

APPELLATE CIVIL.

1886
Ma ch 3.*Before Sir Comer Petheram, Kt., Chief Justice, and Mr. Justice Straight.*BASA MAL AND ANOTHER (DEFENDANTS) v. MAHARAJ SINGH, MINOR, BY
HIS NEXT FRIEND, SARUP KUAR (PLAINTIFF)*.*Hindu law—Joint Hindu family—Sale of ancestral estate in execution of decree
against father—Effect of sale on son's rights and interests.*

When a decree has been made against the father and manager of a joint Hindu family in reference to a transaction by which he has professed to charge or sell the joint ancestral property, and a sale has taken place in execution of such decree of the joint ancestral property without any limitation as to the rights and interests sold, the rights and interests of all the co-parceners are to be assumed to have passed to the purchaser, and they are bound by the sale, unless and until they establish that the debt incurred by the father, and in respect of which the decree was obtained against him, was a debt incurred for immoral purposes of the kind mentioned by *Yajnavalkya*, Chapter II, s. 48, and *Manu*, Chapter VIII, sloka 129, and one which it would not be their pious duty as sons to discharge.

If, however, the decree, from the form of the suit, the character of the debt recovered by it, and its terms, is to be interpreted as a decree against the father alone and personal to himself, and all that is put up and sold thereunder in execution is his right and interest in the joint ancestral estate, then the auction-purchaser acquires no more than that right and interest, *i.e.*, the right to demand partition to the extent of the father's share. In this last mentioned case, the co-parceners can successfully resist any attempt on the part of the auction-purchaser to obtain possession of the whole of the joint ancestral estate, or, if he obtains possession, may maintain a suit for ejectment to the extent of their shares upon the basis of the terms of the decree obtained against the father, and the limited nature of the rights passed by the sale thereunder.

Girdhuree Lall v. Kantoo Lall (1), *Deendyal Lall v. Jugdeep Narain Singh* (2), *Suraj Bansi Koer v. Sheo Persad Singh* (3), *Bissessur Lall Sahoo v. Maharajah Luchmessur Singh* (4), *Muttayan Chetti v. Sangili Vira Pandia Chinnatambiar* (5), *Hurdey Narain Sahu v. Rooder Perakash Misser* (6), *Nanomi Babuasin v. Modun Mohun* (7), *Ram Narain Lal v. Bhavani Prasad* (8) *Gaura v. Nanak Chand* (9), *Appovier v. Rama Subba Aiyar* (10), *Phul Chand v. Man Singh* (11), *Chamaili Kuor v. Ram Prasad* (12), and *Rama Nand Singh v. Gobind Singh* (13), referred to.

* First Appeal No. 66 of 1884, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 23rd November, 1883.

- (1) 14 B. L. R. 187; 22 W. R., 56; L. R. 1 Ind. Ap. 321.
 (2) I. L. R. 3 Calc. 198; L. R., 4 Ind. Ap. 247.
 (3) I. L. R. 5 Calc. 148; L. R., 6 Ind. Ap. 88.
 (4) 5 Calc. L. R. 477; L. R. 6 Ind. Ap. 233.
 (5) I. L. R. 6 Mad. 1; L. R. 9 Ind. Ap. 128.
 (6) I. L. R., 10 Calc. 626; L. R., 11 Ind. Ap. 26.
 (7) Decided by the Privy Council on the 18th December, 1885.
 (8) I. L. R., 3 All. 443.
 (9) Weekly Notes, 1883, p. 194, and Weekly Notes, 1884, p. 28.
 (10) 11 Moo. I. A. 75.
 (11) I. L. R., 4 All. 309.
 (12) I. L. R., 2 All. 267.
 (13) I. L. R., 5 All. 384.

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THIS was an appeal from a decree of the Subordinate Judge of Moradabad, dated the 23rd November, 1883, which came before Petheram, C.J., and Straight J., and was referred by them to the Full Bench. The order of reference, in which the facts are fully stated, was in the following terms:—

“ In this suit the minor plaintiff, by his mother and guardian, sued for a declaration of his right to possession of $2\frac{1}{2}$ biswas shares in two mahals of Kasba Mughalpur, and for the cancelment of a miscellaneous order of the 2nd of February, 1883, under the following circumstances:—The plaintiff alleges that his father, Chaudhri Sheoraj Singh, upon the death of his grandfather, Chaudhri Bhan Partab Singh, inherited certain valuable properties, among which were the mahals in suit; that subsequently his said father, having, by his ‘immoral and licentious life,’ wasted and squandered the income derivable from the ancestral properties, was, on the 9th of July, 1878, obliged to borrow Rs. 3,000 from the defendants, and mortgaged in their favour the shares in Mughalpur already mentioned; that the said defendants, in the year 1879, instituted a suit on their bond against the said Sheoraj Singh; that the plaintiff, by his guardian, prayed the Court in which such suit was pending to make him a party thereto under s 32 of the Code; that his application was rejected and a decree was given in favour of the defendants against Sheoraj Singh on the 20th June, 1879; that the shares in Mughalpur were first brought to sale in execution of that decree in May, 1880; that subsequently to such sale the plaintiff filed an application to have it set aside, but it was refused, though the sale was ultimately set aside at the instance of the judgment-debtor; that the defendant Basa Mal and one Ganeshi Mal, representative of Sita Mal, the other decree-holder, having brought the mortgaged property to sale a second time, on the 21st November, 1881, purchased it for Rs. 2,000; that the plaintiff thereupon urged objections to possession being given to the said auction-purchasers and opposed it, and the latter then filed an application to the Court under s 335 of the Code, and on the 2nd February, 1883, such application was decided in favour of the auction-purchasers, Basa Mal and Ganeshi Mal, and they were ordered to be put in possession; that this order gave the plaintiff the cause of action on which he now sues; and that Sheoraj Singh, being joint with the

plaintiff, had no power to charge the joint property, and such charge was void and of no effect as to the whole. The defence set up was, in substance, that the property was not ancestral, that the bond was executed for necessary purposes, and that Sheoraj Singh, as guardian of and manager for his minor son, the plaintiff, was competent to make the charge.

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“The Subordinate Judge, finding that the debt to the defendants under the bond was incurred for immoral purposes, and that the property was ancestral, gave a decree in the plaintiff’s favour for half his claim. From that decision the defendants have appealed to this Court, and the plaintiff has filed one objection. The pleas before us were, that the debt to the defendants was incurred for legitimate purposes; that the plaintiff failed to establish, as he was bound to do, that the amount borrowed from the defendants was used for immoral purposes; that the facts show that the present suit is instituted with the connivance and at the instigation of Sheoraj Singh. The plaintiff’s objection, on the other hand, is to the effect that the Subordinate Judge should have decreed his claim in whole and not in part. As the case is one involving considerations akin to those that have arisen in another case referred to the Full Bench, we think this should also go. In making the reference we find, as a fact, that the property was ancestral; that the plaintiff is in possession of it; that there is evidence to show that, though a considerable portion of the bond-money advanced on the bond of the 9th July, 1878, to Sheoraj Singh, was required for a necessary purpose, namely, the payment of revenue, he had got himself into the position of having to take a loan by reason of his imprudent and extravagant proceedings, and that the defendants purchased with notice of the plaintiff’s claim. Upon these findings we refer the appeal to the Full Bench for disposal.”

The Full Bench, however, did not dispose of the appeal, but, without expressing any opinion in regard to it, returned it to the Divisional Bench for determination. The appeal was then heard by the Divisional Bench.

Pandit Bisharbar Nath, for the appellants.

Lala Juala Prasad, for the respondent.

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PETHERAM, O. J., and STRAIGHT, J.—The circumstance of this case are set out at length in the order by which the appeal was originally referred to the Full Bench for decision, and they need not be recapitulated. The matter now has come back to us for decision, for reasons that need not be detailed, and, before disposing of it, we think it desirable briefly to refer to certain decisions of their Lordships of the Privy Council, which were commented upon in the course of the arguments, as also some rulings of this Court, with a view to ascertain what are the clear and intelligible rules to be applied in the determination of these cases of a Hindu son seeking to avoid an alienation of joint ancestral property by his father. At the outset, and by way of introduction to the consideration of the subject, the description given by Lord Westbury of the characteristics of the joint Hindu family may be usefully quoted:—"According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he (that particular member) has a certain definite share. No individual member of an undivided family could go to the place of receipt of rent and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the mode of enjoyment by the members of an undivided family"—*Appovier v. Rama Subba Aiyar* (1). In this connection it will be convenient to refer to the principle laid down in *Phul Chand v. Mun Singh* (2) by Straight and Tyrrell, JJ., "that every son born to the father of a joint Hindu family in possession of ancestral property acquires a positive, though undefined, share in the joint estate co-extensive with and as large as that of all the other members of the joint family, including his father, and that it is competent for each and every member of a joint family at any time to demand partition of the ancestral property." It has further been the rule of decision in this Court [see Oldfield, J., in *Chamaili Kuar v. Ram Prasad* (3), and Straight and Brodhurst, JJ. in *Rama Nand Singh v. Gobind Singh* (4)] that one member of a joint and undivided Hindu family cannot mortgage or sell his share of the joint property without the

(1) 11 Moo. I. A. 75

(3) I. L. R., 2 All. 267.

(2) I. L. R., 4 All. 309.

(4) I. L. R., 5 All. 384.

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consent, express or implied, of his co-parceners. These rulings may be said to state the most important incidents that mark the relations of the members of the joint Hindd family *inter se*; and we now proceed to ascertain how far those relations have been touched or modified in reference to transactions between the father of the joint family, its natural head and manager, and third parties by which the joint ancestral property has been mortgaged or sold.

The first important decision of the Privy Council on the question of the power of the father of such a family to deal with the joint ancestral estate is to be found in the case of *Girdharee Lall v. Kantoo Lall* (1). This was an action by a son in the lifetime of his father and uncle to set aside a sale of ancestral property made by them, on the ground that a sale by one member of an undivided property passes no interest in it whatever, and that any other member of the family can set it aside and bring the property back into the family. The Privy Council dismissed the suit, on the ground that ancestral property, which descends to a father under the Mitakshara law, is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property in which the son, as the son of his father, acquires an interest by birth, is liable to the father's debts. The next case is that of *Deendyal Lall v. Jugdeep Narain Singh* (2). That was a suit by a son to recover possession of ancestral property which had been taken possession of by an auction-purchaser of "the rights and proprietary and mokurrari title and share of Tufani Singh, the judgment-debtor," who was the father of the plaintiff. The Privy Council decreed the claim, on the ground that possession of the undivided property could not be taken under a sale of one undivided share, but gave the defendant a declaration that he was entitled to stand in the shoes of Tufani Singh, and to obtain a share of the property by bringing a suit for partition. The judgment contains an expression of opinion that only the undivided share of the father can be sold in a suit to which he only is made a defendant; but inasmuch as the defendant in that suit had only bought the

(1) 14 B. L. R. 187; 22 W. R. 56; (2) I. L. R. 3 Calc. 198; L. R., 4 Ind. L. R. 1 Ind. Ap. 321. Ap. 247.

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interest of the father, the point was not necessary for the decision of the case. The next case is that of *Suraj Bansi Koer v. Sheo Persad Singh* (1). A family, consisting of a father and his minor sons, was in possession of an ancestral estate, and the father mortgaged the estate to secure a sum of Rs. 13,000 and interest, which he had himself borrowed for and spent in immoral purposes. The Privy Council held, on the authority of the case of *Deendyal Lall* (2), that the purchases under a decree on the mortgage security after the death of the father were cancelled as against the surviving sons, who had a right to have the estate partitioned and to obtain possession of the share of the father, and that the mortgage and the decree upon it would not affect the undivided share of the other members of the family *because the money was borrowed and spent for immoral purposes*. In the course of the judgment, they affirmed the following propositions as being established by the case of *Kantoo Lall* (3): "first, that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and secondly, that the purchasers at an execution sale, being strangers to the suit, if they have not had notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceeding."

The case of *Bissessur Lall Saku v. Maharajah Luchmessur Singh* (4) has been referred to, but on examination does not appear to have any bearing on the questions. In that case, an undivided family acquired, in 1847, the property which was in question, and afterwards decrees were obtained against various members of the family for debts which were undoubtedly debts for which the whole family was liable, and for which they might have been sued, and the family property been sold, had proper proceedings been

(1) I. L. R., 5 Calc. 148; L. R., 6 Ind. Ap. 88.

(2) I. L. R., 3 Calc. 198; L. R., 4 Ind. Ap. 247.

(3) 14 B. L. R., 187; 22 W. R. 56; L. R., 1 Ind. Ap. 321.

(4) 5 Calc. L. R. 477; L. R. 6 Ind. Ap. 233.

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taken. The Privy Council held in that case that the Court might look behind the decrees to ascertain whether the defendant was sued in his individual character or as the representative of the entire family, and that the execution should be in accordance with the real facts, and not necessarily against the property of the apparent defendant only. The next case in order is that of *Muttayan Chetti v. Sangili Vira Pandia Chinnatambiar* (1). The facts of that case are complicated, and it is not easy to gather from the report exactly what they were; but it is clear that the main question was, whether a property (that at the time of the mortgage was in the possession of a family which consisted of a father and son) mortgaged by the father alone could be sold after the death of the father under a decree obtained against him alone upon the mortgage. The Privy Council held that it could, the reasons given being that the whole zamindari, or at least the interest which the defendant, the son, took therein by heritage, was liable as assets by descent in the hands of the defendant as the heir of his father for the payment of his father's debts, and the Committee re-affirmed the doctrine laid down in *Girdhwaree Lall's Case*. The next and last decision of the Privy Council on the subject is contained in the case of *Hurdey Narain Sahu v. Rooder Perakash Misser* (2). In that case an ancestral property was in the possession of a family which consisted of a father and son. It appeared that the father was indebted to the defendant in the suit of Hurdey Narain, partly on account of a mortgage and partly for further advances, and that Hurdey Narain brought a suit against him in order to recover the debt, and on the 4th of March, 1873, obtained a common money-decree against him, and that the ancestral property was afterwards attached and sold under the decree, and purchased by Hurdey Narain, the judgment-creditor.

Under these circumstances the Privy Council say that the question which arises is, what was the right or interest in the ancestral property which Hurdey Narain acquired by his purchase at the sale in execution of the decree, and upon the authority of *Deendyal's Case* they held that as the decree was against the father alone,

(1) I. L. R. 10 Cal. 626; L. R. 11 Ind. Ap. 26. (2) I. L. R., 10 Cal. 626; L. R. 11 Ind. Ap. 26.

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and was a money-decree only, such interest was confined to that of the judgment-debtor, the father, only and did not transfer the entire property to the purchaser. There is yet one more case recently decided by their Lordships, and not yet reported, namely, *Nanomi Babuasin v. Modun Mohun* (1), on appeal from Calcutta. There two sons sued to avoid a sale of the ancestral property held in execution of a decree against their father. The Subordinate Judge in whose Court the suit was tried found that all that had passed at the auction-sale to the purchaser was the right, title, and interest of the father, and he therefore gave the plaintiffs a decree for the ancestral property *minus* the father's share. On appeal the High Court reversed the decision of the Subordinate Judge, holding that the auction-purchaser bought the whole property, including the interests of the plaintiffs. The latter then appealed to the Privy Council, and their Lordships, after referring to *Deendyal Lall's Case*, observed:—"If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's co-parcenary interest alone, the absence of the sons from the proceeding may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings." In the result their Lordships held that, as the purchaser had succeeded in showing that he bought the entirety of the estate, the suit of the plaintiffs had been rightly held to have failed.

We now come to the cases which have been considered in the High Court of these Provinces. That of *Ram Narain Lal v. Bhawani Prasad* (2) was decided by the Full Bench of this Court on the 24th January, 1881, that is to say, after that of *Bissessur Lall Sahu* and before that of *Hurdey Narain Sahu v. Rooder Perkash Misser* (3). In that case the facts were, that an ancestral estate was in the possession of an undivided family which consisted of a father and four sons. The father borrowed a sum of money, and as security gave a bond by which he hypothecated a

(1) Decided the 18th December, 1885. (3) I. L. R., 10 Calc. 626; L. R., 11 Ind. Ap. 26.

(2) I. L. R., 3 All. 443.

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portion of the ancestral estate, describing it as his own.* The lender afterwards sued the father on the bond and obtained a decree against him personally and for the sale of the mortgaged property. A sale took place under the decree, and the question was what passed to the purchaser. The majority of the Court (Stuart, C.J., Pearson, Spankie, and Oldfield, JJ.) held on the authority of *Bissessur Lall Sahu's Case*, that it was competent for the Court to go behind the decree, and to ascertain whether the money was borrowed for family purposes, and, upon its appearing that such was the case, to sell the family property under it. Straight, J., thought that as the decree was against the father alone, his share only could be sold under it. Another case is that of *Gaura v. Nanak Chand* (1). The only question in that case was on whom the burden of proof rested, when it was alleged that the property had been parted with by the father for unauthorized purposes, and the Court held that the burden of proving the assertion was on the person who made it; in other words, that the transaction would be presumed to be a legal and proper one until the contrary appeared.

It seems to us that two broad rules are deducible from the foregoing authorities, and they are these:—First, that when a decree has been made against the father and manager of a joint Hindu family in reference to a transaction by which he has professed to charge or sell the joint ancestral property, and a sale has taken place in execution of such decree of the joint ancestral property without any limitation as to the rights and interests sold, the rights and interests of all the co-parceners are to be assumed to have passed to the purchaser, and they are bound by the sale, unless and until they establish that the debt incurred by the father, and in respect of which the decree was obtained against him, was a debt incurred for immoral purposes of the kind mentioned by *Yajnavalkya*, Chapter I, s. 48, and *Manu*, Chapter VIII, sloka 159, and one which it would not be their pious duty as sons to discharge. Next, that if, however, the decree, from the form of the suit, the character of the debt recovered by it, and its terms, is to be interpreted as a decree against the father alone and personal to himself, and all that is put up and sold thereunder in execution

(1) Weekly Notes, 1883, p. 194, and Weekly Notes, 1884, p. 23.

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is his right and interest in the joint ancestral estate, then the auction-purchaser acquires no more than that right and interest, i. e., the right to demand partition to the extent of the father's share. In this last-mentioned case, the co-parceners can successfully resist any attempt on the part of the auction-purchaser to obtain possession of the whole of the joint ancestral estate, or, if he obtains possession, may maintain a suit for ejectment to the extent of their shares upon the basis of the terms of the decree obtained against the father and the limited nature of the rights passed by the sale thereunder.

Applying these rules to this appeal, we are of opinion that it must succeed, and that the decree of the Subordinate Judge cannot stand. That the $2\frac{1}{2}$ biswas share of Mughalpur was sold at the execution-sale under the decree obtained against Sheoraj Singh and purchased by the defendants is clear from the terms of the decree and of the sale-certificate, and there can be no doubt that the entirety of the interest passed to them. The plaintiff has failed to show that the debt for which the bond was executed was an immoral one; indeed, a considerable proportion of the money borrowed was used for the purpose of paying arrears of revenue. We decree the appeal and dismiss the cross-objection, and, reversing the decree of the Subordinate Judge, we dismiss the suit with costs in all Courts.

Appeal allowed.

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March 12.

Before Sir Comer Petheram, Kt., Chief Justice, and Mr. Justice Straight.

DHUM SINGH (DEFENDANT v. GANGA RAM AND OTHERS (PLAINTIFFS).

Vendor and purchaser—Failure of consideration—Suit for money had and received for plaintiff's use—Debt—Limitation.

Prior to September, 1879, pecuniary dealings took place between *D* and *B*, resulting in a debt due by the former to the latter of Rs. 23,000 for money lent. Negotiations were carried on between the parties as to the mode in which the debt should be liquidated; and, on the 1st September, 1879, it was arranged that *D* should execute a sale-deed conveying to *B* certain immoveable property for Rs. 55,000, and that *B* should pay this amount by giving *D* credit to the extent of the debt and paying the balance in cash. In August, 1880, *D* sued *B* for specific performance of the contract, which, he alleged, had been settled and executed, for the sale of the property. *B* in defence alleged that although certain

* First Appeal No. 62 of 1885, from a decree of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Sahāranpur, dated the 26th March, 1885.