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of fact, and they do not find it necessary to do so. They have come to the conclusion that the *hibba* of 1849 was a covinous instrument, not made *bonâ fide* or on any good consideration, and by which creditors (the holders of the decrees) have been delayed in their just rights; and taking the whole transaction together, they are of opinion that the intention of the settler was to protect the property from those who were his creditors at the time.

Their Lordships are of opinion that according to equity and good conscience the *hibba* is fraudulent and void as against creditors, and that the decree appealed from is right, and should be affirmed, and the appeal dismissed; and will so humbly advise Her Majesty.

The costs must follow the event.

Appeal dismissed.

Solicitor for the appellant: Mr. *T. L. Wilson.*

Solicitors for the respondent: Messrs. *Barrow and Rogers.*

P. C.* 1883 *December* 5.

HARDI NARÀIN SAHU (DEFENDANT) APPELLANT v. RUDER PERKASH MISSER (A MINOR) BY ABDUL HYE AND OTHERS (PLAINTIFF) RESPONDENT.*

[On appeal from the High Court at Fort William in Bengal.]

Rights of purchaser of co-sharer's interest in joint family property—Formal objection to minor's representative.

When the right, title, and interest of a co-sharer in joint family estate are sold in execution to satisfy a decree against him personally, the purchaser acquires merely the right of the judgment-debtor to compel a partition against the other co-sharers. *Deendyal Lal* v. *Jugdeep Narain Singh* (1) referred to and followed.

A money decree having been made against the father of a family, and the decree-holder having caused to be attached the family estate, and brought to sale the father's right, title, and interest therein, *Held*, that by the sale, not the father's share, but that interest which he had, *viz*, the right which he would have had to a partition, and to what would have come to him under it, passed to the purchaser.

The family, governed by the Mitakshara, consisting of father, mother, and minor son, at the time of the decree, the Court below had decreed

* *Present:* Lord FITZGERALD, Sir B. PEACOCK, Sir R. P. COLLIER, Sir R. COUCH, and Sir A. HOBHOUSE.

(1) L. R. 4 I. A., 247; I. L. R., 3 Calc., 198.

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to mother and son, one-third each, leaving one-third to the purchaser. A second son was born, and the mother died pending this appeal, the two sons becoming parties in respect of her share. *Held*, that on this appeal, preferred by the purchaser, the decree should stand, the appellant having got quite as much as he would have got if the decree had been more correct in form, as he had obtained all that he would have been entitled to on a partition, without being left to demand it.

The suit having been brought by a manager, appointed by the Court of Wards on behalf of an infant who had a right to sue, an objection to the manager's authority was disallowed, as merely technical.

APPEAL from decrees (23rd April 1881 and 9th September 1881) of a Divisional Bench of the High Court, reversing a decree (25th July 1877) of the Judge of the Bhagulpur district.

The appeal related to the question, what were the rights of a purchaser at an auction sale of the right, title, and interest of a co-sharer in a joint family estate. The family, governed by the Mitakshara, consisted (at the time when the judgment under appeal was given) of a father, mother, and minor son. The property was half a village in the Monghyr district, mouzah Singhôl, the whole village having belonged to Jai Perkash Misser, from whom it was inherited by his two sons, one of whom was Shib Perkash Misser, the father of the minor plaintiff, Ruder Perkash Misser. Each brother took half of mouzah Singhôl, on a partition in 1871. Shib Perkash Misser, after that date, became indebted to the appellant Hardi Narain, a mahajan, who, on 4th March 1873, obtained a decree against him for Rs. 6,939, and in execution attached, caused to be put up for sale, and himself bought the right, title, and interest of Shib Perkash in eight annas of mouzah Singhôl.

Meantime, in the same year, Shib Perkash Misser made a gift of his interest in the family property, dated 30th July 1873, in favor of Ruder Perkash his minor son. And in 1873, upon an application made by the minor's mother, Dhanapati Koer, the Judge of the Bhagalpur district, on the 1st September in that year, made an order directing the Collector of the Monghyr district to take charge of the minor's estate. This Collector, having done so, appointed Abdul Hye to be the manager of the minor's estate.

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In April 1867 the minor, by his manager, brought the suit out of which this appeal arose, alleging that from the date of his birth, in 1866, he had acquired rights in the family estate, the half of mouzah Singhôl, which being the property of a joint family, and without specification of shares, was not liable to be sold in execution of the decree against his father. He, therefore, claimed to recover possession with mesne profits.

The defence was that the sale was binding on the plaintiff, who was bound to pay the debt of his father; the family estate being liable to be sold, as it had been, in satisfaction of the decree. It was also objected that the minor was not legally represented by the Court of Wards under s. 12 of Act XL of 1858.

Afterwards, on a petition for the appointment of the manager, Abdul Hye, to represent the minor in this suit, the District Judge, on 7th June 1877, recorded that it was unnecessary to pass an order thereon, as the Collector was the proper person to represent the minor.

Issues having been fixed, raising the questions whether the plaintiff was duly represented, and whether the attachment and sale had deprived the minor of his interest in the half of mouzah Singhôl, regard being had to the nature of the debt on which the decree was obtained, the Judge of the Bhagulpur district dismissed the suit. His reasons were: (1st) that the plaintiff, under the Mitakshara, was not entitled to maintain this suit, which was for the recovery of the whole of the ancestral family estate, one half of mouzah Singhôl, during the father's lifetime; also (2ndly) that the said family estate had been sold in execution of a decree as (in the Judge's view of the law) it lawfully might have been, for the payment of the debts of the father, not proved to have been incurred for any immoral or unlawful purpose. On appeal to the High Court, a Divisional Bench (MITTER and TOTTENHAM, JJ.) refused to allow an objection that the order of the District Judge, directing the Collector under s. 12 of Act XL of 1858 to take charge of the minor's property, was wrong, holding that this did not affect the case as now presented to the Court. They also rejected another contention that this suit could not be decided

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on the merits because, as it was alleged, the plaintiff was bound by an order, passed upon his father's petition, refusing to set aside the sale under s. 256 of Act VIII of 1859. Their judgment proceeded thus:

"As regards the grounds upon which the lower Court has dismissed the suit, it seems to us that the District Judge is clearly wrong in holding that under the Mitakshara law, the plaintiff during his father's lifetime is not competent to maintain this suit for the whole of the share of the property in dispute, which belonged to the joint family. On the other hand, the suit would have been open to objection, if he had brought it for an undivided share of the family property (*vide* XII, Weekly Reporter, page 478.)

"It is not absolutely necessary in this case to determine whether the debts, for the satisfaction of which Shib Perkash's property was sold, were of such a nature as would be binding upon the sons. It seems to us that what was sold in execution of decree against Shib Perkash was simply his rights and interests in the disputed property, and that the present case is governed by the ruling of the Judicial Committee in *Deendyal Lal* v. *Jugdeep Narain Singh* (1)."

The judgment concluded as follows:

"We do not think that, for the purpose of determining what the interest of Shib Perkash is in the disputed property, the respondent Hardi Narain should be referred to a separate suit. Following the decision of this Court in Special Appeal No. 1728 of 1877, decided on the 11th April 1878 (an unreported case), we think the matter may be enquired into and finally determined in this suit. In that enquiry the mother of the minor is a necessary party, and in her absence we refrain from expressing any opinion as to the contention raised before us, that the family being governed by the Mithila law, the father is entitled to a double share. In the lower Court the respondent Hardi Narain alleged that the family is governed by the Mithila law, and there is nothing in the record which would go to show that he gave up that contention. There is no difference between the Mitakshara and the Mithila law, so far as the questions

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disposed of by our present judgment are concerned. Therefore we have treated the case with reference to those questions, as if it was governed by the Mitakshara law. There may be some difference between the two schools of Hindu law as regards the question of the father's share in a partition of ancestral property. But upon that point, as we have already said, we express no opinion now. For the purpose of disposing of that question, we remit the following issues for the determination of the lower Court :—

"*First.*—Is the family of the plaintiff governed by the Mithila or the Mitakshara law ?"

"*Second.*—If governed by the former law, whether Shib Perkash was the eldest born son of his father, and what is his share in mouzah Singhôl ?"

"In the trial of these issues, the mother of the plaintiff is a necessary party, and accordingly we direct her to be made a party to the suit."

The successor in office of the District Judge having made the return that the family was governed by the Mitakshara, the same Bench of the High Court gave judgment as follows :

"We are of opinion that the finding of the lower Court that the plaintiff's family is governed by the Mitakshara law, is correct. Upon the evidence there is no room for doubt that the plaintiff belongs to a tribe of Brahmins called Shukaldipi, living in various parts of Northern India, quite separated in social intercourse from the other tribes of Brahmins. Although they are scattered over a large tract of country, they are not blended with the tribes of Brahmins of the districts in which they reside. A short description of their tribe is to be found at page 102, Sherring's 'Hindu Tribes and Castes.' 'The Shukaldipis are found,' says Mr. Sherring, 'in considerable numbers in their primitive seat, yet many families have migrated to other parts of the country. They do not, however, form alliances with other Brahmins, though they freely intermarry amongst themselves.'

"Although there are some discrepancies and contradictions in the depositions of the witnesses examined by the plaintiff,

yet all are agreed upon this point, that the Shukaldipis are governed by the Mitakshara law. The two witnesses examined by the defendant also prove that Shukaldipi Brahmins residing in countries on the south of the Ganges are governed by the Mitakshara law. Although the plaintiff's family resides in a country governed by the Mithila law, yet the two facts clearly established in the case, *viz.* (1) that it belongs to a tribe of Brahmins who do not intermarry with the Mithila Brahmins, and (2) that the aforesaid tribe of Brahmins is generally governed by the Mitakshara law, are almost conclusive proof that the plaintiff's family is governed by this latter law. Therefore, the father's interest in the family property must be defined by the Mitakshara law.

"It has been contended before us, that since the institution of this suit, another son has been born to Shib Perkash, and that he is entitled to a share on partition. But this contention is not valid. The property that passed to the defendant by the auction sale was the share and interest of the father seized and attached in execution of decree in the month of April 1873 (see *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1). The defendant is, therefore, entitled to the share which would have been allotted to the father if a partition of the family property had taken place then. And as under the Mitakshara law the mother is entitled to a share on partition, the property is to be divided into three equal parts, one share being allotted to the defendant, and the remaining two to the minor plaintiff and his mother respectively. There is no prayer for partition of the estate by metes and bounds. Nor is it essentially necessary to effect such a division to constitute a partition under the Mitakshara law. A partition under that law may be effected by defining the extent of the rights of the several members. We, therefore, award to the minor Ruder Perkash and his mother two-thirds share of the property in dispute, and direct that each of them do recover possession of their respective shares in the property in dispute. Under the circumstances of the case, we think that each party should bear his own costs in this litigation in all the Courts."

(1) L. R. 6 I. A., 88; I. L. R., 5 Calc, 148; 4 C. L. R., 226.

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The decree which followed upon the foregoing judgment was afterwards amended, upon a review, by the addition of an order for mesne profits. After this appeal had been preferred to Her Majesty in Council, Dhanabati Koer, the wife of Shib Perkash Misser, died leaving another son, born after the date of the decrees under appeal. The parties on the record were altered accordingly.

On this appeal—

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon* appeared for the appellant.

Mr. *J. D. Mayne* and Mr. *C. C. Macrae* for the respondent.

For the appellant it was objected that the order of September 1873 directing the Collector to take charge of the minor's property having been incorrect, this suit was not properly brought in the name of the manager. It was argued that as the minor would not have been bound by an adverse decree made in a suit brought in his name by a person not having a title to sue, so also this suit could not be maintained with this defect in it.

For the respondent it was answered that if the Collector was not guardian of the infant on behalf of the Court of Wards before the order of 7th June 1877, he thereupon became guardian *ad litem*.

Their Lordships decided that the objection was untenable. Reference was made to s. 578 of the Code of Civil Procedure, Act X of 1877. For the appellant it was then argued that the judgment of the High Court could not be upheld. As regards the liability of the family estate to be sold in execution of the decree of 4th March 1873, that estate was then and had been during the time when the debts were incurred, in the hands of the father, Shib Perkash Misser, as manager. He being competent to contract debts, binding on his son, and rendering the family estate liable, had done so. Ancestral property was not exempted from liability in respect of a man's debts because a son was born to him; the legal obligation being imposed on the son to pay his father's debt unless incurred for any immoral or illegal purpose. Reference was made to *Suraj Bunsi Koer* v. *Sheoprosad Singh* (1) and *Girdharee Lal* v. *Kantoo Lal* (2) where, as here, a Hindu family consisted of

(1) L. R., 6. I. A., 88 ; I. L. R. 5 Calc., 148 ; 4 C. L. R. 226.

(2) L. R. 1 I. A., 321.

father and son, the father was manager of the joint property, and was guardian of the son: and the father's act of getting into debt bound the share of the son in the family property, save in the excepted case of debts improperly incurred, which had not arisen here. The father could impose, and by his getting into debt had imposed, the burden of satisfying the decree. That shares in ancestral estate might be so charged as that upon partition they went to creditors appeared from the decisions of the High Court. Reference was made to *Deendyal Lal* v. *Jugdeep Narain Singh* (1). But it was distinguished that in this case "the right, title and interest" of the father in the family estate was his interest as a manager who had incurred debts binding on the other members of the family.

Reference was also made to *Umbica Prosad Tewary* v. *Ram Sahai Lal* (2).

As regards the interest of the deceased wife and mother. It was a question whether she could be said to be entitled to a share under the Mitakshara; see chapter I, ss. 7 and 11. It was true that the wife of the father had been held entitled to a share on a partition taking place between a father and a son in *Sumrun Thakoor* v. *Chunder Mun Misser* (3). But, in the absence of a partition (and here there was no partition except so far as the High Court treated the family estate as subject to partition), the wife was entitled only to maintenance, not to a share.

For the respondent it was submitted that the question being what was the interest of the father, when his "right, title, and interest" were brought to sale, it could be ascertained by determining what share he would obtain upon a partition. Each member of the family had an equal interest, and the extent of that interest was determinable by what they would receive upon partition. The appellant by his purchase acquired only the right, title, and interest of the respondent Shib Perkash Misser in the eight annas of mouzah Singhôl, which was an undivided one-third share therein.

Reference was made to the judgment of MITTER, J., in *Umbica Prosad Tewary* v. *Ram Sahay Lal* (2) and *Ramphul Singh* v. *Deg Narain Singh* (4).

(1) L. R., 4 I. A., 247; I. L. R., 3 Calc., 198.
(2) I. L. R. 8 Calc., 898.
(3) I. L. R. 8 Calc., 19.
(4) I. L. R. 8 Calc., 517.

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The minor plaintiff would have been entitled to a decree for possession of the whole family estate subject to the declaration that the respondent, as purchaser, had acquired the *undivided* one-third share, and was entitled to take the whole subject to a deduction of that share, or those shares, which (as in *Deendyal's* case) belonged to the other co-sharers. In this case, however, the High Court, avoiding circuits of procedure, had directed a partition declaring the minor to be entitled to possession with mesne profits.

The plaintiff had, therefore, got no more than he was entitled to, the appellant suffering no loss, but receiving what otherwise he would have had to resort to a partition in order to obtain.

Mr. *R. V. Doyne* replied, contending that it could not be insisted that the proceedings were of the same effect as a partition.

At the conclusion of the arguments their Lordships' judgment was delivered by

SIR RICHARD COUCH.—Three questions have been raised before their Lordships in the hearing of this appeal. The first was disposed of in the course of the argument. It was this: that the suit was brought by the manager appointed by the Court of Wards on behalf of the infant plaintiff; and that the manager had no authority to represent the plaintiff in it. Without considering whether he had authority or not, their Lordships were of opinion that, if the plaintiff had a right to sue, the objection was only a formal one, and could not be allowed to be raised in the present appeal.

The next and the principal question in the case was, what right or interest in the property, which is the subject of the suit, was acquired by the appellant, Hardi Narain, by his purchase at the sale in execution of a decree which he had obtained against the father of the respondents, Shib Perkash Misser? It appears that Shib Perkash Misser was indebted to Hardi Narain, partly on account of a mortgage, and partly for further advances; and that Hardi Narain brought a suit against him in order to recover the debt, and obtained a decree on the 4th of March 1873. The decree was the ordinary one for the payment of the money; and this case is distinguishable from the cases where the father, being a member of a joint family governed by the Mitakshara law, had mortgaged the family property to secure a debt, and the decree

had been obtained upon the mortgage and for a realisation of the debt by means of the sale of the mortgaged property. It is a simple money decree, which states that the claim was to recover Rs. 6,335, principal and interest, and is: "That a decree be passed in plaintiff's favour for the amount of claim and interest on the principal for the period pending judgment of the case, and costs with interest on the entire amount, at the rate of eight annas per cent. per mensem from to-day till realisation." The property was attached on the 1st of April 1873; and the attachment being by an order prohibiting the defendant from alienating the property, it purported to be, as it must have been, an attachment of the entire eight annas; but what was attached and subsequently sold really was the right, title, and interest of the father, against whom the decree had been obtained, in the eight annas: and it is clear from the terms of the sale certificate that this is what was sold and purchased by the appellant. The sale certificate, which was given after some questions had been raised by the father with respect to the regularity of the sale, and the sale had been confirmed by the High Court, which questions it is not necessary to consider,—stated that an application had been made, and the sale proclamation was issued,—"and the said property was on the 5th August 1873 sold for Rs. 6,800; and whatever rights and interests the said judgment-debtor had in the said property were purchased by Baboo Hardi Narain, decree-holder, auction-purchaser." It then went on, after speaking of the payment of the purchase money, to say: "Therefore this sale certificate is granted to Baboo Hardi Narain, decree-holder, auction-purchaser; and it is proclaimed that whatever right and interests the said judgment-debtor had in the said property having ceased from the date of the auction sale passed to the said decree-holder, auction-purchaser." Therefore what was purchased on that occasion were the rights and interests of the father; and this is precisely like the case of *Deendyal Lal* v. *Jugdeep Narain Singh* (1) where their Lordships held that, the purchase being as it was here, by the person who had obtained the decree, only that passed which the father, the person against whom the

(1) L. R., 4 I. A., 247; I. L. R., 3 Calc., 198.

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decree was obtained, had. The judgment in that case defines what is actually sold. At page 253, speaking of the decision of the High Court at Calcutta in the Full Bench case which is so often referred to, their Lordships say: "So long as Bhagwa lived," —that is, the man against whom the decree was obtained,—"he had an interest in this property which entitled him, if he had pleased, to demand a partition, and to have his share of the joint estate converted into a separate estate." The bond-holder had sued on his bond, obtained a decree, taken out execution against the joint property, and become the purchaser of it at the execution sale. The interest which is purchased is not, as Mr. Doyne argued, the share at that time in the property, but it is the right which the father, the debtor, would have to a partition, and what would come to him upon the partition being made. That is the answer to Mr. Doyne's argument that the father was entitled to a half. What the father was entitled to, and what the purchaser became entitled to, was what the father would get if a partition had been made, which was only a third of the eight annas share. According therefore to the authority of *Deendyal Lal* v. *Jugdeep Narain Singh*(1) the present appellant became entitled only to the one-third, treating it as if the sale was to operate as a partition at that time.

The case of *Deendyal* has been recognised in a subsequent case of *Suraj Bunsi Koer* v. *Sheo Prosad Singh* (2) in which that decision was acted upon, and which case is also applicable to the present.

The other question which has been raised before their Lordships is this: The High Court, when the case came before it on appeal, —having satisfied itself that the present appellant, by his purchase, took only the interest which the father had, and if a partition had been made at the time of the sale the mother would have been entitled to a third, and the son, who was then living, would have been entitled to another third,—directed that the mother should be made a party to the suit, it having been found that the rights of the parties were governed by the Mitakshara law. The mother having been made a party, the High Court then made what in effect is a partition of the property which was the subject of the suit, making a decree that the

(1) L. R. 4 I. A. 247; I. L. R. 3 Calc., 198.

(2) L. R. 6 I. A. 88; I. L. R. 5 Calc., 148; 4 C. L. R., 226.

mother and the son should each recover one-third, leaving the remaining third in the appellant's possession. After the decree and pending this appeal, the mother died, and a second son having been born, the two sons are now parties to this appeal in respect of her share. The question which has been raised is whether the decree which has been made by the High Court ought to stand or not.

According to the judgment of their Lordships in *Deendyal's* case, the decree, which ought properly to have been made, would have been that the plaintiff, the first respondent, should recover possession of the whole of the property, with a declaration that the appellant, as purchaser at the execution sale, had acquired the share and interest of Shib Perkash Misser, and was entitled to take proceedings to have it ascertained by partition. So that, in fact, the appellant has got a decree more favourable to himself than he was entitled to. He retains possession of one-third, instead of being turned out of the possession of the whole and left to demand a partition.

Their Lordships, therefore, think that there is no ground for altering the decree of the High Court, although it may have gone beyond what was necessary or proper. The decree is not strictly right, but the appellant does not suffer by that. He gets all that he would be entitled to if a partition were made.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court and to dismiss the appeal. The appellant will pay the costs.

Appeal dismissed.

Solicitor for the appellant: Mr. *T. L. Wilson.*

Solicitor for the respondent: Mr. *H. Treasure.*