APPELLATE CIVIL.

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

1882.
April 8.
May 5.

SABAPATHI (PLAINTIFF), APPELLANT,

v.

SOMASUNDARAM AND OTHERS (DEFENDANTS NOS. 1, 5, 6, 7, 8 and 16), RESPONDENTS.*

Hindu law—Alienation of family property—Rights of a son unborn.

Under Hindu law a son conceived is equal to a son born; accordingly, an alienation by a Hindu to a *bonâ fide* purchaser for value is liable to be set aside by a son, who was in his mother's womb at the time of the alienation, to the extent of his share.

APPEAL against the decree of C. Venkobachariar, Subordinate Judge of Madura (West), in original suit No. 4 of 1890.

The plaintiff, by his next friend, sued his father and five persons to whom his father had alienated property to have the several alienations set aside: the plaint alleged that the alienations had been made under no circumstances of justifying necessity, but for immoral purposes.

The further facts of the case appear sufficiently for the purposes of this report from the following judgment.

Krishnasami Ayyar for appellant.

Sadagopachariar and *Thiagaraja Ayyar* for respondents.

JUDGMENT.—The appellant is the plaintiff, an infant of 4½ years, who sues nominally by his next friend, his maternal uncle, to set aside, so far as his share is concerned, certain alienations made by his father, the first defendant. The appeal relates to items 4, 5, 10 and 12. Items 4 and 5 were sold to the fifth defendant in July, 1887, two months before plaintiff was born. Item 10 was sold to sixth defendant in September 1888, a year after plaintiff's birth, and item 12 in April 1887.

With reference to these transactions the Subordinate Judge found that the sale of items 4 and 5 was *bonâ fide*, and supported by consideration, and that the sale is valid and binding on the

* Appeal No. 74 of 1891.

plaintiff: that the sale of item 10 took place in discharge of antecedent debts which are not shown to have been immoral: and that as the plaintiff was not born at the time when item No. 12 was sold to the eighth defendant, he cannot object to the alienation.

The fifth defendant is the paternal uncle of the first defendant. In August 1886 first defendant wrote to fifth defendant, setting forth the difficulties he was in owing to the pressure of his creditors, and imploring him to raise a loan of Rs. 1,500 or Rs. 2,000 on the security of item No. 4. On the 7th March 1887, first defendant wrote to fifth defendant a still more pressing letter, stating that his creditors were threatening to take further proceedings, and offering to execute a document in favour of fifth defendant for the lands, item No. 5. On the 9th July 1887, fifth defendant advanced Rs. 3,000 to first defendant and took from him an absolute sale-deed for items 4 and 5, at the same time stipulating to reconvey the property to first defendant after the lapse of 3 years, or even beyond that time on receipt of the consideration. In the sale-deed it was recited that the money was borrowed for the purpose of discharging the debts contracted by first defendant on account of his family expenses, as well as the hypothecation amount due to Kadambavan Sundram Pillai on item No. 4. The first defendant admits the receipt of the Rs. 3,000, and there is other evidence in support of it. But it is argued that as the fifth defendant has not shown that he made enquiry as to the necessity for the loan, and as he did not see to the application of it, it is not binding on the minor plaintiff. We think there is ample evidence on the record to show that the fifth defendant satisfied himself as to the pressing necessity which the first defendant was under, and that he *bonâ fide* advanced his nephew Rs. 3,000 under very favorable terms, in the hope that he would thus enable him to save this portion of his property. The money was advanced by fifth defendant to enable first defendant to pay off antecedent debts, and as it is not shown that such debts were tainted with immorality, plaintiff cannot set up his right against his father's alienation of items 4 and 5.

Item No. 10 was sold to the sixth defendant, the maternal uncle of the first defendant, in discharge of an antecedent debt which is not shown to have been in any way tainted with immorality. The letters written by first defendant to sixth defendant, in September and November 1886, show how urgent his necessity

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was, and in the latter month sixth defendant lent him Rs. 550 on two promissory notes. In discharge of a portion of this amount, first defendant, in September 1888, conveyed to his maternal uncle the house-sites and threshing floors, item No. 10. We concur with the Subordinate Judge that as plaintiff has failed to show that the antecedent debt discharged by the sale of item No. 10 was tainted with immorality, he cannot impeach its validity.

With reference to item No. 12, it is admitted that the sale was not made to discharge an antecedent debt, and the only question is whether the plaintiff, who was not born until 4½ months after this transaction, is entitled to dispute it. It is argued that the son's interest in ancestral property exists even before birth. A son cannot object to an alienation validly made by his father before he was born or *begotten*, because it is by birth only that he obtains an interest in property then existing in his ancestor—(Mayne's Hindu Law, § 316). The question is whether the right of the son to take objection to the alienation of the father dates from the hour of his birth or from that of his conception. The right of an after-born son to share as a coparcener property which has already been divided depends upon his being in the womb of his mother at the time of partition. This indicates that under Hindu law membership with the family is considered as commencing from conception (*see* Smriti Chandrika I, 27). In *Muthia* v. *Zamindar of Ramnad*(1), it was held by a bench of this Court that a father could not make a gift of ancestral property so as to defeat the rights of a son in the womb. Following this decision the Court held in *Minakshi* v. *Virappa*(2), that the rights of a son in the womb could not be defeated by a will made by the father. In *Mussamut Goura Chowdhrain* v. *Chummun Chowdry* (3), Norman, C.J., and Kemp, J., held that a child in the womb takes no estate, and that a son was not entitled to set aside a deed of compromise executed by his father while he was *utero matris*. But by a rule now generally adopted in jurisprudence, for certain purposes, existence begins before birth. As Blackstone says "An infant *in ventre sa mère* is supposed to be born for many purposes. It is capable of having a legacy or a surrender of a copy-hold estate made to it. It may have an estate assigned to it, and it is enabled to have an estate limited to its use and to take afterwards by such limitation as if it

(1) 2 Ind. Jur., 205. (2) I.L.R., 8 Mad., 89. (3) W.R., 1864, p. 340.

were then actually born" (1 Comm., 130). As Domat says (Civil Law, Part II, Book II, s. 1, para. 2797) "The children not yet born when their fathers die are reckoned in the number of children who succeed. Although not born when the succession which they are to inherit falls to them by the death of father or mother or other relations, yet they belong to them upon condition that they shall be born alive, and they are considered as heirs already before their birth."

We see therefore no difficulty in holding that the right to inherit ancestral property accrues at the time of conception and not at birth. It is said that this was expressly decided by this Court in Regular Appeals 43 and 46 of 1874, but on referring to the record we find that no judgment was recorded in those cases.

We concede that, as remarked by the learned Judges who decided *Minakshi* v. *Virappa*(1), there are obvious reasons for holding that a purchaser for value is not bound to enquire whether the wife of his vendor is *enceinte*, but as it appears to us that under Hindu law, as under other systems of law, a son conceived is equal to a son born, we must hold that an alienation to a *bonâ fide* purchaser for value is liable to be set aside to the extent of the son's share, by a son who was in his mother's womb at the time of the alienation.

The decree of the Lower Court will therefore be modified by allowing plaintiff to recover on payment his half share in item No. 12. In other respects the decree of the Lower Court is confirmed, and the appellant must pay the respondents' costs.

(1) I.L.R., 8 Mad., 89.