

ant No. 1, and he, therefore, was, at the time of the gift, a co-sharer with his daughters, being entitled only to a one-quarter share. It is argued that the gift by defendant No. 1 to his eldest daughter was invalid (1) because an undivided share cannot be given, and (2) because the donor retained possession and user of the gift. With reference to the latter objection it is sufficient to say that where there is on the part of the father of a minor a *bond fide* intention to make a gift to the minor, the Muhammadan law is satisfied without actual change of possession, and it will be presumed that the subsequent holding of the father is on behalf of the minor. According to the Shurhi Viqaya "a gift made by a father to his child is perfected by the mere declaration of it.(1)" Nor do we think that the former objection should be allowed to prevail. The doctrine of Muhammadan law that a gift of an undivided share in property is invalid because of *musha* or confusion only applies to such objects of gift as are capable of partition. The shares of the father and his minor daughters in the house were defined, but the house was not capable of being divided into three shares consisting of $\frac{1}{4}$, $\frac{2}{3}$ and $\frac{1}{3}$ respectively. The father gave to his minor daughters on their marriages a moiety of the share to which he was entitled, and the gift was not in our judgment void for indefiniteness. This second appeal fails and is dismissed with costs.

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APPELLATE CIVIL.

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

GNANAMMAL AND OTHERS (DEFENDANTS), APPELLANTS,

v.

MUTHUSAMI (PLAINTIFF), RESPONDENT.*

1889.
February 6.

Court sale—Decree against Hindu father—Interest of undivided son—Certificate of sale—Civil Procedure Code, s. 316—Grounds of second appeal.

In execution of a decree for sale passed on a hypothecation bond, all the land comprised in the security was attached. The judgment-debtor was a member of an undivided family; his son put in no claim in execution, but on a claim put in by his nephew it was ordered that the right, title and interest of the judgment-debtor

(1) Macnaghten, p. 213 (Ed. iv).

* Second Appeal No. 70 of 1888.

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be sold. The decree-holder became the purchaser, and having obtained a sale certificate which recited that "all the interest of the judgment-debtor" was sold, he was put in possession of all the land, part of which he leased to the son. Subsequently the nephew obtained a decree for his share against the decree-holder and then purchased the rest of the land from him. In a suit by the son against the nephew to recover his share, the plaintiff having failed to prove that the judgment debt had been incurred for purposes not binding on him :

Held, that the entire estate less the interest of the nephew was sold to the decree-holder and consequently the son's interest had passed to him.

The question what is actually bargained and paid for at an execution sale is a mixed question of law and fact, and the High Court on second appeal is not bound by the finding of the Court of first appeal with regard to it.

SECOND APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 827 of 1886, reversing the decree of W. Gopalachariar, District Munsif of Trivadi, in original suit No. 31 of 1886.

One Muthu Ayyan, having obtained a decree on a hypothecation bond against the father of the present plaintiff, attached the land comprised in the hypothecation. The present first defendant, an undivided member of the judgment-debtor's family, intervened in execution asserting a claim to a moiety of the land, but at the sale held in execution Muthu Ayyan became the purchaser and was put in possession of the whole property. The present first defendant then obtained a decree against Muthu Ayyan for his share and subsequently purchased from him the remainder of the property.

This suit was brought to recover the plaintiff's share in the land purchased by Muthu Ayyan on the ground that the debt secured by the hypothecation bond was not incurred for his benefit, that he was not a party to the suit, and that the interest of his father alone was sold. The defendant No. 1 pleaded that the sale was binding on the plaintiff, that the plaintiff had signed the delivery account prepared with reference to the land delivered to Muthu Ayyan, and had subsequently taken a lease of part of it from him.

The District Munsif held that the last-mentioned allegation was established, and that taken with the fact "that the plaintiff never came forward with a claim petition," it imposed on the plaintiff the burden of proving that the judgment-debt was not incurred for purposes binding on him, and holding that the plaintiff had failed to prove this, he dismissed the suit. On appeal the Subordinate Judge concurred in the finding that the

plaintiff had not proved the judgment-debt to have been incurred for purposes not binding on him, but reversed the decree on the ground that his interest had not been purchased, observing—

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“The first question is whether plaintiff’s share also passed to the purchaser. That plaintiff’s father mortgaged the entire land is not disputed. There is also no dispute that the land mortgaged was charged with the payment of the decree debt. It is allowed that the land attached in execution was the full extent of land covered by the decree. When the first defendant put in his claim for the release of his half share, the Subordinate Judge of Tanjore, instead of allowing his claim and ordering the sale of the other moiety, made an order that the judgment-debtor’s right, title and interest should be sold as stated in the plaint. Defendants do not contend that the order did not run to that effect. What is stated in the plaint must therefore be taken as correct. The Subordinate Court of Tanjore believing that besides the first defendant there might be some other claimants to property attached seems to have passed the order in question in view to protect the interest of all. That the order directed the sale of plaintiff’s father’s interest alone is not open to question. The sale certificate recites that *all the interest of the judgment-debtor* was sold. Reading it with the light thrown by the order, there can be no doubt that the sale did not extend beyond the interest of plaintiff’s father.”

The defendants preferred this second appeal.

Rama Rau for appellants.

Pattabhiramayyar for respondent.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court.

JUDGMENT.—On the 3rd November 1870 the plaintiff’s father hypothecated certain property to one Muthu Ayyan, who, in original suit No. 99 of 1876, obtained a decree rendering the property liable. On his proceeding to realise the decree by attachment, defendant No. 1, an undivided nephew of the judgment-debtor, applied for and obtained the release of his share in the attached property. Muthu Ayyan purchased the property in Court sale, and the plaintiff was for some time a tenant under Muthu Ayyan. Subsequently Muthu Ayyan conveyed his right to defendant No. 1, and the plaintiff now seeks to recover his share of the

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lands on the ground that he is not concluded by the decree against his father nor by the sale.

The Munsif dismissed the suit, holding that the plaintiff was estopped by his own conduct in taking a lease from Muthu Ayyan from asserting his title, and that he had failed to prove that the debt was contracted for illegal or immoral purposes.

On appeal the Subordinate Judge sent down an issue to determine whether Muthu Ayyan bargained and paid for the whole land.

The Munsif returned a finding in the affirmative, but the Subordinate Judge, on the ground that only the right, title and interest of the judgment-debtor had been ordered to be sold, held that the father's interest alone had passed, and that the plaintiff's share did not pass to Muthu Ayyan. He therefore reversed the Munsif's decree and decreed for the plaintiff.

In original suit No. 90 of 1885, the present first defendant sued Muthu Ayyan for possession of a house and ground purchased from him. The present plaintiff intervened (as second defendant) as the party in possession and claimed a half share as his ancestral property. The Court of first instance and the Lower Appellate Court both found that all that passed to the purchaser (Muthu Ayyan) in the Court sale in execution of the decree in original suit No. 99 of 1876 was the right, title and interest of his judgment-debtor (the present plaintiff's father). On second appeal this Court, remarking that the case had not been decided in accordance with the principles laid down by the Privy Council in *Nanomi Babuasin v. Modhun Mohun*(1) and *Simbhunath Panday v. Golab Singh*(2), remanded the case for a finding on two points—(1) whether Muthu Ayyan bargained and, in point of fact, paid for the whole or for the father's interest only as contradistinguished from that of the son, and (2) if for the whole whether the debt was immoral or vicious. The Subordinate Judge (Kumbakonum) found that the purchaser bargained and paid for the whole property and that the debt was neither immoral nor vicious. This Court accepted the finding, set aside the decrees of the Courts below, and gave the present first defendant a decree.

There are thus two diametrically opposite findings by two Subordinate Judges on one and the same question, and it is argued in

(1) L.R., 13 I.A., 1; s.c. I.L.R., 13 Cal., 21. (2) L.R., 14 I.A., 82.

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.

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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.