Before Mr. Justice Pontifex and Mr. Justice McDonell.

PURSID NARAIN SING AND OTHERS (DEFENDANTS) *v.* HONOOMAN SAHAY AND OTHERS (PLAINTIFFS).* 1880 *Jany.* 28.

Hindu Law—Mitakshara—Liability of Sons to pay Father's Debts—Minor Sons—Adult Sons—Necessity for Alienation—Distribution of Ancestral Property in Father's Lifetime—Widow's Share.

A, the father and managing member of a Hindu family subject to Mitakshara law, executed bonds mortgaging a portion of the ancestral estate to the father of the defendants. At the date of the mortgages *A* had living a wife and two sons, one of whom was alleged to be an adult, and the other a minor. The mortgagee instituted suits on the bonds, making *A* only a defendant, and in execution of decrees obtained by him in those suits four portions of ancestral property were attached and sold by the Court, the sale-certificates being of the right, title, and interest of the judgment-debtor, and were purchased by the mortgagee who got possession of the whole 16 annas of the four portions of ancestral estate sold. In a suit by the widow and the two sons of *A* to recover their shares in the property from the representatives of the mortgagee; *Held*, that as *A* alone executed the mortgages, and was alone made a defendant in the suits on the bond, the sale in execution as against the minor could pass the entire 16 annas of the estate, only in the event of the defendants proving that sufficient necessity existed for incurring the debt: if no necessity was proved, only the right, title, and interest of *A* passed by the sale, although the loans might have been applied by him to immoral purposes, and the sons might, if properly proceeded against, have been bound to pay *A*'s debt. As against the adult son only the right, title, and interest of *A* would pass unless necessity were shown.

Quære—Whether, even if necessity were proved, the interests of adult members of the family could be affected without their consent?

Where, upon a sale under a decree obtained upon a mortgage-bond against the father of a Mitakshara family, property other than that included within the mortgage-bond is sold, such sale only passes the right, title, and interest of the father.

By verses 1 and 2 of s. 7 of Chap. I of the Mitakshara, when a distribution of ancestral property is made during the lifetime of a father of a family subject to Mitakshara law, his wife is entitled to an equal share with her husband and her sons.

Held in this case that the mortgages by *A* and the sales in execution which occurred during his lifetime must, as against the defendants, be taken to be a distribution within the meaning of those verses; and as possession was taken

* Appeals from Appellate Decrees, Nos. 1697 and 1759 of 1878, against the decree of Baboo Matadeen, Subordinate Judge of Gya, dated the 31st of May 1878, modifying the decree of Moulvie Syed Gholam Sharopp, Sudder Munsif of that district, dated the 9th of February 1878.

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by the defendants during *A's* lifetime, it must be considered as a distribution made within that period, and therefore the widow was entitled to an equal share with her two sons.

The principles laid down in the cases of *Giridharee Lall* v. *Kantoo Lall* (1), *Suraj Bunsi Koer* v. *Sheo Pershad Sing* (2), and *Deen Dyal Lall* v. *Jugdeep Narain Singh* (3) enunciated and discussed.

THIS was a suit instituted by the two surviving sons and widow of one Radhay Kishen, deceased, for restoration to possession of their respective shares of the ancestral property purchased by the father of the present defendants, at a sale held in execution of a decree obtained by such father against the said Radhay Kishen, a Hindu, subject to Mitakshara law.

The plaint, *inter alia*, stated, that the said Radhay Kishen, being a member of a joint and undivided family governed by Mitakshara law, had, during his lifetime, borrowed certain moneys from the father of the defendants; that the debts so contracted were for immoral and illegal purposes; that, upon decrees obtained on two mortgage-bonds given in security for such debts, the father of the present defendants had sold the right, title, and interest of the said Radhay Kishen, and at such sale purchased and entered into possession of the whole of the ancestral property belonging jointly to the said Radhay Kishen and the plaintiffs. The present suit was instituted to recover possession of the proportionate shares of the said ancestral property in the hands of the defendants. In their written statement the defendants asserted that a portion of the lands now in suit had descended to the said Radhay Kishen on the death, without issue, of his brother Kulu Ram, and that, in respect of such property, the plaintiffs could, under Hindu law, establish no claim; that no partition of the family property having been made before the death of Radhay Kishen, the plaintiff-widow had no right to share in such property; that the debts contracted by Radhay Kishen were for strictly legal purposes, and the money so obtained had been expended in the maintenance of his family and for other necessary and urgent purposes, as also for the performance of the *koruj* ceremony of the said Kulu Ram; that the loans were made

(1) L. R., 1 I. A., 321; S. C., 14 B. L. R., 187.

(2) L. R., 6 I. A., 88; S. C., *ante*, p. 148.

(3) L. R., 4 I. A., 247; S. C., I. L. R., 3 Calc., 198.

after due enquiry by the father of the present defendants, and in good faith; that the sales, which took place more than eleven years before the present suit, were held when the plaintiffs were of age; and that the plaintiffs, by their conduct at the time of the institution of the suits and subsequent sales, must be taken to have acquiesced in such sales.

The Court of first instance dismissed the plaintiffs' suit altogether, holding that sufficient necessity had been shewn to exist to authorise Radhay Kishen, as managing member of the family, to make the mortgages.

The lower Appellate Court considered it unnecessary to find whether the money was borrowed for necessary purposes or applied to immoral purposes; but upon the grounds that the father alone was a defendant to the suits, and that the sale-certificates related only to the right, title, and interest of the judgment-debtor, held, 1*st*, that only Radhay Kishen's interest passed by the sales; 2*nd*, that the widow was not entitled to any share; and 3*rd*, that the two sons were entitled to receive two-thirds of the properties sued for.

The defendants appealed to the High Court.

The plaintiffs also filed a cross-appeal against the second finding of the lower Appellate Court.

Mr. *Sandel* and Baboo *Shrish Chunder Chowdry* for the appellants.

Baboo *Chunder Madhub Ghose* and Baboo *Jodoonath Sahoy* for the respondents.

During the course of the argument the following cases were cited by the pleaders engaged:—

Gridharee Lall v. *Kantoo Lall* (1), *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (2), *Deendyal Lall* v. *Jugdeep Narain Singh* (3), *Gunga Pershad* v. *Sheo Dyal* (4), *Mahabir Pershad* v. *Ramyad Singh* (5), and *Gonesh Pandey* v. *Dabee Dyal Singh* (6). Mitakshara, Chap. I, sec. vii, vv. 1 and 2.

(1) L. R., 1 I. A., 321; S. C., 14 B. L. R., 187.
(2) L. R., 6 I. A., 88; S. C., *ante*, p. 148.
(3) L. R., 4 I. A., 247; S. C., I. L. R., 3 Calc., 198.
(4) 5 C. L. R., 224.
(5) 12 B. L. R., 90; S. C., 20 W. R., 192. (6) 5 C. L. R., 36.

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The judgment of the Court (PONTIFEX and MCDONELL, JJ.) was delivered by

PONTIFEX, J.—This case is one more instance of the plentiful crop of litigation which has sprung out of the decisions in the reported cases of *Gridharee Lall* (1) and *Deendyal Lall* (2).

The circumstances of the case are as follows:—Radhay Kishen, the father of plaintiffs Nos. 1 and 2, and husband of plaintiff No. 3, by two bonds, purported to mortgage that which was in fact ancestral estate. The family was governed by the Mitakshara, and at the dates of the mortgages both the sons were alive; and it has been stated that one at least of them was of age. From the judgment of the Munsif it would appear that the earlier of the two bonds recited, as a necessity for raising the loan secured by it, the performance of the *koruj* ceremony of Kulu Ram, a deceased member of the family. And from the same judgment it would appear that, on the face of it, the later of the two bonds purported to be executed as security for the balance of account upon former bonds.

The mortgagee subsequently instituted suits on the bonds, in which suits, Radhay Kishen, the father, alone was made a defendant; and in execution of the decrees in those suits, four portions of ancestral property were attached and sold by the Court, and purchased by the mortgagee himself, who is represented by the present appellants. The sale-certificates were in the usual form, under the old Code, of the "*right, title, and interest*" of the judgment-debtor.

It is doubtful from the materials before us whether any one of the four properties now sued for was included in either of the mortgage-bonds; but it is admitted on behalf of the appellants that *only one* of the properties sued for was so included. The sales took place, and possession was taken under them of the whole 16 annas of the four properties more than eleven, and less than twelve, years before suit. The plaintiffs sued to recover possession of the whole 16 annas of the properties.

The Munsif dismissed the plaintiffs' suit altogether, holding that sufficient necessity had been shown to exist to authorize

(1) L. R., 1 I. A., 321; S. C., 14 B. L. R., 187.
(2) L. R., 4 I. A., 247; S. C., I. L. R., 3 Calc., 198.

Radhay Kishen, as managing member of the family, to make the mortgages. The Munsif does not seem to have noticed that at least three of the properties were not included in the mortgages, but he did find that Radhay Kishen did not employ the moneys borrowed for immoral purposes.

The Subordinate Judge considered it unnecessary to find whether the money was borrowed for necessary purposes or applied to immoral purposes; but upon the grounds that the father alone was a defendant to the suits, and that the sale-certificates related only to the right, title, and interest of the judgment-debtor, held, 1*st*, that only Radhay Kishen's interest passed by the sales; 2*nd*, that the widow was not entitled to any share; and 3*rd*, that the two sons were entitled to recover two-thirds of the properties sued for.

Against the whole decree a special appeal has been preferred to us by the defendants; and against the second finding of the Subordinate Judge a cross-appeal has been preferred by the plaintiffs.

Now the principles of law which apply to this case, and which are partly to be gathered from the text-books and the cases, seem to us to be the following:—

That, under the law of the Mitakshara, each son, upon his birth, takes a share (interest) equal to that of his father in ancestral immoveable estate, is indisputable.—*Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1).

The father, as managing member of a Mitakshara family, when the other members of the family are all minors (same case, p. 101) may have authority to convey or charge the whole 16 annas of the ancestral property for the purposes of family necessity. But if a stranger deals with the father alone as managing member, he is, in our opinion, bound to see that a necessity exists.

If no necessity exists, then no power of dealing with the rights of the other members in specific ancestral property exists, and a sale by the father, though purporting to affect the whole 16 annas, can only pass his own right, title, and interest, to affect which alone, under the circumstances, his power—or in Bengal

(1) L. R., 6 I. A., 88, at p. 99; S. C., *ante*, p. 148, at p. 164.

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having regard to *Sadabart Prosad Sahu* v. *Foolbash Koer* (1), his creditor's rights—could extend. Whether, even in cases of necessity, a father, as managing member, has authority to affect the interest of the adult members of the family, without their consent, seems still undecided. The Judicial Committee, in *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (2), say :—"It is not so clearly settled whether, in order to bind adult coparceners, their express consent is not required: but this is a question that does not arise in the present case." So in the case before us, as it has not been found whether either of Radhay Kishen's sons was of age at the respective dates of the mortgages, the question may not arise, and we do not at present feel bound to give a positive opinion upon it. But we may refer to the Mitakshara, Chap. I, sec. i, vv. 27, 28, and 29 as dealing with the question, and may say that, as at present advised, we see no reason why a mortgagee or purchaser should be excused from exercising ordinary caution and obtaining such consent. The case of *Gridharee Lall* v. *Kantoo Lall* (3), which is always so much relied upon, decided a question of Mithila law; and moreover, in that case, a necessity affecting the whole family was proved to have existed, for there were execution-proceedings affecting the family dwelling-house, or at least the father's rights therein, a sale of which had been advertised, and which sale, if carried into effect, must have been detrimental to the family. Even if that case had not been explained in more recent decisions of the Privy Council, we think that the general language of the judgment, applying as it did to the particular facts found in the case, cannot be taken as an authority for the proposition that a Mitakshara father may, when no necessity exists, convey or charge the rights in specific ancestral property of the other members of the family.

Under the Mitakshara law sons are bound to pay the debts of their father which have not been incurred for immoral purposes. But this is a liability either attaching to them personally, or to be satisfied in a due course of administration; and we find no authority for saying that a judgment-creditor of the father in

(1) 3 B. L. R., F. B., 31.

(2) L. R., 6 I. A., 88, at p. 101; S. C., *ante*, p. 148, at p. 165.

(3) L. R., 1 I. A., 321; S. C., 14 B. L. R., 187.

respect of the father's own separate debt, can, either in the father's lifetime, or afterwards, attach or take any specific portion of the ancestral property beyond the father's own proportionate right in it, without having made the other members of the family parties to his suit. The case of *Deendyal Lall* v. *Jugdeep Narain Singh* (1) is an authority of the Privy Council for holding, in a case where no necessity is shown to have existed, that execution-proceedings by a judgment-creditor on a bond given by a Mitakshara father, against property not hypothecated by the bond, and when the father alone had been made a defendant to the suit, cannot affect the interests of the other co-sharers of the family. Indeed, if it were otherwise, there would be an end virtually of the Mitakshara family, for a father would only have to borrow for purposes not immoral and submit to a decree, and the family might, in execution of that decree, be deprived of the most cherished portion of the ancestral property without any opportunity of redeeming it.

A mortgagee, dealing with a Hindu governed by Mitakshara law, is, in our opinion, bound to enquire into the state of the family; and if he finds there are other members of it besides the father with whom he is dealing, he is further bound to enquire into the necessity of the transaction; and if there are adult members of the family it is at least doubtful whether he ought not to obtain their consent.

A mortgagee can only take such a charge on specific ancestral property as the mortgagor can give; and if the mortgagor is acting as managing member, he can affect the 16 annas of the property only in cases of necessity, and if there are adult members of the family, perhaps only with their consent. And it is difficult for us to see how the purchasers under a mortgage-decree can obtain any better or more extensive title than the mortgagee and mortgagor could conjointly give. There is no magic in a Court or Judge which enables them to deal with or affect property in any higher or more extensive degree than the parties to the suit conjointly could do.

The sale by the Court does not give what is called in England a Parliamentary title, but is only a link in the chain of title;

(1) L. R., 4 I. A., 247; S. C., I. L. R., 3 Calc., 198.

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and a purchaser is, or in our opinion ought to be, as much bound to see that all proper parties are represented in a suit, as he would be to see that all persons interested were parties to a conveyance. We can see no difference between the effect of a decree of our Courts and the effect of a decree of the Court of Chancery in England; but if there is any difference, it would seem to be to the disadvantage of the Indian decree, which by express enactment deals only with the "*right, title, and interest*" of the defendant to the suit *by name*.

It has been decided that if the managing member of a family, the other members of which are at the time minors, having authority (the touchstone of which is necessity) mortgages the whole 16 annas of the ancestral property, then in a suit by the mortgagee the sale under the decree would pass the whole 16 annas of the mortgaged property, although the mortgagor alone was made defendant; and the reason for such decision probably is, that the 16 annas having been validly mortgaged to the mortgagee, and his remedy being foreclosure or sale, the decree of the Court would affect what was in the parties before it,—namely, the mortgagee's right, validly acquired, to have the whole 16 annas sold; though even in that case (where necessity would have to be proved by the mortgagee and purchaser) it seems to us that the Courts would exercise a wise discretion in enquiring into the state of the mortgagor's family, and directing that the adult members of such family (if any at the date of the suit) should be made co-defendants, so as to give them an opportunity of redeeming, and also in order to secure the due application of any surplus sale moneys, in the same way as the Court of Chancery in England acted in analogous cases; see *Goldsmid* v. *Stonehewer* (1), *Young* v. *Ward* (2), and *Sifken* v. *Davis* (3). For it must be remembered that, in a large proportion of mortgage-suits in India, the mortgagee himself, as in the case before us, becomes the purchaser, and thus virtually obtains all the benefits of foreclosure without sacrificing his other remedies as a mortgagee.

Applying the principles to which we have referred, and which seem to us correct, to the case before us, we should be of opinion

(1) 9 Hare, Appx., 38. (2) 10 Hare, Appx., 58. (3) Kay, Appx., 21.

even if this was not a special case, that, as the father alone executed the mortgages and was made a defendant to the suit, the sale in execution could, as against those members of the family who were minors at the dates of the respective mortgages, pass the entire 16 annas of the mortgaged ancestral property, only in the event of the defendants proving that sufficient necessity existed for incurring the debt; and if no necessity was proved, could pass to the defendants only the right, title, and interest of the father, Radhay Kishen, although the loans might not have been applied by him to immoral purposes, and the sons might, if properly proceeded against, have been bound to pay their father's debt; and if any members of the family were adult at the dates of the respective mortgages, it is still an open question whether, even if necessity were proved, their interests could be affected without their consent. But this is a special case, for here the mortgagee and purchaser was the same person, and therefore, in this case at all events, only the right, title, and interest would pass unless necessity was shown to exist. With respect to the properties not included in the mortgages, we are of opinion, that the execution-sales could only pass the right, title, and interest of the father Radhay Kishen; and therefore, with respect to such last-mentioned properties, the decree of the Subordinate Judge will, subject to the observations we shall presently make in the cross-appeal, be approved, and the appeal will be dismissed with costs. In the words of the Privy Council in *Deendyal Lall* v. *Jugdeep Narain Sing* (1), if the defendants had sought "to go further, and to enforce their debt against the whole [16 annas of the] property and the co-sharers therein, who were not parties to the bond, they ought to have framed their suit accordingly, and have made those co-sharers parties to it." With respect to such parts of the properties sued for (if any) as were included in the mortgage-bonds or either of them, as there has been no finding in the lower Appellate Court with respect to the existence of sufficient necessity for the loans, or as to the ages of the sons at the dates of the respective mortgages, the case must go back there for a decision on the following points:—1*st*, whether any and what part of the property sued for was included

(1) L. R., 4 I. A., 247; S. C., I. L. R., 3 Calc., 198.

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in the mortgage-bonds respectively; and if any part was so included, then, *2ndly*, whether sufficient necessity existed for incurring the debt secured by each bond so as to bind the 16 annas of the property mortgaged by it; and *3rdly*, whether either and which of the sons was of age at the dates of the mortgages respectively. If either was of age, whether he consented to the mortgage; and if he did not consent, whether he was bound by the mortgage; and the Subordinate Judge must reconsider his judgment and decide the case, so far as it relates to property comprised in either of the mortgages, in accordance with findings he may arrive at on those points; and the costs of the appeal in relation thereto will abide the result.

With respect to the cross-appeal no distinct authority has been quoted, or appears to exist. We must, therefore, deal with it as a new case. The question is indeed mooted in the last words of the Privy Council judgment in *Deendyal's case* (1), but does not appear to have been raised in the subsequent case of *Suraj Bunsi Koer* v. *Sheo Pershad Sing* (2) where the infants sued by their mother as guardian. Possibly the reason for not there raising it, was because the mother was not strictly a party to the suit, or because, in the previous execution-proceedings (see p. 96), an order had been made rejecting her claim, to which she had submitted. By vv. 1 and 2 of sec. vii, Chap. I of the Mitakshara, it is declared that, upon a distribution made either during the life of a father or after his decease, the wife is to take an equal share; but in the latter event she will be only entitled to half a share, if any separate property has been given to her.

Now we are of opinion that the mortgages of the father, and the sales in execution against him, which occurred during his lifetime, must, as against the defendants, be taken to be a distribution within the meaning of those verses, and as possession was taken by the defendants during the father's lifetime, we must consider it a distribution made within that period; and, therefore that the widow is entitled to an equal share with her husband and sons.

If, however, a necessity shall be found to have existed for

(1) L. R., 4 I. A., 247; S. C., I. L. R., 3 Calc., 198.
(2) L. R., 6 I. A., 88; S. C., *ante*, p. 148.

incurring the loan for which any portion of the properties sued for was mortgaged, the widow will be entitled to no share in the property included in such mortgages; with respect to the properties not included in the mortgages, she is entitled to a one-fourth share, as also to the same share in the mortgaged properties if no sufficient necessity shall be found to have existed. The decree of the lower Appellate Court will be modified accordingly, all such parts of the properties sued for as were not mortgaged for purposes of necessity being for this purpose divisible into fourths, and the cross-appeal is allowed with full costs, or apportioned costs according to the findings which the lower Appellate Court shall arrive at.

By their plaint the plaintiffs prayed that mesne profits for the period of pendency of suit up to the day of recovery of possession to such amount as may be determined in execution of decree, may be awarded to them. Such mesne profits will, of course, be governed by the ultimate decision in the case.

Decree varied.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Pontifex, Mr. Justice Morris, and Mr. Justice Mitter.

LUCHMUN DASS (DEFENDANT) *v.* GIRIDHUR CHOWDHRY BY HIS GUARDIAN KAMINI CHOWDHRANI (PLAINTIFF).* 1880 *April* 5, 6, 7, & *June* 2.

Hindu Law—Mitakshara Family—How far Alienation by Father of Ancestral Property is binding on Sons—Suit by Mortgagee against Family before or after Father's Death for Sale of the Property—Rights of Mortgagee as against Infant Son if Suit is brought against Father alone.

The manager of a joint Mitakshara family (the family consisting of the father and a minor son) raised money on the mortgage of certain family property, it not being proved, on the one hand, that there was legal necessity for raising the money, nor, on the other hand, that the money was raised or expended for improper purposes, or that the lender made any enquiry as to the purpose for which the money was required,—

* Full Bench Reference on Regular Appeal No. 228 of 1878, from a decision of Baboo Ram Pershad Roy, Subordinate Judge of Tirhoot, dated 30th May 1878,—and on Regular Appeals, Nos. 279, 288, and 289 of 1879.