

second appeal that the finding of the Subordinate Judge in the present case being on a question of fact, it cannot be questioned in second appeal. In our judgment the question as to what the purchaser actually bargained and paid for is not a mere question of fact but a mixed question of law and fact, and we think that, looking at all the circumstances, the Subordinate Judge erred in holding that plaintiff's share did not pass.

GENANAMMAL
MUTHUSAMI.

There can be no doubt that by the bond on which the suit was brought the property was charged. The decree directed the entire mortgaged property to be sold, and the whole property was attached. Then the first defendant, the undivided nephew of the judgment-debtor, advanced his claim, and his interest was released from attachment. The plaintiff put in no claim. The property was sold and the sale confirmed as to the property itself, Muthu Ayyan being declared the purchaser of the immovable property specified. We have no doubt that the interest brought to sale was the entire estate less the interest of the first defendant.

We therefore reverse the decree of the Subordinate Judge and restore that of the Munsif. The plaintiff will pay appellant's costs both in this and the Lower Appellate Court.

APPELLATE CIVIL.

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

CHINNAYYA (PLAINTIFF), APPELLANT,

1889.
April 5.

v.

PERUMAL AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu law—Alienation by father when binding on son—Burden of proof.

The father of an undivided Hindu family has no power to alienate the son's co-parcenary share in land in the absence of any debt. One claiming merely as the father's vendee must therefore give evidence that the alienation was made for some purpose which would bind the son, or that it was made with his consent.

SECOND APPEAL against the decree of C. Venkobacharyar, Subordinate Judge of Madura (West), in appeal suit No. 264 of

* Second Appeal No. 1373 of 1885.

OKINNAYYA
v.
PERUMAL.

1887, reversing the decree of P. S. Gurumurthi Ayyar, District Munsif of Madura, in original suit No. 451 of 1886.

The plaintiff in execution of a personal decree obtained by him in original suit No. 42 of 1884 against defendant No. 3 attached the judgment-debtor's interest in a certain house. Defendant No. 1 intervened in execution claiming title under a sale-deed executed to him in 1883 by defendant No. 2, who was the father of defendants Nos. 3, 4 and 5. The attachment was released by an order made under section 278 of the Code of Civil Procedure and the plaintiff brought this suit to set aside the above order and to obtain a declaration that his judgment-debtor's interest therein was liable to be sold in execution of his decree.

The District Munsif passed a decree in favor of the plaintiff, but on appeal this decree was reversed by the Subordinate Judge who said:—"Half of this house is ancestral property and the other half had been purchased by Minatchi Naidu in Court sale under exhibit II. On the date of attachment, the sons of Minatchi Naidu had no interest in the house as he had disposed of the property long before the attachment. Although in the sale-deed I, Minatchi Naidu is not described as the manager, yet the evidence on record shows that he was, and is still, the family manager. The father has a disposing power, and, by reason of it, he represents his sons also in transactions and suits provided that the power is properly exercised. The District Munsif finds that the transaction in question is *bonâ fide*. The vendee has had possession following his purchase, and till the present moment Minatchi Naidu's sons have not raised objections to first defendant's purchase. According to the principles enunciated in the case of *Kunhali Beari v. Keshava Shanbaga* (1) it is quite clear that the sons cannot set aside the alienation unless they show that the transaction was immoral or illegal. Plaintiff, who is the son's creditor, cannot be in a better position than the son himself. The Lower Court's view is not, therefore, tenable."

The plaintiff preferred this second appeal.

Bhashyam Ayyangar for appellant.

The only question is whether the sale by defendant No. 2 to defendant No. 1 passed the whole property. It was not an

(1) I.L.R., 11 Mad., 64.

alienation in satisfaction of a debt, so *Kunhali Beari v. Keshava Shanbaga*(1) and other authorities as to Court sales are inapplicable, for the obligation on a Hindu to pay his father's debt is independent of the existence of family property; nor was this shown to have been an alienation made for any family purpose. The plaintiff therefore is entitled to attach and sell the share of defendant No. 3 in execution of his decree. The case is governed by *Subramanya v. Sadasiva*(2).

Subramanya Ayyar and *Desikacharyar* for respondents.

The law as to the father's power of alienation and as to the burden of proof when that power is called in question is correctly stated by West, J., in *Jagabhai Lalubhai v. Vijbhukandas Jagjivandas*(3) which case was followed in *Kunhali Beari v. Keshava Shanbaga*(1) see also *Nanomi Babuasin v. Modhun Mohun*(4). Moreover the presumption is that alienation made by the father as managing member of a Hindu family are made for family purposes. *Um Savant Bal Savant v. Narayan Dhond Savant*(5).

Bhashyam Ayyangar in reply. The presumption does not go so far as is contended for. If the purchaser says "I do not know what caused the father to sell, all I know is that I bought or paid for the land," the sons could intervene. *Arunachala v. Munisami*(6).

JUDGMENT.—The Subordinate Judge has misunderstood the decision in *Kunhali Beari v. Keshava Shanbaga*(1). Although the son or the son's creditor cannot set up his vested interest in ancestral property for the purpose of denying the father's power to alienate it *for a debt*, the father has no power to alienate the son's co-parcenary share in the absence of any debt.

It was for the purchaser therefore to give evidence that the alienation was for some purpose which would bind the son, or that it was made with his consent.

We must reverse the decree of the Lower Appellate Court and remand the appeal for rehearing.

The costs will follow and abide the result.

(1) I.L.R., 11 Mad., 64.

(3) I.L.R., 11 Bom., 37.

(5) I.L.R., 7 Bom., 467.

(2) I.L.R., 8 Mad., 75.

(4) I.L.R., 13 I.A.; 1 s.c., I.L.R., 13 Cal., 21.

(6) I.L.R., 7 Mad., 39.