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There is another reason for coming to this conclusion. The sale under a decree is an important matter. It has greater effect than an ordinary sale; and the Legislature may have thought that a shorter period ought to be allowed for impeaching it.

The decree of the lower court is, therefore, affirmed.

Decree affirmed.

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Jan. 11.

Special Appeal No. 237 *of* 1864.

BÁ BÁJI SAKHOJI.... .... *Appellant.*

RÁMSHE HÁNDUSHET and another.... ... *Respondents.*

Ancestral Land, Sale of—Suit to Set Aside—Burden of Proof—Common Family Necessity.

In a suit brought by a Hindu son, for himself and in behalf of three infant brothers, to set aside a sale of certain ancestral lands, which had been made by his father without his concurrence :—

Held that the *onus* of proving that the payment of the debts on account of which the property was sold, was not a common family necessity, was properly laid by the District Judge upon the plaintiff.

THIS was a special appeal from the decision of C. Gonne, Joint Judge of the Konkan District, in appeal Suit No. 79 of 1861.

The case was heard before TUCKER and WARDEN. JJ.

Ma'dhavra'v Krishna Kharkar for the Appellant.

MeCombie (with him *Dhirajla'l Mathura'das*) for the respondent.

The facts are stated in the judgment.

Cur, adv. vlt.

TUCKER. :—This action was brought by a Hindu son, for himself and on behalf of three infant brothers, to set aside a sale of certain ancestral lands, which had been made by his father without his concurrence.

Both the father and the purchaser were made defendants. The father did not answer, but appeared at the trial, and was examined, when he stated that he had not received full consideration for the deeds which he had executed.

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The purchaser answered that the father was the head of the family, and the manager of its affairs, and that he had sold the property for the joint family benefit.

The sale was made on the 18th of February 1859; and the suit was instituted on the 25th of September 1860.

The Munsif who first tried the cause declared that the father was competent to alienate the property, and upheld the sale.

On appeal the Principal Sadr Amin of Tha'na reversed the Munsif's decree, on the ground of a previous decision of the late Sadr Divani Adalat, by which it had been decided that a *kunba'va'* was not property, and, therefore, independent of the Hindu law of inheritance.

On a special appeal this decree was reversed by the High Court, and the case remanded that it might be determined whether the plaintiff's father had a right to alienate the lands in dispute or not.

At the second trial in the lower appellate court the District Judge decided that the plaintiff and his brothers were all minors at the time the sale was made; that it was established that the property had been sold for the payment of certain judgment debts; and that the plaintiff had *not* proved that the payment of these debts was not a common family necessity. He, therefore, affirmed the original decree of the Munsif.

It has been urged by Mr. Mádhavráv in special appeal that the *onus* of proof has been improperly laid: that it was for the purchaser to show that the debts had been incurred for the common family benefit, and not for the son to prove that the liability had not arisen out of a common family necessity. It has also been argued that, as the question, whether the eldest son was an infant or of full age at the time of sale, had not been raised as a definite and distinct issue by the District Judge, he was not justified in declaring the infancy to be established on the evidence adduced, The case of *Tandavaraya Mudali* v. *Valli Ammal* (*a*) and *Trimbuk Anunt* v. *Gopalshet* (*b*) were cited by *Mr. Ma'dhavra'v.*

(*a*) 1 Mad H. C. Rep., 398. (*b*) 1 Bom. H. C. Rep., 27.

Mr. McCombie, on the other side, has contended that the purchaser has established all that was necessary for his case, namely, that the property was sold for a common family necessity. Decrees had been passed against the father, and if he had been taken in execution the whole of the infant family must have suffered. In a case like the present one the burden of proof had been properly cast upon the plaintiff. He cited *Hanoomanprasad Panday* v. *Mussumut Babooee Munraj Koonweree* (*c*) and *Oomed Rai* v. *Hiralal*. (*d*)

We are of opinion that in the present suit the District Judge has rightly thrown the burden of proof on the plaintiff, who disputes the validity of the sale effected by his father.

By the decision of the Privy Council which has been cited, the law on this subject has been enunciated as follows:—"The question on whom does the *onus* of proof lie in such suits as the present is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated and dependent on them." In the same judgment a *dictum* of the Agra Sadr Court in the case of *Oomed Rai* v. *Hiralal*, to the effect that "if the *factum* of a deed of charge by the manager for an infant be established, and the fact of the advance be proved, the presumption of law is *prima facie* to support the charge, and the *onus* of disproving it lies on the heir," is quoted; and it is declared with reference to it: "The dictum, then, though general, must be read in connection with the facts of that case. It might be a very correct course to adopt with reference to suits of that particular character, which was one where the sons of a living father were, with his suspected collusion, attempting, in a suit against a creditor, to get rid of the charge on an ancestral estate created by the father, on the ground of the alleged misconduct of the father in extravagant waste of the estate. Now it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know or come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate; whilst the

(*c*) 6 Moo. Ind. App., 393. (*d*) 6 S. D. A. Dec. N. W. P., 128.

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antecedents of their father's career would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger. Consequently, this 'dictum' may perhaps be supported on the general principle that the allegation and proof of facts presumably in his better knowledge is to be looked for from the party who possesses that better knowledge, as well as on the obvious ground in such suits of the danger of collusion between father and sons in fraud of the creditor of the father.'

Now the circumstances of the present suit are nearly identical with the case described in the judgment of the Privy Council. From the father's answers, when under examination, there is every reason to suspect collusion between himself and his sons to recover the lands from the purchaser; and the only difference between the two cases is that in the one the property has been permanently alienated while in the other it was only incumbered, by the father. In the present case, too, there is the additional fact that the property was sold to satisfy decrees which had been passed against the father. It has been stated in the course of the argument that one of these decrees was obtained against the father as surety for some third person, and that it may be presumed that this liability at any rate did not arise out of any common family necessity. We do not think that we can equitably form any such conclusion. The circumstances under which the father became surety are wholly unexplained; and we consider that it was for the plaintiff to show that there was anything in the character and circumstances of the act which would exempt the family property from liability.

We do not consider that the decisions in *Trimbuk Anunt* v. *Gopalshet* and in *Ta'ndavara'ya Mudali* v. *Valli Ammal* militate with our present view. The circumstances of both of these cases are plainly distinguishable from the present suit; and, the principle being that the imposition of the burden of proof on the one party or the other will vary in accordance with the circumstances of each particular case the course adopted in either of those causes is not one that we need necessarily follow in the present instance.

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With respect to the only other point in the memorandum of special appeal which has been argued, we are clearly of opinion that the question of the age of the eldest son at the time of the sale was substantially raised by the issue laid down in the lower appellate court at the second trial; and that, therefore, it was not only competent to the District Judge, but was indeed obligatory upon him, to determine this question of fact.

On the above grounds, we affirm the decree of the District Judge, and direct that the special appellant bear all the costs of this special appeal.

Decree affirmed.

Special Appeal No. 645 *of* 1864.

Jan. 25.

DEVÁJI GOYÁJI and others . . . . . *Appellants.*

GODADBHÁI GODEBHÁI and another. . . . . *Respondents.*

Possession—Proof of Deed—Conduct of Suit—Special Appeal.

A sued B, in 1841, to recover possession of certain villages in Gujarát, B produced a deed, purporting to be a conveyance by way of mortgage by A's ancestors of their 6/16th share in the villages to B's ancestors. A at first denied the genuineness of the deed; but the suit of 1841 having been withdrawn by consent, with a view to arbitration—took no steps to have the question decided, until the deed was again produced (from the records of the court where it remained meanwhile) in the present suit, brought, in 1859, by A against B to recover the same villages.

Held, in the absence of evidence to show that the defendants, by their conduct during the interval, had admitted that the deed was not genuine, or that they did not intend to rely upon it, so as to mislead the plaintiffs, that the time which elapsed must be taken into account, and that they ought not to be required to prove the deed in the same way as they might have been when it was first produced and relied upon by them.

Held, also, that the High Court, sitting in special appeal, will not examine the evidence, with a view to determine whether such a document be genuine or not; nor will it consider the question, whether there is any evidence to connect the plaintiffs with the parties to the deed, when the suit appears to have been conducted in the courts below as if this was admitted.

THIS was a special appeal from the decision of C. H Cameron, District Judge of Ahmedábád, in Appeal Suit No. 174 of 1860, affirming the decree of the Munsif of Gogo in Original Suit No. 363 of 1859.