LETTERS PATENT APPEAL.

Before Addison and Abdul Rashid JJ.

SUKH DIAL AND ANOTHER, Appellant,

versus

NAZIR AHMAD AND OTHERS, Respondents.

1936 .

March 17.

Letters Patent Appeal No. 1 of 1936.

Custom — Ancestral house property — attached in execution of simple money decree — and sold during the life time of the debtor—whether next reversionary holder can object to the sale—and on what grounds—Civil Procedure Code, Act V of 1908, section 65 and Order XXI, rules 90, 92.

Certain house property was attached and sold in the execution of two decrees against M. and his son S. The judgment debtor put in objections under section 60 and Order XXI, rule 90, Civil Procedure Code. During the pendency of these objections M. one of the judgment debtors died and his grandsons N. and H. were brought on the record as his legal representatives. They pleaded *inter alia* that the house being ancestral, their half share could not, under custom, be sold in the execution of a simple money decree against their grandfather after his death.

Held, that the sale of the half share of the house could not be set aside merely on the ground that the property was ancestral.

Jagdip Singh v. Bawa Narain Singh (1), explained and distinguished.

And, that as the ancestral property had been attached and sold in the life time of the ancestor, the only objections which the reversioners could prefer were those open to them in an ordinary suit against a private alienation of the last holder of the property, in addition to the objections which could be raised under the Civil Procedure Code.

Case-law, discussed.

Appeal under clause 10 of the Letters Patent from the judgment of Agha Haidar J. passed in Civil Appeal No. 2015 of 1934 on 16th October, 1935, reversing

(1) 4 P. R. 1913 (F. B.).

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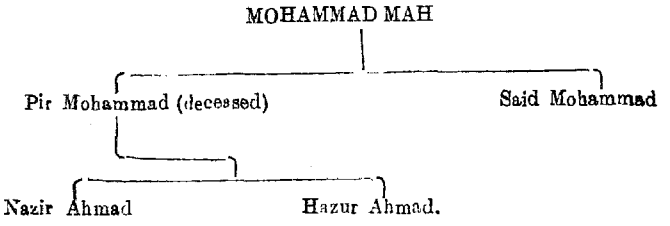
that of R. B. Lala *Shibbu Mal, District Judge, Gujrat at Gujranwala, dated 10th July, 1934 (who modified that of* Lala *Kishan Chand, Subordinate Judge, 1st Class, Gujrat, dated 7th May, 1934), and setting aside the sale of a half-share of the house.*

SHAMAIR CHAND, for Appellants.

BARKAT ALI and MOHAMMAD AMIN, for Respondents.

The judgment of the Court was delivered by—

ADDISON J.—The following pedigree table is necessary in order to understand this appeal :—



Sukh Dial obtained a money decree against Mohammad Mah and Said Mohammad. Narain Das obtained another money decree against the same two persons. Both the decree holders proceeded to execute their decrees and certain house property was attached on the 2nd April, 1933 and sold on the 21st November, 1933. On the 18th December, 1933, Mohammad Mah and Said Mohammad judgment-debtors put in certain objections to the execution of the decree under section 60, Civil Procedure Code and also objected to the sale under Order 21, rule 90, Civil Procedure Code. While these objections were being considered Mohammad Mah died on the 12th February, 1934 and on the 2nd March, 1934 his grandsons, Nazir Ahmad and Hazur Ahmad, were brought on the record as some of his legal representatives, Said Mohammad, the other legal representative, being already on the record as a

judgment-debtor. The two grandsons, Nazir Ahmad and Hazur Ahmad, in addition to continuing the other objections, also pleaded that, the house being ancestral, their half share could not under custom be sold in execution of a simple money decree against their grandfather after his death and for this proposition they relied upon the Full Bench decision, *Jagdip Singh v. Bawa Narain Singh* (1). The executing Court found that there was no force in the original objections under section 60 and Order 21, rule 90, Civil Procedure Code, but purporting to follow *Jagdip Singh v. Bawa Narain Singh* (1), held that the half share of the two grandsons was not liable to attachment and sale by reason of the death of Mohammad Mah.

There was an appeal to the District Judge who held that it had been established that by custom the house could be sold in execution of a money decree even after the death of Mohammad Mah. The Single Judge of this Court, who heard the second appeal, held that the grandsons had not been given a proper opportunity in the executing Court to prove that the custom was otherwise and he accordingly remanded the following issue to the lower appellate Court under Order 41, rule 25, Civil Procedure Code:—

"Whether there was a special custom under which the grandsons were precluded from raising the plea that on the death of their ancestor the ancestral property was not liable to attachment and sale in execution of a money decree obtained against him."

The finding on remand was that the custom set up by the decree-holders had not been proved. This finding was accepted by the Single Judge who thereafter accepted the two appeals before him and the sale of a

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half share of the house was set aside. There were two appeals because there were two executing decree holders who were both affected by the result. Against this decision the decree holders have preferred separate appeals under the Letters Patent which may be conveniently disposed of together.

There is no dispute that it has been held by a Full Bench in *Jagdip Singh v. Bawa Narain Singh* (1), that where a male proprietor, governed by customary rules, has contracted a just debt and dies leaving ancestral property, such property is not liable in the hands of the next holder in respect of such debt, unless the debt had been charged on the property and that a person who has obtained a simple money decree for such a debt against the debtor himself or his representatives, has no right to execute it against the ancestral land (or house property), once in the debtor's possession, which has passed into the hands of the next holder under customary law. But in this Full Bench case there had been no attachment or sale in the life-time of the judgment-debtor; while in the present case not only attachment but sale had taken place in his life time. It was pointed out in the Full Bench judgment that the reversionary heir of the customary law bears a resemblance to the tenant-in-tail, such reversioner not inheriting from the last owner but from the common ancestor. In the course of that judgment also occur the following remarks :—

" In these circumstances can a creditor by obtaining a simple money decree either against the debtor himself in his life-time or after his death against the persons who are the legal representatives *pro tanto* of the deceased debtor execute his decree after the death

(1) 4 P. R. 1913 (F. B.).

of the debtor, by attachment of the landed ancestral property which was at one time in the possession of the deceased? It may perhaps be conceded that such attachment is permissible during the life time of the debtor, but with that aspect of the question, we are not at present concerned."

It is clear from the last sentence that such a case as the present was not meant to be decided by the Full Bench and indeed the judgment indicates that attachment during the life time of the debtor would take the case outside the decision given by the Full Bench though a final decision was not given on the question.

These cases under customary law are in fact very similar to cases of joint families under Hindu Law. In Hindu Law in the case of a joint family there is no legal representative of a deceased member thereof, the others succeeding by survivorship. Under customary law also, those who succeed to the last holder of ancestral property do not do so as legal representatives but derive their title from the common ancestor and that is why ancestral land or house property, which had not been attached or sold in the life-time of the judgment-debtor, cannot be attached and sold except in the hands of the widow, after his death in execution of a simple money decree obtained against him. Now in the case of co-parceners under Hindu Law it has been held that the undivided interest of a co-parcener if it is attached in his life-time may be sold after his death whether the order for sale is made in his life-time or after his death; but of course even under Hindu Law it cannot be attached after his death, for it then has ceased to be his interest and has passed to the other co-parceners by survivorship. Similarly under customary law it is not disputed that if the sale had been confirmed before

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the death of Mohammad Mah it would have been a valid sale, although of course the grandsons might be entitled to attack the sale on the ground of want of consideration and necessity or of immorality on the part of the judgment-debtor, as the property is ancestral. The holder for the time being of ancestral property under custom can sell it, but such a sale is subject to attack by the reversioners on the grounds already stated. Similarly a sale in execution of a decree of Court might possibly be attacked in the same way as all that can be sold by the Court is the interest of the judgment-debtor.

There is a decision of their Lordships of the Privy Council under Hindu Law reported as *Suraj Bunsi Koer v. Sheo Persad Singh* (1). It was held in that case that the property having been attached for the debt of a co-sharer during his life-time the sale was good for his share, but that as it appeared on the evidence in the suit that the debt was one for which according to Hindu Law the other co-sharers could not be made liable the sale was not good for their shares. This decision has been followed in *Birthal Das v. Nand Kishore* (2), and *Faqir Chand v. Sant Lal* (3). In *Sheik Karoo v. Rameshwar Sao* (4), a decision of the Patna High Court, it was held that a decree against a Hindu judgment-debtor can be executed against his son to the extent of the ancestral property which is liable for the debt covered by the decree passed against the father, and the proper procedure was for the decree holder to bring the son on the record as a legal representative of the deceased father. The son, it was held, could raise the plea in execution of the

(1) (1880) I. L. R. 5 Cal. 148 (P. C.).
(2) (1901) I. L. R. 23 All. 106.
(3) (1926) I. L. R. 48 All. 4.
(4) (1923) 62 I. C. 905.

decree that the debt of his father was tainted with immorality but, if he failed to make this out, he was bound to pay out of the joint property all the debts of his ancestor, not incurred for immoral or illegal purposes including a judgment debt. Similarly in the present case it was no doubt open to the two grandsons to raise the plea that the property was not liable to be sold as the debt was incurred for immoral purposes or was without necessity as already remarked, but these pleas were not taken. The grandsons must be allowed to take these pleas in the execution proceedings as, having been brought on the record, a separate suit probably would not lie by virtue of section 47 of the Civil Procedure Code, but there is no question of this in the present case. All that the grandsons alleged was that the property being ancestral *qua* them could not be sold in execution of a decree against their grandfather after his death.

On behalf of the grandsons certain other decisions have been relied upon. The first is *Moti Lal v. Karrabuldin* (1), where it was held that attachment merely prevented alienation and did not give title. This is undoubtedly true and in no way affects the decision of their Lordships in *Suraj Bansi Koer v. Sheo Persad Singh* (2), at page 174 where their Lordships remarked as follows :—

" They think that, at the time of Adit Sahai's death, the execution proceedings under which the mouza had been attached and ordered to be sold had gone so far as to constitute in favour of the judgment creditor *a valid charge* upon the land, to the extent of Adit Sahai's undivided share and interest therein,

(1) (1897) I. L. R. 25 Cal. 179 (P. C.).
(2) (1880) I. L. R. 5 Cal. 148, 174 (P. C.).

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which could not be defeated by his death before the actual sale."

Another case relied upon was *Ragunath Das v. Sundar Das Khatri* (1), where it was said that an attachment in execution of a money decree on a mortgage of land followed by an order for sale of the interest of the judgment-debtor does not create any charge on the land. The facts of this case are of a special nature and must be briefly stated: A colliery leased to the judgment-debtors was attached under a mortgage decree by judgment-creditors and an order for sale on 5th September, 1904, was made, but the sale was postponed until the 10th at the request of the judgment-debtors. On the 8th September the judgment-debtors filed their petition in the Insolvency Court at Calcutta and the usual vesting order was made the same day. On 12th September the execution proceedings were stayed. After issue of notice, on the application of the judgment-creditors, to the Official Assignee to show cause why he should not be substituted in place of the judgment-debtors, the Subordinate Judge on 10th January, 1905, finding that notice had been duly served, made the order for substitution and fixed the sale for 6th March, 1905 and had the property sold on that day. It was purchased by the judgment-creditors who were put in possession in June. Meanwhile on the 23rd May, 1905, the Official Assignee, with leave from the Insolvency Court in March, 1905 sold the property to a purchaser, who on the 24th June, 1908, sold it to the plaintiffs, by whom on the 16th July the suit before their Lordships was brought for possession of the colliery. It was held by the Privy Council that the notice calling on the Official Assignee to show

(1) (1914) I. L. R. 42 Cal. 72 (P. C.).

cause why he should not be substituted for the judgment-debtors was not a proper notice but it was further held that, assuming the notice to have been duly served, the sale was altogether irregular and inoperative. The property having vested in the Official Assignee, it was wrong to allow the sale to proceed at all. *The judgment-creditors had no charge on the land and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents.* In the second place it was held that the Official Assignee, not having been properly brought before the Court, was not bound by anything which had been done. In the third place it was held that the judgment-debtors had, at the time of the sale, no right, title or interest which could be sold to, or vested in, the purchaser as the judgment debtors' rights had then vested in the Official Assignee. What, therefore, this amounts to is that an attachment prevents a private alienation but does not invalidate an alienation by operation of law such as is effected by a vesting order under the Indian Insolvency Act and that an order for sale, though it binds the parties, does not confer title. This authority appears to go against the grandsons, for here there has been an alienation by operation of law, by means of the Court auction in the life-time of the grandfather.

Reference was made also to *Natha v. Ganesha Singh* (1), and similar authorities to the effect that a mere attachment infringes the rights only of the judgment-debtor and has the effect of placing the property attached *in custodia legis*. It does not amount to an infringement of the rights of his reversioners and cannot furnish the latter with a cause of action for a suit

(1) (1932) I. L. R. 13 Lah. 524.

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for a declaration that the attachment shall not affect their reversionary rights. These decisions do not help towards the decision of the present case.

Reference has also been made to section 65 of the Civil Procedure Code which enacts that where immovable property is sold in execution of a decree and such sale has become absolute the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute. Under Order 21, rule 90 an application may be made to set aside the sale but if such an application is not made or is made and disallowed, then the Court shall make an order under Order 21, rule 92 confirming the sale, and thereupon the sale shall become absolute with effect, by virtue of section 65, from the date of the sale. In the present case the sale took place in the life-time of Mohammad Mah. Objections could be taken under Order 21, rule 90 and were taken and disallowed. Further the grandsons could take such objections to the sale, which took place in their grandfather's life-time, as they would be entitled to do under customary law in the case of a private alienation by their grandfather, but it seems to us that they could not take the objection merely that the land was ancestral and that the sale should be set aside on that ground; for the sale was effected in the life-time of their grandfather and could not be attacked merely on the ground that the property was ancestral but only on the grounds already stated. It is not necessary in the present case to decide as to whether attachment in the grandfather's life-time was sufficient to create such a charge as was held to be created by their Lordships of the Privy Council in *Suraj Bunsi Koer v. Sheo Persad Singh* (1), but it is quite clear

(1) (1880) I. L. R. 5 Cal. 148 (P. C.).

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that, where attachment and sale have taken place, the only objections of the reversioners are those open to them in an ordinary suit against a private alienation of the last holder of the property in addition, of course, to the objections which can be raised under the Civil Procedure Code.

For the reasons given we accept these appeals, set aside the decisions of the Single Judge and confirm the sales *in toto*. The decree-holders will have their costs throughout against the grandsons.

P. S.

Appeals accepted.

APPELLATE CIVIL.

Before Addison and Abdul Rashid JJ.

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April 7.

DEWAN SINGH AND OTHERS (PLAINTIFFS) Appellants

versus

MST. SANTI AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 1074 of 1935.

Custom—Succession—Self-acquired property—Johar Jats of tahsil Phillaur, District Jullundur—Daughters—whether succeed in preference to second degree collaterals—Indian Evidence Act, I of 1872, section 13—"Recognised"—meaning of—Judicial decisions—value of—Riwaj-i-am.

Held, that according to custom amongst Johar Jats of tahsil Phillaur in Jullundur District, daughters do not succeed to the self-acquired land of their father in preference to second degree collaterals.

Customary Law, Jullundur District, 1918, Answers to Questions 45 A and B, referred to.

Sajjan Singh v. Mst. Dhanti (1), and Civil Appeal No. 613 of 1933, followed.

(1) 1936 A. I. R. (Lah.) 130.