contends that the second part of S. 63 does not apply to the present case with the result that S. 92 retrospectively applies to it. We are unable to accede to this contention. It is true that under S. 28, Provincial Insolvency Act, the power of a secured creditor to realize or otherwise deal with his security remains unaffected by that Section as to the vesting of the insolvent's property in a receiver, and under S. 47 a secured creditor may of his own choice relinquish his security for the general benefit of the creditors and prove for his whole debt. In the present case the two creditors did not relinquish their security. They only gave consent to the mortgaged property being sold on condition that their rights would attach to the sale-proceeds. Then they raised contentions as to their respective priority before the receiver. But all this does not mean that the proceedings began only when they gave their consent. The insolvency proceeding was one continuous proceeding throughout, and although they came in at a certain stage in it, their appearance on the record must be, and has, in fact, been treated as having taken place in the insolvency proceeding itself and not in a subordinate or separate proceeding. The fact that the mortgaged property could not be sold by the receiver without either the consent of the mortgagees or without paying them off, does not mean that if they so consent to be paid out of the sale-proceeds without relinquishing their security, there is a new and separate proceeding *qua* them from the time they give their consent and that the question of their priority is decided in this new proceeding. Even taking it that a secured debt is not within the jurisdiction of the Insolvency Court, unless the creditor applies to be brought on the record, the moment he comes within such jurisdiction, he does so in the original proceeding on the record of which he applies to be brought, and not in any fresh proceeding starting with his submission to the Insolvency Court. There are no two parallel proceedings from the time he comes on the scene, but the sale and the subsequent priority proceedings are all part of the same insolvency proceeding from start to finish. We think therefore that the claim for priority was a part of the insolvency proceeding pending on 1st April 1930, when the Amending Act came into force, and that by virtue of the latter part of S. 63 of the Amending Act, the new S. 92, T. P. Act, cannot apply to this proceeding. The result is that the subrogation was valid without a registered deed.

In this view of the case, it is not necessary to go into the other contention of the appellant that the lower Court was wrong in holding that even though there was no pending proceeding as against these parties on 1st April 1930, S. 63 is not retrospective in its operation with regard to substantive rights acquired before that date as opposed to rights of procedure. The order of the lower Court is confirmed and the appeal is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

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RANGNEKAR AND N. J. WADIA JJ.

Govind Gurunath Naik—*Defendant* — Appellant.

v.

Deekappa Mallappa Hubballi — *Plaintiff* — Respondent.

First Appeal No. 98 of 1935, Decided on 16th December 1937, from decision of First Class Sub-Judge at Dharwar, in Special Civil Suit No. 27 of 1933.

(a) Hindu Law — Alienation — Manager — Creditor making inquiry and satisfying himself that manager is acting for benefit of estate or family — Real existence of alleged necessity is not condition precedent to validity of charge— What is legal necessity and what is for benefit of estate depends upon circumstances of each case—No duty is cast on creditor to inquire as to what happened to money subsequently.

In order to support an alienation of joint family property by the manager of a joint Hindu family, it must be shown that there was a need or that the transaction was entered into for the benefit of the estate; but if the creditor, who is bound to inquire into the necessities for the loan and to satisfy himself as a reasonable person that the manager, in the particular instance, is acting for the benefit of the estate or the family, makes such an inquiry and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of the charge. What is a legal necessity or what is for the benefit of the family cannot admit of one single or uniform answer. The answer to the question must depend upon the circumstances of each case. It is permissible to refer to the Privy Council case in 6 M I A 393 as also to the text of Mitakshara to find out whether in a particular case a charge was justified by legal necessity or was for the benefit of the family. If a transaction is entered into by the father for the sake of the family, it is clearly binding on those who have clearly benefited from it. There is no duty cast on the creditor to inquire as to what happened to the money after once he has satisfied himself that it was required for the benefit of the family. [P 390 C 1, 2; P 391 C 1]

Where therefore a Hindu father alienates the joint family property for the purpose of raising

money to meet the expenses of litigation to establish an adoption of his only minor son, the alienation is one for legal necessity or, in any case, for the benefit of the family as a whole and in particular for the benefit of the minor son : *6 M I A 393 (P C), Rel. on.* [P 390 C 2]

(b) Hindu Law—Alienation—Father—Ancestral property — Alienation is not void but only voidable by son—He can also ratify it.

An alienation of ancestral property by a Hindu father without a legal necessity or justifying cause is not void but voidable and can be avoided by his son. So also such alienation by a father can be ratified by the son : *19 Cal 123 (P C), Rel. on.* [P 391 C 2]

(c) Hindu Law—Alienation— Legal necessity — Second mortgagee of joint family property taking his mortgage with notice of fact that first mortgage was for legal necessity — He cannot raise question of want of legal necessity.

A second mortgagee of property belonging to a joint Hindu family, who has clear notice of the fact that the first mortgage, subject to which he takes his own mortgage, was entered into for legal necessity, is not entitled to raise the question that in fact there was no legal necessity. [P 391 C 2]

G. N. Thakor and K. G. Datar — *for Appellant.*

Dr. B. R. Ambedkar and G. R. Madbhavi — *for Respondent.*

Rangnekar J.—This is a curious case in which a mortgage of what is alleged to be a joint family property effected by a Hindu father having a minor son is challenged as to part of the consideration for it, by the second mortgagee of the father on the ground that there was no legal necessity so as to justify the prior mortgage. The suit was brought by the first mortgagee under a mortgage effected by one Kanchangouda on 20th April 1921, the consideration being Rs. 9000. That consideration was made up of the balance of Rs. 3500 then found due at the foot of a previous account in respect of money dealings existing between Kanchangouda and the plaintiff mortgagee and a fresh advance of Rs. 5500 in cash. The suit was directed against the son of Kanchangouda and the latter's widow (defendants 1 and 2) as heirs and legal representatives of Kanchangouda, and the present appellant (defendant 3) who claimed to hold a second mortgage from the father under a document dated 17th April 1926. Defendants 1 and 2 put in no written statement and did not defend the suit. Defendant 3 raised various pleas. Most of them were given up by him at the trial. But he persisted in contending that the mortgage did not affect the interest of the minor son of Kanchangouda as there was no justifying necessity for the same. The learned First Class Subordinate Judge on the evidence held that the mortgage effected by Kanchangouda in favour of the plaintiff was a valid mortgage and the moneys were required for legal necessity and were for the benefit of the family including the minor son, and in the result he decreed the plaintiff's claim. It is from that judgment that the present appeal is taken.

The appellant now disputes part of the consideration for the plaintiff's mortgage relating to the cash advance of Rs. 5500, and his case is that to that extent there was no legal necessity and the minor son is not bound by the mortgage. It was contended on behalf of the plaintiff in the lower Court that it was not open to the second mortgagee to raise that contention as defendants 1 and 2 had admitted, or at any rate not disputed the existence of a justifying necessity, but the learned Judge overruled that contention, though on the merits he found in the plaintiff's favour. The evidence in the case shows that Kanchangouda was carrying on business and he had dealings with the plaintiff in respect of which Kanchangouda had passed from time to time at least three promissory notes in favour of the plaintiff. It appears that Kanchangouda gave the minor son in adoption to a richer family possessed of large estate. The adoption was disputed by the adoptive family and the disputes resulted in a litigation which ultimately came to this Court, and this Court held that the adoption was invalid. Kanchangouda then applied for leave to appeal to the Privy Council and that application was granted. The plaintiff's case is that it was for the purpose of defraying the cost of prosecuting the appeal in the Privy Council that the mortgage in suit was executed. The mortgage is Ex. 46 and on the face of it shows that an account of the previous dealings was made and Rs. 3500 had become due to the plaintiff by Kanchangouda. Then it proceeds to state that he had been granted leave to appeal to the Privy Council and that he was unable to find the money for the purpose of prosecuting the Privy Council appeal and required a loan of Rs. 5500 in cash. So that the recital in the mortgage deed, which of course is some evidence of the purpose for which the loan was contracted, is entirely in favour of the plaintiff. Then there is the evidence of the plaintiff himself which shows that this amount of Rs. 5500 was taken in connexion with the litigation relating to the

adoption of the minor son of Kanchangouda. The evidence of the plaintiff's clerk, who seems to be more familiar with the matter and has given full details, also supports his case. On the other hand, defendant 3 who was the only contesting party did not venture to go into the witness-box, nor was any evidence led on his behalf to rebut the case made on behalf of the plaintiff. After the mortgage it appears that there was a compromise between Kanchangouda, as representing his minor son, and the adoptive family, as a result of which land measuring 6 kurgis, which equals about 24 acres, was conveyed to defendant 1. The learned Judge on these facts observed as follows :

> Thus the money was required for the benefit of defendant 1, because if the appeal to the Privy Council had succeeded, defendant 1 would have got a large property. It was also to the benefit of the estate of Kanchangouda because if this adoption had been upheld, a sharer in the family property would go out of the family and Kanchangouda would have become the sole owner.

After hearing all that has been said by Mr. Thakor on the point, we are in entire agreement with the view taken by the learned Judge. The law on the subject is to be found in the well-known case in 6 M I A 393,[1] where their Lordships of the Privy Council observed as follows (pp. 423-424) :

> 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 a 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 the 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.

It is clear from this therefore that there must be a need, or the transaction must be entered into for the benefit of the estate. But even if in fact there was no need or in fact there was no benefit to the estate, and the creditor, who is bound to inquire into the necessities for the loan and to satisfy himself as a reasonable person that the manager in the particular instance is acting for the benefit of the estate or the family, makes such an inquiry and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of the charge. We think that in this case it is quite clear that the plaintiff made inquiries. He was told that the money was required for carrying on a litigation entirely for the benefit of the minor son. Until the adoption of the minor was established he did not cease to be a member of the family. If therefore for the purpose of advancing the interest of his only son the father alienates the family property, it is difficult to see why such an alienation cannot be said to have been made for a legal necessity or in any case for the benefit of the family as a whole and in particular for the benefit of the minor son. The principles laid down in 6 M I A 393[1] were, it is clear, influenced by the texts cited before their Lordships, and amongst these texts there were verses 27, 28 and 29 of Ch. 1 of the Mitakshara. Verse 27 deals both with ancestral moveable and ancestral immovable property, and as to ancestral immovable property it says that the father has no power to alienate it without the consent of his sons. But reference is made to an exception which is mentioned by Brihaspati which is set out in verse 28. That verse is as follows :

> Even a single individual may conclude a donation, mortgage, or sale of immovable property, *during a season of distress, for the sake of the family*, and especially for pious purposes.

The text of Brihaspati is itself explained in verse 29 as follows :

> While the sons and grandsons are minors, and incapable of giving their consent to a gift and the like; or while brothers are so and continue unseparated ; even one person who is capable may conclude a gift, hypothecation, or sale of immovable property, *if a calamity affecting the whole family require it, or the support of the family render it necessary*, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable.

It is clear from the decided cases that the dictum of their Lordships in 6 M I A 393,[1] as well as the text of Mitakshara which is illustrative of what is a legal necessity or what is for the benefit of the family, is by no means exhaustive. What is a legal necessity or what is for the benefit of the family cannot admit of one

1. Hunoomanpersaud Panday v. Mt. Babooee Munraj Koonweree, (1856) 6 M I A 393=18 W R 81*n*=2 Suther 29=1 Sar 552 (P C).

single and uniform answer. The answer to the question must depend upon the circumstances of each case. It is permissible to refer to the Privy Council case as also to the text of Mitakshara to find out whether in a particular case a charge was justified by a legal necessity or for the benefit of the family. If therefore as the Mitakshara says "for the sake of the family" a transaction is entered into by the father, it is difficult in my opinion to hold that the transaction will not bind those, who, as in this case, have clearly benefited from it. To say the least, it would not lie in the mouth of the son himself to contest the mortgage particularly as it has clearly resulted in his benefit.

As against this, all that is pointed out by the learned counsel on behalf of the appellant is this that although the money was taken for the purpose of carrying on litigation in the Privy Council, there was a compromise and the money was not then required for that purpose. But the evidence in the case is that the money was utilized for the purpose of the father's business as well as for agricultural purpose and for household expenses. There was no duty cast upon the plaintiff to inquire as to what happened to the money after once he had satisfied himself that the money was required "for the sake of the family" and for the benefit of the minor boy. Still the evidence shows that he did make inquiries as to what happened to that money and we think that he acted entirely honestly in the case, and it is difficult to accept the contention that the present claim should not be allowed. We think therefore that the view taken by the learned Judge is correct and on this ground alone the appeal must fail. In this view of the case, it is not necessary to consider a somewhat more serious objection raised at the trial on behalf of the plaintiff and supported here by Dr. Ambedkar, and that is whether it is at all open to defendant 3, who, as I have already pointed out, was the second mortgagee of the same property from the same mortgagor, to raise the contention that the mortgage subject to which he took his own mortgage is not binding on him, because part of the consideration was not required for purposes binding on the minor son. There is no decided case which actually bears on the point. The argument on behalf of the appellant is that the second mortgage included also the interest of defendant 1. There is no clear evidence on the record to show that the second mortgage was effected by the father both for himself and on behalf of his minor son. The learned Judge seems to have understood the defendant's case to be that the second mortgage was effected by the father himself. Reference is made to the written statement which in my opinion does not clearly show that the mortgage was effected by the father for himself and as guardian of his minor son. But assuming that it is so, I am unable to see that it would make the slightest difference to the principles which govern the question. It is conceded by Mr. Thakor that the second mortgagee is not claiming under defendant 1 and indeed he could not be said to be claiming under him. Defendant 1 has not disputed the mortgage, and according to all rules of pleadings, must be deemed to have admitted it. That is to say he must be deemed to have ratified the mortgage, and if he has done so, it is difficult to hold that a stranger can question a transaction which is recognized by the principal person whose interests were affected by it.

I think it is too late in the day to contest the proposition that an alienation by a Hindu father is ab initio void. All the authorities show that such an alienation of ancestral property by a Hindu father without a legal necessity or a justifying cause is not void, but voidable and can only be avoided by his son. It is also clear on general principles, and authorities on the point are not wanting, that such a sale by a father can be ratified by the son. I may refer on this point to the observations of the Privy Council in 18 I A 158[2] at p. 164. Their Lordships observed that an alienation by a manager is not necessarily void, but is only voidable if objection were taken to it by the other members of the joint family. If that is the view of the nature of an alienation made by a father without legal necessity, in my opinion, it is difficult to hold that the second mortgagee, who had clear notice of the fact that the first mortgage, subject to which he took his own mortgage, was entered into for a legal necessity, can raise the question that in fact there was no legal necessity. The principle is that if a person purchases an estate subject to a mortgage, whether under a voluntary conveyance or a sale *in invitum*, the purchaser cannot be heard to deny the

2. Hanuman Kamut v. Hanuman Mandar, (1892) 19 Cal 123=18 I A 158=6 Sar 91 (P C).

validity of the mortgage subject to which he made his purchase. The purchaser cannot therefore set up any personal disability on the part of the mortgagor to make the mortgage. If that is the position in the case of a purchaser from a mortgagor, it is difficult to hold that a second mortgagee from the mortgagor can contest the validity of the prior mortgage. The view which we have taken seems to derive support from the observations of the learned authority, Mulla's Hindu Law, at p. 272, Para. (4), which are to the following effect :

An alienation by the manager of a joint family made without legal necessity is not void, but voidable at the option of the other coparceners. They may affirm it or they may repudiate it, but a creditor cannot repudiate it, there being no suggestion that it was in fraud of creditors.

If the case is brought under S. 53, T. P. Act, then of course the position would be quite different. The appeal therefore fails and must be dismissed with costs.

N. J. Wadia J.—I agree.

R.M./R.K. *Appeal dismissed.*

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RANGNEKAR AND N. J. WADIA JJ.

Bhikarchand Devidas and another—*Plaintiffs*—Appellants.

v.

Lachhamandas Bansilal and others—*Defendants*—Respondents.

First Appeal No. 220 of 1934, Decided on 7th December 1937, from decision of First Class Sub-Judge, Ahmednagar, in Special Civil Suit No. 22 of 1933.

Limitation Act (1908), S. 7 and Art. 44—Alienation by mother of two brothers during their minority—No other property belonging to two brothers as members of joint family—Brothers maintained by aunt—Presumption that elder brother is manager of joint family does not apply—Suit by elder brother for setting aside alienation more than three years after attaining majority is barred only against him and not against other brother.

It is true that a manager of joint Hindu family is competent to give a discharge on behalf of the minor members of the family, and if the manager who happens to be a minor does not take any proceedings to set aside alienations made either by the mother or by the father within three years after attaining majority, then it would not be open to his minor brothers to bring a suit to set aside such alienations on their attaining majority, and a suit of that nature would be barred. It is also correct to say that the presumption under Hindu law is that ordinarily the eldest brother would be the manager of the joint family ; but, where the evidence shows that excepting the property sold by mother there was no other property as such which belonged to the two brothers as members of the joint family and the two brothers were actually thrown on the street on the death of their father, and for a long time they were being maintained by their aunt, the ordinary presumption, which arises in the case of a joint Hindu family possessed of ancestral property, that the eldest brother must be deemed to be the manager of the family and its property, cannot apply and this being so, the suit is barred only against the elder brother and not as against the other younger brother : *A I R 1921 Bom 289, Disting.; A I R 1922 Bom 319, Ref.* [P 393 C 2 ; P 394 C 1]

T. N. Walawalkar — *for Appellants.*

P. S. Joshi and G. S. Gupte — *for Respondents 1 & 2 respectively.*

Rangnekar J.—The appellants who are brothers brought a suit in forma pauperis for a declaration that a sale effected during their minority by their mother as their guardian was not binding on them, and to recover possession of the property. Defendant 1 is the purchaser from the mother, and the other defendants are subsequent alienees from him. The defendants contested the suit inter alia on the ground that it was barred by limitation inasmuch as it was filed more than three years after plaintiff 1 had attained majority. The learned Judge therefore raised two preliminary issues, one as regards the age of plaintiff 1, and the other as regards limitation. He found that plaintiff 1 was more than 21 years of age when the application to sue in forma pauperis was filed. On the second question, relying on the decision in 45 Bom 446[1] he held that the suit was barred by limitation. The sale was effected on 5th November 1924 ; the suit was instituted on 1st September 1932, and on that day plaintiff 1 was found to be over 21 years of age. These findings are not disputed before us on behalf of the appellants, but it is contended by Mr. Walawalkar on the appellants' behalf that the ruling in 45 Bom 446[1] did not apply to the facts of this case ; and that, assuming that it did, it must be deemed to have been overruled by the decision of their Lordships of the Privy Council in the case in 53 I A 36.[2] There is no dispute that the law which applies to the facts of this case is that contained in Article 44 read with S. 7, Limitation Act, 1908. In 45 Bom 446[1] the

1. Bapu Tatya v. Bala Ravji, (1921) 8 A I R Bom 289=59 I C 759=45 Bom 446=22 Bom L R 1383.

2. Jawahir Singh v. Udai Parkash, (1926) 13 A I R P C 16=93 I C 216=53 I A 36=48 All 152 (P C).