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Das and Guha, JJ.) in *Province of Bengal* v. *Radha Gobinda and others* (2), that where the claim of 4 brothers is not severable and the reference under section 18 is made by all of them acting jointly, the Land Acquisition Judge is justified in making an award for the entire sum representing their interest in spite of the fact that one of them later withdraws from the reference. Even if some of the claimants in the present case do not desire to contest the award, the reference would still be justified. Recently, it has been ruled by a Division Bench of the Kerala High Court (Sankaran and T.K. Joseph, JJ.) in *State* v. *Narayani Pillai Kuttiparu Amma* (3), that where the award is in favour of several persons having no separate and distinct interest in the property acquired, all of them may be said to be interested in the objection raised by one or more of them to the award made by the Land Acquisition Officer. In such a case the objection may be deemed to have been made on behalf of all.

I would accordingly make this rule absolute and allow this petition for revision. The papers including the order of the 26th July, 1961, would be sent back to the Collector who would then proceed with the application presented to him in accordance with law.

There would be no order as to costs of this petition.

B.R.T.

APPELLATE CIVIL

Before Tek Chand and Inder Dev Dua, JJ.

MST. NARO,—*Appelalnt*

versus

HARBANS LAL AND ANOTHER,—*Respondents.*

Letters Patent Appeal No. 294 of 1959.

1962

Feb., 26th

Custom—Rattigan's Digest of Customary Law—Para 59—Consent to alienation by father given by a major son

(2) A.I.R. 1951 Cal. 43,
(3) A.I.R. 1959 Kerala 136.

during the minority of another son—Minor son—Whether can challenge the alienation—Code of Civil Procedure (Act V of 1908)—Section 2(11)—Legal Representative—Intermeddler with the deceased's estate and Executor de son tort—*Whether entitled to the rights of the deceased.*

Held, that in view, of the clear language of para 59 of Rattigan's Digest of Customary Law the consent to the sale given by a son who is major during the minority of another son cannot estop the minor son from suing for possession of his share of the ancestral land on the ground that the sale by his father was without consideration and legal necessity. In order to screen an alienation of ancestral property from attack under the rules of customary law and to validate it or make it indefeasible, the consent of all the descendants of alienor in existence and entitled to challenge it, is essential, subject of course to the proviso that *bona fide* consent by the alinor's son would bind the consenting party's sons and his other descendants as well, and the latter cannot maintain a suit to avoid such an alienation. If, however, one or only some out of the descendants of the alienor have consented to the alienation then it cannot have the effect of making the alienation indefeasible or absolutely unassailable, and the other or remoter descendants are fully competent to sue to set it aside. This rule is only concerned with the *locus standi* to challenge the alienation and it does not in any way affect the inference which may in a given case be permissible for the purposes of holding the alienation to be otherwise for a necessary purpose or an act of good management which inference may legitimately be drawn from the consent of the alienor's descendant or descendants. The effect of consent given by one of the reversioners is that he loses his right to challenge the alienation to which he has consented and even if some other reversioner succeeds in assailing such an alienation the consenting party cannot take advantage of the successful challenge.

Held, that legal representative as defined in section 2(11) of the Code of Civil Procedure, includes any person who intermeddles with the estate of the deceased. Intermeddling means, to meddle with the affairs of others in which one has no concern; to meddle officiously to interpose or interfere improperly. It signifies meddling with the property of another improperly. Intermeddling may take several forms including collecting or taking possession of the assets or other acts which might evince a legal

control. A legal person who intermeddles is on the same footing as an *executor de son tort* (executor of his own wrong) as he takes upon himself the office of an executor by intrusion and not so constituted by the testator. He is a person who without authority intermeddles with the estate of the deceased. Very slight act of intermeddling with the property of the deceased makes a person *executor de son tort*, and where he has so acted, he renders himself liable to an action not only by the rightful executor but also by a creditor of the deceased or by a legatee. He thus incurs all the liabilities without the privileges attaching to a validly constituted executor. An executor of his own wrong cannot bring any action in right of the deceased, though by his own conduct he exposes himself to an action being brought against him. Thus he is liable to be sued as an executor and made accountable for his conduct in dealing with the estate and he is also answerable for the acts of others when authorised by him. When a person intermeddles with the property of the deceased, he is a legal representative of the deceased for the purposes of procedure to the extent of the property with which he has intermeddled, but that does not mean that the intermeddler becomes representative of the deceased for purposes of succession to the property. Such a person is "legal representative" under section 2(11) of the Civil Procedure Code, but only for purposes of procedure. The definition is for the purposes of adjective law and does not alter the rule of substantive law. Simply because an intermeddler is joined as a party to the suit for recovery of possession, no relief can be given to him and he cannot be treated on the same footing as the real heir of the deceased. A legal representative cannot assert his own individual or hostile title to the suit assuming he had one.

Appeal under Clause 10 of the Letters Patent from the decree of the Hon'ble Mr. Justice S. S. Dulat, dated the 14th day of April, 1959, passed in RSA No. 592 of 1954, reversing that of Shri J. N. Kapur, District Judge, Hoshiarpur, Camp Dharamsala, dated the 11th March, 1954, granting the plaintiff a decree for possession of half the share in the property in dispute as prayed for and dismissing his declaratory suit relating to half share in property of Ishri Parshad and leaving the parties to bear their own costs throughout; and in lieu thereof restoring the decree of Shri Guru Dutta Sikka, Senior Subordinate

Judge, Kangra at Dharamsala, dated the 6th August, 1952, dismissing the suit of the plaintiff with costs.

K. C. NAYAR AND D. S. KEER, ADVOCATES, for the appellant.

K. L. KAPUR and R. K. AGGARWAL FOR V. C. MAHAJAN, ADVOCATES, for the Respondents.

JUDGMENT

TEK CHAND, J.—Mst. Naro, mother of Dina Bandhu, deceased has filed this Letters Patent appeal from the decision of Dulat J., in Regular Second Appeal No. 592 of 1954, who allowed the appeal of the defendant-appellant, set aside the decree passed by the District Judge, Hoshiarpur, and affirmed the decree of the trial Court dismissing the plaintiff's suit but left the parties to bear their own costs throughout. Tek Chand, J.

The facts giving rise to this suit are that one Madhu Sudan, a Brahman of Tika Dhanotu, village Dodamb, tahsil Kangra, sold 39 *kanals*, 19 *marlas* of land by a registered deed of sale, dated 2nd of June, 1936 (Exhibit D. 1), in favour of Pala Ram, father of defendant No. 1 Harbans Lal. This sale was for Rs. 2,500 and the mutation of sale was sanctioned at No. 251 on 15th of January, 1937. The suit was instituted by Dina Bandhu, the younger of the two sons of the alienor, Madhu Sudan, on 20th/21st of March, 1951, nearly 15 years after the sale which was impugned. He became major on 24th of June, 1948 and the suit has thus been instituted within three years of his having attained the age of majority. The plaintiff prayed for a decree for possession of the land in dispute alleging that the sale effected by his father, Madhu Sudan, was of ancestral land and was without consideration and necessity and, therefore, not binding upon him. His elder brother, Ishri Parshad who was major at the time of the sale. had given his consent and he was on this ground impleaded as a *pro forma* defendant. When the suit was instituted Harbans Lal defendant No. 1

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was a minor aged 17 years and had attained the age of majority during the course of the trial. On this reckoning Harbans Lal must have been aged two or three years at the time of the execution of the sale in favour of his father, Pala Ram.

Harbans Lal defendant No. 1 resisted the suit on the usual grounds that the sale was not of ancestral land and that it was for consideration and necessity. The trial Court framed the following issues:—

(1) Whether the suit is within time?

(2) Whether the property in suit is ancestral *qua* the plaintiff?

(3) If issue No. 1 is proved, whether the sale in suit was effected for consideration and valid necessity?

(4) Whether the plaintiff is governed by custom and what that custom is?

(5) What is the effect of the consent given to the sale in suit by Ishri Parshad defendant No. 2?

(6) Whether the plaintiff can sue for the share of Ishri Parshad?

(7) Relief.

It was held on the first issue that the suit was within time and that the land was ancestral with the exception of khasra No. 100, measuring 1 *kanal* 15 *marlas*, which was held to be non-ancestral. It was held under the fourth issue that the parties were governed by the agricultural custom in matters of alienation and succession. The sixth issue was decided against the plaintiff as the latter had consented to the property being sold by his father. He had also his own sons alive and, under the circumstances, the plaintiff was not entitled to sue for the recovery of possession of more than half the property in dispute. Issues 3 and 5 were disposed of together and these are the only material issues for purposes of disposing of this appeal. The trial Court found that

the consideration for the sale as mentioned in the sale-deed consisted of the following items:—

(1) Rs. 80 received previously by way of earnest-money.

(2) Rs. 1,220 received at the time of the execution of the deed of sale before the Registrar for payment to antecedent creditors.

(3) Rs. 1,200 left with the vendee for payment to other antecedent creditors of the vendor.

The deed of sale was found to be for consideration except for Rs. 100 out of Rs. 1,200. The necessity for the sale was held to have been proved. On these findings the Senior Subordinate Judge dismissed the plaintiff's suit.

The plaintiff's appeal was allowed by the District Judge and the plaintiff was granted a decree for possession of half the share in the property in dispute. From this decree defendant No. 1 appealed to this Court and the appeal was allowed by the learned Single Judge. During the pendency of the regular second appeal Dina Bandhu had died leaving neither widow nor issue on 25th of July, 1954, leaving Mst. Naro, widow of Madhu Sudan. An application was made under Order 22, rule 4, Civil Procedure Code, (Civil Miscellaneous No. 384/C of 1954), stating that though the right to sue did not survive to Mst. Naro or to his step brother Ishar Das (*alias* Ishri Parshad), but they were made legal representatives of Dina Bandhu plaintiff for purposes of continuing the proceedings in the appeal. It was also mentioned that besides being Dina Bandhu's mother, Mst. Naro was also in possession of the property of Dina Bandhu deceased.

Before the learned Single Judge Shri Karam Chand Nayar, counsel for the plaintiff, had conceded that the land comprised in *khasra* No. 100 was non-ancestral and that the finding of the

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learned District Judge treating that area to be ancestral was erroneous and that the suit regarding that particular field had, in any case, to be dismissed. The learned Single Judge rejected the contention of the learned counsel for defendant No. 1, Harbans Lal, that the finding of the District Judge that the evidence regarding the existence of the antecedent debt was unsatisfactory, was erroneous as it was a clear finding of fact and even if erroneous, could not be disturbed in second appeal. The second contention on behalf of the defendant prevailed with the learned Single Judge. Reliance was placed on the statement of customary law contained in paragraph 59 of Rattigan's Digest of Customary law according to which ancestral immoveable property is ordinarily inalienable except for necessity or with the consent of male descendants, or in the case of a sonless proprietor of his male collaterals. As Dina Bandhu plaintiff at the time of the sale was a minor, he was incapable of giving his consent to the alienation. Consent of the elder son, Ishri Parshad, had been obtained. The learned Single Judge felt that if the major son of the alienor was agreeable to the alienation, a legal inference could be raised that the alienation was for family necessity. In these circumstances, a presumption was raised that the alienation had been rendered valid especially in the absence of any suggestion that the consent of Ishri Parshad, the elder brother, was dishonest or *mala fide*. Taking this view, the appeal was allowed and the plaintiff's suit dismissed.

Before us Shri Karam Chand Nayar has maintained that the view of the learned Single Judge was not in accordance with the rule of custom as stated in para 59 of the Rattigan's Customary Law. He has emphasised that the words used are "with the consent of male descendants" and in this case the consent of both the male descendants was necessary to validate alienation. As the plaintiff on account of his minority was incapable of giving his consent, the ancestral immovable property could be alienated only for necessity and as that matter was concluded by a finding of

fact against the defendant, the plaintiff's suit deserved to succeed. He cited a number of authorities in support of his contention. In *Chuni Lal* v. *Nanda and others* (1), an alienation by a widow of her deceased husband's property had been challenged and it was held that the mere act of one among several reversioners of equal degree in assenting to a sale by a widow of her late husband's property does not estop the other reversioners from suing to set aside the sale, inasmuch as one of the body of reversioners, unless specially authorised by the others, cannot sign away their rights. In that case no minor was involved and the alienation was by the widow who was entitled to a limited estate for her life.

Mr. Karam Chand Nayar next cited the case of *Gulab and others* v. *Mussammat Jioni* (2), which was a case of gift of the land by a sonless proprietor in favour of his daughter in the presence of near collaterals. Our attention was drawn to the following observations at page 230:—

> "To take the question of acquiescence first—four out of nine plaintiffs are still minors, and some of the others have recently come of age. The suit is in time, and in any case no conduct of the plaintiffs, who are of age, in the way of acquiescence could bind the plaintiffs who were not of age and parties to that conduct".

Mr. Nayar also referred to a Bench decision in *Milkha Singh* v. *Suba Singh* (3). In that case the grandfather had mortgaged the ancestral property with the consent of the father, but there was evidence that the debts were probably incurred for the immoral pursuits of the father, and the son challenged the alienation. It was held that the consent of the father was not *bona fide* and, therefore, could not be taken as presumptive evidence of necessity. The plaintiff, his son, had an

(1) 174 P.R. 1888.
(2) 49 P.R. 1899.
(3) A.I.R. 1937 Lah. 477.

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independent right as reversioner to challenge the alienation as he derived his right from the common ancestor and the alienation in question was not binding on the son. It was observed that the consent of the father to the alienation by the grandfather, might have been taken as presumptive evidence of necessity had it been given in good faith. There is, however, a distinction between a consent given by the father which might be taken as a presumptive evidence of necessity and, therefore, binding on his sons, and consent given by a brother. The brother's consent cannot be equated with the consent given by the father. Moreover, as stated in paragraph 59 of Rattigan's Digest of Customary Law, the consent has to be of male descendants and the younger brother is certainly not a descendant of the elder. Moreover, the father's share is entire whereas the brother's share in this case is only one-half.

Our attention was also drawn to a judgment of the Lahore High Court in *Mussammat Bassanti* v. *Chanda Singh and others* (4). All that was held in that case was that the fact that a reversioner of the alienor takes over the alienation on payment of full consideration to the original alienee amounts to a waiver of his own claim to sue to challenge the alienation and is presumptive evidence that the alienation was not bad for want of necessity. It was held that the waiver on the part of the father did not bind his son. Mr. Krishan Lal Kapur, learned counsel for the defendant-respondent, placed reliance upon a Full Bench decision in *Santa Singh* v. *Banta Singh and others* (5). The Full Bench expressed the view that where the grandfather alienates the ancestral immovable property and the fathers give their consent *bona fide* to the alienation, the grandsons have no right to challenge it. The grandsons can challenge it only if their fathers have concurred in the alienation *mala fide* or without sufficient reason. It was also observed that when consent is given by the father in realisation of the fact that

(4) 77 I.C. 475.
(5) A.I.R. 1950 Lah. 77.

alienation by the grandfather was an act of good management the consent being *bona fide* one really amounts to consent by the fathers on behalf of the entire reversionary body in a representative capacity and the alienation cannot be challenged by the grandsons. The analogy of consent given by the father cannot apply to the case of consent given by a brother so as to prevent the latter from challenging the alienation. The latter does not derive his customary right to dispute the alienation from his brother or any intermediate ancestor, other than the common ancestor. As at present advised, I would hesitate to apply by analogy the view expressed in the Full Bench case to a case like the present where a brother had expressed his acquiescence to a sale by the father during the lifetime of the minor brother, who was incapable of giving his consent or expressing his disapproval. This certainly is not deducible from what is contained in para 59. Of course, it is a different matter whether a consent given by some of the collaterals or brothers can be treated as a presumptive evidence of necessity which would depend upon several other circumstances, namely, the good or bad faith of the person giving the consent or the immoral propensities of the alienor. We were also referred to *Faqir Chand and others* v. *Mt. Bishan Devi and others* (6), for the proposition that where the alienation is valid by reason of its having been assented to by the alienor's descendants in case the alienor is not a sonless proprietor it cannot be contested by any one. This again was a case of a consent given by a person binding his male descendants. In this case while examining the respective scopes of para 59 and para 67 of Rattigan's Customary Law, Achhru Ram J. said—

> "The rule of law stated in para 67 becomes applicable only where the alienation is otherwise liable to be impugned. If the alienation is valid by reason of having been assented to by the alienor's descendants in case the alienor is not a

(6) A.I.R. 1947 Lah. 185.

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sonless proprietor, and by his reversioners in case he is such a proprietor, it cannot be contested by anyone. Where, however, it has not been validated by such consent, and is otherwise liable to be challenged, para 67 prescribes the order in which it can be impugned by the reversionary heirs. The occasion to refer to para 67 arises only where the concurrence of the next reversioner in the alienation or the act alleged to be wrongful has not the effect of making it absolutely unassailable. For example where one or some only out of the descendants of the alienor, have consented to the alienation, para 59 can have no application, and, under para 67, the other or remoter descendants may sue to set aside the alienation. Similarly where some only out of the body of male collaterals have consented, other or remoter collaterals may sue. Where, however, the consent or concurrence of the descendants and reversioners, who have not sued has the effect of making the alienation wholly unassailable para 67 cannot be taken to confer any right on the remoter reversioners to challenge that alienation. (p. 187)."

The above remarks, though made in a different context, do, however, signify that consent to the alienation given by one out of the several descendants of the alienor would not suffice for purposes of para 59. Reliance was also placed by the learned counsel for the respondent on *Risaldar Ram Singh* v. *Labh Singh and others* (7), where a learned Single Judge expressed the view that where persons, who would be interested in challenging an alienation agree to it, that would be presumptive proof which if not rebutted by contrary proof would validate the transaction as a proper and right one and this is when necessity is not proved *aliunde* nor is there proof of enquiry

(7) A.I.R. 1954 Punj. 119.

on the part of the alienee nor honest belief for the necessity. These observations in view of the peculiar facts of that case are not of much help in resolving the controversy. No other authority has been cited which is really germane to the contention canvassed before us. In view of the clear language of para 59, I cannot persuade myself to hold that on the facts of this case the consent to the sale given by Ishri Parshad during the minority of the plaintiff would estop him from suing for possession of his share of the ancestral land on the ground that the sale by his father was without consideration and legal necessity.

The next argument urged by the learned counsel for the respondent is that the learned District Judge, while deciding the issue on consideration and necessity in plaintiff's favour, had committed grave errors of law and that the learned Single Judge should have interfered with the finding on second appeal. There is no gainsaying the fact that in arriving at some conclusions the lower appellate Court has committed palpable errors; for instance, after having found that the plaintiff's counsel did not question the payment of the amount of Rs. 80 and Rs. 1,220 which payment was proved, it committed a serious error in holding that the sale was entirely without consideration either for Rs. 1,220 or for Rs. 1,200. While holding that the whole sale deed was a made-up affair and so was the payment of Rs. 1,200, because D.W. 9 Babu Ram was not more than seven years old when the payments were made, the learned District Judge manifestly erred, as the witness was not seven but twenty years old. He has, however, held that the existence of the debt was not proved. If we were sitting as a Court of first appeal, we would certainly have not agreed with most of the conclusions of the learned District Judge, but that will not warrant disturbing a finding which is essentially of fact, though manifestly erroneous. The learned Single Judge declined to disturb the finding of fact, though its correctness was assailed before him. The Supreme Court in *Deity Pattabhiramaswamy* v.

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S. Hanyamayya and others (8), has endorsed the view expressed by the Judicial Committee of the Privy Council in *Durga Chowdhrani* v. *Jawahir Singh* (9), and *Wali Muhammad* v. *Muhammad Baksh* (10), that there is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however gross the error may seem to be. The contention advanced by the learned counsel for the respondent which has the effect of interfering with a finding of fact cannot, therefore, be entertained.

It was lastly urged that Mst. Naro, the appellant before us, has no *locus standi* as she is neither the heir of her son Dina Bandhu deceased nor is competent to contest the alienation of her deceased husband Madhu Sudan. There is force in this contention. It was held in *Gobinda and another* v. *Nandu and another* (11), that the mere fact that A is an heir to B, does not entitle A to control B's dealings with the property which A may on his death inherit. A may on B's death succeed to his estate, but he may not have a right to challenge an alienation made by B. "There can be no doubt whatsoever that the right of inheritance does not carry with it a right to contest an alienation". In this case Mst. Naro is not even an heir of Dina Bandhu. His heir is his brother, Ishri Parshad, and the latter's issues. Reference may be made to question and answer 41 of the Customary Law of the Kangra District which are reproduced below:—

> "*Question* 41.—Where there are no male lineal descendants (sons, grandsons, or great-grandsons) and brothers and nephews succeed, do they take their shares in the same manner, or how?
>
> *Answer.*—In the absence of sons and grandsons brothers and nephews succeed on the same principle as explained in the answer to question No. 40."

(8) A.I.R. 1959 S.C. 57.
(9) I.L.R. 18 Cal. 23 (P.C.)
(10) A.I.R. 1930 P.C. 91.
(11) I.L.R. 5 Lah. 450.

To this argument Mr. Karam Chand Nayar replies that Mst. Naro was impleaded as the legal representative by defendant No. 1 when Dina Bandhu died during the pendency of the defendant's second appeal in the High Court. This, however, would not confer a right to contest the alienation upon Mst. Naro. She was impleaded being an intermeddler with the estate of deceased Dina Bandhu, and such a person is regarded as a legal representative. The necessity of impleading Mst. Naro arose, because defendant No. 1 wanted to pursue his appeal in the High Court on the death of Dina Bandhu. Section 2(11) of the Code of Civil Procedure defines "legal representative" as meaning "a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued".

Intermeddling means, to meddle with the affairs of others in which one has no concern; to meddle officiously; to interpose or interfere improperly. It signifies meddling with the property of another improperly. Intermeddling may take several forms including collecting or taking possession of the assets or other acts which might evince a legal control. A legal person, who intermeddles is on the same footing as an executor *de son tort* (executor of his own wrong) as he takes upon himself the office of an executor by intrusion and not so constituted by the testator. He is a person who without authority intermeddles with the estate of the deceased. Very slight act of intermeddling with the property of the deceased makes a person executor *de son tort,* and where he has so acted, he renders himself liable to an action not only by the rightful executor but also by a creditor of the deceased or by a legatee. He thus incurs all the liabilities without the privileges attaching to a validly constituted executor. An executor of his own wrong cannot bring any action in right of the deceased, though by his own

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conduct he exposes himself to an action being brought against him. Thus he is liable to be sued as an executor and made accountable for his conduct in dealing with the estate and he is also answerable for the acts of others when authorised by him,—*vide Peters* v. *Leeder* (12), and *Attorney-General* v. *New York Breweries Company* (13).

It was held in *Firm Balkisan Hukumichand* v. *Mt. Jatnabai* (14), that an executor *de son tort* is not entitled to recover debts due to the estate of the deceased of which he has wrongfully taken possession. In that case one Bhivraj brought a suit seeking a decree on the ground that the partnership between his father and the defendant had been dissolved by the death of the former and he was entitled to such amount as might be found due on taking account of the partnership. During the pendency of the suit Bhivraj died and his sister, Jatnabai, was brought on the record as his legal representative. It was held that though she was a legal representative as defined in section 2(11) of the Civil Procedure Code, but the mere fact of intermeddling with the estate of Bhivraj would not give her the right to maintain the action. There is authority for the proposition that when a person intermeddles with the property of the deceased, he is a legal representative of the deceased for the purposes of procedure to the extent of the property with which he has intermeddled, but that does not mean that the intermeddler becomes representative of the deceased for purposes of succession to the property. Such a person is "legal representative" under section 2(11) of the Civil Procedure Code, but only for purposes of procedure. The definition is for the purposes of adjective law and does not alter the rule of substantive law. Simply because an intermeddler is joined as a party to the suit for recovery of possession, no relief can be given to him and he cannot be treated on the same footing as the real heir of the deceased,—*vide Lalsa Rai*

(12) (1878) 47 L.J.Q.B. 573.
(13) (1899) A.C. 62.
(14) A.I.R. 1938 Nag. 298.

and others v. *Udit Rai and another* (15). This decision of the Allahabad High Court was cited with approval by Bhide, J., in *Jai Kishan Dass* v. *Karimuddin and another* (16). In the Lahore case a mortgagee decree-holder had died leaving a daughter, who was the lawful heir and also collaterals who were not. It was held that if the collaterals were in possession, they might be legal representatives for purposes of the definition in the Civil Procedure Code. It was observed that because a person who has merely managed to obtain unlawful possession of the property of a deceased person, he should not be entitled to execute decrees in favour of the deceased on the strength of such a possession when he was himself not the lawful heir. From this discussion it ensues that Mst. Naro as an intermeddler, though in the eye of procedure a legal representative for certain purposes, cannot by the mere act of filing an appeal claim for herself the status of an heir under the customary law and further arrogate to herself the right to contest an alienation and despite the fact, that the customary law does not treat her as an heir and does not confer upon her the power to assail the alienation in a Court of law. In this case on the death of the sole plaintiff, Dina Bandhu, the right to sue does not survive as his rights on his death do not devolve upon his mother, Mst. Naro. Moreover, it is not open to a legal representative to assert his own individual or hostile title to the suit assuming he had one. Our attention was drawn by Mr. Karam Chand Nayar to a decision of the Division Bench in *Gulli* v. *Sawan and others* (17), where it was held that when a party to a suit dies, a legal representative is appointed merely in order that the suit may proceed, and a decision be arrived at. It is the original parties' rights and disabilities that have to be considered; and the mere fact, that the legal representative so appointed could not have brought a suit himself to set aside the alienation concerned in the suit, as, a suit by him would be

(15) A.I.R. 1924 All. 717.
(16) A.I.R. 1939 Lah. 321.
(17) I.L.R. 4 Lah. 72.

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barred by limitation, is not sufficient to render the suit by the original plaintiff liable to dismissal. In that case certain alienations were made by the collaterals of the plaintiff which were challenged by one Nigahia, son of Gulli, on the ground that the alienations being of ancestral land were without consideration and for no necessity and as such would not affect the plaintiff's reversionary rights. Gulli, the father of the plaintiff, who had the right to challenge the alienations, did not do so within the period of limitation. The alienations were challenged by his son, Nigahia, but Nigahia died *pendente lite* and his father, Gulli, was brought on the record as the legal representative of his son. In this connection it was observed that it is the original parties' rights and disabilities that have to be considered and the mere fact that Gulli could not have brought a suit to set aside these alienations on the ground of limitation is not sufficient to render the suit by Nigahia liable to dismissal. On Gulli being impleaded as the legal representative on the death of his son, Nigahia, it was remarked that the appeal should have been decided on the merits. These observations are not *in pari materia* and are no guide for a decision in the instant case where the mother as the legal representative had no right to bring a suit questioning the alienation. Our attention was also drawn to *Dareppa Alagouda* v. *Mallappa Shivalingappa* (18) and *Yeshwantrao Sabnis* v. *Bhalchandrarao and others* (19), where similar observations were made, and it was said, that a legal representative must continue the litigation on the cause of action sued upon and cannot set up a new and individual right. He can take up any plea which may be appropriate to his character as legal representative, but he cannot take up a new and inconsistent plea, or, a plea contrary to the one taken by the deceased. Nor can he take any plea which was not open to the deceased defendant himself. The above observations are true so far as they go, but are no guide to a case like the present. The distinguishing features of

(18) A.I.R. 1947 Bom. 307.
(19) A.I.R. 1952 M.B. 207.

this case are, that the legal representative as an intermeddler cannot prosecute the appeal, because the right to sue did not survive to her. In her own right she was neither an heir nor had any power to contest the alienation.

It was then contended that this plea ought to have been raised before the learned Single Judge. This contention is not tenable, because the appellant in the regular second appeal was defendant, Harbans Lal, who wanted the dismissal of the plaintiff's suit by reversal of the judgment of the District Judge, who had granted to the plaintiff a decree for possession in respect of one-half share. It was, therefore, necessary for the defendant appellant, with a view to resist the decree in favour of the plaintiff, to establish his right to possession and, therefore, the intermeddler, i.e., Mst. Naro, was rightly impleaded as the legal representative of her deceased son, Dina Bandhu. In the Letters Patent appeal before us, it is now she, who wants to fight her battle as if it were really the plaintiff's. The defendant as a respondent before us can with justification raise an objection at this stage that an appeal by an intermeddler is not competent. This objection has not been raised belatedly. It was finally urged by Shri Karam Chand Navar that we should examine the record and hold that, in fact, Ishri Parshad had not given his consent to the sale by his father but had merely attested the deed of sale and the mere act of attestation does not amount to giving of consent. I do not think that we can entertain this point when it is raised for the first time in this Court, never having been canvassed in the Courts below. This contention is not even mentioned in the grounds of appeal. I am also of the view that this matter cannot be agitated except at the instance of Ishri Parshad, who has not appealed, nor was this issue previously raised even at his instance.

For reasons discussed above, the appeal is devoid of merit and I would, therefore, dismiss the same with costs.

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DUA J.—I agree with my learned brother that this appeal should be dismissed with costs and would like to add a few words of my own. The facts have been fully stated in the judgment of my learned brother and, therefore, need not be repeated.

Section 2(11) and Order 22, rules 3, 4 and 11, Code of Civil Procedure, are the relevant provisions to which it is necessary to refer for the purposes of considering the question of the *locus standi* of Smt. Naro to prefer this Letters Patent Appeal. Section 2(11) defines the expression "legal representative" to mean a person, who in law represents the estate of a deceased person, and includes any person, who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. The definition clause in the Code, it may be mentioned, expressly excludes from its operation cases of repugnancy in the subject or context. Rule 3 of Order 22 prescribes the procedure in case of death of one of several plaintiffs or sole plaintiff and rule 4 does so in case of death of one of several defendants or of sole defendant. According to rule 11 in the application of this order to appeals, so far as may be, the word "plaintiff" is to be held to include an appellant and the word "defendant" a respondent, and the word "suit" an appeal. For the purposes of appeal, therefore, rules 3 and 4 considered in the light of rule 11 would read as under:—

"3. (1) Where one of two or more appellants dies and the right to appeal does not survive to the surviving appellant or appellants alone, or a sole appellant or sole surviving appellant dies and the right to appeal survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased appellant to be made a party and shall proceed with the appeal.

(2) Where within the time limited by law no application is made under sub-rule (1) the appeal shall abate so far as the deceased appellant is concerned, and, on the application of the respondent, the Court may award to him the costs which he may have incurred in defending the appeal, to be recovered from the estate of the deceased appellant.

4. (1) Where one of two or more respondents dies and the right to appeal does not survive against the surviving respondent or respondents alone, or a sole respondent or sole surviving respondent dies and the right to appeal survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased respondent to be made a party and shall proceed with the appeal.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased respondent.

(3) Where within the time limited by law no application is made under sub-rule (2) the appeal shall abate as against the deceased respondent."

It may be noticed that there is no provision in rule 3 similar to sub-rule (2) of rule 4.

Reading together these provisions it appears to me that the expression "the right to sue" as used in rules 3 and 4 should also be held to mean the right to appeal, and thus construed we have to see whether or not on the death of Dina Bandhu the defendants-appellants had a right to appeal against the decree for possession on the ground that such right survived to them. Now the right to appeal which vested in the defendants was the right to seek relief against the decree for possession passed against them and this right would appear to me to survive to them as against any

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one who intermeddled with the subject matter of the decree by taking possession of the same under colour of title claiming it as an heir or legal representative of the deceased, irrespective of the sustainability of such claim in law. In other words the right to assail the decree for possession survived to the defendants-appellants against all intermeddlers and it would hardly be relevant to consider the question whether the right of suit exercised by the deceased legally passed on to such intermeddler

As soon as the defendants succeeded in getting reversed and set aside the decree for possession passed against them by the Court of first appeal, it appears to me that the parties stood in or were relegated to the same position in which they were either before the institution of the suit or at worst during the proceedings in the court of first instance. In this view of the matter I am inclined to think that when Smt. Naro preferred the Letters Patent Appeal, she would have to show that the right to have the alienation in question set aside lawfully passed on to her on Dina Bandhu's death as his lawful heir and successor. Now supposing Dina Bandhu had died during the trial of the suit in the Court of first instance or if he had failed in that Court, Smt. Naro in order to be entitled to prosecute the suit or to prefer an appeal would have to establish that the right to challenge the sale had devolved on her by succession. The question arises: Does it make any real difference if Dina Bandhu had before his death obtained a decree for possession in his favour which decree was later set aside on appeal after his death ? I am not unmindful of a possible argument that on Dina Bandhu's death the decree for possession was a part of his estate left by him which devolved on Smt. Naro and she would perhaps be entitled to defend and uphold the existence of the decree even as an intermeddler. This argument, however, was not developed or even adverted to at the bar with the result that I need say nothing more about it. As at present advised, therefore, I am inclined to take the view that

after the decree for possession was set aside by the learned Single Judge of this Court, if Smt. Naro wants to continue the legal proceedings initiated by Dina Bindhu for possession of the land after setting aside the alienation in question she would have to establish her right to challenge the sale under the rules of customary law. In this connection it would not be out of place to mention that the right to challenge sales of ancestral property is based on agnatic theory and except for those in whom the right vests no one else can question such sales: nor is this right heritable or transferable independently of the customary law. This right of challenging a sale on the ground that it is not for consideration and necessity only vests in the collaterals within certain specified degrees and does not pass on to their heirs as heritable estate, for, its origin or source is the common male ancestor from whom the property came by inheritance. When, therefore, Smt. Naro chose to file a Letters Patent Appeal her position would for all practical purposes be similar to the position of Dina Bandhu's heirs if he had died during the proceedings in the trial Court. Nothing convincing has been urged at the bar and indeed the counsel has not chosen to attempt to argue that Smt. Naro could, as an heir of Dina Bandhu, continue the suit in case of Dina Bandhu's death in the trial Court. On the basis of the arguments addressed at the bar, therefore, I would as at present advised hold that Smt. Naro has not been proved to have any *locus standi* to prefer the Letters Patent Appeal.

In so far as the question of consent of Dina Bandhu's brother being binding on him is concerned, as has been discussed by my learned brother, Dina Bandhu cannot lose his right to challenge the sale merely because his brother had consented to it. The law is by now very well settled and is not open to any doubt that in order to screen an alienation of ancestral property from attack under the rules of customary law and to validate it or make it indefeasible, the consent of all the descendants of alienor in existence and

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entitled to challenge it, is essential, subject of course to the proviso that a *bona fide* consent by the alienor's sons would bind the consenting party's sons and his other descendants as well, and the latter cannot maintain a suit to avoid such an alienation. If, however, one or only some out of the descendants of the alienor have consented to the alienation then it cannot have the effect of making the alienation indefeasible or absolutely unassailable, and the other or remoter descendants are fully competent to sue to set it aside. This rule is only concerned with the *locus standi* to challenge the alienation and it does not in any way affect the interence which may in a given case be permissible for the purposes of holding the alienation to be otherwise for a necessary purpose or an act of good management which inference may legitimately be drawn from the consent of the alienor's descendant or descendants.

The effect of consent given by one of the reversioners is that he loses his right to challenge the alienation to which he has consented and even if some other reversioner succeeds in assailing such an alienation the consenting party cannot take advantage of the successful challenge. In this view of the matter the question of the necessity for the sale in dispute assumes some importance. Half of the land belonging to the consenting son of the alienor must be considered to be immune from attack. Excluding that half portion and also excluding the area held to be non-ancestral, consideration and necessity only to the extent of less than half the sale price would require proof by the vendees and if about two third of this amount can be established to be for a necessary purpose the sale deserves to be upheld. Before the learned Single Judge this aspect does not seem to have been pressed with the result that this aspect was not considered by him. On the arguments addressed before the learned Single Judge, so far as are discernible from his judgment, the finding of the learned District Judge would *prima facie* appear to be one of fact. But as Smt. Naro has been held to have no *locus*

standi to prefer the Letters Patent Appeal it may not be necessary to say anything more on this question. It may, however, be mentioned that the respondent has urged that the finding on the question of consideration and necessity as given by the learned District Judge is perverse and was arrived at without realizing the exact point which arose for consideration and, therefore, was not binding on the learned Single Judge. As this precise point does not seem to have been urged before the learned Single Judge it is unnecessary to pursue it.

With these observations, I agree with my learned brother that this appeal fails and should be dismissed with costs.

B.R.T.

FULL BENCH

Before Mehar Singh, Shamsher Bahadur and Prem Chand Pandit, JJ.

M/s SANT RAM DES RAJ,—*Petitioner.*

versus

KARAM CHAND,—*Respondent.*

Civil Revision No. 373 of 1960.

1962

June, 1st

East Punjab Urban Rent Restriction Act (III of 1949)—Section 13(3)(a)(i)—Landlord seeking eviction of the tenant establishing bona fide *requirement of premises for his own occupation—Whether entitled to evict tenant—Occupation of another premises in the same urban area which does not meet his requirement being inadequate for his needs—Effect of—"Requires" and 'another residential building'—Meaning of—Section 2(a)—"Building"—Whether means demised premises only.*

Held, that where a landlord establishes that he has made his application for eviction of his tenant in good faith and that he requires the premises for his own occupation and further that the premises already in his occupation do not meet his requirements and needs, he is