ORIGINAL JURISDICTION. (*a*)

Original Suit No. 179 *of* 1863.

VIRASVAMI GRÁMINI *against* AYYASVÁMI GRÁMINI.

According to the Hindu law current in Madras, the member of an undivided family may alien the share of the family property to which, if a partition took place, he would be individually entitled.

There may be a valid sale of such a share upon an execution in an action of damages for a tort.

Such damages and the costs recovered constitute a judgment-debt in respect of which the execution-creditor's rights are the same as those upon any other judgment for the payment of money.

Special Appeals Nos. 17 *of* 1859 and 113 *of* 1855 affirmed.

Special Appeals Nos. 123 *of* 1859, 183 *of* 1859, and 167 *of* 1859 observed upon.

The *Daya-bhaga*, chap. II., Sec. 31 noticed :

Although under the Civil Procedure Code, the Court is bound to take into consideration all the rights of the parties to the suit, whether legal or equitable, and by its decree to give effect to those rights as far as possible, the Court should confine itself to granting such relief as is prayed in the plaint.

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THE relief sought for by the plaintiff was possession of two houses and grounds, numbered respectively 82 and 83 in Chule Bazar Road, within the local limits of Madras.

The subject of his claim was as follows:—

On the 17th January 1859, the plaintiff filed a plaint in trespass in the late Supreme Court to recover damages against Pallikudattán Periya Muniyan, Chinna Muniyan, Venkatachella Grámini, Rámasvámi Grámini, the defendant Ayyasvámi Grámini and Rámalinga Grámini and Murugappa Grámini.

On the 26th day of September 1859, the action came on for trial, and a verdict was found for the plaintiff against all the defendants for the sum of rupees 300.

Judgment was entered up in such action in October 1859 for the sum of rupees 992-14-0, being the amount of verdict and the taxed costs.

On the 27th of October 1859, a writ of fieri facias was issued in the said action, and the Sheriff of Madras under such writ seized the two houses Nos. 82 and 83 in the Chule Bazar Road ; and on the 3rd December 1859, the Sheriff sold all the right, title and interest of the defendants in the two houses to the plaintiff.

(*a*) Present : Scotland, C. J. and Bittleston, J.

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The plaint alleged that the two houses at the time of the sale belonged to the defendant Ayyasvámi Grámini, and he had been residing there ever since.

The cause of action in this suit was non-delivery of possession by the defendant to the plaintiff of the two houses and grounds Nos. 82 and 83 in the Chule Bazar road and accrued to the plaintiff in 1859.

Three issues were settled. The first was, whether at the time of the sale by the Sheriff, the two houses and grounds or either of them, were or was the sole and exclusive property of the defendant Ayyasvámi Grámini ?

The second issue was, whether the plaintiff by virtue of such sale acquired any and what title or interest in the houses and grounds or either of them ?

The third issue was, whether at the time of the sale by the Sheriff there was any valid and subsisting mortgage of the house and ground No. 82.

The Acting Advocate General (*Norton*) for the plaintiff. The late Supreme Court always supported alienations by an undivided Hindu to the extent of his own share, *Ramasamy* v. *Sashachella* (*a*) : Colebrook's opinion on that case, 2 Str., N. C. (ed. 1827) 79, 80 cited infra, p. 474. The same rule prevails in Bengal : 1 Morl. Dig., 40, 41. Counsel also cited *Special Appeal No.* 17 *of* 1852 (*b*), *Special Appeal No.* 113 *of* 1855 (*c*).

Mayne, for the first three defendants. The sale by the Sheriff passed no interest in the family property. Even if the sale had been made by Ayyasvámi himself without his co-parceners' consent, the alienation would have been void even as to his own share. *A fortiori* this must be so when the sale is made upon an execution in an action of damages for a tort. The existence of the rule in Bengal is admitted, but there the share of each parcener is, though unascertained treated as separate even before partition, *Daya*, *Bhaga*, chap. II, sec. 31 (*d*). Otherwise in Madras. Counsel also cited *Special*

(*a*) 2 Strange, N. C. (ed. 1827) 74. (*b*) Mad. S. Dec. 1853, p. 227, (*c*) Mad. S. Dec. 1855, p. 234. (*d*) "Accordingly [since there is not in such case a nullity of gift or alienation] Nárada says : When there are many persons sprung from one man, who have duties apart and transactions apart, and are separate in business and character, if they be not accordant in affaris' should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth."—See too, 1 Morl. Dig., 535.

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Appeal No. 123 *of* 1859(*a*), *Special Appeal No.* 183 *of* 1859(*b*) and *Special Appeal No.* 167 *of* 1859(*c*).

Arthur Branson, for the fourth defendant.

The Acting Advocate General, replied.

The first and third issues where then found against the plaintiff. But as to the second issue the Court took time to consider, and on the 15th of December the following judgment was delivered by

SCOTLAND, C. J. :—This was a suit for the recovery of two houses and permises numbered respectively 82 and 83, in the Chule Bazaar road, which the plaintiff had purchased at a sale by the Sheriff of Madras under a writ of fieri facias issued to recover the amount of damages and costs in an action of trespass against the defendant Ayyasvámi Gramini and others. Three issues were settled. The first was whether at the time of the sale the houses and premises were the sole and exclusive property of the defendant Ayyasvámi Grámini, and the third, whether at the time of the sale there was any valid and subsisting mortgage of the house No. 82. The Court disposed of these issues at the close of the case, finding the first in the negative, and the third in the affirmative, and both against the plaintiff. But the second issue raised a further question whether, assuming the houses and premises to be the property of the undivided family of which Ayyasvámi and the defendants Ayyasvámi Grámini and Devane Ammál are members, the plaintiff by virtue of such sale acquired any and what title and interest in the same ; and upon this question we have now to give judgment.

For the defendants it was contended as a matter of law that the sale by the Sheriff passed no interest whatever in the family property ; for that even if it had been an alienation by Ayyasvámi himself without the consent of his coparceners, such alienation would have been void and inoperative even to the extent of his own share ; and this being a sale upon an execution in an action of damages for a tort was put as an *a fortiori* case. But we are of opinion that Ayyasvámi might have made a valid alienation of his share

(*a*) Mad. S. Dec. 1860, p. 17. (*b*) Mad. S. Dec. 1860, p. 67.
(*c*) Mad. S. Dec. 1859, p. 270.

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and interest in the property, and that it passed under the sale in execution by the Sheriff. As regards the supposed distinction where, as in the present case, the execution is for damages for a tort, we think that the damages and costs recovered constitute a judgment-debt, and the right of the execution-creditor thereunder, is the same as upon any other judgment for the payment of money. To hold differently in this case would be in effect to declare the pecuniary immunity of all members of undivided Hindu families not possessing self-acquired property for any wrong, however great, which they may commit.

Mr. Mayne, however, mainly relied upon the general ground that no alienation by a member of an undivided Hindu family without the consent of his co-parceners can bind even his own share; and he asked our consideration of several decisions of the late Sadr Court upon this subject. It was not disputed that the course of decision in the late Supreme Court since at least the case of *Ramaswamy* v. *Sashachella*(*a*), and the opinion expressed by Mr. Colebrooke in his observations upon that case(*b*), supported the validity

(*a*) 2 Strange, N. C. ed., 1827, p. 74.

(*b*) "On the subject of the question which you had lately before you, I entirely agree with you that a mortgage (sale or gift) by one of several joint owners, without the consent of the rest, is invalid for other's shares. In Bengal law, it is clear that it is good for his own share, and for his only. In the other provinces, it is as clear that the act is invalid, as it concerns other's shares; and the only doubt, which the subtlety of Hindu reasoning might raise, would be, whether it be maintainable even for his own share, of undivided property. On the two first points, then, as stated by you, the law is, undoubtedly, as you have viewed it. On the third point, I take the law to be, that the consent of the sharers, express or implied, is indispensable to a valid alienation of joint property, beyond the share of the actual aliener; and that an unauthorized alienation by one of the sharers is invalid, beyond the aliener's share, as against the alienees. But consent is implied, and may be presumed in many cases, and under a variety of circumstances, especially where the management of the joint property, entrusted to the part-owner who disposes of it, did suppose a power of disposal; or, where he was the only ostensible and avowed owner; and generally, when the acts, or even the silence of the other sharers have given him a credit, and the alienee had not notice(*c*). I cannot refer you to authority, beyond the passages to which you have already adverted, for this position. I rather consider it to be a point of evidence, what shall suffice to raise the presumption of consent or acquiescence than a matter on which the Hindu law has pronounced specifically: and I do not recollect any passage more express than those to which you have referred, showing that the alienation is invalid as against the alienee.

The case of *Prannath* v. *Calishunker* (*d*) to which you refer, was, I conceive, determined on the ground of implied consent; the land being answerable for the revenue which the managing owner had engaged on the part of himself and sharers; besides other peculiar circumstances in the case."

(*c*) See case of *Comarah Pillay* v. *Permal P. and others.*

(*b*) Reports in *Sudder Adawlut, Bengal*, previously to 1805, p. 49, 51.

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of such an alienation to the extent of the alienor's own share: nor that the same rule of law prevails in Bengal. But it was said that there is a foundation for the rule in Bengal which does not exist according to the Hindu law applicable to Madras, for that in Bengal the share of each parcener is treated as separate even before partition, though unascertained.

In support of this the 31st section of the second chapter of the *Daya Bhaga* was referred to. But that section appears to be a quotation from Nárada, and according to Mr. Colebrooke's note to the passage it is otherwise interpreted by different compilers, and is generally understood as declaring the separate and independent right of co-heirs who have made a partition; and certainly the language of the passage itself refers to a condition of separation of some extent. But we do find in chap. 11, sec, 1, § 26, on the widow's right of succession, that the author, in the course of a discussion upon the contradictory statements of text-writers and commentators, makes the observation that "it is not true that, in the instance of re-union [and of a subsisting co-parcenery] what belongs to one appertains also to the other parcener. But the property is referred severally to unascertained portions of the aggregate. Both parceners have not a proprietary right to the whole." This observation, however, is used only in reply to the the argument, that the preferable right of the surviving parceners may be deduced by inference from the fact that "the same goods, which appertain to one brother, belong to another likewise," and that "when the right of one ceases by his demise, those goods belong exclusively to the survivor, since his ownership is not divested." But according to both schools of Hindu law the right of survivorship is not absolute, and the undivided share, according to both, descends to his sons; and it seems to us that the real ground upon which the widow's right of succession is placed in the *Daya Bhaga* is the authority of Vrihaspati, who says that "a wife is declared by the wise to be half the body of her husband, equally sharing the fruit of pure and impure acts. Of him whose wife is not deceased half the body survives." Adding by way of question "How then should another take his property while half his person is alive?" So that the right in truth rests upon the

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oneness of husband and wife, and not upon the existence of a separate estate and interest of the husband in the property during his life. Such a separate estate as a matter of inference might be deduced as well from the descent of the father's undivided share to sons, which is common to both schools of law, as from its descent to his widow, which is peculiar to the Bengal school. It is further to be observed that whatever distinction there exists In this respect was certainly present to the minds of Mr. Colebrooke and of the Judges who decided the cases above referred to.

It only remains for us to notice the Sadr Court decisions to which our attention was called. We have looked at these cases, seven in number, and we find that three of them expressly decide that one of several co-parceners may bind his own share by alienation and that it is liable for his individual debt. These are the decisions to be found at p. 222 of the Reports for 1853, at p. 235 of Reports of 1855 and at p. 247 of the Reports for 1860, which is the latest case. There are, however, in the volume for 1860, two decisions in which the contrary is held. One of these, at page 67, is rested upon the authority of the other at p. 17, and that again is rested upon the authority of the decision at p. 270 of the Reports of 1859. Looking at that case it does not seem to go the length supposed in the two last mentioned cases : for the judgment in terms recognizes the power of the co-parcener to confer upon the purchaser a right to what might eventually fall to his share at division, and the suit being for the recovery of a specific portion of property upon an alleged division, which was disbelieved, appears to have been properly dismissed. As to the decision at p.215 of the Reports for 1854,we need only say that the court appears to have proceeded upon the ground that the managing member having the control of the family property in his own hands could not proceed by suit and process to enforce his individual claim against the property.

We see nothing in these decisions that materially conflicts with (and some of them support) the opinion we have above expressed, and Sir Thos. Strange in the first volume of his work of authority, at p. 202, expressly says " that in favour of a *bona fidè* alienee of un-

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divided property, where the sale or mortgage could not be sustained as against the family, such amends as it could afford would be due out of the share of him with whom he had dealt, and for this purpose a court would be warranted in enforcing a partition." What the purchaser or execution creditor of the co-parcener is entitled to is the share to which if a partition took place the co-parcener himself would be individually entitled, the amount of such share of course depending upon the state of the family. In this case there appear to be two brothers and a step-mother, and the share of each brother is a moiety. There is no evidence of Ayyasvámi's having sons. If he had, they would no doubt be entitled to shares in their father's moiety, and so the property available for the plaintiff would to the extent of their shares be reduced; and except in this way the existence of sons would not, we think, affect the plaintiff's right. Having then established his right to an undivided moiety subject to a charge of maintenance, we might, as in an action of ejectment in the late Supreme Court, have decreed to the plaintiff possession of the undivided moiety in both the houses, but for the mortgage that has been proved under the third issue; although further proceedings should be necessary in order to realize to the plaintiff the actual enjoyment of the moiety. In suits under the Civil Procedure Code, the court is certainly bound to take into consideration all the rights of the parties to the suit, whether legal or equitable, and by its decree to give effect to those rights as far as possible ; but we think that the court should confine itself to granting such relief as is prayed by the plaint. In the present case therefore, as the suit is simply for the recovery of possession, and as there was at the time of the sale by the Sheriff and at the institution of the suit a valid subsisting mortgage of the house No. 82, entitling the mortgagee to possession, the Court can only decree to the plaintiff the right to possession of Ayyasvámi's share in the house No. 83.

The plaintiff is to have the costs of the second issue, to be paid him by the first, third and fourth defendants. The plaintiff will pay all the defendants their general costs of suit.