Special Appeal No. 389 *of* 1867.

1867. Nov. 18.

GANE BHIVE PARAB *et al.* .....*Appellants.*

KANE BHIVE *et al.* .....*Respondents.*

Hindú Law—Separate Property—Undivided Family—Onus Probandi.

By Hindú law the burden of showing of what separate property consists lies upon the person who alleges the property to be separate.

A person lending money on the security of the property of an undivided Hindú family is bound to make inquiries as to the necessity that exists for such loan. If he lends the money after reasonable inquiry, and *bonâ fide* believing it will be properly expended, he is not bound to see to the application of it. The rule is the same whether all the members of the family are adults or minors.

Authorities bearing on the question of the *onus probandi* in such cases cited.

THIS was a Special Appeal from the decision of C. B. Izon, Joint Judge at Ratnágirí, in Appeal Suit No. 297 of 1866, affirming the decree of the Munsif of Vengurlá.

The Special Appeal was argued before COUCH, C.J., and NEWTON, J.

Bhairavanáth Mangesh for the appellant.

Dhirajlál Mathurádás for the respondent.

The facts of the case, so far as material, appear from the following judgment, delivered by

COUCH, C.J.:—This was a suit for the partition of a family estate, formerly of Bhive, the father of the plaintiffs, the defendant Gane being his eldest son, the defendant Thake a claimant of part of the property, and the defendant Bápu a mortgagee from Gane. Two questions were raised: (1) whether the estate of Bhive consisted of seven *ṭhikáṇs*, or only of the half of four as was alleged by the defendant Thake; and (2) whether the plaintiffs were chargeable with the amount of the mortgage to Bápu.

Upon the first of these the Joint Judge says: "On the first point the only evidence that all seven ṭhikáṇs belong to the separate kháte of Bhive, consists of the zapta of 1817 (exhibit 12) and the accounts (exhibit 80). The names of the

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fields are not given in the mortgage bond by Gaṇe to Ganeshám (exhibit 11), but there is no manner of doubt that Bhive's sons have a separate kháte (63 Thake's deposition, exhibit 14). Considering that there is no evidence that only half of four fields constitutes Bhive's kháte, I find the evidence referred to (exhibits 42 &c.) sufficiently proves that all seven ṭhikáṇs are included."

This reasoning appears to us to be erroneous. The Joint Judge has not borne in his mind that the onus of showing of what the separate property consisted lay upon the plaintiffs; and if the affirmative evidence was not sufficient to satisfy him that all seven ṭhikáṇs belonged to it, he ought not to have found that they did, because there was no evidence that it was only half of four fields. The suit must be remanded for a reconsideration of the evidence upon this question.

Upon the second question the facts were that Bhive mortgaged his estate in 1836, and after his death, the mortgagee having brought a suit and obtained a decree, Gaṇe, the eldest son and manager of the family, for the purpose of satisfying the claim, made a fresh mortgage (exhibit 11), and subsequently made a third mortgage to the defendant Bápu for a larger sum, part of which was said to have been applied in payment of the second mortgage. The Joint Judge says—"I agree with the lower court that the only debt with which the plaintiffs are chargeable is the debt of the father as shown in the bond (exhibit 11). I find the mortgage to Bápu not binding on them."

Here also we think the Judge was in error, and that he has not considered the question properly. He gives no reason for his opinion. Probably if he had attempted to do so, and had for that purpose examined into the state of the law on the point, he would have perceived his error. As this question will have to be again determined when the suit comes on for re-trial, it is right that the law applicable to it should be now stated. In *Govind Luxumon* v. *Sukharam Rajasht*, S. A. No. 1338 of 1861 (*a*), Govind sued for the

(*a*) 8 Harrington 159.

removal of an attachment from a half-share, to which, he urged, he was entitled, of certain properties which Sakhárám, having obtained a decree against Vithobá Angria, had proceeded to attach after the death of that individual. Sakhárám answered that Govind and Vithobá lived as an undivided family, and were jointly liable for the money borrowed from him. On appeal from the Munsif of Alíbág, the Judge held that, since the respondent Govind did not show that the alleged transaction was purely personal to Vithobá, who was then in charge of the estate, and although he was only a half-brother of Vithobá, it must be held, as regards the claim of third parties being creditors, that Vithobá was acting in his representative capacity until the opposite was established by the party claiming to interfere. On special appeal to the late Ṣadr Diváṇi Adálat, on the ground that the onus of proving that the debt was incurred for the benefit of the family should have been thrown on the defendant, the court held the passage referred to in Strange's Hindú Law (page 200), to the effect that creditors "at their peril must see in such a case that the transaction be one by which the rest of the co-heirs will be concluded," only to mean that persons lending to a member of an undivided family must take care that the transactions be entered into under such circumstances as would at the time justify them in considering that the borrower, being otherwise competent to act as the representative of the family, would lay out the money for the family's good, and not to require that the lender should ascertain the manner in which the money might subsequently be expended.

It has been held by this court, in a suit to recover possession of a house mortgaged by the manager of an undivided Hindú family where one of the members of it was a minor, that if the plaintiff, after reasonable inquiry, did in good faith believe that the mortgagor was manager, and wanted the money for family purposes, he would be entitled to recover, and that the onus of proving this was on the plaintiff: *Trimback Anant* v. *Gopalshet* (*b*); and there is a decision of the

(*b*) 1 Bom. H. C. Rep. 27.

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High Court of Madras, *Tandavaraya Mudale* v. *Valli Amai* (*c*), that when one of the members of a Hindú family is a minor, the creditor seeking to enforce his claim against the family property must show that the debt was contracted *boná fide* and for the benefit of the family. In *Nowruttun Kover* v. *Gooree Dutt Sing* (*d*), Sir Barnes Peacock and Mr. Justice Jackson held, in a case as to Hindú joint family property, that "although it may not be necessary for the lender of money upon zur-i-pesgee (mortgage), or for the purchaser of an estate which is actually sold, to see to the application of the purchase-money, still it is necessary for him to make due inquiry as to the necessity to borrow or sell; that if the necessity existed, or if the purchaser from inquiries *boná fide* made was led to believe that a necessity to sell existed, the sale would not be invalidated by the sellers failing to apply the money properly." Concurring in these decisions, we consider that the question to be determined by the lower court in the present case is, whether the defendant Bápu advanced the money, for which the mortgage to him was executed, *boná fide*, and believing, after making reasonable inquiries, that it was required for the support or other necessary expenses of the family. If he did so, it is a good charge upon the entire property.

With regard to the onus of proof in the present case, the Judicial Committee of the Privy Council have said, in *Hanoomanpursaud Panday* v. *Mussumat Babooe Munraj Koonweree* (*e*), that the question on whom does the onus of proof lie in such suits is one not capable of a general and inflexible answer: "the presumption proper to be made will vary with circumstances, and must be regulated by and dependent on them. Thus, where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour, made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the

(*c*) 6 Moor. Ind. App. 419. (*c*) 1 Mad. H. C. Rep. 398.
(*d*) 6 Calc. W. Rep., Civ. R. 193.

representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan." "The case before their Lordships is one of a mixed character; the existing security represents loans and transactions at various times and under varying circumstances; it is a consolidating security; and as to part, at least, namely, the ancestral debt, there is, in the opinion of their Lordships, ground to raise a *primâ facie* presumption in the appellant's (the mortgagee's) favour of a consideration that binds the estate." These observations are, in our opinion, as applicable where all the members of the family are adults as where one of them is an infant. The lower court, in determining the question now put before it, should be governed by these remarks, and should receive any further evidence which either of the parties may desire to give.

Decree reversed and suit remanded.

Special Appeal No. 539 *of* 1867.

Nov. 20.

RATANSHANKAR REVA'SHANKAR .....*Appellant.*
GULA'BSHANKAR LA'LSHANKAR.....*Respondent*

Jurisdiction—Varshásan—Gáikwád—Title—Small Cause Court—Extraordinary Jurisdiction.

In an action brought to recover a third-share of *arrears* of a *varshásan*, or annual allowance, paid by the Gáikwád of Barodá to the defendant, and in which the plaintiff alleged that he was entitled to a third-share:

Held that such an action can be maintained in a Munsif's Court, although it may be necessary to determine the title of the plaintiff to share in such *varshásan*.

Semble that such an action is maintainable in a Court of Small Causes.

Where the District Judge reversed the decree of the Munsif *for want of jurisdiction*, although the amount of the claim was under Rs. 500, the Court, in the exercise of its extraordinary jurisdiction, interfered.

THIS was a special appeal against the decision of C. G. Kemball, District Judge of Súrat, in Appeal Suit No. 74 of 1867, reversing the decree of the Munsif of Súrat.

The original suit was brought to recover arrears of a third-share of a *varshásan*, or annual allowance, collected for six years by the defendant.