

finding as conclusive that the 450 rupees were due to plaintiff and not to Chanáppá—*Hemanta Kumari Debi v. Broje Kishore Roy Chowdry*<sup>(1)</sup>.

Without, therefore, intending to suggest that his conclusion was wrong, or to express any opinion directly or indirectly on the merits of the case, we must, for the reasons above stated, reverse the decree of the Court below and send back the case for a fresh decision on the merits on the evidence as it stands. Cost to abide the result.

*Decree reversed.*

(1) I. L. R., 17 Calc., 875; L. R., 17 I. A., 69.

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## APPELLATE CIVIL.

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*Before Mr. Justice Bayley and Mr. Justice Telang.*

RANGA'YA'NA SHRINIVASA'PPA', (ORIGINAL PLAINTIFF), APPELLANT,  
v. GANAPABHATTA, (ORIGINAL DEFENDANT), RESPONDENT.\*

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*Hindu law—Alienation—Mortgage by a co-parcener—Liability of his share after his death to satisfy the mortgage.*

Where a member of a joint Hindu family makes a mortgage, such mortgage, being good when made, creates a valid charge on the property to the extent of his share, which cannot be defeated by his death.

SECOND appeal from the decision of Gilmour McCorkell, District Judge of Kánara, in Appeal No. 132 of 1889 of the District File.

Timápá, the uncle of defendant No. 1, mortgaged his share in the joint family property to the plaintiff in 1867. On this mortgage the plaintiff obtained a decree, but before it was executed Timápá died. After his death, his share in the joint family property was attached in execution of the mortgage decree.

The defendant No. 1 objected to the attachment, on the ground that Timápá's interest in the property had ceased to exist. His objection was allowed, and the attachment was raised.

\* Second Appeal, No. 234 of 1890,

The plaintiff thereupon filed the present suit for a declaration that the property in dispute was liable to attachment and in execution of his decree against the deceased Timápá.

Both the lower Courts rejected the plaintiff's claim, holding, the authority of *Udarám Sitárám v. Ránu Pánduji*<sup>(1)</sup>, that on Timápá's death the family property had passed by survivorship to his co-parcener, defendant No. 1, and was not liable in his hands to satisfy the decree obtained against Timápá.

Against this decision the plaintiff preferred a second appeal to the High Court.

*Ghanashám Nilkant Nádkarni* for appellant :—It is the settled law in this Presidency that a co-parcener can alienate his share in the undivided family property for valuable consideration—*Vásudev Bhat v. Venkatesh Sanbhar*<sup>(2)</sup>. Such alienation, whether by sale or mortgage, binds the family estate to the extent of his share, even after his death. The ruling in *Udarám Sitárám v. Ránu Pánduji*<sup>(3)</sup> does not apply to a case like the present.

There was no appearance for the respondent.

TELANG, J.:—The District Judge does not appear to have noticed the distinction which exists between cases in which a co-parcener dies without having made a mortgage of his share and those in which he does enter into such a transaction<sup>(4)</sup>. In cases of the former class, no doubt, *Udarám Sitárám v. Ránu Pánduji*<sup>(5)</sup>, which he relies upon, is a binding authority, except in so far as it approved of *Goor Pershad v. Sheodeen*<sup>(6)</sup>. To that extent, that is to say, as regards those cases where although no specific charge is created by the co-parcener himself on his share, still an attachment has been placed on that share before the co-parcener's death, it must be taken to have been modified by the Privy Council's decision in *Suraj Bansi Koer v. Sheo Proshád Singh*<sup>(7)</sup>. In cases of the latter class, however, that is, where the co-parcener himself makes a mortgage, such mortgage being good when made, creates a specific right in favour of the creditor (see *Vásudev*

(1) 11 Bom. H. C. Rep., 76.

(5) 11 Bom. H. C. Rep., at p. 80.

(2) 10 Bom. H. C. Rep., 139.

(6) 4 N.-W. P. Rep., 137.

(3) 11 Bom. H. C. Rep., at p. 80.

(7) I. L. R., 5 Calc., 148; L. R., 6 I. A., p. 88.

(4) Comp. *Kompo Konan v. Chinayan* quoted in Mayne's H. L., pl. 306, and the observations thereon at I. L. R., 5 Calc., 168.

*Bhat v. Venkatesh Sanbhav*<sup>(1)</sup> ; or, to borrow the language of the Privy Council used in reference to an attachment of a co-parcener's share, it creates a valid charge on the property to the extent of the parcener's undivided share and interest therein which cannot be defeated by the death of that parcener.

We must accordingly hold that the share of the deceased Timápá in this case is, by virtue of the mortgage made by him, liable in the hands of the first defendant for the debt due on the mortgage, which is ordered to be realized by the decree in Sn. No. 36 of 1879. The decree of the Court below must, therefore, be reversed, and the declaration prayed for in the plaint must be made in favour of the plaintiff. Defendant must pay the plaintiff his costs throughout.

*Decree reversed.*

(1) 10 Bom. H. C. Rep., 139, and compare 11 Bom. H. C. Rep. at p. 81 ; and I. L. R., 5 Calc., at pp. 173-4.

## APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Birdwood, and Mr. Justice Candy.*

SINA'PAYA BIN RA'MA'PAYA HARIDA'S, PLAINTIFF, v. SHIVA'PA BIN SHIDA'PA' BA'MNI, DEFENDANT.\*

*Instrument—Conveyance—Consideration—The General Stamp Act (I of 1879), Sec. 24—Agreement—Stamp—Construction.*

Where under an instrument a mortgagor relinquished his title to the mortgaged property in favour of the mortgagee and also agreed to pay the Government assessment until the transfer of the land to the name of the mortgagee-purchaser in the Collector's books,

*Held*, that such an instrument was a conveyance of which the amount of the consideration calculated according to section 24 of the General Stamp Act (I of 1879) was the original mortgage amount plus the amount mentioned in the instrument.

*Held*, also, that the instrument was an agreement to pay assessment until the land conveyed was transferred in the Collector's books, and as such should bear the additional stamp for an agreement, namely annas eight.

THIS was a reference made to the High Court by Ráo Sáheb Vináyak Vithal Tilak, Subordinate Judge of Bijápur, under section 49 of the General Stamp Act (I of 1879).

The reference was made in the following terms :—

“As I feel doubt as to the amount of duty to be paid in respect of Exhibit A produced in Suit No. 380 of 1889, I have the honour,

\* Civil Reference, No. 25 of 1890.