APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1893.
October 3,
4, 5, 10, 11,
December 21.
1894.
April 30.

In Appeal No. 7 of 1892.

KRISHNASAMI AYYANGAR (DEFENDANT No. 5), APPELLANT,

v.

RAJAGOPALA AYYANGAR AND OTHERS (PLAINTIFF AND DEFENDANTS Nos. 1 TO 4 AND 6 TO 9), RESPONDENTS.*

In Appeal No. 50 of 1892.

RANGASAMI AYYANGAR AND OTHERS (DEFENDANTS Nos. 2, 3 AND 4), APPELLANTS,

v.

RAJAGOPALA AYYANGAR AND OTHERS (PLAINTIFF AND DEFENDANT No. 1 AND DEFENDANTS Nos. 5 TO 9), RESPONDENTS.*

In Appeal No. 51 of 1892.

KRISHNASAMI AYYANGAR (DEFENDANT No. 1), APPELLANT,

v.

RAJAGOPALA AYYANGAR AND OTHERS (PLAINTIFF AND DEFENDANTS Nos. 2 TO 6), RESPONDENTS.*

Hindu law—Sale of a co-parcener's share—Claim of co-parceners on proceeds—Remuneration for management—Evidence Act—Act I of 1872, *s.* 35—*Judgments and private documents—Civil Procedure Code—Act XIV of* 1882, *ss.* 2, 215, 540—*Provisional decree—Admission made* arguendo.

In a suit for partition of family property it became necessary for the plaintiff to prove that his grandfather had been adopted by A, and he tendered in evidence judgments from which it appeared that A's brother, who was the grandfather of defendant No. 1, had sued to recover moneys due to A, alleging that the adopted son was an infant living under his protection. An adoption of the father of the defendant No. 1 by D was also put in issue, and to prove it defendant No. 1 tendered in evidence decrees in which the alleged adopted son was so described and also other documents (to which neither defendant No. 5 who denied the adoption nor his father was a party) where the same description was used. It appeared that one of the deceased co-parceners had sold to a stranger his undivided share in almost all the immovable property of the family, and with part of the proceeds had discharged some debts and with the rest had purchased certain lands, now claimed

* Appeals Nos. 7, 50 and 51 of 1892.

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by his widow as his separate property. One of the defendants claimed to be credited with a sum payable to him as the managing co-parcener under a deed of management to which the plaintiff was not a party. A decree was passed declaring the share to which the plaintiff and some of the defendants were entitled in the family property, but reserving all other questions involved in the suit:

Held, (1) that the decree was a provisional decree and was subject to appeal, but that it was irregular in form in that it should have contained declarations as to all the rights and liabilities which had been adjudicated on and directions as to the accounts and enquiries remaining to be taken and made;

(2) that the documents tendered in evidence of the two adoptions above mentioned respectively were admissible in evidence;

(3) that the proceeds of the sale of the co-parcener's share so far as they were in excess of the requirements of his creditor's equity were not divested of the character of co-parcenery property, and the lands purchased therewith were consequently property subject to partition and not separate property as contended by his widow;

(4) that the claim under the deed of management was not valid against the plaintiff.

Per cur: The opinion expressed by a vakil in the course of argument adversely to a claim which he undertook to advocate is not binding on his client.

APPEAL against the decree of C. Venkobachariar, Subordinate Judge of Tanjore, in original suit No. 27 of 1890.

The plaintiff sued for partition of the property of the undivided family consisting of himself and defendants Nos. 1 to 5, of which he claimed to be entitled to a half share. The seventh defendant was the widow of a deceased member of the family who, as was averred in the plaint, had in 1884 effected a partition with defendants Nos. 1 and 5 in fraud of the rights of the plaintiff. With regard to defendant No. 6 the plaint alleged that he had obtained from the late husband of defendant No. 7 a conveyance of his undivided one-third share of a moiety of the family property. It appeared from the conveyance that the transfer comprised only the executant's share of the immovable property of the joint family excluding therefrom a certain house. The consideration for the conveyance was made up of a previous debt and a sum of Rs. 21,150 then paid. With this money the transferor purchased certain land through his father-in-law who was joined in this suit as defendant No. 8 and who managed the property by his agent, defendant No. 9.

There was a contest with regard to the share of the plaintiff which turned upon the question whether or not his grandfather Varadayyangar was the adopted son of Ammalayyangar as alleged by the plaintiff. In order to prove this adoption the

plaintiff tendered in evidence certain judgments from which it appeared that the grandfather of defendant No. 1 had brought suits to recover moneys due to the alleged adopted father, then deceased, stating that he sued because Varadayyangar, the adopted son of Ammalayyangar, was an infant living under his protection. Another alleged adoption came in question in this suit, viz., that of the first defendant's father by his uncle Dorasami. In order to prove this adoption there were put in evidence two decrees in which the alleged adopted son (then the defendant) was so described and also various other documents (a sale-deed, a lease, a money-bond executed to him and a claim petition filed in a Munsif's Court by third parties) to which neither the fifth defendant who denied the adoption nor his father was a party, where the same description appeared.

Of some of the properties comprised in the plaint, defendant No. 7 alleged that they were self-acquired properties of her deceased husband and claimed to be entitled to them in preference to his co-parceners. These were the properties purchased with the money paid by defendant No. 6, viz., Rs. 21,150 as mentioned above. At the hearing in the Subordinate Court the plaintiff's vakil stated that the claim in respect of this property, which had been made the subject of the ninth, tenth and sixteenth issues, was made "unwarrantably," and the Subordinate Judge accordingly dismissed the plaintiff's claim on this head without determining the issues relating that. It appeared further that the seventh defendant's late husband had in 1888 handed over certain title-deeds relating to family property to defendant No. 6 by way of guarantee without the consent of his co-parceners.

Defendant No. 1 claimed to be credited with a sum of Rs. 8,000 payable to him under a document referred to as a deed of management which provided for the payment to him of this sum as a remuneration for the management of the family property. The plaintiff was not a party to this deed which was executed by defendants Nos. 1 and 5 and the late husband of defendant No. 7, and the Subordinate Judge held that he was not bound by it.

In the result the Subordinate Judge passed a decree as follows:—"This Court doth order and decree that plaintiff, as "the grandson of Varadayyangar, who was adopted by Ammalay-"yangar, be, and is hereby declared entitled to a half share "and defendants Nos. 1, 5 and 6 as well as the third defendant

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"(who was adopted by Sindu Ayyangar, adopted son of Dora-"sami Ayyangar) to one-eighth share each in the plaint properties, "save those detailed in Schedule A, and that the other questions "involved in the suit be reserved."

Issues raised as to the amount of outstanding debts due to the family and of sums expended by the defendants for family purposes and as to mesne profits payable to the plaintiff, &c., were reserved for determination at a later stage.

The present appeals were filed by defendants Nos. 1 to 5 against this decree, and it was objected that no appeal lay because the decree was incomplete and not a final adjudication.

In Appeal No. 7 of 1892—

The Advocate-General (Honorable Mr. *Spring Branson*) and *Sankaran Nayar* for appellant.

Subramania Ayyar, *Bhashyam Ayyangar*, *Pattabhirama Ayyar*, *Shadagopachariar*, *Tiruvenkatachariar* and *Krishnasami Ayyangar* for respondents.

In Appeal No. 50 of 1892—

Pattabhirama Ayyar for appellants.

Bhashyam Ayyangar, *Sankaran Nayar*, *Shadagopachariar*, *Tiruvenkatachariar* and *Krishnasami Ayyangar* for respondents.

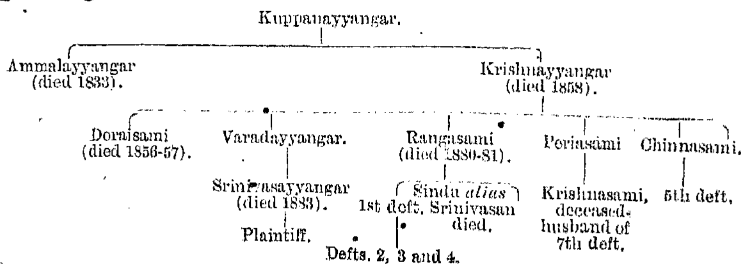
In Appeal No. 51 of 1892—

Mahadeva Ayyar for appellant.

Pattabhirama Ayyar, *Subramania Ayyar*, *Govinda Menon*, and *Krishnasami Ayyangar* for respondents.

JUDGMENT.—These three appeals are all from the same decree (Appeal No. 7 being by the fifth defendant, Appeal No. 50 by defendants Nos. 2 to 4 and Appeal No. 51 by the first defendant) in a suit brought by plaintiff for partition of family property and recovery of a moiety as the share to which he is entitled.

The relationship of the parties will be seen from the following genealogical table :—



Plaintiff's case is that his grandfather Varadayyangar, the second son of Krishnayyangar, was adopted by the latter's brother Ammalayyangar, and that plaintiff is consequently entitled to a moiety of the property as representative of Ammalayyangar, the other moiety going to defendants Nos. 1 to 5 representing Krishnayyangar's branch to which also belonged the late husband of the seventh defendant.

The adoption of plaintiff's grandfather by Ammalayyangar was denied by all the present appellants as defendants in the Lower Court, and the denial is persisted in by them all as appellants in this Court.

The first question for determination now is, therefore, whether or not Varadayyangar was adopted by his uncle Ammalayyangar.

This was the first issue recorded in the Court below; and the finding of the Subordinate Judge is in the affirmative—see paragraph 32 of his judgment, in which he expresses his finding to the above effect, after discussing the evidence at length in paragraphs 14 to 31. We do not think it necessary to do more than notice the documents, which afford unambiguous evidence of the adoption. These are exhibits L Series, O Series, A and XIV, C and E.

From exhibits L, L1, L2, L3 and L5 it is seen that the adoption of Varadayyangar by Ammalayyangar was stated by the latter's brother Krishnayyangar in suits brought by him in 1838, 1841 and 1843 to recover moneys due to Ammalayyangar (then deceased). He explained that the suits were brought by him as Varadayyangar, the adopted son of Ammalayyangar, was under his protection. It has been objected on behalf of appellants that these copies of judgments are inadmissible as evidence, and in support of this objection we were referred to *Subramanyan* v. *Paramaswaran*(1). Copies of judgments and decrees were there held to be inadmissible with reference to the decision of the majority of Judges of the Calcutta High Court in *Gujju Lall* v. *Fatteh Lall*(2). As pointed out by this Court in *Byathamma* v. *Avulla*(3), the sole object for which it was sought to use the former judgment in *Gujju Lall* v. *Fatteh Lall*(2) was to show that in another suit against another defendant the plaintiff had obtained an adjudication in his favour on the same right; and

(1) I.L.R., 11 Mad., 116. (2) I.L.R., 6 Calc., 171. (3) I.L.R., 15 Mad., 19, 23.

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it was held that the opinion expressed in the former judgment was not a relevant fact within the meaning of the Evidence Act. The case is clearly different where the previous judgment is produced not in order to prove and adjudication between third parties, but in order to prove a statement made by a predecessor in title of the party against whom the document is sought to be used; *c.f. Parbutty Dassi* v. *Purno Chunder Singh*(1) and *Thama* v. *Kondan*(2). Such is the case here and we have no doubt that the judgments in question are relevant under section 35 of the Evidence Act. But even were it otherwise, a copy of the plaint in the suit of which L3 is the judgment is filed as fifth defendant's exhibt LXVIII and affords the same evidence as exhibits L series. See also fifth defendant's exhibit LXVIII*a*; also the N series of exhibits. These latter are no doubt signed by Varadayyangar himself as vakil of Krishnayyangar, but O and O1 to 8 show that Varadayyangar was appointed as his vakil by Krishnayyangar, who describes him in all these documents as his natural (Janaka) son, which description would not be used unless there had been an adoption. This description of plaintiff also occurs in the documents P series and others of the years 1841 to 1843. It has been contended for appellants that the O series of documents are forgeries, but the Subordinate Judge has held otherwise and there is no reason for thinking that he is wrong.

The next document to be considered is exhibit A. From it it is seen that in 1858 Chellathammal, widow of Varadayyangar, brought a suit for maintenance against Krishnayyangar, which suit was continued on the latter's death against his sons (i) Rangasami Ayyangar, the father of the first defendant and grandfather of defendants Nos. 2 to 4 and (ii) Periasami Ayyangar, the father of the seventh defendant's late husband and (iii) Chinnasami Ayyangar, father of the fifth defendant, describing Varadayyangar as the adopted son of Ammalayyangar, to which description no objection appears to have been taken.

The statements made by the first defendant in exhibits C, E and XIV in 1882 also support the adoption alleged by plaintiff, as pointed out in paragraph 28 of the Subordinate Judge's judgment.

It is further contended on behalf of appellants that Varaday-

(1) I.L.R., 9 Calc., 586.
(2) I.L.R., 15 Mad., 378.

yangar's adoption by Ammalayyangar (even if it is a fact) is invalid in consequence of Varadayyangar being previously married, as appears from the evidence of his widow Chellathammal, who has been examined as eleventh witness for the plaintiff. Considering that the precise date of Varadayyangar's adoption is not known and that no living member of the family has any personal knowledge of it, even assuming that he had a daughter born about 1831 (as would appear from the evidence of the eleventh witness) this circumstance is not sufficient to justify the finding that his first marriage took place prior to his adoption. When we find it recognized in 1838, 1840 and 1841 in the suits to which L, L1, L2, L3, L5, LXVIII and LXVIII*a* relate, and not denied in 1858 in the suit brought by his widow for maintenance (exhibit A), the presumption is in favour of its validity and such presumption must be rebutted by more positive evidence than has been adduced in this suit.

We see no reason, therefore, to doubt the correctness of the Lower Court's finding either as to the *factum* or validity of the adoption of Varadayyangar by Ammalayyangar; and the adoption being found to be a fact and valid, plaintiff is clearly entitled to a moiety of the property as representative of Ammalayyangar's branch.

The next point for consideration merely affects the shares to which defendants Nos. 1 to 5 are entitled *inter se* out of the moiety belonging to their branch as representatives of Krishnayyangar. On reference to the genealogical table given at the beginning of this judgment, it is seen that Krishnayyangar had five sons, the second of whom Varadayyangar (the grandfather of the plaintiff) was, as found above, adopted by Ammalayyangar; the fourth son Periasami had a son Krishnasami who died in 1889, leaving a widow (seventh defendant) and no male issue (his father pre-deceased him), fifth defendant is the son of Krishnayyangar's youngest son Chinnasami. Rangasami, the third son of Krishnayyangar (died in 1880–81), had two sons, first defendant and one Sindu *alias* Srinivasan. Defendants Nos. 2, 3 and 4 are the sons of the first defendant.

The eldest son Doraisami had no issue. The case of defendants Nos. 1 to 4 is that Doraisami adopted the first defendant's younger brother Sindu; and that this latter adopted the third defendant. If such be the fact, Krishnayyangar's moiety of the

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property is divisible into three shares, one of which belongs to the third defendant, another to defendants Nos. 1, 2 and 4, and the third to the fifth defendant. The fifth defendant however denies the alleged adoption (1) of Sindu by Doraisami and (2) of the third defendant by Sindu; and claims that he, as representing Chinnasami's branch, is entitled to a share equal to that of defendants Nos. 1 to 4 jointly as representatives of Rangasami's branch. The questions for decision with reference to this contention are consequently two, namely, (1) was Sindu adopted by Doraisami? and (2) was the third defendant adopted by Sindu? The Subordinate Judge has found in the affirmative with regard to both these adoptions. The evidence is considered in paragraphs 33 to 35 of his judgment.

The evidence of witnesses who speak to the adoption of Sindu by Doraisami is supported by exhibit IV, an inam statement prepared in 1862, in which Sreenivasa Ayyangar is entered as the adopted son of Komalavallee, the widow of Doraisami Ayyangar. The third defendant's second witness, by whom the statement was prepared, swears that it was prepared on information given by the father of defendants Nos. 1 and 5 and their brother Periyasami, the father of the seventh defendant's husband. Exhibits II and III are decrees in two suits of 1869 in which Sindu Ayyangar was defendant and described as adopted son of Doraisami. There are also a number of other documents produced in which Sindu is described as Doraisami's son. Cf. XIII, XVII, XX, XXIV, &c. It is true that the fifth defendant was not a party to these last-mentioned documents but, nevertheless, they are admissible as corroborating the oral evidence of both plaintiff's and the third defendant's witnesses.

As to the third defendant's adoption by Sindu Ayyangar, there is the evidence of defendants' sixth and seventh witnesses and also of plaintiff's eighth witness, all of whom say they were present when the adoption took place, while other witnesses speak to the performance by the third defendant of the exequial rites and sraddhas of Sindu and of Doraisami's widow Komalavallee.

The finding of the Subordinate Judge as to these two adoptions is thus supported by evidence which we see no reason for holding to have been misappreciated; nor do we see reason to differ from the finding of the Subordinate Judge on the fourth, fifth and sixth issues. We also agree with him in finding that the seventh

defendant's late husband was an undivided co-parcener at the date of his death.

The next question is as to the validity of the transfer evidenced by exhibit LVIII executed by the seventh defendant's late husband to the sixth defendant. It was the subject of the eighth issue recorded by the Subordinate Judge. The Subordinate Judge has found that though the seventh defendant's late husband could not convey any definite portion of the undivided family property, he could convey his undefined interest and share in the same and that to this extent the conveyance under LVIII is valid; and the sixth defendant stated his readiness to accept his vendor's share whatever it comes to. As pointed out by the Subordinate Judge, the consideration for the conveyance is Rs. 40,000, of which Rs. 8,000 and odd were paid to one Sadagopachari under exhibit XXXIII, Rs. 11,000 and odd to N. Saminathayyar by whom were granted the receipts XXXII series (which are admitted by him as a witness examined on commission) and the remaining Rs. 21,000 were to be paid to the eighth defendant, the father of the seventh defendant, for the purpose of liquidating other debts of the executant of LVIII. The evidence on the point is stated in paragraph 40 of the Subordinate Judge's judgment. There is no reason for holding that this sale to the sixth defendant was not for valuable consideration or that the sixth defendant purchased *benamee* for the plaintiff. According to the law administered in this Presidency a sale by a co-parcener of his undivided interest in family property is clearly valid and gives the vendee a right to claim the share of his vendor though not any specific property. It is clear, however, from exhibit LVIII that what was sold thereby to the sixth defendant is the seventh defendant's late husband's share in the immovable property only of the joint family excluding therefrom the "old, tiled, full-built dwelling house," situate in the northern row of Mela Valattur. The decree of the Lower Court must be amended accordingly by excluding from the portion to be awarded to the sixth defendant the above house and Krishnasami Ayyangar's share in the movable property.

The next question is as to the properties specified in schedule H which consist of 34 items. It is contended for the seventh defendant that items 4 to 28 were acquired by her deceased husband, that she had yet realized nothing from the policy of insurance on his life, that item 32 which was also her husband's self-acquisition

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was conveyed by him for the purpose of conducting a charity to one Tatu Desikachariar of Triplicane who was not made a party to this suit, and that under Hindu Law she was entitled to take her husband's self-acquisition in preference to his co-parceners and that no other items of schedule H were in her possession.

As regards items 29, 30 and 31, it was urged on behalf of the eighth defendant, father of the seventh defendant, that he acquired the first two items by purchase and that they did not belong to the joint family and that item 31 was bought by him on the 19th July 1888 at a Court sale. As for items 29, 30, 31, 33 and 34, he alleged that even supposing that they all belonged to his son-in-law Krishnasami Ayyangar, the latter ceased to be a co-parcener in consequence of the sale of his undivided share to the sixth defendant, and that the seventh defendant was the lawful heir entitled to succeed to it upon her husband's death. With reference to items 1 to 3 in schedule H, the ninth defendant's case was that they belonged exclusively to the seventh defendant's husband, and he purchased them at a revenue sale for arrears of revenue due to the Government by Krishnasami Ayyangar. As regards all the above items, the plaintiff averred in paragraphs 5 and 6 of his plaint, that out of the sale amount, viz., Rs. 40,000 due by the sixth defendant to the seventh defendant's husband, the latter paid his father-in-law, the eighth defendant, Rs. 21,500 which was the surplus that remained after payment of his debts, in order that the father-in-law might purchase land for him, that the items in dispute were so purchased, and that the co-parceners of the seventh defendant's husband were entitled to recover them from defendants Nos. 6 to 8. As to this sum of Rs. 21,500, the eighth defendant contended that it was paid to him out of the purchase money, not to be invested as alleged in the purchase of land for the benefit of the seventh defendant's husband, but in payment of debts due by him to the eighth defendant of moneys lent at his intercession and of debts which he was requested to liquidate. The eighth defendant stated also that the sixth defendant executed a promissory note in his favour for Rs. 21,150 at the date of the sale to him and that he obtained a decree upon the promissory note against the purchaser and recovered from him after decree Rs. 7,410. He alleged further that the plaintiff's case that Rs. 9,000 remained with him as unexpended balance of the sale amount, viz., Rs. 40,000 was false.

These contentions formed the subject of the ninth, tenth and sixteenth issues and the Subordinate Judge decided them all against the plaintiff on the ground mentioned in paragraph 41 of his judgment, viz., that the plaintiff's vakil who argued the case said that the properties in schedule H were claimed very unwarrantably. The contention in appeal is that this is not a proper or sufficient disposal and we think that it is entitled to weight. The opinion expressed by a vakil in the course of argument adversely to a claim which he undertook to advocate is not binding on his client when it is not in accordance with the law applicable to the case, and it is clearly not binding on the other contending defendants.

The question arising on these contentions is whether when a co-parcener sells his undivided share and when a surplus is left after paying his debts from the sale-proceeds, that surplus is co-parcenary property subject to the right of survivorship vesting in other co-parceners or his self-acquired property devolving upon his demise on his childless widow. The Subordinate Judge apparently considers it to be the deceased co-parcener's separate estate, but we are unable to concur in this opinion. It has been held by this Court that a co-parcener can only alienate his undivided share for value and that he cannot alienate it by will or gift.

The law on this subject, as administered in this Presidency was explained by the Privy Council in *Suraj Bunsi Koer* v. *Sheo Proshad Singh*(1). Their Lordships say that "since the decision of "the cases in *Virasvami Gramini* v. *Ayyasvami Gramini*(2), *Pedda-"muthulaty* v. *N. Timma Reddy*(3), *Palanivelappa Kaundan* v. "*Mannaru Naikan*(4) and *Rayacharlu* v. *Venkataramaniah*(5), it "has been settled law in the Presidency of Madras that one co-"parcener may dispose of ancestral undivided estate, even by con-"tract and conveyance, to the extent of his own share; and *a* "*fortiori* that such share may be seized and sold in execution for "his debt." It is also pointed out that the law obtaining in the Presidency of Bombay differs from that administered in this Presidency to this extent, viz., that in the former the alienation must be for value, whilst in the latter an alienation by gift was recognized. The Judicial Committee proceeded to observe that there

(1) L.R., 6 I.A., 88, 101, 102. (2) 1 M.H.C.R., 471. (3) 2 M.H.C.R., 270. (4) 2 M.H.C.R., 416. (5) 4 M.H.C.R., 60.

"can be little doubt that all such alienations are inconsistent "with the strict theory of a joint and undivided family, and the law "as established in Madras and Bombay has been one of gradual "growth, founded on the equity which a purchaser for value has "to be allowed to stand in his vendor's shoes and to work out his "rights by means of a partition."

In paragraphs 331 to 334 of Mayne's Hindu Law the learned writer gives the history of Hindu Law on the alienability of an undivided share by a co-parcener as administered in this Presidency. The decisions passed subsequent to the date of the decision of the Privy Council, *Baba* v. *Timma*(1) and *Ponnusami* v. *Thatha*(2) show that a co-parcener is not at liberty to alienate his undivided interest by gift except when he is expressly authorized to do so by a text of Hindu Law, because the equity which exists in favour of a purchaser for value does not arise in favour of a donee who is a mere volunteer. In the former case he question was fully discussed by a Full Bench of this Court, and the conclusion arrived at is that a co-parcener has no power to alienate his undivided interest by gift, unless such gift is sanctioned by an express text of Hindu Law. As regards devises by will, it was held that at the moment of death, the right by survivorship arises, and as it is in conflict with the right by devise, the former prevails as the prior right against the latter. The law applicable to alienations of an undivided share may thus be summarized. It may be alienated for value but not otherwise except where a gift is expressly sanctioned by Hindu Law, and the equity of the creditor or the purchaser is the foundation on which the power to alienate for value rests.

If a co-parcener then sells his undivided interest for Rs. 40,000, of which a part only is applied to payment of his debts and the rest is either retained by him, or by some one else in trust for him, or laid out in the acquisition of other property, the right of survivorship attaches to the surplus so retained or to the property in which it has been invested. For the sale, so far as it produces the surplus, was in excess of the requirements of the creditor's equity and amounts to a mere conversion of the co-parcenery interest into money or other property, which when warranted neither by Hindu Law nor by the equity engrafted upon it,

(1) I.L.R., 7 Mad., 357. (2) I.L.R., 9 Mad., 273.

cannot operate to remove it from the domain of survivorship or to divest the surplus of its character of co-parcenary property. Suppose that a co-parcener alienates his undivided share only in part of the joint property and that it is sufficient to satisfy the equity of the creditor; it cannot be pretended that his share in the rest of the joint property is thereby changed into his separate property, and we consider that the same principle ought to govern the unexpended surplus which it is not necessary to raise or the property in which it happens to be invested. Although the sale may be upheld, because the purchaser has the equity to stand in the place of the vendor and to work out his rights by partition as he has paid value for his purchase,—the purchase money, except so far as it is applied to payment of debts, continues to be co-parcenary property. There are no doubt decisions to the effect that when a co-parcener's share is alienated, the alienor ceases to be a co-parcener *quoad* the property so alienated, and the co-parcenery is thereby determined *pro tanto* inasmuch as the purchaser, who is a stranger to the joint family, cannot be a co-parcener. But they do not establish the proposition that the sale-proceeds, when they are not paid to a creditor in whole or part but retained by the co-parcener, cease likewise to be co-parcenary property.

The Subordinate Judge must be requested to come to fresh findings on the contention of the plaintiff and the other co-parceners and defendants Nos. 7 and 9 in regard to the several items of property mentioned in schedule H including Rs. 9,000 and pass a final decree with reference to those findings and the foregoing observations on the law applicable to the case.

There are several minor points as to which the Subordinate Judge has come to no finding though it was desirable to do so before passing a provisional decree.

It is first urged that the Subordinate Judge has recorded no finding on issues 21 to 24. As to issues 23 and 24 the Subordinate Judge has expressed, as his opinion, in paragraph 40 of his judgment, that the sale to the sixth defendant was not *benami* for the plaintiff as alleged by him and in this opinion we concur. The question of fraud suggested by the twenty-third issue must also be negatived, for, we are referred to no evidence in its support, whilst it is clear that the sixth defendant paid full value for his purchase. No distinct findings are, however, recorded

on the twentieth and twenty-second issues, and we think they must be included among those which remain to be adjudicated upon before a final decree is passed.

Another matter urged upon us is that the seventh defendant's husband acknowledged in exhibit LXII that he collected moneys due on some of the bonds belonging to the joint family, and that the Subordinate Judge has not expressed his opinion as to the amounts collected by him and as to whether he has duly accounted for them. The Subordinate Judge must be requested to come to a distinct finding on the matters mentioned above as he probably intended to do whilst deciding the eleventh and twelfth issues which he has reserved for adjudication before final decree.

As regards the sum of Rs. 8,000 claimed under the deed of management, the Subordinate Judge observes, and we think correctly, that plaintiff who was not a party to exhibit LXXVIII is not bound by it. In the absence of a valid special agreement, the managing co-parcener of a joint Hindu family is clearly entitled to no special remuneration as the property which he manages is one of which he is a joint owner.

Another contention urged in appeal is that 89 documents which admittedly relate to family properties were handed over to the sixth defendant under exhibit LXXV by way of guarantee andthat the Subordinate Judge has not noticed the objection raised to the guarantee. As an individual co-parcener, the seventh defendant's husband was not entitled to charge joint property (as he did) by way of indemnity without the consent of the other co-parceners. The sixth defendant admits as the seventeenth witness for defence that those documents are with him, and we think that the indemnity should be set aside and that provision should be made in the final decree for the return of those documents.

As regards the nineteenth issue * the Subordinate Judge states that there is no evidence in regard to it and we adopt his finding so far as it relates to plaintiff and we leave it, so far as it relates to seventh defendant, to abide the result of the further enquiry which we have ordered.

It only remains for us to notice the preliminary objection taken on behalf of the eighth defendant that the decree passed by

* "Are plaintiff and seventh defendant in possession of any movable or immov- able properties liable to be brought to partition, and if so, what are they?"

the Subordinate Judge is incomplete and that no appeal lies until there is a complete and final decree. We are of opinion that this objection cannot be supported. A decree is defined by section 2 of the Code of Civil Procedure, and it implies that an order directing accounts to be taken is separable from the rest of the decree adjudicating on the rights claimed or the defences set up in the suit. A provisional decree is clearly appealable and the decree before us appears to us to be in the nature of a provisional decree. The decision of the Privy Council, *Chidambaram Chettiar* v. *Gauri Nachiar*(1), and section 540 of the Civil Procedure Code which allows an appeal from part of a decree support that view. A provisional decree is permitted to be passed by section 215 in a suit for dissolution of partnership and a partition suit which has for its object the determination of the co-parcenery is similar to it. The decree before us is however somewhat defective in form. A provisional decree ought to declare the several rights and liabilities which have been adjudicated on and embody an order similar to the one contemplated by section 215 and section 215-A. The decree passed by the Subordinate Judge will be so amended as to declare all the rights and liabilities which have already been adjudicated on and to contain directions as to what remains to be done, viz., that an account be taken in respect of the matters mentioned in issues 11, 12, 13, 15, 20 and 22 and that further enquiry be made as to the properties mentioned in schedule H as herein directed and that the result of such enquiry be embodied in the final decree.

The costs in the Original Court will be reserved for adjudication when the final decree is passed. The costs of this appeal will follow the result and be provided for in the decree to be passed by the Subordinate Judge.

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(1) I.L.R., 2 Mad., 83.