Nor can it in my opinion make any difference that the zamíndár is himself a sharer. As a sharer he would no doubt be liable in a suit for contribution, if he had not paid up the full amount due on his own shares. But he has done this, and the suit is only brought as zamíndár for the balance jointly and severally due from those sharers who have not paid up. If he recovers from any one of them, that sharer will be able to claim contribution from any one of the rest who has not paid up the full amount due on his share.

Upon these grounds, I have come to the conclusion that the decree of the Lower Court was correct, and I can see no reason why interest should not be allowed. I would dismiss the appeal with costs.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, and Mr. Justice Muttusámi Ayyar.

PONNAPPA PILLAI (PLAINTIFF), APPELLANT,

and

PAPPUVAYYANGÁR AND ANOTHER (DEFENDANTS NOS. 2 AND 3), RESPONDENTS.*

1885. April 24.

Hindú Law—Liability of ancestral estate for father's debt—Effect of sale in execution of mortgage decree and of money decree against the father—Transfer of Property Act, s. 85.

Where the property of an undivided Hindú family, consisting of father and sons, has been sold in execution of a decree obtained against the father only for a debt contracted by him for purposes neither immoral nor illegal, the sons cannot recover their shares from the purchaser, if the decree has been obtained upon a mortgage or hypothecation of the property directing such property to be sold to realize the debt. It is otherwise if the decree in execution of which the sale takes place is a mere money decree.

Per Kernan, J.—It will still be necessary in all cases where a creditor seeks in suit to bind a son's estate in ancestral or other property for a debt incurred by his father and not by him, that the son should be made party to the suit.

Girdharee Lall v. *Kantoo Lall* (L.R., 1, I.A., 321).

Muddun Thakoor v. *Kantoo Lall* (L.R., I, I.A., 321).

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* Second Appeals, 703, 704, and 705 of 1878.

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Deendyal Lall v. *Jugdeep Narain Singh* (L.R., 4, I.A., 247), discussed.
Hardi Narain Sahu v. *Ruder Perkash Misser* (I.L.R., 10, Cal., 626), followed.
Ponnappa Pillai v. *Pappuvayyangár* (I.L.R., 4, Mad., 1), modified.

THIS case came before a full bench on 1st April 1881.

The facts will be found reported at I.L.R., 4, Mad., 1.

In pursuance of the order made by the full bench (Turner, C.J., Innes, Kernan, Kindersley, and Muttusámi Ayyar, JJ.), on the 1st April 1881, the Múnsif reported that the sale of the ancestral estate of plaintiff and defendant No. 1 took place under a decree which directed that the land should be sold to realize the amount due on a mortgage.

Appellant did not appear.

Hon. *Rámá Ráu* and *Báláji Ráu* for respondents.

The Court (Turner, C.J., Kernan and Muttusámi Ayyar, JJ.), delivered the following judgments :—

TURNER, C.J.—Since these cases were formerly before the Court two decisions have been passed by the Privy Council in reference to the questions which call for decision. In *Muttayan Chetti* v. *Sangili Vira Pandia Chinnatambiar*,(1) our ruling that the principles laid down in *Girdharee Lall* v. *Kantoo Lall*(2) apply to cases in this presidency has been approved. On the other hand, in *Hardi Narain Sahu* v. *Ruder Perkash Misser*,(3) decided as recently as the 5th December 1883, it has been held affirming *Deendyal Lall* v. *Jugdeep Narain Singh*(4) that where the right, title and interest of the father has been held liable in execution of a mere money decree, the interests of the son will not pass to the decree-holder, being the auction purchaser, although he may have also held a mortgage on the property. At the same time the case is distinguished from those in which the father, being a member of a joint family governed by the Mitákshará law, had mortgaged the family property to secure a debt and the decree had been obtained upon the mortgage and for the realization of the debt by means of a sale of the mortgaged property.

This decision, it must be admitted, corrects the view expressed by me as to the effect of the decision of the Privy Council in *Muddun Thakoor's case*,(5) and which had also been expressed by Sir Michael Westropp and Mr. Justice Melville in *Nárayanácharya*

(1) I.L.R., 6 Mad. 1.
(2) L.R., 1, I.A., 321.
(3) I.L.R., 10, Cal., 626.
(4) L.R., 4, I.A., 247.
(5) L.R., 1, I.A., 321.

v. *Narso Krishna* (1) and by Mr. Justice Mitter and Mr. Justice Maclean in *Umbica Prasad Tewary* v. *Ram Sahay Lall*, (2) and again in *Sheo Proshad* v. *Jung Bahadoor*.(3)

It is necessary, therefore, that I should again consider the rulings by which we are to be guided and give effect to what may be collected as the intention of the august forum to whose rulings our decision must conform.

In *Girdharee Lall* v. *Kantoo Lall* (4) their Lordships held that among Hindús governed by the Mitákshará ancestral property in which the son, as the son of his father, acquires an interest by birth is liable to the father's debts, and that a son is not at liberty to contest a sale of ancestral estate made by a father to discharge a debt contracted for purposes which were not immoral. These rulings are unaffected so far as I know by any subsequent decision.

The report of the case of *Muddun Thakoor* v. *Kantoo Lall* (4) not being sufficiently full to enable me to ascertain under what circumstances the sale impugned was made and what was the interest which the Court executing the decree against the father professed to sell, I obtained through the courtesy of the Chief Justice of Bengal a copy of the transcript. It appears that on February 11th, 1855, the two sons of Kunhya Lall, deceased, Bhikharee Lall, the father of Kantoo Lall, and Bujrung Sahye, the father of Mahabir Pershad, in consideration of a loan of Rs. 3,540, executed in favor of Mussamat Bibi Asmatunisa and others a bond undertaking to pay the principal and interest at 12 per cent. per annum at a time named; and, as security, they thereby hypothecated Mouzah Rajpore Usli Alinugger, Mouzahs Khuma Munjulpore Subrampore, Chuck Durcon Dhoodula Dakhili Anundpore Usli Shapore Dakhili Balasandut and Mouzah Assamudpore (see pp. 131, 132).

On November 23rd, 1857, the bond-holders obtained judgment on the bond in the Court of the Principal Sadr Amín of Bhagulpore against Bhikharee Lall and Bujrung Sahye in the following terms:—

"Plaintiffs sue defendants for the recovery of Company's Rs. 3,540, principal under a bond duly registered, dated 11th

(1) I.L.R., 1, Bom., 262.
(2) I.L.R., 8, Cal., 898.
(3) I.L.R., 9, Cal., 389.
(4) L.R., 1, I.A, 321.

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February 1855, and Company's Rs. 1,189-7-1, interest thereon from date of bond to date of present suit at one per cent. aggregating Company's Rs. 4,729-7-0.

Statement as to evidence.

Read the cause of action, dated the 11th February 1855 A.D., No. 2.

Whereas after the filing of pleadings and recordings of proceedings under Regulation XXVI of 1814 and adducing of witnesses on the part of plaintiffs in this suit, the defendants presented a petition to the presence on the 2nd June 1858, acknowledging the plaintiffs' claim, stating, *inter alia*, that the plaintiffs do not agree to being sworn in this suit; therefore, having presented this petition to the presence, they pray that, according to our answer acknowledging claim, the said suit be decreed to the plaintiffs, and as in this suit an answer acknowledging claim has been filed on the part of defendants consequently,

ORDERED.—That this suit be decreed to plaintiffs according to acknowledgment filed by defendants. The plaintiffs do recover from defendants the money claimed with costs and interests from the date of suit to that of realization.

DETAIL OF COSTS."

The plaint is not in the transcript, nor is there any other decree. I apprehend the order I have set out was regarded as the final proceeding. There is nothing in this proceeding to show that the plaintiffs sought to obtain the enforcement of the hypothecation.

All that appears is that the plaintiffs sued to recover the amount of the bond from the obligees, and that the defendants acknowledged the claim and prayed that a decree might be passed in favor of the plaintiffs, and that it was ordered that the suit should be decreed according to the acknowledgment filed by defendants, and that the plaintiffs should recover from defendants the money claimed with costs and interest from the date of suit to that of realization (pp. 133, 134). In terms this decree was what is termed a money decree. It appears from the proceeding of the Principal Sadr Amín, dated February 2nd, 1859, that "the right, title and interest" of the judgment-debtors in Mouzahs Rajpore Alinugger Usli and Dakhili and three Mouzahs included in

Mouzah Anundpore together with Buniyadpore *alias* Manikpore Usli and Dakhili was brought to sale in execution of the decree of Mussamat Asmatunisa on 6th September 1858 and that the maháyats were purchased by Muddan Chand Doss. The Principal Sadr Amín overruling an objection taken by the judgment-debtors to the sale of Anundpore, ordered that the auction sale should be confirmed and that a bill of sale should be given to the auction purchaser (p. 38). The sale was held under the provisions of Act IV of 1846, s. 10, which declared that sales in execution of decrees should be of the nature of private transfers. The sale certificate is not in the transcript. Its purport may, however, be inferred from the proceedings of the Deputy Collector of Bhaugalpore, April 9th, 1860, on a petition addressed to him by the auction purchaser which commences as follows :—

"The petitioner states that in execution of decree in the suit of Mussumat Asmatunisa on the 6th September 1858, I purchased the right, title and interest of Bhikharee Lall and Bujrung Sahye, proprietors in a share of Mouzah Rajpore Alinugger, including the Mouzahs appertaining thereto in Purgunnah Bhaugulpore, the whole of Mouzah Anundpore including Buniyadpore *alias* Manikpore together with the Mouzahs appertaining thereto in Purgunnah Bhaugulpore at the auction sale held in the Civil Court of the Principal Sádr Amín, &c."

The Deputy Collector ordered that the name of the auction-purchaser should be enrolled instead of Bhikharee Lall and Bujrung Sahye in respect of Mouzah Rajpore Alinugger ; and by another proceeding also dated April 9th, 1860, in which the date of the auction sale is given accurately as 6th September 1858, he also ordered the substitution of the auction-purchaser's name for that of Bhikharee Lall, the then registered holder of Anundpore (pp. 104–106).

In order to confirm the title to the properties purchased, the auction-purchaser allowed the revenue to fall into arrear, and before the orders last mentioned were passed, the properties were brought to sale for arrears and purchased by Muddun Thakoor (pp. 109, 110).

It was found by the High Court that Muddun Thakoor was in fact the auction-purchaser and that Muddun Chand Doss had only purchased as a benámidár, and it was held that the revenue sale

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under the circumstances gave Muddun Thakoor no new title (p. 264).

On these facts the Principal Sadr Amín supported the title of the auction-purchaser. The High Court considered that the claim of Mahabir Pershad could not be sustained, as he had not been born till November 1858 and, therefore, subsequently to the sale in September 1858; but it reversed the decree of the Principal Sadr Amín in respect of the share of Kantoo Lall in Mouzahs Rajpore Alinugger and Anundpore.

This part of the decree of the High Court formed the subject of the appeal preferred to the Privy Council by Muddun Thakoor; and their Lordships, applying the rule they had declared in *Girdharee Lall's case* that the interests of sons as well as of their fathers in property although ancestral were liable for the payment of the fathers' debts, held that the sale conveyed the interest of Kantoo Lall to the purchaser and that the purchaser having found that there was a decree against the fathers, and that the property was liable to satisfy the decree if it had been properly given against them, and having inquired into that, and *bonâ fide* paid a valuable consideration for the property, was not bound to go further back. Their Lordships did not hold that the decree was a mortgage decree. The order for sale was a mortgage decree. The order for sale was not contained in the decree, but as is usual in execution of money decrees, passed after decree.

It appeared to me then that the following points were established by this decision.

That fathers may for the satisfaction of those debts which it is the duty of their sons to discharge out of ancestral estate render available the interests of their sons as well as their own; that the Court has the same power when it is called upon to execute a decree for money obtained against the fathers; that though the property be described as the right, title and interest of the judgment-debtors, a sale in execution of a money decree would pass the interests of the sons as well as of the fathers; and that a bidder is not bound to inquire whether the debt was contracted for a proper purpose: that he has only to see that the decree has been properly passed, and if he purchases without notice that the debt has been contracted for purposes which do not bind the son, he will be protected.

In *Deendyal Lall* v. *Jugdeep Narain Singh*,(1) Toofani Singh being indebted to a creditor executed in his favor a Bengali mortgage bond: on this the creditor sued and obtained a decree in the ordinary form of a decree for money. In September 1870 he caused to be brought to sale the rights and proprietary and mokurriri title and share of Toofani Singh, the judgment-debtor. Their Lordships held that there passed by the sale only such a share as would have fallen to the father on a partition, and that it was immaterial whether the debt on which the decree was obtained had been contracted for a purpose binding on the family. The sale was held under Act VIII of 1859, which did not declare a sale in execution to have the effect of a private transfer, but declared that the purchaser should obtain a certificate that he had purchased the right, title and interest of the judgment-debtor. It does not appear whether it was then argued that the father had not only a right to secure to himself his own share on a partition, but also a right in certain circumstances, *e.g.*, for the payment of his debts when not immoral, a right to sell the interest of his sons. This decision was in this country regarded as inconsistent with the decision in *Muddun Thakoor's case*(2) and various suggestions were made to reconcile them. Mr. Mayne seems to have been of the same opinion, for he suggested as a possible explanation that the execution creditor had expressly attached the *share* of the father Toofani Singh. In *Suraj Bunsi Koer* v. *Sheo Proshad Singh*,(3) their Lordships summarized their rulings in terms which have been frequently cited in this Court, and which are to the effect that the interests of the sons as well as of the father in joint ancestral estate pass under a conveyance executed by the father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, and that the sons cannot recover the property unless they show that the debts were contracted for immoral purposes; and, secondly, that the purchasers at an execution sale being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings. In that case the father, Adit Sahai, had inherited Mouzah Bissambhurpore and, after two sons had been born to him, mortgaged the estate. On this

(1) L.R., 4, I.A., 247. (2) L.R., 1, I.A., 321. (3) L.R., 6, I.A., 88.

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mortgage the creditor sued and obtained a decree for the recovery of the amount from the judgment-debtor and for a sale of the estate in default. A sale was ordered in execution of this decree, when the widow of the judgment-debtor, who had died, filed a petition of objections on behalf of her minor sons setting forth their claims as co-parceners. She was referred to a regular suit, and the sale took place. A suit was then instituted by the minors through their mother as guardian, and it being proved that the debt had not been contracted under such circumstances that it would be binding on the minors, and that the purchaser had previously to the sale had notice of the minors' claim, it was held that interests of the minors did not pass by the sale. These are the grounds on which the case was distinguished by their Lordships from that of *Kantoo Lall*, the authority of which they expressly declared they desire to leave unimpaired:—

"The respondents must be taken to have had notice, actual or constructive, of the plaintiffs' objections and with the order made upon them, and therefore to have purchased with the knowledge of the plaintiffs' claim and subject to the result of this suit.

"It follows then that as against them as well as against Bolaki Choudri (the decree-holder) the plaintiffs have established that by reason of the nature of the debt neither they nor their interests in the joint ancestral estate are liable to satisfy their father's debt."

The following conclusions I drew from this judgment:—firstly, that unless the plaintiffs had proved that the debts were not of such a nature as would have justified an alienation of ancestral property by a father, the sale would have conveyed their interests to a purchaser; that, if they had even established that point, they could not have recovered their interests from the purchaser unless they had proved he had had notice that the debt was not one in which the sons' interests would be bound; and that if the points mentioned had not been proved, the sale, whether under the order in the decree or under an order in execution of the decree as a money decree, would have passed the interests of the sons to the purchaser.

In re-affirming their ruling in *Kantoo Lall's case*,(1) their Lordships, I may observe, drew no distinction between a sale

(1) L.R., 1, I.A., 321.

in execution of a mortgage and a sale in execution of a money decree.

Such were the decisions of the highest Court of Appeal when these cases formerly came before this Court. As I had understood them, I thought they warranted the opinion that inasmuch as a father has a right to sell ancestral estate including the interests of his sons in order to free himself from a debt, provided he had not contracted it for a purpose which relieved the sons of their obligation, the Court executing a decree could, by a sale, make the same disposition as the father, that the father having a disposing power to discharge proper debts, the Court would exercise that power in favor of a creditor; that the father had a right independently of his right to a share on a partition; and that a sale of his right, title and interest would, therefore, transfer the estate to a *bonâ fide* purchaser without notice as effectually as the father could have done. I also thought where a father had thought fit to deal with a limited interest in the estate by creating a mortgage, and the creditor desired to enforce the mortgage, it was the duty of the creditor to make all persons interested in the right to redeem parties to the suit according to the rule which is recognized in s. 85 of the Transfer of Property Act, and that, in consequence, if the sons were not parties to, nor represented in, the suit, they could not be foreclosed of their right to redeem. On both points my conclusions are overruled by the latest decisions of the Privy Council, and though I do not see that the arguments I have advanced were fully put to their Lordships, I daresay it was because they are open to objections which do not at present present themselves to my mind. However this may be, we have now only to follow the exposition of the law contained in *Hardi Narain Sahu* v. *Ruder Perkash Misser* (1) and to ascertain whether in the cases before the Court the sale was made in execution of mortgage or money decrees.

The decree in second appeal 703 of 1878 ordered a sale of the hypothecated property, and the Judge has found that although the decree was both a money and a mortgage decree, the property was sold in execution of the mortgage decree.

The sale must be sustained. The appeal fails and is dismissed with costs.

(1) I.L.R., 10, Cal., 626.

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KERNAN, J:—These cases having been referred to a Full Bench, the majority of the Court, on the 1st April 1881, held that the principle established by the decision of the Privy Council in *Girdharee Lall* v. *Kantoo Lall* (1) as to the liability of a son's share of ancestral property to pay the debts of his father, not contracted for illegal or immoral purposes, applied to this Presidency. That decision has since been approved of by the Privy Council in *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (2).

By order of the 1st April 1881, issues were directed to be tried whether the ancestral lands of the plaintiff and defendant No. 1 sold in the Suits Nos. 35 of 1876 and 193 of 1876 were sold under so much of the decree in these suits as was personal, or in execution of the decree for enforcement of the mortgage. The Múnsif returned that the sales took place under decrees, which were both personal and directed sale of the lands to realize the amounts due on the mortgages.

This was in effect a finding that the sales were made under the decrees directing sale of these identical ancestral lands for payment of the debts due by defendant No. 1, the plaintiff's father. It was found in the original suit that those debts were not incurred by defendant No. 1 for an illegal or immoral consideration.

The plaintiff no doubt was not party to the mortgages or to the suits in which the decrees for sale were made. But following the decision of *Muddun Thakoor* v. *Kantoo Lall*(3) and the several subsequent cases in the Privy Council to the same effect, *Suraj Bunsi Koer's case*,(4) &c., we are bound to hold that, though the plaintiff was not a party to those suits, yet, as they were suits in which the sale of the mortgaged ancestral lands was prayed for, and in which decrees for sale of the specified lands were made, the plaintiff is bound by such sales, as he has not shown that the mortgage debts of his father were contracted for illegal or immoral consideration. The principle decided by the Privy Council does not conflict with the general rule, viz., that all persons whose interests are sought to be prejudicially affected by a suit should be made parties, unless their interests are sufficiently represented

(1) L.R., 1, I.A., 321.
(2) L.R., 9, I.A., 128.
(3) L.R., 1, I.A., 321.
(4) L.R., 6, I. A., 88.

and protected by other parties to the suit (*see* the rule—Mitford on Pleadings, pp. 163-4).

It was because the son was not a party to the suits against his father in each of the cases before the Privy Council and, therefore, not bound thereby as if he was a party, that an opportunity was given him by the Privy Council to show that the debt due by his father was not in its nature one which bound the son.

It will, therefore, be still necessary in all cases where a creditor seeks in suit to bind a son's estate in ancestral or other property, for a debt incurred by his father and not by him, that the son should be made party to the suit. The son can then raise all proper defences, and if a decree for sale shall be made, a purchaser will be protected without any prejudice being done to the son.

The decision in the present cases following *Muddun Thakoor's case* (1) and *Bunsi Koer's case* (2) and several other cases of sales under decrees made for sale of the property mortgaged is in no way inconsistent with the recent decision of the Privy Council in *Hardi Narain Sahu* v. *Ruder Perkash Misser*(3), in which it was held that a sale under a money decree against a father of his right, title and interest in ancestral property did not pass the interest of his son in the ancestral property sold. That case affirmed the decision in *Deendyal Lal* v. *Jugdeep Narain Singh* (4). The case of *Muddun Thakoor* was apparently believed by the Privy Council to be the case of a mortgage and a decree thereon directing sale of the lands mortgaged—see the judgment of the Court referring to the decree for sale. *Suraj Bunsi Koer's case* was certainly one of mortgage, and in it *Deendyal's case* was referred to. *Hardi Narain Sahu's case*(3) explains the distinction between sales under the two classes of cases, and the different result of the sales under the different decrees.

MUTTUSÁMI AYYAR, J.:—I assent to the order, as it is in accordance with the recent ruling of the Privy Council.

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(1) L.R., 1, I.A., 321.
(2) L.R., 6, I.A., 88.
(3) I.L.R., 10, Cal., 626.
(4) L.R., 4, I.A., 247.