1892.

JAIRÁM LUXMON.

for, as the debt was not for an immoral purpose, and the infants would be bound, but without this order he will not get such a good price. Hence the order prayed for is for the infants' benefit.

[FARRAN, J.:—You can scarcely say that the father has not an interest adverse to his sons in making this application.]

Not if he has the power already—as undoubtedly he has—to bind the infants' interest by a sale. This order, then, can only be for the benefit of the infants. It is true it is for his own benefit too: it is for the benefit of all the sharers.

FARRAN, J.:—I have had some doubts as to the propriety of making the order prayed for, appointing the applicant, Jairám Luxmon, guardian of his minor sons. I should have liked the point to have come up for a fuller argument before a proper tribunal. But as I must decide it, I think I should appoint the guardian as asked for. The order is likely to benefit the whole family, and, therefore, the minors, by securing better terms than would otherwise have been obtained from a purchaser or a mortgagee. But I cannot grant the rest of the petition, or sanction beforehand the contemplated mortgage. I will appoint the applicant guardian of his infant sons Harishankar and Ráoji, and then it will be for him, on his own responsibility, to do what he thinks right and proper under the circumstances of the case.

Attorneys for the applicant:—Messrs. *Mulji and Rághowji.*

ORIGINAL CIVIL.

Before Mr. Justice Farran.

1892.
August 27.

NA'NA'BHA'I GANPATRA'O, (PLAINTIFF), *v.* JANA'RDHAN VA'SUDEOJÍ, (DEFENDANT).*

Civil Procedure Code (XIV of 1882), Sec. 248—Legal representative of a joint undivided Hindu in respect of ancestral immovable property attached in execution.

The plaintiff and his brother were joint undivided brothers possessed of certain immovable property. This property was attached in execution, but before a warrant for sale of the property was obtained the plaintiff died. The attaching creditor issued a notice, under section 248 of the Civil Procedure Code (XIV o

* Suit No. 210 of 1886.

1892.

NÁNÁBHÁI GANPATRÁO v. JANÁRDHAN VÁSUDEOJI.

1882), addressed to the brother and widows of the plaintiff as his "legal representatives" within the meaning of that section calling on them to show cause why execution should not proceed against them.

Held, that his widows, and not his brother, were the plaintiff's legal representatives for this purpose, for it must be as *quasi*-separate property of the deceased plaintiff that the attaching creditor had a claim to it. If it were to be treated as joint property, he could have none, for the deceased's interest would then have disappeared, having gone by survivorship to his brother.

NOTICE, in Chambers, under section 248 of the Civil Procedure Code and Rule 116 of the High Court Rules, calling on Báláji Ganpatráo, Sarasvatibái, Ramábái and Anpurnábái, the brother, mother and two widows respectively of the plaintiff in the above suit, deceased, to show cause why an order in the above suit made on the 9th July, 1891, ordering the said plaintiff, deceased, to pay certain costs to Mr. A. F. Turner should not be executed against them as the legal representatives of the said deceased.

On the 8th March, 1892, Mr. Turner obtained a warrant of attachment for his costs against certain ancestral immovable property belonging to the plaintiff in the above suit and his joint undivided brother, the said Báláji Ganpatráo.

On the 18th March, 1892, the property was attached. On the 9th April, 1892, before a warrant of sale had been obtained, the plaintiff, Nánábhoy, died, and Mr. Turner consequently issued this notice under section 248 of the Code.

Starling in support of the notice:—An undivided share in joint property is seizable and saleable in spite of the death of the owner of the share before sale—*Suraj Bunsi Koer* v. *Sheo Proshad Singh*[1]; and for this purpose the person, on whom that undivided share in the attached property has devolved, must be held to be the heir or legal representative,—that is, in this case the brother. The widows have also an interest in the property for their maintenance, and, therefore, they are properly made parties to this proceeding. The mother was added by a mistake; I must admit she is not a proper party.

Jardine for Báláji Ganpatráo:—My client cannot be a proper party to this application. He takes nothing in this property as heir or representative to his brother. He takes what he does

(1) L. R., 6 I. A., 88.

1892.

NÁNÁBHÁI GANPATRÁO v. JANÁRDHAN VÁSUDEOJI.

take in his own right by survivorship. Either he has in him the share which Mr. Turner had attached, or he has not. If he has, it is because it has become his own by survivorship, and Mr. Turner then has no right against it. If he has not, it is because, *pro tanto*, that has ceased to be joint undivided property and become the separate, or *quasi*-separate, property of the plaintiff; and then the plaintiff's widows, and not his brother, are his heirs and legal representatives in respect to that property.

FARRAN, J.:—It is curious that this point should apparently be uncovered by direct authority. It is by no means an easy one to decide, but on the whole I think Mr. Jardine's argument is logical and must prevail. It must be as *quasi*-separate property of the deceased plaintiff that Mr. Turner has a claim to it; otherwise he could have none. If it were still joint undivided property, it would survive to the plaintiff's brother; and he would take the whole; plaintiff's interest on his death would have disappeared; his share on his death would have merged at once in his brother's share, which then became the whole. I will revive the proceedings against Ramábái and Anpurnábái, the two widows. Mr. Turner will then proceed to sell, and the purchaser will work out his purchase, if he takes anything by it, by partition.

Order:—Notice absolute as to Ramábái and Anpurnábái, and dismissed as to Báláji and Sarasvatibái with costs. Counsel's costs to be costs in the question of the right to attach the joint property, or continue that attachment on, when such question is raised.

Attorneys for applicant:—Messrs. *Turner and Hemming*.

Attorneys for Báláji Ganpatráo:—Messrs. *Frámji and Moos*.