

The creditor and the lapse of time



**ASSIGN
BUSTER**

The burden of proof of legal necessity or benefit to estate is on the creditor and the lapse of time will not affect the question of onus of proof though the circumstance may effect the value or weight of evidence.

The following category of persons may challenge unauthorised alienations of joint family property i. e. alienations without legal necessity or benefit to estate:— (1) Every coparcener other than alienor if— (a) He was in existence on the date of alienation, and (b) He was not otherwise disqualified. A child in the mother's womb is deemed as a son born and his right to challenge an alienation dates back to the date of conception whether manifest or not. (2) A person who has succeeded to joint family property as an immediate heir of a reversioner or of a sole surviving coparcener provided the sole surviving coparcener himself could have done so.

(3) A subsequent alienee of the whole coparcenary property, but it is not settled whether the transferee of a particular portion of the coparcenary property could also do it. (4) A purchaser at sale in execution of a decree against the entire coparcenary property or a portion of it. (5) A person holding title to the whole of joint family property by adverse possession. (6) A creditor, on finding the alienation as a fraudulent act to defraud him. The unauthorised alienation could be challenged by a person who is born or begotten on the date of the alienation, provided he was born or begotten before the death of all the coparceners who were then in existence and possessed with the power of getting the alienation set aside. Where the Karta sells away or mortgages the joint family property, it becomes a binding duty of the purchaser or mortgagee to enquire into the necessity for the sale or mortgage.

The burden lies on the purchaser or mortgagee either to prove that there was a legal necessity in fact or that he made proper and bona fide enquiry about the existence of such necessity. If there was want of legal necessity and the transferee proves it that he was reasonably satisfied with the existence of such necessity, the alienation in that case would be upheld. The transferee is not bound to see that the money paid or advanced by him was actually applied to meet the necessity or not, because he cannot have the means of controlling its actual application, unless he enters on the management himself. In *Catholic Church v.*

Vishal Kumar, approving the view the Jammu & Kashmir High Court, held that where on attaining majority a minor challenges alienation of ancestral property, (1) an alienee is required to establish only the legal necessity for the transaction and it is not necessary for him to show that every bit of the consideration which he advanced was actually applied for meeting the family necessity, and (2) where a major portion of the amount of sale consideration is applied to satisfy the pre-existing debt it is enough to support the sale without further proof as to how the balance had been applied. It is an established principle of Hindu law that legal necessity does not mean actual compulsion, but is a sort of pressure upon the state which in law may be regarded as serious and sufficient to justify the alienation. The sale would be valid: Firstly, if there is proof of actual necessity; and Secondly, there is the proof that the alienee did make proper inquiries about the existence of necessity and he had all that was reasonable to satisfy himself as to the existence of necessity. Both the essentials are, however, exclusive and not

complementary to each other as proof regarding only it is enough to uphold the transaction”.

The period of limitation for setting aside an alienation of joint family property by a Karta or father is 12 years from the date when alienee takes possession of the property.