

to protection against the claim of any member of an undivided family who was a minor when the transaction took place; the latter must be held bound by the acts of his manager.

*Decree reversed.*

NOTE.—As to the burden of proof in cases of the sale by the manager of the property of an undivided Hindú family, see further 2 Bom. H. C. Rep. pp. 23, 306, 348, 2nd ed.; 4 Bom. H. C. Rep., A. C. J. 169, and cases there cited.—Ed. 2nd ed.

1863.  
TRIMBAK  
A'NANT  
v.  
GOPA'LSHET  
M. MAHA'DU.

*Special Appeal No. 155 of 1863.*

Aug. 4.

GOPA'L, GOVIND, and NA'RA'YAN, the sons of

SANTU.....*Appellants.*

NA'RA'YAN bin TUKA'JI and MAHA'DU SAKHA'-

RA'M .....*Respondents.*

*Separation—Evidence—Recital in Deed of Mortgage.*

A recital in a deed of mortgage granted by one of two undivided brothers to a third party, that a division had taken place between the mortgagor and his brother, is no evidence of separation as against the latter or his representatives.

NA'RA'YAN and Mahádu, respondents, the plaintiffs below, instituted this suit in the Court of the Munsif of Kadá, in the Ahmednagar District, against Santu, the father of the appellants, to recover possession of a house which they asserted one Yessu, the brother of Santu, had mortgaged to them by a deed bearing date the 13th of Bhádrapad Vadya Shake 1779. One of the stipulations in this deed was that if the amount advanced on the mortgage was not repaid within six months from the date, the mortgage should merge into a sale; and that period had passed without redemption of the mortgage.

Santu having died subsequent to the filing of the suit, the names of his sons were entered as defendants. The defence set up was that no division of interests had taken place between Yessu, the grantor of the mortgage, and defendants' father, Santu; that, therefore, Yessu could not by his sole act alienate the property in dispute; and that Yessu was imbecile at the date of the mortgage and conditional sale.

The Munsif of Kadá, A'zam Anandráv Rájárám, found the plaintiffs had failed to prove payment of any consideration for the mortgage; that they had never been in possession of the mortgaged property, and had not brought forward the claim during the lifetime of Yessu: he, therefore, rejected the claim with costs.

1863.  
 GOPAL  
 SANTU *et al.*  
 v.  
 NARAYAN  
 TUKAJI *et al.*

On appeal, the Assistant Judge of Ahmednagar, W. H. Newnham, held that the Munsif had erred in requiring the plaintiffs to prove payment of consideration, the execution of the mortgage bond being established; further that it was for the defendants to negative the payment, which they had failed to do; and as Yessu, the mortgagor, died shortly after making the mortgage, the plaintiffs ought not to be prejudiced by not bringing their action during his lifetime, nor by the fact that no possession followed on the mortgage; that it was not shown that Yessu was of unsound mind, and that with respect to the plea that Yessu, being a member of an undivided Hindú family, was incompetent to alienate the property by his sole act, the very deed sued on showed the brothers were divided in interests. He accordingly reversed the Munsif's decree, and awarded as claimed, with all costs on the defendants.

A special appeal was thereupon preferred to the High Court, on the ground, among others, that, granting the construction put upon the deed sued on was correct, the Assistant Judge erred in law in receiving the bare admission of one of two brothers, that they were divided in interests, as conclusive proof on the point against the other brother, who was no party to the deed in which such recital was made.

*Dhirajlal Mathuradas* for the appellants.

*Ganesh Hari* for the respondents.

PER CURIAM (FORBES and WARDEN, JJ.):—The Court finds that, the original defendants having urged that no separation had taken place between their father, Santu, and Yessu, the Assistant Judge was in error in concluding that a statement upon the point contained in the bond passed by Yessu to the plaintiff Narayan was evidence of the separation as against them. The Court, therefore, reverses the decree of the lower court, and remands the case in order that the lower court may inquire into and decide the question of separation, and may pass a new decree on the merits, awarding costs.

*Decree reversed.*