CHRISTÁCHÁRLU v. KARIDAS-AYYA.

to allow him to give the altered document in proof of the debt and to recover in this suit. I do not see how he could possibly in any view recover the first instalment, for the obligation to pay that and the other instalments at certain times was entirely created by, and depends upon the document. If *Rámasámy Kón's case* is to be followed as to the debt, it would seem that the document can only be used as evidence of a pre-existing debt (if any). But the parties having by contract in writing fixed the amount of debt and the periods for its payment, and that contract having become by the fraudulent act of one of the contracting parties incapable of being enforced, how can the Court now declare what is the debt, and when and how it is to be paid? Or if it can do so, shall it do so in this suit expressly framed for the enforcement of a contract found never to have existed between the parties? I think the suit was rightly dismissed by the Lower Courts, and I would dismiss the Second Appeal with costs.

Appeal dismissed with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1886. April 21. July 15.

NARASANNA (PLAINTIFF), APPELLANT,

and

GURAPPA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Decree against father—Sale of ancestral estate in execution of money-decree—Son's liability and rights.

A sale of ancestral property in execution of a money-decree obtained against a Hindú father will, if the debt was neither immoral nor illegal, pass to the purchaser, the entire interest of which the father could dispose, *i.e.*, his son's as well as his own share provided the purchaser has bargained and paid for such interest.

The son not being bound by the decree against his father may contest the sale by suit, but unless he proves that the debt was not such as to justify the sale, he cannot succeed.

The revised ruling of the Full Bench in *Ponnappa* v. *Pappuvayyangár*, I.L.R., 9 Mad., 343, as to sales in execution of money-decrees against the Hindú father has been overruled by the decision of the Privy Council in *Mussamut Nanomi Babuasin* v. *Modun Mohun*, L.R., 13 I.A. 1; s.c. I.L.R., 13 Cal., 21.

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* Second Appeal 926 of 1885.

NARASANNA v. GURAPPA.

APPEAL against the decree of F. E. Gibson, Acting District Judge of Kurnul, reversing the decree of P. V. Rangáchárlu, District Múnsif of Nandyál, in suit 229 of 1884.

The facts of the case appear from the judgment.

Srirangáchárlyar for appellant.

Viśvanáda Ayyar for respondent.

The Court (Collins, C.J., and Muttusámi Ayyar, J.) delivered the following

JUDGMENT:—The appellant Narasanna resides in the district of Kurnul, and his family, which consists of himself, his two brothers and his father, is governed by the Mitákshará law. In original suit 125 of 1871 on the file of the District Múnsif of Nandyál, the respondent No. 1 obtained a decree for a sum of money against the father of the appellant. Neither the appellant nor his brothers were parties to that suit. The judgment-creditor brought to sale certain lands belonging to the joint family by execution proceedings instituted against the father, and the respondents Nos. 2 and 3 became the purchasers. The appellant then brought the present suit to have it declared that the lands which had been sold were his self-acquired property. He stated in his plaint that he had divided from his father about 20 years prior to the suit and that he had acquired the lands in dispute with his own funds.

Respondent No. 1, who alone resisted the claim, denied the alleged division and contended that the lands which he brought to sale were ancestral property. The District Múnsif upheld this contention and decided that the appellant was not entitled to the declaration that the lands were his exclusive property. The District Múnsif then proceeded to consider whether the appellant was entitled in part to the declaration he asked for on the respondent's own showing. The appellant did not allege that the decree was for a debt which a son would not be liable to pay under the special rule of Hindú law relating to the obligation of sons to pay their father's debts. The District Múnsif, however, considered himself bound to follow the Full Bench decision of this Court, in *Ponnappa* v. *Pappuvayyangár* (1) and held that the appellant's interest in ancestral estate did not pass by the Court sale, and that such interest was not liable to be sold in execution of a money-

(1) I.L.R., 9 Mad., 343.

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decree against the father. Accordingly he made a decree declaring that the appellant was entitled to a quarter share, and that the Court sale did not affect the appellant's interest in ancestral estate. From this decree the respondent No. 1 appealed. The Judge reversed it on the grounds that he was not aware of the recent decision of this Court on which the District Múnsif relied, and that the son's interest also passed by the Court sale. He relied on the decision of the majority of the Judges of this Court in *Ponnappa Pillai* v. *Pappuvayyangár*.(1)

It is from this decree of the Lower Appellate Court that this second appeal is preferred.

It is urged on behalf of the appellant that his undivided interest in ancestral estate did not pass by the Court sale in execution of the money-decree against his father. The respondents support the decree not only on the ground that the son's interest passed by the sale but also on the further ground that the District Múnsif was not justified in decreeing in the appellant's favour on a case not disclosed by his plaint.

It is no doubt true, as alleged for the respondents, that the appellant stated in his plaint that the lands in dispute were his self-acquisition and that he failed to prove his averment. But this was certainly no ground for dismissing his suit altogether if he was entitled in part to the relief sued for on the facts admitted by respondent No. 1 himself. His admission is clearly evidence in favour of the appellant, and the latter is entitled to claim relief to the extent to which it may be lawfully adjudged by virtue of such admission. The question then on which our decision must depend is one of Hindú law as already stated. It is a question which frequently occurs in this country, and the decisions in regard to it are not on all points in harmony either in India or in the Privy Council. The leading case on this subject in this Presidency is *Ponnappa Pillai* v. *Pappuvayyangár*. It was decided on the 1st April 1881, and the judgments delivered in that case contain a full exposition of the Hindú law on the subject and of the course of decisions in India and before the Privy Council.

It was decided by the majority of the Court in that case (I) that the son was bound to pay his father's personal debt out of ancestral property derived through the father, and (II) that the

(1) I.L.R., 4 Mad., 1.

father was competent to sell ancestral property to pay his own antecedent debts provided they were such as the son would be bound to pay under the special rule of Hindú law. These two propositions of law were since approved by the Privy Council in *Muttayan* v. *Zamindár of Sivagiri*,(1) which was decided in May 1882.

As to the interest which passed by a Court-sale in execution proceedings, it was held that when the decree against the father was founded upon a mortgage and when it contained a direction that the mortgage property be sold on default of payment, the son's interest would not pass by the Court-sale, for, the right of redemption which the son had could not be foreclosed except by a decree to which he was made a party. In regard, however, to money-decrees against the father, it was decided that the entire ancestral property inclusive of the son's interest passed by the Court-sale. In appeal 71 of 1880 it was held by a Division Bench of this Court that when it appeared from the execution proceedings that the purchaser intended to buy only the father's interest, the son's interest did not pass. The course of decisions was in accordance with these propositions of law, until the decision of the Privy Council in *Hardi Narain Sahu* v. *Ruder Perkash Misser*.(2) In that case the Judicial Committee held that the son's interest did not pass by a sale in execution of a money-decree and referred to their decision in *Deendyal* v. *Jugdeep Narain Singh*.(3) They further hinted that, if the decree were founded on a mortgage and contained a direction in regard to the sale of the mortgaged property, the son's interest might also pass by the execution sale. In advertence to this case, the decision of the Full Bench of this Court passed in 1881 was reconsidered in S.A. 703, 704 and 705.(4)

It was decided that when there was a money-decree the father's interest was alone liable to be sold in execution, and that when there was a mortgage-decree the entire estate was liable to be sold. It was considered that in the one case, the right, title and interest of the judgment-debtor was the right of the father as an individual co-parcener, and that in the other the Court by its decree executed the father's mortgage. But in December 1885 the

(1) I.L.R., 6 Mad., 16.
(2) I.L.R., 10 Cal., 626.
(3) L.R., 4 I.A., 247.
(4) I.L.R., 9 Mad., 343.

NARASANNA v. GURAPPA.

Privy Council laid down the law differently in *Mussamut Nanomi Babuasin* v. *Modun Mohun*. In that case, the question raised for decision was, as in this, whether anything passed by the sale except such share as the father would have taken on partition, and the Judicial Committee held that the entire ancestral estate passed though there was only a money-decree against the father. They observed as follows: "There is no question that considerable difficulty has been found in giving full effect to each of two principles of the Mitákshará law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father." "Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debtor against the creditors' remedies for their debts, if not tainted with immorality." The Judicial Committee do not think that the authority of the *Deendyal's case* bound the Court to hold that nothing but Girdhari's (the father's) coparcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might procure a sale of it by suit. All the sons can claim is that not being parties to the sale or execution proceedings, they ought not be barred from trying the facts or the nature of the debt in a suit of their own. Assuming that they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale. If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or the father's coparcenary interest alone (and in *Deendyal's case* there certainly was an ambiguity of that kind), the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings. Thus, it is clear that the Courts are now first to ascertain whether the purchaser in fact bargained and paid for the entirety, and if it appears that he did so, then to inquire whether the decree debt is tainted with immorality or one which the son would not be liable to pay, and

if the debt is not immoral, to hold that the entire ancestral estate and not merely the father's coparcenary right passed by the sale.

In the case before us the plaint is framed on the view that the purchasers bought in fact the entire estate, and the appellants did not even allege that the decree debt was tainted with immorality. Though there was only a money-decree, the father could sell the entire ancestral estate to pay his antecedent debt, and by the execution sale, therefore, the entire interest over which he had disposing power passed to the purchasers.

For these reasons, we confirm the decree of the Judge, though the grounds on which he rested it cannot be supported and dismiss this appeal. Having regard, however, to the decision of this Court in *Ponnappa* v. *Pappuvayyangár*,(1) we direct each party to bear his costs of this appeal.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

QUEEN-EMPRESS

against

O'SHAUGHNESSY.*

1886. July 12.

Madras District Municipalities Act, 1884—*Procedure to compel payment of tax—Distress.*

Under s. 103 of Act IV of 1884 (Madras), a prosecution for default of payment of tax cannot be instituted unless the tax cannot be recovered by distress and sale of moveable property of the defaulter as provided in that section.

APPEAL under s. 417 of the Code of Criminal Procedure against the order of W. E. Clarke, First-class Magistrate of Nílgiris, in calendar case No. 11 of 1885, acquitting J. E. O'Shaughnessy charged under s. 62 of the Towns' Improvement Act, 1871 (Madras Act III of 1871) with having exercised his profession as Civil Engineer within the municipality of Ootacamund for more than two months in the official year 1884-85 without paying tax in respect thereof as required by s. 58 of the Act.

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(1) I.L.R., 9 Mad., 343.

* Criminal Appeal 167 of 1886. See *ante*, p. 38.