Legislature, if we have not correctly interpreted its intention, to insert limiting words in the section in question.

1886.

HÁJI ABDUL RAHIMAN v. KHOJÁ KHÁKI ABUTH.

Attorneys for the appellants:—Messrs. *Tyabji and Dayabhai.*

Attorneys for the respondents:—Messrs. *Hore, Conroy and Brown.*

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1886. *June* 30.

JAGABHA'I LALUBHAI, (ORIGINAL DEFENDANT), APPELLANT, *v.* VIJBHUKANDA'S JAGJIVANDAS AND ANOTHER, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Hindu law—Joint family—Decree against the father alone—Attachment of family property in execution of such decree—Son's interest in the family property when bound by decree against the father or by a sale effected by the father—Civil Procedure Code (Act XIV of 1882*), Sec.* 266.

Where, in a joint Hindu family, the father disposes of family property, the son's interest is bound, unless the son can show, in proceedings taken for that purpose, that the disposal of the property by his father was made under circumstances which deprived his father of his disposing power. So, also, where family property is sold under proceedings taken against the father alone, the son's interest is bound, unless the son can show that the sale was on account of an obligation to which he was not subject.

The father is, in fact, the representative of the family both in transactions and in suits, subject only to the right of the sons to prevent an entire dissipation of the estate by particular instances of wrong-doing on the father's part.

SECOND appeal from the decision of E. M. H. Fulton, Acting District Judge of Surat, reversing the decree of Khán Bahádur B. E. Modi, First Class Subordinate Judge of Surat.

The defendant, Jagabhái Lalubhái, obtained a money decree against Jagjivandás Dayárám and Dáyábhái Dayárám. The two judgment-debtors were brothers living in union and doing joint business. Both were in possession of family property as managing members of a joint Hindu family. They had firms at Surat and Barodá, in which they were jointly interested. The business of the firms was the family business, and the dealings with the defendant, which gave rise to his suit, took place in the course of this business. In execution of the decree obtained by the defendant,

* Second Appeal, No. 539 of 1884.

1886.

JAGABHÁI LALUBHÁI v. BHUKANDÁS JAGJIVANDÁS.

certain ancestral property of the judgment-debtors was attached. The plaintiffs in this suit were the sons of Jagjivandás, and they sought to raise the attachment, on the ground that their father, Jagjivandás, having died before the attachment, his interest in the property was extinguished, and was not liable, in the hands of his sons, to satisfy his personal debts. They further alleged that those debts had not been incurred for the benefit of the family. These objections having been disallowed in the summary proceedings, the plaintiffs brought the present suit to have their shares in the property declared exempt from attachment and sale in execution of the defendant's decree against their father.

The Court of first instance, following the Privy Council rulings in *Girdhari Lall* v. *Kanto Lall*(1) and *Suraj Bansi Koer* v. *Shiv Prasad Singh*(2), dismissed the plaintiffs' suit, holding that as the debt, in respect of which the decree was obtained, was not alleged or proved to have been contracted for any immoral or illegal purpose, the plaintiffs were bound to satisfy it out of the ancestral property in their hands.

On appeal the District Judge raised the following issue :—

"Can the decree against Jagjivandás be executed against the plaintiffs' shares in the family property"?

On this issue he recorded his finding as follows :—

"The judgment-creditors have obtained a simple money-decree against the plaintiffs' father alone, and, in execution, have attached the ancestral property. This suit has been instituted to obtain a declaration that the plaintiffs' shares are not liable to attachment and sale. I agree with the Subordinate Judge in considering that the debt is one not contracted for immoral or illegal purposes, and it is one for which the sons might, by a proper procedure, have been made responsible to the extent, at any rate, of the family property. The only question, therefore, for consideration is, whether their shares can be attached and sold in execution of a money-decree, against their father, obtained in a suit to which they were not made parties. The learned Subordinate Judge has collected most of the numerous authorities on this subject, but I regret that I am unable to concur in the conclusion at which he has arrived. The latest decisions on the question are those of *Hurdey Nárain* v. *Ruder Perkash*(3) and *Bhikáji* v. *Yashvantráv*(4). In the former case a simple money decree had been obtained, and, in delivering the judgment of the Privy Council, Sir Richard Couch said: 'The attachment being by an order prohibiting the defendant from alienating the property, it purported

(1) L. R., 1 I. A., 321.
(2) L. R., 6 I. A., 88.
(3) I. L. R., 10 Calc., 626.
(4) Printed Judgments for 1884, p. 126.

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 has 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.' This case has been followed by the Bombay High Court in *Bhikáji* v. *Yashvantrav*(1). It was objected that both these cases were against purchasers, who, of course, could not buy more than what had been put up for sale, namely, the right, title, and interest of the judgment-debtor; but, I think, the judgment of the Privy Council, at any rate, rests on a somewhat broader basis than the hypothesis that, by mistake, merely the right, title, and interest of the judgment-debtor was sold, when the right, title, and interest of the family might have been sold. No doubt in the case of *Suraj Bansi* v. *Shiv Prasád*(2) the Privy Council, as pointed out by Mr. Justice Latham in *Fakirchand* v. *Motichand*(3), has ruled that 'where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of antecedent debt, or under a sale in execution of a decree to pay father's debts, his sons, by reason of their duty to pay their father's debts, cannot recover that property...: but this ruling does not help us much to decide under what circumstances a sale of the whole property can take place in execution of a decree to pay father's debts. The decisions in *Girdhari Lal's Case* and *Suraj Bansi Koer's Case* show that where a father has mortgaged property, it can be sold, although the sons have not been made parties to the suit; but this seems to rest on the consideration that the father had a legal right, under certain circumstances, to charge the property, and that the sons were owners of shares which were subject to that charge. Here, however, the father has not charged the property, and there does not seem to be any decision of the Privy Council which favours the view, that, under such circumstances, anything more than the right, title, and interest of the father can be sold in execution of a decree in a suit to which the sons are not parties. Looking to section 266 of the Civil Procedure Code, I find a list of the property liable to attachment and sale in execution of a decree, and it includes all saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit.' This list must be considered exhaustive, as the Courts have clearly no right to attach property, unless some authority for their doing so can be found in the Civil Procedure Code; and there is no other section authorizing a Court to attach property not mentioned in section 266 in execution of a decree. Now, it can certainly not be said that the sons' shares in ancestral property belong to the father, and it can hardly be said that he has over such shares a disposing power which he may exercise for his own benefit. He can dispose of those shares in payment of certain antecedent debts, and such disposal may, doubtless, be beneficial to him in so far as it frees from liability, but I do not think that it can be said that he can dispose of those shares 'for his own benefit without putting a very forced meaning on these words. I have examined all the decisions referred to by the Subordinate Judge, and also the cases reported in *Ponnappa Pillai* v. *Pappuvayyangar* (4) and *Muttayan Chetti* v. *Zamin*

(1) Printed Judgments for 1884, p. 126.
(2) L. R., 6 I. A., 88.
(3) I. L. R., 7 Bom., 441.
(4) I. L. R., 4 Mad., 1.

1886.

JAGABHÁI LALUBHÁI v. BHUKANDÁS JAGIVÁNDÁS.

dár of *Swágiri* (1). In the former of these Madras cases, Turner, C. J., points out that there are substantial differences between a sale under a money decree and a sale under a decree ordering a sale to enforce a mortgage. 'Where a Court orders an absolute sale to enforce a mortgage, it professes to sell whatever interest the mortgagor was, under any circumstances, competent to create, and intended to create, at the time of the mortgage. Where a Court orders a sale in execution of a money-decree, it professes to sell whatever interest in the property would, under any circumstances, be available to creditors at the date of the attachment.' As pointed out above, the property available to creditors at the date of the attachment is the property belonging to the judgment-debtor, and the property over which he has a disposing power which he may exercise for his own benefit.

"It is, of course, with great hesitation that I have arrived at the conclusion, that a son's share in ancestral property cannot be attached in execution of a money decree obtained against the father alone. I am aware that a contrary decision was arrived at in Calcutta (*Ramdut Sing* v. *Mahender*(2)), but its effect seems somewhat weakened by the previous decision of the same Bench on p. 389, which it is difficult to reconcile with the recent decision of the Privy Council in *Hurdey Nárain's Case*. Possibly, both decisions would have been modified had the decision in *Hurdey Nárain's Case* been published before they were issued. Under any other circumstances it would have been impossible for me to depart from such a very clear ruling (*Ramdut Sing* v. *Mahender*(3)); but, considering the subsequent decision of the Privy Council, the Calcutta case cannot be held to dispose of the question. In *Jettyapá* v. *Laximaya*(4) the decision was given by Sargent, C. J., and Melvill, J., and their Lordships remarked: 'Now, assuming that other property than that of the father himself could be attached in execution of a money-decree against him, which may well be doubted having regard to the decision in *Deendyal's Case*, (5) &c.;' and I think it likely that the doubt here expressed would have been still stronger had the decision in *Hurdey Nárain's* case been then in existence."

For these reasons the District Judge held, reversing the decree of the first Court, that the plaintiff's shares in the family property were not liable to attachment and sale in execution of the decree against Jagjivan.

From this decision the defendant appealed to the High Court *Mánekshá Jehángirshá*, for the appellant, referred to *Nanomi Bábudsin* v. *Modhun Mohun*(5).

There was no appearance for the respondents.

WEST, J.:—The extremely well-reasoned judgment of the District Judge is supported, apparently, by that of the Judicial

(1) I. L. R., 6 Mad., 1. (2) I. L. R., 9 Calc., 452.

(3) On the other hand, see *Rámphul Sing* v. *Deg Nárain Sing*, I. L. R., 8 Calc., 517.

(4) Printed Judgments for 1883, p. 87. (5) I. L. R., 13 Calc., 21.

Committee in *Hurdey Náráin's Case* (1). But that judgment has, in its turn, been qualified by the recent decision in *Nanomi Bábuásin* v. *Modhun Mohun*(2). By this, the father's disposition of the family estate, or a disposal of it under proceedings taken against the father alone, is made to affect the son's as well as the father's interest, except so far as the son can establish, in a proceeding taken for that purpose, that the voluntary disposal was made under circumstances which deprived the father of the disposing power, or that the enforced disposal was on account of an obligation to which the son was not subject. The father, in fact, is made the representative of the family, both in transactions and suits, subject only to the right of the sons to prevent an entire dissipation of the estate by particular instances of wrong-doing on the father's part.

The District Judge has relied on section 266 of the Code of Civil Procedure, which says that the property subject to attachment must be such as the judgment-debtor could dispose of for his own benefit. This is the direction, no doubt; but it does no more than state a general principle, which, though the section is not referred to, must have been present to the minds of the Judicial Committee. Their Lordships thought probably that the father could dispose of the family estate for his own benefit, at least *primâ facie*, and subject only to the rights on which the sons could rely in particular cases.

In the present instance, the father was really sued as the head of a firm. It seems that the debt was one for which the sons would be liable. In their suit to establish their title, as against the attachment, they have had an opportunity of proving all in favour of their own exemption which they could have urged had they been joined as defendants. Thus, no injustice is done in declaring their shares answerable, equally with their father's, for the common debt, although this has been established in a suit against the father alone.

The decree of the District Court is reversed, and that of the Subordinate Judge restored, with costs throughout on the respondents.

Decree reversed.

(1) L. R., 11 I. A., 26.

(2) I. L. R., 13 Calc., 21.