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IN THE MATTER OF THE PETITION OF KALI KRISTO THAKUR.

ceedings under s. 530 of the Code of Criminal Procedure. I also wish to add that, if there had been substantial evidence of possession or a conflict of evidence on that question, the Magistrate would have been justified in looking to the evidence of title in corroboration of the evidence of possession. But as my learned brother has read the deposition of the witnesses, and it does not appear that there was sufficient evidence of possession, I agree that the case should not have been decided upon evidence of title alone.

Rule absolute.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Maclean.

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GOBURDHON LALL (DEFENDANT) *v.* SINGESSUR DUTT KOER AND OTHERS (PLAINTIFFS).*

Hindu Law—Mitakshara — Mortgage of Ancestral Estate by Father for Family Purposes—Attachment of Property in Execution of Decree—Death of Judgment-Debtor prior to Sale.

Where a decree on a mortgage was obtained against the father of a joint Hindu family governed by the Mitakshara law, the debt having been incurred for joint family purposes, and in execution thereof the joint family property was attached, but prior to sale the judgment-debtor died: in a suit subsequently brought by the other members of the joint family, praying for a partition of their shares, and for a declaration that such shares were not liable to be sold in execution of the mortgage decree,—

Held, that there could not be a partition as between a person already dead and his sons, and that the whole of the ancestral property was liable for the mortgage-debt, the only declaration to which the plaintiffs could be entitled being, that they were not liable to pay the debt.

THIS was a suit brought by the plaintiffs, seven in number, for the purpose of obtaining a partition of a four-annas share of Mouza Nirpur, and seven-annas of Mouza Chuck Ibrahim,

* Appeal from Original Decree, No. 231 of 1879, against the decree of Baboo Koylash Chunder Mookerjee, Subordinate Judge of Tirhoot, dated the 9th May 1879.

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between themselves and Chundermun Koer, the deceased father of the plaintiffs Nos. 1 to 6, and husband of the plaintiff No. 7; and for a declaration that the share which should be allotted to them was not liable to be sold in execution of a decree, dated 26th July 1875, passed against the said Chundermun Koer. The facts alleged in the plaint were, that the plaintiffs Nos. 1 to 6, with Chundermun Koer their father, and the plaintiff No. 7 their mother, were members of a joint Hindu family, holding jointly possession of ancestral property consisting of, among others, the mouzas aforesaid; that Chundermun Koer, on the 17th of May 1874, executed a bond in favour of the defendant (the plaintiffs not being aware for what necessity the bond was executed); that in that bond the abovementioned shares of the mouzas were hypothecated; and that the defendant, on the 26th of July 1875, obtained a decree on the strength of the bond, and that, in execution of the decree, the shares were attached. Chundermun Koer subsequently died. Upon these facts the plaintiffs contended that they were entitled to the declaration and the relief abovementioned. The defendant alleged in his written statement that the mouzas in dispute were the self-acquired property of Chundermun Koer; that the debt contracted by Chundermun Koer, being not for immoral purposes, but, on the other hand, having been necessary for the joint family, was binding upon the sons. The defendant, therefore, contended that the shares in question were liable to be sold in execution. The Subordinate Judge found that the property in dispute was the ancestral property of Chundermun Koer, and that it was not proved that the loan advanced by the defendant on the 17th of May 1874 was necessary for joint family purposes; and, in giving the plaintiffs a decree, declared, that only $\frac{4}{5}$th anna of Nirpur and $\frac{1}{5}$th anna-share of Chuck Ibrahim was liable to be sold in satisfaction of the defendant's decree against Chundermun Koer, dated the 20th July 1875, and that the remaining portion of the four annas share and seven annas share of those estates belonged to the plaintiffs, and that their shares should be separated from that of Chundermun, and be equally partitioned between themselves.

From this decree the defendant appealed to the High Court.

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Baboo *Mohesh Chunder Chowdhry* and Baboo *Aubinash Chunder Banerjee* for the appellant.

Baboo *Kally Kissen Sein* for the respondents.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J. (who, after stating the facts as above, continued).—Upon these findings of fact by the Subordinate Judge he framed the following judgment:—

"It is hereby declared that only $\frac{4}{8}$th-anna of Nirpur and $\frac{1}{8}$th-"anna share of Chuck Ibrahim are liable to be sold in satis-"faction of the defendant's decree against Chundermun Koer, "dated 20th July 1875. The remaining portions of four annas "share and seven annas share of those estates belong to the plain-"tiffs, and their shares should be separated from Chundermun's "share, and would be equally partitioned between themselves." We think that this decree is erroneous, because it seems to us that there could not be a partition between a person who is already dead and his sons. No doubt, according to the case of *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1), if the property under attachment had been sold, and if it had been proved that the decree was a personal decree against the father, and that the debt for which the decree was passed was contracted for immoral purposes, the purchaser would have acquired only the interest of the deceased father, and a partition might have taken place between the purchaser on the one hand, and the sons and the widow on the other. That is not the case here, because although there was an attachment in the lifetime of the father, that attachment was not followed by a sale. It may be that the defendant, decree-holder, would not proceed upon that attachment. In that case, the decree which has been passed by the lower Court would be wholly infructuous. We are, therefore, of opinion that the decree passed by the lower Court cannot stand. It appears to us that the only declaration which in this suit the plaintiffs can obtain is, that they are not liable to pay the debt due to the defendant under the decree of

(1) L. R., 6 I. A., 88.

July 1875. The lower Court has gone into that question in its judgment, and has decided it in favour of the plaintiffs.

This question has been set at rest by the decision in the case of *Muddun Thakoor* v. *Kantoolall* (1). In the course of the judgment in that case, their Lordships of the Judicial Committee observe :—"In the case, which has been referred to in argument, "of *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj* "*Konweree* (2), Lord Justice Knight Bruce, who delivered "the judgment of the Privy Council, says,—though an estate be "ancestral, it may be charged for some purposes against the "heir, for the father's debt, by the father, as indeed the case "above cited — *Oomed Rai* v. *Heera Lall* (3) — incidentally "shows. Unless the debt was of such a nature that it was not "the duty of the son to pay it, the discharge of it, even though "it affected ancestral estate, would still be an act of pious "duty in the son. By the Hindu law the freedom of the son "from the obligation to discharge the father's debt has respect "to the nature of the debt, and not to the nature of the estate, "whether ancestral or acquired, by the creator of the debt." It is quite clear from this passage that, whether the original debt was a personal debt of the father or not, the ancestral property in the hands of the sons would be liable to satisfy it, unless it be proved that it was contracted for immoral purposes. This is clearly an authority to show that, unless the debt is proved to have been contracted for immoral purposes, the defendant is entitled to recover it by the sale of the ancestral property in the hands of the sons. In this case, although the plaintiffs did not allege that the debt was contracted for immoral purposes, still that question has been gone into by the lower Court and found to be not established. That being so, we are of opinion that the lower Court was wrong in holding that the whole of the ancestral estate in the hands of the sons is not liable for the money which is due to the defendant under the decree of July 1875.

The plaintiffs' suit must, therefore, be dismissed with costs in all the Courts.

Appeal allowed.

(1) L. R., 1 I. A., 321. (2) 6 Moore's I. A., 421.
(3) 6 S. D., N. W. P., 218.