1895.

GOVINDRA'M v. TA'TIA.

To this question the answer must be in the affirmative, in the circumstances of the case now before us. Under the provisions of section 231 of the Civil Procedure Code, Shankarlál was entitled equally with the other judgment-creditors to apply for execution of the whole decree for the benefit of all the decree-holders; and as he was a minor when the decree was passed, and when the last application for execution was made, he is entitled to the benefit of section 7 of the Limitation Act, and can apply for execution within three years of attaining majority.

We agree with the opinion expressed in *Seshan* v. *Rájágopála*[1] that section 8 of the Limitation Act applies only to those cases in which the act of the adult joint owner is, *per se*, a valid discharge. But we are unable to hold that section 7 does not apply where only some of the judgment-creditors, and not all, are affected by a legal disability. The reasoning in *Perry* v. *Jackson*[2] referred to by the Madrás High Court does not really touch the point under consideration, inasmuch as section 7 applies to an application like the present one, which any one of the judgment-creditors may present by himself under the provisions of section 231 of the Civil Procedure Code.

For these reasons, we agree with the Subordinate Judge in holding that Shankarlál is, in the circumstances, entitled to obtain execution of the decree. This is also the view of the Calcutta High Court in *Anando Kishore Dass* v. *Anando Kishore Bose*[3].

Order accordingly.

(1) I. L. R., 13 Mad., 236. (2) 4 T. R., 519.
(3) I. L. R., 14 Cal., 50.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

1895.
March 12.

UMED HATHISING (ORIGINAL OPPONENT), APPLICANT, *v.* GOMAN BHÁLJI, MINOR, BY HIS GUARDIAN AND NEXT FRIEND HIS WIDOWED MOTHER CHANDA (ORIGINAL APPLICANT), OPPONENT.*

Hindu law—Joint family—Money decree against father—Execution against son after the death of the father—Ancestral property in the hands of the son liable—Civil Procedure Code (Act XIV of 1882*), Secs.* 234, 244 *and* 278.

* Application No. 72 of 1894 under the extraordinary jurisdiction.

1895.

UMED HATHISING v. GOMAN BHA'IJI.

A money-decree obtained against the father of an undivided Hindu family can be executed after his death against his sons to the extent of the ancestral property that has come into their hands even if the debt has been incurred for the sole purposes of the father, provided that it is not tainted with immorality or illegality. If the son against whom the decree is sought to be executed as representative of his father takes the objection that the debts are tainted with immorality, he can do so under section 244 of the Civil Procedure Code (Act XIV of 1882).

Ariabudra v. *Dorásami* (1) and *Lachmi Náráin* v. *Kunji Lál*(2) not followed.

THIS was an application under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of J. B. Alcock, District Judge of Surat, confirming the decree of Khán Sáheb J. E. Modi, Second Class Subordinate Judge of Olpád, in an execution proceeding.

Umed Hathising obtained a money-decree against one Bháiji, the father of the minor opponent, and after Bháiji's death proceeded to execute it by attachment and sale of his land in the hands of the opponent. The opponent through his mother and guardian applied to have the attachment removed on the ground that the land was ancestral undivided property, and was not liable for Bháiji's debts after his death, and that the debt in dispute was not contracted by Bháiji for family purposes. The applicant contended that the debt for which the decree was obtained had been incurred by Bháiji for the benefit of the family, and that the opponent succeeded to the ancestral estate burdened with the payment of his father's debt.

The Subordinate Judge treated the opponent's application as falling under section 244 of the Civil Procedure Code (Act XIV of 1882) and removed the attachment.

On appeal by the applicant, the District Judge confirmed the decision of the Subordinate Judge.

The applicant now applied under the extraordinary jurisdiction of the High Court, and obtained a rule *nisi* calling on the opponent to show cause why the order of the District Court should not be set aside.

Govárdhanrám M. Tripathi, for the applicant, in support of the rule :—The question is whether a money-decree against a Hindu

(1) I. L. R., 11 Mad., 413. (2) I. L. R., 16 All., 419.

father is binding on the sons after the death of the father to the extent of the assets they have received. The authorities on the point are in conflict. The High Courts at Madras and Allahabad have held that it is not binding, while the High Courts at Bombay and Calcutta have held that it is binding.

There was no appearance for the opponent.

The following authorities were cited in argument:—*Maganlál* v. *Soma Hirachand*(1); *Sakhárám Rámchandra* v. *Govind Váman*(2); *Jagábhai Lalubhai* v. *Vijbhukandás*(3); *Cooverji Hirji* v. *Dewsey Bhoja*(4); *Nanomi* v. *Modun Mohun*(5); *Punchánun Bundopádhya* v. *Rabia Bibi*(6); *Lachmi Náráin* v. *Kunjilál*(7); *Karnataka Hanumantha* v. *Andukuri Hanumayya*(8); *Ariabudra* v. *Dorasami*(9); Mayne's Hindu Law, arts. 321 to 323; White's Act (Bom. Act VII of 1866), sec. 5.

SARGENT, C. J.:—The question which we have to decide is whether when a money-decree has been obtained against the father of an undivided Hindu family, execution can be had after his death against his sons to the extent of the ancestral property that has come into their hands. The matter has recently been considered, and the question answered in the negative by the Allahabad High Court in the case of *Lachmi Náráin* v. *Kunjilál*(7); but the decision cannot be reconciled with the judgment of this Court in *Jagábhai* v. *Vijbhukandás*(3), in which it was held that ancestral property in the hands of sons could be attached in execution of a money-decree against their deceased father with whom they had remained united until his death.

It cannot be denied that the wording of section 234, Civil Procedure Code, presents an obstacle to proceedings in execution against the sons as the legal representatives of their father in respect of the ancestral property as it vests in them by birth and survivorship, and cannot be described as the property of the deceased which has come into their hands. But the answer to the question turns upon the inference to be drawn from the recent

(1) P. J., 1889, p. 191.
(2) 10 Bom. H. C. Rep., 361.
(3) I. L. R., 11 Bom., 37.
(4) I. L. R., 17 Bom., 718.
(5) L. R., 13 I. App., 1.
(6) I. L. R., 17 Calc., 711.
(7) I. L. R., 16 All., 449.
(8) I. L. R., 5 Mad., 232.
(9) I. L. R., 11 Mad., 413.

1895.

UMED HATHISING v. GOMAN BHA'IJI.

decisions of the Privy Council as to the right of creditors to realize their claim against the father out of the entire estate. In *Jagábhai* v. *Vijbhukandás* Mr. Justice West says, in reference to the decision of the Privy Council in *Mussámut Nanomi* v. *Modun Mohun*[1], which it is to be observed was the case of a money-decree, "The father in fact is made the representative of the family, both in transaction 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." It will be safer perhaps to rely on the language of Lord Hobhouse, who delivered the judgment of the Privy Council in the above case, as to the principle laid down by the decisions of that Court. He says: "Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality." Again His Lordship says: "If the debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own."

Such being the general principle as to the power of the father to bind the interest of the sons in a suit against the father, there may doubtless be cases in which having regard to the execution proceedings it is to be inferred that it was only the father's estate which was intended to be sold, such as *Deendyal* v. *Jugdeep*[2], *Hurdey Narain* v. *Baboo Rooder*[3], *Mahabir* v. *Rai Markunda*[4], which are important decisions as showing the nature of the distinctions which may be drawn having regard to the nature of the suit and the execution proceedings; but it being distinctly established by the Privy Council's decisions that the creditor can attach and sell the entirety of the estate in execution of a money decree against the father, we are unable to agree

(1) L. R. 13 I. App., 1.
(2) L. R. 4 I. A., 247.
(3) L. R. 11 I. A., 26.
(4) L. R. 17 I. A., 11.

with what is said by the Madras High Court in *Ariabudra* v. *Dorásami*[1], and which is much relied on in the judgment of the Allahabad High Court in *Lachmi Náráin* v. *Kunjilál*[2], that the obligation of the sons to satisfy their father's debts is not within the scope of the decree against the father. On the contrary it appears to us that the judgment of Lord Hobhouse above referred to treats it throughout as being so, whether on the ground of representation of the sons by their father as stated by West, J., in *Jagábhai* v. *Vijbhukandás*[3] or on the ground that the creditor has the power to attach and sell the entire interest in the land in execution proceedings against the father. If the son, against whom the decree is sought to be executed, as the representative of his father, takes the objection that the debts were tainted with immorality, he can do so under section 244 as decided by the majority of the Full Bench in *Seth Chand* v. *Durga Dei*[4] in the analogous case in which the objection was taken by the sons, that the property sought to be attached was not assets in their hands or at any rate under section 278, Civil Procedure Code (Act XIV of 1882), which Tyrrel, J., considered to be the proper course. The Subordinate Judge has noticed that in the case of *Jagábhai* v. *Vijbhukandás* the debt was incurred for the benefit of the family, but the result would have been precisely the same if it had been incurred for the sole purposes of the father, provided it was not tainted with immorality or illegality.

Under these circumstances we think that in refusing in this case to entertain the execution proceedings against the sons to the extent of the ancestral property that had come into their hands, the lower Courts failed to exercise a jurisdiction vested in them by law, inasmuch as it was their duty to grant execution to such extent unless the sons who had been made parties to the record as representatives of their deceased father succeeded in proving that the debt was not one for which they could be made liable by Hindu law.

We accordingly discharge the orders of the lower Courts and direct the Subordinate Judge to restore the *darkhást* to his file

(1) I. L. R., 11 Mad., 413.
(2) I. L. R., 16 All., 449.
(3) I. L. R., 11 Bom., 37.
(4) I. L. R., 12 All., 314.

1895.

UMED HATHISING v. GOMAN BHA'IJI.

and dispose of it in conformity with the above remarks. The applicant to have his costs of this application if he should succeed in the execution proceedings.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

1895. *March* 12.

DESA'I LALLUBHAI JETHA'BHAI (ORIGINAL DEFENDANT NO. 7), APPELLANT, *v.* MUNDA'S KUBERDA'S (ORIGINAL PLAINTIFF), RESPONDENT.*

Mortgage—Priorities—Registration Act III of 1877, *Sec.* 50—*Sale in execution of decree on prior unregistered mortgage—Rights of purchaser—Claim of subsequent mortgagee in possession under registered mortgage—Rights of such subsequent mortgagee where he was not a party to the suit on prior mortgage—Transfer of Property Act* (*IV of* 1882), *Sec.* 75.

In October, 1887, the plaintiff purchased certain lands at a sale held in execution of a decree passed on an unregistered mortgage effected in 1862. The defendant was in possession as mortgagee under a subsequent registered mortgage of 1867. He was not a party to the suit and decree of 1887. The plaintiff sued for possession. The defendant claimed that the plaintiff could not recover possession without paying off his (the defendant's) claim.

Held that at the execution sale the plaintiff bought the property in dispute free from all subsequent incumbrances, subject only to the right of the defendant, if he so desired, to retain possession.

Held also that the plaintiff as purchaser stood in the place of the prior mortgagee and had a right to possession; that the defendant as subsequent mortgagee could not compel the plaintiff to pay off his (the defendant's) mortgage, but that the defendant not having been a party to the suit on the prior mortgage had a right, if he wished to retain possession, to pay off the plaintiff's claim.

Mohan Manor v. *Toga Uka*(1) referred to and followed.

Registration under Act III of 1877 does not operate so as to exclude instruments executed before Act XX of 1864 came into operation on the ground of their non-registration.

Tirumala v. *Lakshmi*(2) referred to and followed.

SECOND appeal from J. FitzMaurice, Assistant Judge of Ahmedabad.

Suit for possession of a godown and certain lands.

In February, 1862, one Nathubhai and his sons mortgaged the property in question by an unregistered *san*-mortgage-deed to Bhogilál and Kálidás.

* Second Appeal, No. 880 of 1893.

(1) I. L. R., 10 Bom., 224. (2) I. L. R., 2 Mad., 147.