APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Candy.

GURLINGAPA SATWIRAPA GIDWIR (ORIGINAL PLAINTIFF), APPELLANT, *v.* NANDAPA CHANBASAPA SOLAPURI (ORIGINAL DEFENDANT No. 2), RESPONDENT.*

1896. *March* 4.

Hindu law—Joint family—Alienation of his share by a co-parcener—His position and rights after such alienation—Position of purchaser—Subsequent death or birth of other co-parceners—Effect on position of purchaser—Rights of alienor.

1. The alienation by a Hindu co-parcener of his rights in part or the whole of the joint family property does not place the purchaser of such rights in his own position. The purchaser becomes a sort of tenant-in-common with the co-parceners, admissible, as such, to his distributive share upon a partition taking place.

2. Such an alienation before partition does not deprive the alienating co-parcener of his rights in the joint family.

3. As the purchaser does not by the death of the vendor lose his right to a partition, so his position is not improved by the death of the other co-parceners before partition.

4. The purchaser like his alienor is liable to have his share diminished upon partition by the birth of other co-parceners if he stands by and does not insist on an immediate partition.

Three undivided brothers, *viz.*, Sidmalapa, Nijlingapa and Murgyapa, were the owners of a certain house which on the 1st August, 1845, Nijlingapa mortgaged with possession to one Shidlingapa. In 1878 the house was vested in the respective sons of the said three brothers, *viz.*, Basapa (son of Sidmalapa), Revapa (son of Nijlingapa), and Khubana (son of Murgyapa). In September 1878, in execution of a decree against Basapa alone, the house was sold *eo nomine* (not merely Basapa's interest) to one Gurpadapa. Formal possession was given to the purchaser, but the actual possession remained with the mortgagee (Shidlingapa). After this sale took place no other family property remained in which Basapa had an interest.

Khubana died in 1880 and Revapa died in 1883, no partition having been made between them and Basapa. In March, 1891, Basapa sold his interest in the house to the plaintiff, who in 1892 filed this suit to redeem the mortgage of 1845. The lower appellate Court dismissed the suit, holding that when in 1878 Gurpadapa purchased Basapa's right and interest in the last remaining portion of the family property, Basapa ceased to be a co-parcener with Khubana and Revapa, and consequently took nothing by survivorship on their death, their shares going to Gurpadapa. On appeal to the High Court,

* Second Appeal, No. 503 of 1895.

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Held, that Basapa's rights to succeed to his brothers' shares were not affected by the sale of his interest in the last item of joint family property to Gurpadapa so long as the latter did not proceed to work out his rights by partition. Basapa became entitled on the death of Khubana and Revapa to their respective shares.

SECOND appeal from G. Jacob, District Judge of Belgaum.

Suit for redemption. The house in question belonged to three undivided brothers, *viz.*, Sidmalapa, Nijlingapa and Murgyapa. On the 1st August, 1845, Nijlingapa mortgaged the property with possession to one Shidlingapa.

In 1878 all three brothers were dead and the house was the property of their sons, *viz.*, Basapa (the son of Sidmalapa), Revapa (the son of Nijlingapa) and Khubana (the son of Murgyapa).

On the 28th September, 1878, in execution of a decree obtained against Basapa alone, the house was sold *eo nomine* (not merely the interest of Basapa therein) to one Gurpadapa. Formal possession was given to the purchaser, but the actual possession remained with the abovenamed mortgagee (Shidlingapa). After this sale took place no other family property remained in which Basapa had an interest.

Khubana died in 1880 or 1881 and Revapa died in 1883. No partition had previously been made between the cousins.

On the 21st March, 1891, Basapa sold his interest in the house to the plaintiff, and in 1892 the plaintiff filed this suit to redeem the mortgage of 1845. The defendants pleaded that the equity of redemption had been sold in 1878 to Gurpadapa, who had sold it to them.

The Subordinate Judge held that Basapa's original one-third share of the property had been sold in 1878 to Gurpadapa, but sh[illegible] the family being undivided, the shares of Khubana and Revapa had subsequently come to Basapa by survivorship on their respective deaths; that he had sold this two-third share of the property to the plaintiff, who was thereupon entitled to redeem the mortgage. He, therefore, passed a decree for the plaintiff for redemption.

On appeal the Judge reversed the decree and dismissed the suit. He held that when in 1878 Gurpadapa purchased Basapa's right, title and interest, Basapa ceased to be a co-parcener with Khubana and Revapa and was not in a position when they died to take their shares by survivorship, and that their shares would go not to him, but to Gurpadapa the purchaser.

The following are extracts from his judgment :—

"The plaintiff claims through Basapa. The Subordinate Judge found that the house was purchased by Gurpadapa on 28th September, 1878 (Exhibit 58), but held that as Basapa's cousins Revapa and Khubana, who were then alive, were not parties to the decree or to the execution proceedings, only Basapa's right, title and interest passed to the purchaser; and finding that Basapa on the subsequent death of his cousins became entitled by survivorship to their shares, he held that plaintiff had acquired from him a two-third share in the house, and was, therefore, as owner of a share of the equity of redemption entitled to redeem the whole.

"This decision cannot, I think, be supported. The purchaser affected to buy the whole house, and seems to have been put in possession by the Court. The possession was not apparently physical, as there was a mortgagee in possession, but the question would arise whether any title claimed through Basapa's cousins would not now be barred by limitation.

"However that may be, the purchaser would have stepped into Basapa's shoes. If there was more undivided property, and if this house might on partition have fallen within Basapa's share, the purchaser might have been entitled to claim the whole house under his purchase.

"If there was no other undivided property, Basapa, from the date of Gurpadapa's purchase of his right, title and interest, ceased to be a co-parcener with his cousins, and was not in a position when they subsequently died to take their shares by survivorship. Their shares would have gone not to him but to Gurpadapa. The learned pleader for the respondents relies on the judgment in Civil Suit No. 761 of 1883, (Exhibit 62), as showing that Basapa and his cousins were undivided, and that there was other property.

"It may be noted here that as the appellant claimed under Gurpadapa, whose title through Basapa came into existence some years before that decision, he could not be bound by the decision in that suit, as the Subordinate Judge seemed to suppose. It may be added that Chanbasapa and Basapa appear to have been merely formal parties to that suit; and again the decision could not be taken as establishing that Revapa and Chanbasapa were undivided up to the time of their death.

"Then again although the house involved in that suit would appear originally to have formed part of the joint family property, it seems that no

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contention was then raised that there was any other such property besides the house in dispute in their suit; and it appears that Basapa's interest in the other house had been sold under a decree in 1876, or two years before the purchase of this house by Gurpadapa.

"It is clear, therefore, that at the date of Gurpadapa's purchase, Basapa had no interest in any other joint family property, and there was, therefore, no foundation upon which his right to take his cousins' shares, on their death, by survivorship would be based; and he had, therefore, no interest in the equity of redemption which he could convey to the plaintiff, who has thus no right to sue for redemption."

The plaintiff preferred a second appeal.

Dhoṇḍu P. Kirloskar, for the appellant (plaintiff).

Balaji A. Bhagvat, for the respondent (defendant No. 2).

FARRAN, C. J.:—The facts of this case, which appear to have been either assumed or found by the District Judge though he has not precisely stated them, are these. The property in suit (a house) originally belonged to Nijlingapa and his brothers Sidmalapa and Murgyapa. The pleader for the respondent contends that the District Judge did not assume this original joint ownership though it was found by the Subordinate Judge, but we think that this is not so. If it were, Basapa, Nijlingapa's nephew, would have had no interest in the premises, and the District Judge certainly speaks of the family of Nijlingapa as joint and as owning joint family property.

On the 1st August, 1815, Nijlingapa mortgaged the house with possession to Shidlingapa whom the defendants or some of them now represent. In 1878 the interests of the three brothers, whom we have named, were vested in their respective sons, Basapa, son of Sidmalapa, Revapa, son of Nijlingapa, and Khubana, son of Murgyapa. On the 28th of September in that year in execution of a decree obtained against Basapa alone the house was sold *eo nomine* and not the mere interest of Basapa therein. Formal paper possession was given to the purchaser Gurpadapa, but actual possession continued with the mortgagee. This was the last item of family immoveable property in which Basapa was interested, his interest in the other house which had been similarly mortgaged having been sold in execution of a decree against him in 1876. The District Judge expressly says that, at the date of the

sale in 1878, Basapa had no interest in any other joint family property. Khubana died in 1880 or 1881 and Revapa died in or after 1883. There is no evidence of any partition having, in fact, been come to between the cousins before the respective deaths of Khubana and Revapa.

On the 28th March, 1891, Basapa sold his interest in the house to the plaintiff, who in 1892 filed the present suit to redeem the mortgage upon it of 1845. The defendants set up a sale of the equity of redemption by Gurpadapa to them, but its execution has not been established, nor the *factum* of the sale to the satisfaction of the Subordinate Judge. The District Judge has not dealt with this part of the case. These are the facts.

The Subordinate Judge held that the family being undivided, the shares of Khubana and Revapa in the equity of redemption in the house in suit vested in Basapa by survivorship on their respective deaths, and that the plaintiff as Basapa's vendee was entitled to redeem the house. He relied upon the judgment in a suit to which the three brothers were parties in 1882 as showing that they were joint at that date, but the District Judge points out that the judgment is not evidence against Gurpadapa or the defendants and this would seem to be so.

The District Judge has held, in the alternative, that if Basapa was separate from his cousins in 1878, the house in suit passed to Gurpadapa by his purchase at the execution sale in 1878, and that the claims of Revapa and Khubana to it have become time-barred. This alternative would, no doubt, defeat the plaintiff's claim though not by the operation of the law of limitation, as Basapa's interest in the house passed to the purchaser and the interest of Khubana and Revapa in it would have centred on the death of the latter in his mother who is still living, and nothing would have passed to the divided brother Basapa. There is, however, no evidence, as we have said, of an actual division between Basapa and his cousins, and the original state of union must be presumed to have continued until the death of Revapa, unless the other alternative, upon which the District Judge relies, bars the right of Basapa by survivorship. This is the main question in the case.

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It is argued by the pleader for the respondent that the interest of not only Basapa, but also that of Revapa and Khubana, passed by the execution sale in 1878, but that is not so. The decree was against Basapa alone. It is not suggested that he was the manager of the undivided family or that the decree was passed against him as such. Though the house was sold under the decree, the interest of Basapa alone in it passed to the purchaser and not that of his cousins who were not parties to the proceedings.

The District Judge is of opinion that as at the date of Gurpadapa's purchase Basapa had no interest in any other joint family property than the house in question there was no foundation upon which his right to take his cousins' shares on their deaths by survivorship could be based and so on their deaths their interests in the equity of redemption in the house did not pass to him by survivorship. We have to consider whether this is the correct interpretation of the law. The District Judge has not cited any authority in support of his view.

No express authority on the subject is found in the Hindu law books. It is questionable whether an alienation by a co-parcener of his undivided interest in the family property was recognized by Hindu jurists. The legal mode of breaking up the family union and joint ownership was by partition. Even now in Bengal a voluntary alienation by a co-parcener of his interest in joint family property is ineffectual—*Sudaburt Pershad* v. *Foolbash* (1); *Madho Pershad* v. *Mehrban Singh* (2). An alienation for value is, however, allowed in Bombay as in Madras and a sale in execution of a decree of a co-parcener's interest in undivided family estate is valid in all the Presidencies—*Deendyal Lal* v. *Jugdeep Narain* (3); *Suraj Bunsi* v. *Sheo Proshad* (4). "There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided Hindu family; and the law as administered in Madras and Bombay has been one of gradual growth founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes and to work out his rights by means of a partition." This is the view which the

(1) 12 Cal. W. R., F. B., 1.
(2) L. R., 17 I. A., 194.
(3) L. R., 4 I. A., 247.
(4) L. R., 6 I. A., 88.

Judicial Committee of the Privy Council took of the position of the purchaser of the property of a Hindu co-parcener. It seems to follow from it that the sale of a co-parcener's interest in joint family property cannot affect the position of such co-parcener in the joint family or alter the rights of the several co-parceners *inter se*, though it confers upon the purchaser the equity by means of a partition to obtain the benefit of his purchase and thus wholly or in part to break up the family union and joint estate. Basapa's rights to succeed to his brother's shares by survivorship were not, therefore, we think, affected by the sale of his interest in the last item of joint family property to Gurpadapa so long as the purchaser did not proceed to work out his rights by partition.

It remains to consider whether the interests of Revapa and Khubana when they devolved upon Basapa devolved upon him for his own benefit or for the benefit of Gurpadapa. The sale being a compulsory sale by the Court and not a sale by Basapa himself, the principle laid down in *Alukmonee Dabee* v *Bance Madhub Chuckerbutty*[1] and recognized by section 43 of the Transfer of Property Act (IV of 1882) does not apply to the case. Is then the purchaser, on general principles applicable to purchasers from a Hindu co-parcener, entitled to the share of his vendor as it existed at the date of his purchase or to that share as increased by subsequent accretions? The question has been dealt with by the Madras High Court in *Rangasami* v. *Krishnayyan*[2]. The share purchased in that case had diminished by the birth of new co-parceners before partition took place, and it was held that the purchaser was only entitled to the diminished share ascertained at the time of partition. It was not necessary for the Full Bench to give an opinion upon the converse case and they gave none. The referring Bench seems to consider that both would be governed by the same rule. In *Suraj Bunsi* v. *Sheo Prosha d* (*supra*) the Privy Council have, in effect, held that if the undivided co-parcener, whose share has been sold in execution, dies before that share has been ascertained by partition, the right of the purchaser nevertheless will not be defeated. "Their Lordships * * * think that at the time of

(1) I. L. R., 4 Calc., 677 at p. 682. (2) I. L. R., 14 Mad., 408.

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Adit Sahai's death the execution proceedings under which the Mouzah 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 which could not be defeated by his death before the actual sale * * *. If this be so, the effect of the execution sale was to transfer to the respondents the undivided share in 8 annas of Mouzah Bissumbhurpore which had formerly belonged to Adit Sahai in his lifetime, and their Lordships are of opinion that notwithstanding his death the respondents are entitled to work out the rights which they have thus acquired by means of a partition" (p. 109).

The principle upon which their Lordships proceeded was deduced from the analogous case of a share in a partnership sold by a creditor of one of the partners. "It seems to their Lordships that the same principle may and ought to be applied to shares in a joint and undivided Hindu estate; and that it may be so applied without unduly interfering with the peculiar *status* and rights of the co-parceners in such an estate, if the right of the purchaser at the execution sale be limited to that of compelling the partition, which his debtor might have compelled had he been so minded, before the alienation of his share took place" (p. 255).

The Madras Full Bench deals with this aspect of the case in the case above referred to in the following manner:—"As regards the contention that, if the vendor dies before the purchaser effects a partition, the purchaser will take nothing, it is also one which does not arise on the facts of the case before us. If it is necessary to notice it as an objection to the rule of decision indicated above, the answer is that the interests carved out by the sale vest in the purchaser at once and that—the vendor being competent to sell—his subsequent death is an event which cannot divest the interest which has once vested; and for the purpose of giving effect to his contract of sale, the purchase must be dealt with as if the seller were alive when the purchaser demands partition."

The result of that view applied to the facts of the present case would be that Gurpadapa ran no risk of losing his purchase

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by the death of Basapa, but gained the benefit which accrued to the survivors on the death of Khubana and again on the death of Revapa, a result which appears to us to be neither logical nor equitable.

The decision in *Pandurang* v. *Bhaskar*(1) points to the period of alienation by a Hindu co-parcener, whether voluntary or compulsory, as that at which the rights of the alienee are to be determined. That decision was approved in *Mahabalaya* v. *Timaya*(2).

During the course of the argument in *Rangasami* v. *Krishnayyan* Mr. Justice Muttusami Ayyar lays down two principles: "(1) A purchaser gets his vendor's right to a partition *quoad* the thing bought; (2) if he buys an exact share he cannot get more." When a Court in an execution sale sells the interest of the judgment-debtor it cannot, we imagine, vary that interest by the words which it uses. If it be a $\frac{1}{3}$rd share it sells the $\frac{1}{3}$rd share, if a half share the half. If it purports to sell the whole estate, only the share of the judgment-debtor in it, whatever it may be, can pass.

The conclusions to which we are led by the decisions and their results upon this branch of the law are these:—

(1) That the position of the purchaser of the interests of a Hindu co-parcener in part or the whole of a joint estate are very anomalous. It is impossible to work out his rights on an exact logical basis. As it is an equity it must be worked out upon equitable principles.

(2) That a Hindu co-parcener by an alienation of his rights in part or the whole of the joint family property does not place the purchaser of such rights in his own position—does not confer upon him the *status* of an undivided Hindu. See *Ballabah Das* v. *Sunder Das*(3). Such a purchaser is in *Vasudev Bhat* v. *Venkatesh*(4) spoken of as "becoming a sort of tenant-in-common with the co-parceners admissible as such to his distributive share upon a partition taking place" (p. 147).

(1) 11 Bom. H. C. Rep., 72.
(2) 12 Bom. H. C. Rep., 138.
(3) I. L. R., 1 All., 429.
(4) 10 Bom. H. C. Rep., 139.

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(3) That such an alienation before partition does not deprive the alienating co-parcener of his rights in the Hindu joint family. If the alienation of his rights in each individual portion of the joint family property has not that effect, the fact that it is the last item which is being alienated cannot alter the position. The purchaser of the last part of the property of the co-parcener cannot be in a better or worse position than the purchaser of the penultimate portion.

(4) That as the purchaser does not by the death of his vendor lose his right to a partition, so his position is not improved by the death of other co-parceners before partition.

(5) That he stands in no better position than his alienor and consequently like the latter is liable to have his share diminished before partition by the birth of other co-parceners if he stands by and does not insist on an immediate partition.

The result is that, in our opinion, upon the death of Revapa, Basapa was entitled to $\frac{2}{3}$rd of the equity of redemption in the house in suit and he or his vendee is now entitled to redeem it.

We reverse the decree of the District Judge and remand the case for a retrial of the appeal. Costs, costs in the cause.

Decree reversed and case remanded.

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Parsons.

PANDU (PLAINTIFF) v. BHAVDU (DEFENDANT).*

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March 5.

High Court—Extraordinary jurisdiction—Reference by Collector—Civil Procedure Code (Act XIV of 1882), Sec. 622—Practice—Procedure.

The High Court will not interfere on a reference by the Collector with a Mámlatdár's Court's decision in a possessory suit. The aggrieved party can himself apply to the Court.

Satu v. *Shivrambhat* (1) followed.

REFERENCE from A. Cumine, Acting Collector of Khándesh, in a case decided by Mr. Ganesh Kashinath Lele, Mahálkari of petha Bhadgaum, under Bombay Act III of 1876 (Mámlatdár's Act).

* Civil Reference, No. 1 of 1896.

(1) P. J., 1894, p. 52.