as the pleadings go no attempt at making any distinction in respect of the claims of plaintiffs 1, 2, 3 and 9 on the one hand from that of plaintiffs 4 to 8 has been either made or indicated by the plaintiffs. On the other hand, their entire case was one namely that the transaction Ext. D4 is devoid of consideration and not binding even as against the executants of the document namely plaintiffs 4 to 8. That was the same stand that was taken even in respect of the proceedings connected with O.S. 516/1112. Even if the claim of the sons of the 4th and 6th plaintiff, as urged by the appellant, is to be considered separately, Mr. Mathew Muricken pointed out that in law there has been a proper representation of the family by the 4th plaintiff who was admittedly the manager of this Hindu family at the material time and who was a party to the transaction Ext. D 1 and to the proceedings connected with O. S. 516/1112. The mere circumstance that the 4th plaintiff, has not described himself as the manager or the further circumstance that some other adult members of the family have also joined in execution of Ext. D4 or have figured as defendants in O. S. 516/1112 does not in any way, advance the case

of the plaintiffs so long as the 4th plaintiff who is in law competent to represent the family as manager has been a party to both Ext. D4 as well as to the proceedings in O. S. 516/1112. The learned counsel also pointed out that the recitals in Ext. D4 will clearly show that the document was incurred for a chitty which was conducted really for the benefit of the family though in the name of the 6th plaintiff and that a substantial portion of the consideration has also gone in discharge of a debt which has been incurred even at the time when the father namely Krishnan Achari was alive. Because according to the learned counsel one of the items of consideration for which Ext. D4 has been executed is for the purpose of discharging a mortgage liability incurred by the family in 1097 at a time when admittedly the father Krishnan Achari was alive.

24. The learned counsel no doubt referred me to certain decisions as well as to certain passages in text books dealing with Hindu law to the effect that so long as the manager of a Hindu joint family has executed a document for a legal necessity and binding purpose on the family that transaction will be binding on all the members of the family though they are not parties to the said transaction. The learned counsel also pointed out that these authorities and passages will also establish the further proposition that if in court proceedings the manager of the family is on record a decree obtained as against that party will be binding on all the other members of the family as well as the properties of the joint family also. Therefore the learned counsel pointed out that the attempt that is made in this court by the learned counsel for the appellants to differentiate the case of plaintiffs 1, 2, 3 and 9 from that of plaintiffs 4 to 8 should not be allowed to succeed. Even if that contention is allowed to be raised, the position in law is that all the proceedings which are under challenge are binding on these parties as well. The learned counsel also pointed out that under Ext. A no special rights can be claimed by plaintiffs 1 to 3. The learned counsel by a reference to the recitals contained in Ext. A pointed out that though there is an acknowledgement of a receipt of a sum of Rs. 115/- by the 6th plaintiff and his father as Stridanam amount of the wife of the 6th plaintiff nevertheless it will be seen that the brother-in-law of the 6th plaintiff is given a right to enforce any charge created under Ext. A, only under two conditions namely:
(a) the wife of the 6th plaintiff dying without issues; and

(b) the 6th plaintiff himself dying without issues. None of these contingencies have occurred in this case. The wife of the 6th plaintiff had died as early as 1114 and plaintiffs 1, 2 and 3 are her children. Therefore it cannot certainly be said that Parvathy died without issues. Again 6th plaintiff cannot base any rights under Ext. A nor can plaintiffs I to 3 because 6th plaintiff is not dead and 6th plaintiff has admittedly issues.

25. Regarding the evidence of P. W. 2, Mr. Mathew Muricken pointed out that the trial court was perfectly justified in rejecting as false the evidence of P. W. 2, a lawyer however unfortunate it may be. The learned counsel read out the evidence of the

lawyer given in these proceedings as well as the evidence given by him before the Magistrate which led to the judgment Ext. D 1, The learned counsel pointed out that P. W. 2 is an interested witness.

26. The learned counsel has adverted to the evidence considered by the lower court particularly the evidence furnished by the tax receipts Exts. D 9 to D 12 beginning from 5-7-1952 to 26-6-1957 as well as the evidence of D.W. 3 in support of his contention that the finding of the learned Judge on this aspect is perfectly correct. Therefore the learned counsel urged that no interference is called for by this Court as against the finding recorded by the learned Judge and dismissing the suit in consequence.

27. In my view, accepting the contentions of the respondent this appeal will have to be rejected. Admittedly no distinction has been made by the plaintiffs in the plaint of any separate approach to be made in respect of the claims of plaintiffs 1, 2, 3 and 9 on the one hand and plaintiffs 4 to 8 on the other. Curiously it will be seen that the plaintiffs did not, as such, ask for setting aside the transaction evidenced by Ext. D4 or the proceedings connected with O. S. 516/1112. They appear to ignore all these proceedings. Though, it must be stated that in paragraph 6 of the plaint there is a reference to the transaction Ext. D4 as well as the decree Ext. B the reference is that Ext. D4 is not supported by consideration and hence the decree Ext. B based upon such a document and passed without all the members of the family being on the party array is not valid and binding. Excepting this allegation so far as Ext. D4 and Ext. B are concerned I am not able to find any other averments made by the plaintiffs in respect of this transaction. But no relief as such is asked for as against either Ext. D4 or the decree Ext. B. It is absolutely difficult for this Court to accept the claim made by the plaintiffs as a body that the transaction evidenced by Ext. D4 or the proceedings connected with O. S. 516/1112 are not valid and binding as against any of them.

28. Admittedly the plaintiffs 4 to 8 are executants of the hypothecation bond Ext. D4 and they are also parties to O. S. 516/1112. Their claim that the transaction under Ext. D4 is not supported by consideration cannot certainly be accepted at this stage. If that was the case it was open to them to have raised the plea when the mortgagee instituted O.S. 516/1112. They never raised any such plea and allowed a decree to be passed as against them and further proceedings in execution have also been taken. Therefore, so far as the plaintiffs 4 to 8 are concerned, their suit should have been straightaway rejected on the short ground that after all these events have happened and when even the decree-holder claims to have obtained possession under Ext. D2, it is no longer open to those parties to claim any rights in the property.

29. Inasmuch as the learned counsel for the appellants has requested this Court to consider the claims of the other plaintiffs, I will advert to those aspects and express my views as to whether they are entitled to any relief either. The plaintiffs 1, 2 and 3

are the children of the 6th plaintiff. The 9th plaintiff is the son of the 4th plaintiff. No particular evidence is adduced in the case as to the date of birth of these plaintiffs. But anyhow I will proceed on the basis that the 9th plaintiff was already born on the date of Ext. D4 and that plaintiffs 1, 2 and 3 were also born at the time when O. S. 516/1112 was instituted.

30. Mr. Mathew Muricken, learned counsel for the respondent pointed out that it is not really necessary that the 4th plaintiff should have described himself as the manager when executing Ext. D4 nor is it necessary that he should have been impleaded as the manager of the family in O. S. 516/1112. According to the learned counsel so long as the 4th plaintiff was the manager at the time of the execution of Ext. D4 and when the suit O. S. 516/1112 was filed, which fact is not controverted by the defendants, the decree obtained as against the 4th plaintiff alone should have been sufficient to enable the decree-holders to proceed in execution as against the shares of these plaintiffs also.

31. The learned counsel also pointed out that unless these plaintiffs who want a distinction to be made regarding their claims are able to establish that the transaction evidenced by Ext. D4 is not for legal necessity and for purposes binding on the family, no relief can be granted to those plaintiffs at all. In this connection, the learned counsel pointed out that a reading of Ext. D4 will clearly show that out of the total consideration of Rs. 156-4-0 recited therein a sum of Rs. 80-4-0 is really for the purpose of discharging the mortgage liability in favour of one Narayanan, and the Bank. According to the learned counsel the recital in Ext. D4 will clearly show that the family as such was interested in the chitty of which the 6th plaintiff no doubt was the subscriber.

32. Therefore when once it is established that the transaction evidenced by Ext. D4 was executed for a valid and binding purpose these plaintiffs, the learned counsel pointed out, cannot certainly attack the transaction especially when their fathers namely 4th plaintiff and the 6th plaintiff were also parties to Ext. D4 and to the decree in Ext. B. In my opinion, the contention of the learned counsel for the respondent will have to be accepted.

33. Ext. D4 itself will clearly show that though the 6th plaintiff was the subscriber to the chitty, really the benefit of that transaction goes to the entire family; and it is also seen that among the items of consideration which go to make up Ext. D4 a substantial part of it is for the discharge of a mortgage liability which has accrued as early as 1097. In the absence of any other evidence adduced by the plaintiffs, the presumption must be that liability must have been incurred by the father Krishnan Asari who was alive in 1097.

34. The principles that have to be born by the court under those circumstances namely when a minor member of the family attacks the transaction entered into by the manager of the family have been referred to by Mulla in his Principles of Hindu

Law in the''12th Edition. At page 362 in paragraph 242 the learned author states that the power of the manager of joint Hindu family to alienate joint family property is analogous to that of a manager for an infant heir and in that connection refers to the decision of the Privy Council reported in Persaud v Musammat Babooee (1856-6 M. T. A. 393). The learned author further states that the manager of a joint Hindu family has power to alienate for value joint family property so as to bind the interests of both adult and minor coparceners in the property. But the essential limitation is that the alienation is made for legal necessity, or for the benefit of the estate. It is also stated by the author that a manager, who is not the father, can alienate even the share of a minor coparcener to satisfy an antecedent debt of the minor''s father or grand father when there is no other reasonable course open to him.

35. In this case I have already indicated that the substantial part of the liability that is sought to be discharged under Ext. D4 is a mortgage liability of the grandfather of these plaintiffs namely of Krishnan Asari incurred in 1097. As to when exactly a transaction can be challenged is again dealt with by the learned author at page 405 in paragraph 268.

36. The author states that where a member of a joint family governed by the Mitakshara law sells or mortgages more than his own interest in the joint family property, the alienation, not being one for legal necessity or for payment by a father of an antecedent debt, the other members or persons to whom their interests in the property have passed, are entitled to have the alienation set aside to the extent of their own interest therein.

37. Unless these circumstances are established it is not open to the members to challenge the transaction. They will have to establish that the alienation is not for legal necessity or it is not for payment by a father of an antecedent debt.

38. Later on the author also refers to cases where alienation is made by a coparcener in excess of his powers, it may be set aside to the extent mentioned in the earlier part of paragraphs 268 and 269; but it can only be done at the instance of any other coparcener who was in existence at the time of the completion of the alienation. But the author states that an alienation of joint family property made by a father when there is no male issue in existence at the date of the alienation will be valid though the alienation itself cannot be supported by any legal necessity.

39. Therefore it will be seen that in this case unless the plaintiffs 1, 2, 3 and 9 are able to establish that the transaction entered into under Ext. D4 and the decree based upon the said transaction is not for legal necessity, they will not be able to persuade this Court to accept their contention that those transactions will have to be set aside so far as their shares are concerned. It cannot certainly be stated that the transaction evidenced by Ext. D4 is not for purposes binding on family or for legal necessity. Therefore, on that ground these plaintiffs cannot succeed.

40. Then the question is as to whether the circumstance that in the decree Ext. B the 4th plaintiff has not been sued as manager makes any difference in this case. That it is enough that the manager of a joint Hindu family may sue or be sued as representing the family in respect of a transaction entered into by him as manager of the family or in respect of joint family property, and that a decree passed against him in such a suit would bind all other members of the family if, as regards minors, he acted in the litigation in their interests, and, as regards adults, with their consent is also established by the passage occurring in Mulla''s Principles of Hindu Law 12th Edition at page 379 paragraph 251 (5).

41. That it is not necessary, in order that a decree against the manager may operate as res judicata against coparceners who were not parties to the suit, that the plaint or written-statement should state in express terms that he is suing as manager or is being sued as a manager is also found in the passage occurring in the same text-book at page 383.

42. This proposition which has also been referred to by Mayne''s Hindu Law, has been quoted with approval by Mr. Justice Govinda Menon in the decision reported in Papansam Chettiar v Muthayya Chettiar (A. I. R. 1949 Mad. 625).

43. The same principle has also been laid down by the Division Bench of the Andhra Pradesh High Court in the decision reported in Kumaji Save Mai Firm v Devadattam (A. I. R. 1958 A. P. 216).

44. In the Madras decision referred to above, the learned Judge at page 626, after referring to the passages in Mayne''s Hindu Law, 10th Edition, at pages 386 and 387, has observed that a family will be bound by a decree properly passed against a manager either in respect of family property or in respect of a debt payable by the joint family. The learned Judge also states that it is not necessary that the person sued as manager should be described as such in the plaint, though it is advisable to do so; but if it is seen that in fact the part so sued was the manager of the family and the suit related to a joint family liability, the presumption is that he was suing or being sued in a representative capacity. The learned Judge goes further and states that even an omission to state in the decree that it was passed against that person in his capacity as a manager, does not prevent the decree from being proceeded with against the entire family properties. The same principles have also been reiterated by the Andhra Pradesh High Court in the decision referred to above.

45. From these decisions it is clear that in order to enable a decree-holder to proceed against joint family properties, it is not absolutely essential or necessary that the person impleaded as representing the family should in all cases be described as manager of the family. Having due regard to the principles referred to above, in this case the question is whether it can be stated that either the transaction evidenced by Ext. D4 or the decree that was passed in O. S. 516/1112 is not a decree passed as against the family as such. Admittedly the 4th plaintiff was

the manager of the joint Hindu family on all material dates, namely 2-3-1104 when Ext. D4 was executed, and 9-3-1938 when the decree Ext. B was passed in O. S. 516/1112. No doubt Mr. G. Viswanatha Iyer, learned counsel for the appellants, pointed out that in proceedings connected with O. S. 516/1112, even the female members of the family, namely the 7th and 8th plaintiffs, who cannot be considered to have any right as such, have been impleaded and decree passed as against them. Therefore, this circumstance, the learned counsel pointed out, will clearly show that it was only individuals who were sought to be made liable in O. S. 516/1112, and not the unit, viz., the family, as such represented by the 4th plaintiff as manager. I am not inclined to accept this contention of the learned counsel for the appellants. No doubt it is seen that 7th and 8th plaintiffs were impleaded as defendants in that suit. In fact it will be seen that several other members of the family who were then in existence appear to have also been impleaded as parties. But the essential test to be applied in such cases is as to whether the liability, to enforce which the suit was instituted, is a liability of the family as such. So far as that is concerned I have already pointed out that the transaction evidenced by Ext. D4 is for a legal necessity and for purposes binding on the family. The mere circumstance that the 4th plaintiff was not described as manager, and the further circumstance that several other members of the family were also included as party defendants to O. S. 516/1112, are of no consequence whatsoever, so long as the person, who can properly represent the family and a decree passed against whom will bind the family, namely the 4th plaintiff, was on record. If this conclusion arrived at by me is correct, then it follows that the decree obtained in O. S. 516/1112 will be binding as against plaintiffs 1, 2, 3 and 9 also. Therefore the position is that the attack levelled as against execution of the document Ext. D4 or the decree based upon that document, namely the proceedings connected with O. S. 516/1112, must be rejected and they should be considered to be binding not only as against plaintiffs 4 to 8, but also as against plaintiffs 1, 2, 3 and 9. Therefore it follows that the decision of the learned Subordinate Judge holding that the transaction evidenced by Ext. D4 as well as the proceedings connected with O. S. 516/1112 are binding as against all the plaintiffs, is perfectly justified and will have to be confirmed.

46. Then the question is as to whether the decision of the learned Judge that the plaintiffs have parted with possession on 17-7-1115, is based upon the evidence in the case and will have to be sustained. No doubt on this aspect Mr. T. N. Subramonia Iyer, learned counsel for the appellants, stressed be fore me for acceptance the evidence of P.W.2. The learned counsel pointed out that P. W. 2 is a respectable lawyer and owner of a property adjoining the suit properties, and he has given straightforward evidence regarding the plaintiffs continuing in possession of the properties notwithstanding the so-called delivery under Ext. D2 on 17-7-1115. The learned counsel also pointed out that the rejection of the evidence of this respectable witness, according to him, by the lower court, was total unjustified. The learned counsel also urged for acceptance the evidence of P.W. 3. The learned

counsel pointed out that according to D.W.1 the court auction purchaser, the very first enjoyment of the properties by way of leasing out, after getting possession under Ext. D2, is by taking a lease from P. W. 3 on 21-12-1115. P. W. 3, according to the learned counsel, has let down the defendants by stating that he never obtained any possession at all of the properties under Ext. D3 and that the plaintiffs were in possession throughout. That evidence also, according to the learned counsel, has been wrongly rejected by the lower court. On the other hand, Mr. Mathew Muricken, learned counsel for the respondents, pointed out that the lower court has given very good reasons for not accepting either the evidence of P. W. 2 or the evidence of P. W. 3. The learned counsel pointed out that the lower court was impressed by the evidence of the court auction purchaser as D. W. 1, supported as it was by the lease deed Ext. D3, and payment of taxes in respect of the properties, evidenced by Exts. D9 to D12. The learned counsel also read to me in extension the evidence of P.W.2 and the different version he gave in the Magistrate''s Court which led to the passing of the order Ext. Dl. Therefore, notwithstanding the fact that P.W.2 is a lawyer, the learned counsel pointed out, in this case he is not as disinterested a witness as he wants the court to believe. According to the learned counsel, he has played into the hands of the plaintiffs by even advising them not to part with possession notwithstanding the court delivery proceedings evidenced by Ext. D2.

47. In my view, the contentions of the learned counsel for the respondent in this regard have again to be accepted. Normally, I do agree with the learned counsel for the appellants that the testimony of a disinterested lawyer, who may have no interest in any of the parties concerned, must be given considerable importance. But unfortunately in this case a reading of the evidence of P. W. 2 will clearly show that he is not really discharging his role as a lawyer in these proceedings, but really as a party coming to give evidence to support the claim of the plaintiffs. The learned Subordinate Judge has adverted to the different version given by this witness before the Magistrate''s Court, which evidence has been marked in those proceedings as Ext. D5. Again, regarding P.W.3, the learned Judge was not at all impressed by his evidence, because having taken the properties on lease under Ext. D3 and being bound to pay rent to the landlord, namely the court auction purchaser in this case, the learned Judge is perfectly justified when he criticises the evidence of P. W. 3 on the ground that at no time has P.W.3 informed his landlord that he has not been, able to get possession of the properties. On the other hand there is the evidence of D.W.1 as well as the evidence of D.W.3, D. W. 3''s evidence has been accepted by the learned Judge. He is a person who knows the properties for over 35 years. That oral evidence is amply supported by the documentary evidence produced on behalf of the defendants, particularly the tax receipts from 1952 to 1957, evidence by Exts. D9 to D12. Therefore the finding of the learned Subordinate Judge that under Ext. D2 possession has actually passed from the plaintiffs to the court auction purchaser on 17-7-1115 is also based upon the evidence, and is justified in the circumstances of the case.

48. There is only one other matter that will have to be dealt with before I close this judgment; and that is the special claim made by plaintiffs 1 to 3 on the basis of Ext. A. No doubt Ext. A is of a date anterior to Ext. D4. Ext. A is dated 28-6-1100 and Ext. D4 is dated 2-3-1104. If plaintiffs 1 to 3 are really entitled to any special rights on the basis of Ext. A by virtue of a charge created over the suit properties, it goes without saying that that charge must have preference to the claim of the mortgagee under Ext. D4. But the question is whether plaintiffs 1 to 3 are entitled to any special consideration or rights reserved in their favour on the basis of Ext. A. I am free to admit that the discussion on this aspect of the case by the learned Subordinate Judge is far from satisfactory. No doubt the learned judge has ultimately come to the conclusion that no special rights can be reserved in favour of plaintiffs 1 to 3. And with that conclusion as such I do agree. But as I mentioned earlier, the discussion leading up to that conclusion is far from satisfactory.

49. Under Ext. A, there can be no controversy, the father of plaintiffs 1 to 3 namely the 6th plaintiff, and their grand-father namely Krishnan Asari, acknowledge a sum of Rs. 115/- representing the sthreedhanam paid to the wife of the 6th plaintiff, namely Lakshmi Parvathy. Lakshmi Parvathy, there is no controversy, died in or about the year 1114. Ext. A was executed by Krishnan Asari and the 6th plaintiff in favour of the brother of Lakshmi Parvathy, i.e., the brother-in-law of the 6th plaintiff. The view of the learned Subordinate Judge that there is no charge created over the suit properties under Ext. A cannot be accepted. But that by itself will not help the appellants, as I will presently show. The brother-in-law of the 6th plaintiff is given a right to recover the amount of Rs. 115/- with a charge over the suit properties, under certain specified conditions alone. Those conditions are Lakshmi Parvathi dying without issues or the 6th plaintiff dying without issues. In this case Lakshmi Parvathy died even in 1114. Surely she cannot be considered to have died without issues, because plaintiffs 1 to 3 are her children. The 6th plaintiff is fortunately alive, and it cannot also be said that he has no issues, because plaintiffs 1 to 3 are his children. Therefore, on that ground, the claim of plaintiffs 1 to 3 for special rights based upon Ext. A will have to be negatived because no such special rights can be claimed by them under the conditions which have been referred to above, on the existence of which alone the special considerations under Ext. A will come into play. Therefore, though I accept the finding recorded by the learned Subordinate Judge on this aspect, it is really on totally different grounds.

50. There are certain other minor findings recorded by the learned Subordinate Judge. But I do not think it necessary to consider them in this appeal, in view of the fact that I am agreeing with the conclusions arrived at by the learned Judge that the plaintiffs are not entitled to any relief in the suit.

51. The result, therefore, is that the judgment and decree of the learned Subordinate Judge will stand confirmed, and the appeal dismissed with costs of the respondents, one set. As the appeal is filed in forma pauperis, the State Government

will be allowed to recover from the appellants the court-fee which they are bound to pay on the memorandum of appeal.