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March 20, 31;
April 29.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 382 *of* 1872.

VA'SUDEV BHAT .....*Appellant.*

VENKATESH SANBHA'V .....*Respondent.*

Joint Hindu family—Alienation—Partition—Execution—Voluntary Payment—Consideration—Moral obligation—Request.

It is settled law in the Presidency of Bombay, that one of several parceners in a Hindu undivided family may, without the assent of his coparceners, sell, mortgage, or otherwise alienate, for valuable consideration, his share in the undivided family estate, moveable or immoveable.

It is also settled law in the same Presidency that a share in the undivided estate of a Hindu family may be taken in execution, under a judgment against the parcener to whom such share belongs, at the suit of his personal creditor.

Where a Hindu parcener voluntarily advanced money to his brother and coparcener, for the purpose of his defence against a charge of forgery, without any previous request, and merely to save the reputation of the family, the obligation, being no more than a moral obligation, was *held* not to be a sufficient consideration to support an assignment to the former by the latter of his share in the undivided family estate.

IN this special appeal, which was argued upon the 20th and 31st of March 1873 before Westropp, C.J., and Melvill, J., the facts are sufficiently stated in the judgment of the Court delivered on the 29th April in the same year.

Shámráv Vithal for the special appellant :—Writers upon Hindu law do not include, amongst the outlays, enumerated by them as valid charges upon the estate of an undivided Hindu family, the cost of the defence of one of the co-parceners indicted for a criminal offence : 1 Stra. H. L. 166, 167, 224 ; Stokes H. L. 261, 262. The monies, advanced by the first defendant, Vásudev Bhat, to the second defendant, Munjnáth Bhat, for that purpose, not being so chargeable, the law will imply a promise by the second de-

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fendant to repay these monies to the first. That promise, so long as it remained unperformed, would render the sum (Rs. 3,500) so advanced a debt, which debt would be a good consideration for the deed of the 1st March 1868 (Exhibit No. IX.) : Leake on Contracts, page 26 ; Story on Contracts, page 561, Sec. 456. That deed, being of earlier date than the plaintiff's execution, would have priority over the latter. Again, the Hindu law prohibits one of several parceners from alienating his share previously to partition : Miták. Ch. 1. Sec. I. pl. 30 ; *Gangubai* v. *Ramana* (*a*), *Sadabart Prasad Sahu* v. *Foolbash Koer* (*b*), *Haunman Dutt Roy* v. *Kishen Kishore Narayen Sing* (*c*), except to a member of the family, the principle being that one member has no right to force upon the other members of the family a stranger as a coparcener. And, as a legitimate consequence of that proposition, an undivided share of Hindu family estate cannot be taken in execution, for, if it were, there would be an alienation to the purchaser under the attachment, and thus a stranger might be forced upon other members of the family. The plaintiff's attachment was, therefore, rightly set aside. He could not recover his claim against the family property.

Shántárám Náráyan for the respondent :—The District Judge has found that there was not any previous request from the second defendant to the first defendant to advance the Rs. 3,500, and the Court will not imply a promise by the latter to repay that sum to the former. It was an advance confessedly made by the first defendant to the 2nd defendant to save the family reputation, and not on the credit of the latter. Exhibit No. IX. was not a transfer by the second defendant to the family at large, or in trust for them, but to the 1st defendant individually. The lists given by Strange and others, of charges which the family at large should bear, are not exhaustive. The 2nd defendant, having been acquitted of the offences laid against him, must be regarded as innocent of them. It was right and for the benefit of the family that they should establish his innocence,

(*a*) 3 Bom. H. C. Rep. 66. A. C. J. (*b*) 3 Beng. L. Rep. 31 F. B.
(*c*) 8 Beng. L. Rep. 358 F. B.

and so protect the reputation of the family at large. The first defendant properly so applied the Rs. 3,500, and was not, nor was the family, entitled to treat that sum as a debt due by the 2nd defendant. The advance was voluntary, no action would lie to recover it: *Lampleigh* v. *Braithwaite* (*d*). Hence there was not any debt, and, therefore, not any consideration for the deed of assignment (Exhibit No. IX.,) to the first defendant, and it is fraudulent and void against a creditor. *Twyne's case* (*e*), Mayukha, Chap. IX., pl. 2. 10.

Secondly—At this side of India and in Madras, a parcener may, before partition, assign his share for valuable consideration: *Gundo* v. *Rambhat* (*f*); *Damodhar Vithal* v. *Damodhar Hari* (*g*); *Tukaram* v. *Ramchandra* (*h*); *Virasvami Grámini* v. *Ayyasvámi Grámini* (*i*); *Palanivelappa* v. *Mannaru* (*j*). The case cited for the appellant from 3 Bombay H. C. Rep. 66 (*Gangubai v. Rámanná*), was an alienation by gift, and not for valuable consideration. The Calcutta cases, which have been quoted, are inapplicable here.

Shámráv Vithal was heard in reply.

Cur. ad. vult.

WESTROPP, C.J.:—This suit was brought, in the Court of the Subordinate Judge at Coompta, by the respondent, Venkatesh Sanbháv, against the appellant, Vásudev Bhat, and his brother Munjnáth Bhat, to set aside an order made, we presume, under Section 246 of the Civil Procedure Code, raising an attachment obtained by the plaintiff (under a decree in a suit brought by him against the present second defendant, Munjnáth Bhat,) against three houses, to an undivided share in which Munjnáth Bhat was entitled, but which the plaintiff alleged to have been, by deed (Exhibit 9), executed shortly before the attachment, fraudulently and collusively assigned by that defendant to his brother, the first defendant, Vásudev Bhat.

(*d*) 1 Sm. L. C. 139 5th Ed.

(*e*) 1 Sm. L. C. 1.
(*f*) 1 Bom. H. C. Rep. 39.
(*g*) Ibid. 182.
(*h*) 6 Bom. H. C. Rep. 247. A. C.J.
(*i*) 1 Mad. H. C. Rep. 471.
(*j*) 2 Mad. H. C. Rep. 416.

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The first defendant, by his written statement, relied on Exhibit 9 as a *bonâ fide* deed of sale to him by the second defendant in consideration of Rs. 3,500 previously advanced by the former to the latter.

The second defendant also alleged that the deed of sale was executed *bonâ fide*, that the Rs. 3,500 had been advanced to him *at his request* by the first defendant for the purpose of enabling him to obtain his release from imprisonment, in respect of transactions relating to land exclusively belonging to himself, and that he had, for some years, been separated from the family, of which he and the first defendant were members.

The Subordinate Judge, being of opinion that the deed of sale was insufficiently stamped, rejected it, and made a decree for the plaintiff.

The first defendant appealed to Mr. Spens, the District Judge of Canara, who held that the deed was sufficiently stamped, but was fraudulent; and he, accordingly, on that ground, affirmed the decree of the Subordinate Judge.

The first defendant has now made a special appeal to this Court, in disposing of which we must accept the following facts as found by the District Judge, viz., that both of the defendants were, at the time of the execution of the deed of sale (Exhibit No. 9), members of an undivided family, and that the sum of Rs. 3,500, asserted to be the consideration for the deed, was voluntarily paid by the first defendant to the second defendant without any previous request from the latter, but "merely to save the reputation of the family" by enabling him to defend himself against a charge of forgery, in respect of which he had been committed for trial before the Sessions Court. The first defendant was not present either at the execution or registration of the deed. Finally, the District Judge found that the "second defendant in collusion with the 1st defendant" executed the deed of sale "in order to defraud creditors from whom he (the second defendant) had personally borrowed money."

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It was argued before us that for two reasons the decree of the District Judge is erroneous—1st—that the family property, or any share in it, cannot, for the separate debt of one of several coparceners in an undivided Hindu family; be lawfully taken in execution, and thus alienated previously to partition; 2nd—that the sum of Rs. 3,500, having been actually paid by the first to the second defendant for his personal benefit only, was not properly chargeable against the family at large, and hence that the law would imply a promise by the second defendant to repay it, and that accordingly it became a debt due by him to the first defendant, and was a valuable consideration for the deed.

With respect to the first point, as a preliminary remark, we should observe, that neither Bombay Regulation IV. of 1827, nor its substitute, the Civil Procedure Code, contains any exemption of a share in undivided property from liability to attachment and sale.

The objection, contained in the first point, has been rested upon the assumed inalienability of the share of a member of a Hindu family in the undivided estate belonging to the family without the assent of his co-parceners.

In Macnaghten's Hindu Law, Vol. 1, p. 5, it is stated that "a co-parcener is prohibited from disposing of his own share of joint ancestral property; and such an act, where the doctrine of the Mitákshará prevails (which does not recognize any several right until after partition, or the principle of *factum valet*,) would undoubtedly be both illegal and invalid. But according to the Dáyabhága, which recognizes this principle, and also a several though unascertained right in each co-parcener, even before partition, a sale, or other transfer, under such circumstances, would be valid and binding as far as concerned the share of the transferring party." This latter doctrine Sir William Macnaghten states to be the rule of Hindu Law in Bengal, and he instances two cases in 3 S. D. A. Rep. pp. 17 and 138, as exemplifying that rule— both of which were cases of gift, not of sale. In the

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course of his criticism upon another case, reported in the same volume, p. 2, Sir William Macnaghten, with respect to the third reason there assigned by the Pandits for their opinion, which reason was "that a co-heir may dispose of his own share of undivided property," observes "that his right to do so is admitted; but this does not include his right to alienate the shares of others." He also refers to the notes of Mr. Colebrooke at pp. 47 and 117 of 1. S. D. A. Rep. as supporting the Bengal rule. In Macnaghten's note given in *Doe d. Gunganarain* v. *Bonerjee* (*k*), it is said that "if one of four brothers make a deed of sale of the whole patrimonial property, it will hold good as far as his share is concerned." And in another case Colvile, C.J., (Boulnois 228) says: "On the death of an original co-sharer, his heirs stand in his place, and succeed to his rights, as they stand at his death, his rights may also in his lifetime pass to strangers either by alienation, or, as in the case of creditors, by operation of law; but in all cases those, who come in the place of the original co-sharer by inheritance, assignment, or operation of law, can take only his rights, as they stand, including of course the right to call for a partition."

Macnaghten (Vol. I. H. L. pp. 5, 6), in illustration of the more strict doctrine against alienation, which some schools of Hindu Law hold the Mitákshará to justify, mentions the instance of a deed of *gift* in Behar (Mithila), which was held invalid even to the extent of the donor's own share (*l*). Other instances, to the same effect, of the Mithila doctrine are to be found in 4 S. D. A. Rep. 158, 160, 330; 5 Ibid. 24, 163, 202; 6. Ibid 176.

The passages in the Mitákshará on Inheritance, from which this doctrine has been drawn, are in Chap. I, Sec I, placita 27 to 30 inclusive (Colebrooke's Trans. pp. 256, 257). Of these, placitum 30 is that most relied upon. There the

(*k*) East's Notes; 2 Morley Dig. 152, 155.
(*l* 3 S. D. A Rep. 232 and see. pp. 144, 145.

author, explaining the following passage from Vrihaspati as cited in the Ratnákara: "Separated kinsmen, as those who are unseparated, are equal in respect of immoveables; for one has not power over the whole to make a gift, sale, or mortgage"—says it must be thus interpreted—"among unseparated kinsmen, the consent of all is indispensably requisite, because no one is fully empowered to make an alienation, since the estate is in common; but, among separated kindred the consent of all tends to the facility of the transaction, by obviating any future doubt, whether they be separate or united; it is not required, on account of any want of sufficient power, in the single owner; and the transaction is consequently valid even without the consent of separated kinsmen." The doctrine of the Mayukha, as stated in Chap. IV., S. VII., pl. 36, 37, 38, does not seem materially to vary from that of the Mitákshará, but in the same chapter, Section I, pl. 6, it is admitted that ownership is acquired by co-parceners by birth, and their respective shares only ascertained by partition; so that a sale by a co-parcener of his share before partition could not, according to the Mayukha, be regarded as a sale without ownership. The value of this remark will be seen when we refer to the arguments used by those writers who maintain the right of a co-parcener to alienate his share before partition. See also Smriti Chandriká (Chap. VII. pl. 56, Chap. XV. pl. 1, Iyer's trans: pp. 91, 236), which agrees with the Mitákshará.

Mr. Colebrooke, however, who stood first amongst the authorities on Hindu Law, writing, with a full knowledge of those passages, to Sir Thomas Strange, upon a Madras case, *Sashachella Pillay* v. *Ramasamy* (*m*), said: "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 *others'*

(*m*) 2 Madras Notes of Ca. 234, 240

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shares. In Bengal law, it is clear, that it is good for his own share and for that only. In other provinces, it is as clear that the act is invalid, as it concerns others' 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 alienor; and that an unauthorized alienation by one of the sharers is invalid, beyond the alienor's share, as against the alienee" (Appendix to 2 Stra. H. L. p. 344). In the case, as to which Mr. Colebrooke thus wrote, Sir T. Strange held the alienation valid as regarded the alienor's own share, but invalid as regarded that of his co-parcener As to another Madras case, Mr. Colebrooke said: "See Mitak. on Inheritance, Chap. I., Sec. 1, pl. 30, 32. None can dispose of joint property (especially immoveables) without consent of the sharers." The alienor there had attempted to dispose not merely of his own share in a village, but of the whole village. Mr. Colebrooke continued: "But here the sale appears to have been without authority, general or special. In setting it aside on this ground, equity would require redress to be afforded to the purchaser, by enforcing a partition of the whole, or a sufficient portion of it so as to make amends to the purchaser out of the vendor's estate." Mr. Ellis, as to the same case, said: "The sale is valid only so far as the seller's share in the property extended" (Appendix to 2 Stra. H. L., 349, 350). Sir Thomas Strange (1 Stra. H. L. 200) said: "Accordingly it imports creditors to take notice whether the family, with which they are about to deal or contract, be divided or undivided; and, if the latter, at their peril, to see that the transaction be one, by which the rest of the co-heirs will be concluded; since otherwise, he only with whom it had been entered into, will be answerable for it, and not the common stock.

Such seems to be the result of the decisions referred to below; of which those at Bengal rest upon the highest living authority in Hindu Law, that of Mr. Colebrooke, who upon this point, and with reference to a case at Madras upon which he was consulted, held 'that the consent of the sharers, express or implied, is indispensable to a valid alienation of joint property, beyond the share of the actual alienor,' observing, in the course of his opinion, 'that the only doubt which the subtlety of Hindu reasoning might raise, would be whether it be maintainable even for his own, the property being undivided.' Such *may be* the construction of a passage in the Mitakshara on the ground of co-ordinate property (Mitak Ch. 1, Sec. 1, pl. 30). But where each parcener is considered to have vested in him during the co-partnership, a several, though unascertained, right, as is the case where the authority of Jimuta Vahana prevails, it is clear that there may be an assignment before partition; the alienee becoming a sort of tenant-in-common with the other parceners, admissible, as such, to his distributive share upon a partition taking place; and even with respect to an alienation of the whole, it would be good for the alienor's share, though for his attempt to dispose of more, unwarranted, he would be liable to penal consequences.' Subsequently, at page 202, Sir T. Strange says: "In favour of a *bonâ-fide* alienee of undivided 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."

The Bengal doctrine will be found in the Dáyabhága, Chap. II., pl. 27 to 31 (Colebrooke's Translation, pp. 31 to 33; and Stoke's H. L., pp. 205 to 207); and in the Dáya Krama Sangraha; Chap. XI., pl. 1 to 9, the author of which (Cri Krishna) strongly maintains the right of an unseparated co-parcener to part with his own share either by gift or other mode of alienation.

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In three several parts of the Digest (Colebrooke's Trans., Ed. of 1801) Jagannátha lays it down in positive terms that, although an alienation by a parcener, without the assent of his co-parceners, even of his own share, is a moral offence, yet it is legally valid, and he denies that such a transaction is a sale without ownership—1 Dig.,, p. 455 (Bk. II., Chap. II., pl. 6) ; 2 Dig., pp. 98 to 105 (Bk. II., Chap. IV., pl. 4, 5, and 6) where he quotes the text of Nárada : "If they severally give or sell their own *undivided* shares, they may do what they please with their property of all sorts, for surely they have dominion over their own." The commentator admits that "if a parcener, without the assent of his co-heirs, give the whole joint-property, the gift is null ; for the joint-property of all cannot be divested by the act of one." The expression "null" he, subsequently, limits to the shares of the non-assenting co-parceners. He says of the alienor : "There is nothing to prevent the annulling of his own property, since the gift, which he himself makes with the intention of annulling the rights of all the parceners in that chattel, is the act of an owner, of whom property is predicable. Consequently, the ownership of the giver appears in this instance to be alienable ; but the ownership of the rest subsists *in full force*. The meaning of ancient authors, who hold a gift of joint property to be void. is the same. But a parcener's gift of his own share is valid. All the brothers have each their respective predicable property in all the effects." And, again, he says : "joint property is wealth belonging to more than one owner. Misra says : 'the gift is invalid, because a man has not full dominion over joint property, a wife or a son ; and the want of dominion, in the other instance, is deduced from the same reasoning, which proves it in the case of joint property.' By 'the same reasoning' he means that the ownership of one cannot be annulled by another. From Misra's exposition it is inferred that a parcener's gift of his own share of undivided property is void. But to reconcile the two opinions of different authors" (Nárada and Váchaspati Misra we

presume), "we adopt the sense inferrible by reasoning, and say a gift of the whole joint property is void, not a gift of the parcener's own share. Thus, the donor cannot, at his own choice, annul the ownership of others; but he is not debarred from aliening his own single right in the joint property; for such acts by partners in trade are often seen in common practice. This may be stated as the opinion of Váchaspati Bháttachárya and Vijnyaneshwar. Therefore the gift is valid as far as the donor's share is concerned; but he shall be punished, and must perform penance. Such is the rule ordained concerning gift or other alienation of what may not be given. 'That a thing may not be given' denotes that the gift is attended with sin; for this form of speech bears the sense of the imperative. It does not denote that the gift is a void act; were it so, it would not differ from a void donation; and full dominion would not be noticed under this title of 'what may not be given.' If it be said this title is intended to show punishment for such gifts, it is answered, this form of prohibition implying offence, the offender should be punished. Thus the gift of things, which are enumerated among those which may not be given, is punishable; gifts enumerated among those which are void are utterly null; and those noticed under both heads are both void and punishable; as the gift of a deposit, or the like, of *another's* share in undivided property and so forth." See also Jagannátha's comment on another text from Nárada to the same effect—3 Dig., 430, 431 (Bk. V., Chapter VII., pl. CCCXC.).

The opinion of Váchaspati Misra (Bhattáchárya), referred to and explained by Jagannátha, is probably that expressed in the Viváda Chintámani, pp. 72, 73, 75, 76 (Tagore's Translation). By his reference to Vijnyaneshwara, the author of the Mitákshará, Jagannáth shows that he would similarly explain the passages in the Mitákshará relating to the alienation of joint property. But Mr. Colebrooke (Appendix, 2 Stra. H. L. 432, 433), after referring to the Smriti Chan-

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driká of Devanda Bhatta, observed: "Neither this author nor any other of the same school, so far as I can find, takes the distinction which those of the Bengal school assume between gifts exceeding or not exceeding the giver's own share, and between void donations and unfit gifts. Lawyers of Bengal hold that an unfit gift (*adeya*), to which class this of undivided property belongs, is immoral, and even punishable, but not void, nor voidable; while one of the other class, termed void donation (*adatta*), is null, and also punishable. The Mitakshara of Vijnyaneshwara makes no such distinction nor exception, though the author explains unfit gifts as comprising, 1st, such as are not fit to be given for want of proprietary right; and, 2ndly, such as may not be given by reason of an express prohibition. I am entirely at a loss to conceive on what grounds Jagannatha asserts in his Digest (Vol. 2, p. 105) that his mode of reconciling the discordant opinions of authors, by maintaining the co-heir's alienation of joint-property to the extent of his own share in it, is consistent with the opinion of Vijnyaneshwara. The alienation of joint-property is comprehended in this author's class of gifts unfit, because they are prohibited; and the only distinction that seems fairly deducible from his doctrine, is that gifts unfit, by reason of the want of proprietary right are necessarily null and void; but that gifts unfit, because they are prohibited by general rules, may be valid under the exceptions which the law allows, such as distress, necessary support of the family, and pious purposes arising from indispensable duties (Mitak. on Inh.; Chap. I., Sec. I., pl. 29)." The next observations of Mr. Colebrooke are of great importance, and, no doubt, have much influenced the Madras and Bombay Courts in taking the course which they have adopted. He continued thus: "It may be objected to Vijnyaneshwara and the Smriti Chandrika, that the tests, which prohibit gifts of any portion of joint-property, or of the whole of a man's sole property, thereby distressing his family, equally forbid sale and mortgage of it; so that these also would be void,

although a valuable consideration have been paid and received. Injury and injustice may, however, be prevented by holding him and his property answerable for the repayment of the money or valuable consideration received by him; and equity, perhaps, would award partition, for the purpose of enforcing payment from his share, thus rendered a separate one." (Here Sir T. Strange refers by a footnote to the passage in his work already quoted from Vol. 1, p. 202.) Mr. Colebrooke continued: "But in the case of a gratuitous alienation, there are not the same difficulties; and I apprehend that under the Hindu law, as received among those with whom the Mitakshara and Smriti Chandrika are the chief authorities, it must be held that the disposal by will (considered as gift) of an undivided share of joint-property is not valid; nor of any part of it, unless for pious purposes, or other uses incumbent on the testator to provide for, and falling within the exception which the law makes to the general prohibition." As to gift see also, Stra. H. L. 261.

The High Court of Madras has adopted the views of Mr. Colebrooke, Mr. Ellis, and Sir Thomas Strange (and the decision of the latter at Madras in *Sashachella Pillay* v. *Ramasamy* already mentioned by us) as to the validity of an alienation, for valuable consideration, of the share of one of several co-parceners in a Hindu undivided family.

In *Virasvámi Grámini* v. *Ayyasvámi Grámini* (*n*), Sir C. Scotland, C.J., and Bittleston, J., held, at the Original Jurisdiction side, that one member of an undivided family may alien his share of the family property, and that there may be a valid sale of such a share upon an execution in an action of damages for a tort. The judgment, there delivered, shows that the Supreme Court and the S. D. Adawlut respectively of Madras had acted upon the same doctrine. Frere and Holloway, J.J., in *Palanivelappa* v. *Mannaru* (*o*), held that a sale by a father is valid by Hindu law to the extent of his own share of the undivided estate, and that

(*n*) 1 Mad. H. C. Rep. 471 (*o*) 2 Mad. H. C. Rep. 416.

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according to the Madras school there is no distinction in this respect between a father and other co-parceners. In their judgment, they say: "The principle, upon which, following the suggestion of Sir Thomas Strange and Mr. Colebrooke, the Courts have of late years satisfied the contract of one individual member out of the share which would have come to him on partition, is that as the co-parcener has contracted he ought to fulfil his contract, that if he could, if disposed, at any time, according to the Madras School, enforce a partition, it is only just that when he has incurred an obligation, he shall not be allowed to escape its effects by the allegation that his own deed was *ultra vires*; but compelled to give to his creditor all the remedies to which he would himself be entitled as against the object matter of his agreement."

The Mithilá and Benares Schools, however, interpret the Vivada Chintámani and the Mitákshará as declaring the invalidity of alienation, for valuable consideration, even of his own share, by one parcener without the assent of the others. Upon that view, the High Court at Calcutta (following several previous decisions of the Calcutta Sudder Dewanee Adawlut, and one in the N.-W. Provinces,) has acted in cases coming before it, in its appellate jurisdiction, from provinces where the law of the Mitákshará prevails.—*Cosserat* v. *Sudaburt Pershad Sahoo* (*p*), *Sudaburt Prasad Sahu* v. *Foolbash Koer* (*q*), and *Haunman Dutt Roy* v. *Kishen Kishor Narayan Sing* (*r*), both of which last decisions were made by a Full Bench. Sir B. Peacock, referring to the previous decisions upon that question at that side of India, and to the well-known passage in the judgment of the Privy Council in *Appovier* v. *Rama Subha Aiyan* (*s*), said, in *Sudaburt Prasad Sahu* v. *Foolbash Koer* (*t*): "We are called upon to decide this case according to the Mitakshara law as

(*p*) 3 Calc. W. Rep. 210. (*q*) 3 Beng. L. Rep. 31 F. B.
(*r*) 8 Beng. L. Rep. 358. (*s*) 11 Moo. Ind. App. 75.
(*t*) 3 Beng. L. Rep. 45 F. B.

we find it, and not according to our own views of policy. Whatever our opinions might be, in the absence of the decided cases to which I have referred, I am of opinion that we should not be justified in unsettling the law by over-ruling the current of authorities, by which, for nearly half a century, the law appears to have been settled, and in accordance with the principles of which it appears to have been generally understood and acted upon," and held accordingly that one parcener "had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint-family-property, in order to raise money on his own account, and not for the benefit of the family."

In the same case (p. 36), he said: "It may be that the law does not make any difference as to the liability of the property to satisfy the debts of the deceased, whether it passes to heirs by inheritance, or to survivors by survivorship; and that the survivors take it charged with the debts of the deceased, in the event of his having no other assets. I express no opinion upon that point. It is stated in the Treatise of Yajnavalkya (I am not reading now from the Law of Inheritance, but from that part of the work of the author which treats of the payment of debts, published by Mr. Roer and Mr. Montriou), in text No. 51: 'He who takes the property of one who leaves no (capable) son, shall pay the debts,' that is, the debts of the deceased; 'so he who takes, or marries the widow; also that son whose personal estate no other has appropriated, and who in such case shall always be deemed fit to inherit property,' that is to say, he who marries the widow is also liable to pay the debts out of the assets which would have been available if he had not married her. Also he says, 'if one die without any son, then whosoever succeeds to the property.' According to this doctrine, whosoever succeeds to the property is liable to the extent of that property to pay the debts. I express no opinion upon the subject, because the case has not been argued, and does not arise in the present suit."

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That latter point, as to the liability of a parcener's share in an undivided estate to be taken in execution for the private debt of that parcener, thus touched, but not decided by Sir B. Peacock, as already observed, directly arises in this case. Such a liability may be regarded as a corollary to the proposition that a parcener may alienate his share independently of the consent of his fellow parceners. It is observable that the appellant, who denies the liability of the share of the second defendant in the family estate to execution, puts forward and relies upon the deed of sale to himself by the same parcener—a position apparently involving some inconsistency, but which he explains by saying that one member may relinquish his share in favour of the other members of the family or any one of them, but not in favour of a stranger.

Previously to adverting to the Bombay authorities, we may notice that in a recent case before the Privy Council from Oude, *Syud Tuffuzzool* v. *Rughoonath Pershad* (*u*), Lord Justice James, in giving the judgment of their Lordships and speaking of a share in undivided Hindu property, said: "Mr. Leith referred in his argument to the family property of Hindus, and urged that such a share in such property may be attached and sold in execution. No doubt that such a share is property and that a decree-holder can reach it. It is specific, existing, and definite; but it is not properly the subject of seizure under this particular process, but rather by process direct against the owner of it, whether by seizure or sequestration, or appointment of a receiver. In the present case the attachment, as it has been observed, is not of the antecedent share in the undivided assets. It is of a claim under a future award, as to which it is wholly uncertain, until the award be made, to what the debtor will be entitled."

As a general proposition, it is true that, in this Presidency, the Mitákshará, where not differing from the Mayukha, is usually followed by the courts upon questions of Hindu Law.

(*u*) 14 Moo. Ind. App. 40

But this rule is not invariable. The Courts have, in some instances, declined to follow either of those works. The doctrine of Mr. Colebrooke, Mr. Ellis, and Sir Thomas Strange, as to the right of alienation for valuable consideration by one of several coparceners of his share in undivided Hindu family estate without the assent of the others, has been here preferred to that of the Mithilá and Benares Schools; and, as a logical consequence of that doctrine, the Courts have recognized the right of a judgment creditor to take in execution, for the private debt of a parcener, his share in such undivided property.

Steele, who is an authority in this Presidency, seems, at p. 210 of his work, 1st Ed., to take much the same view of alienation as Strange and Colebrooke. He treats the consent of the other members of an undivided Hindu family as necessary to the validation of an alienation by the manager, or an individual member of the family, except where such alienation is indispensable for the support or is for the benefit of the family; but he would appear to refer there to alienations of the interest of the members at large of the family in the whole or a part of the property, and to be of opinion that any one parcener may sell his own share, for he subsequently in the same page says: "Descended property is considered entailed, but one of several may alienate his own share." But *vide ibid* p.66, pl. 66, 1st. Ed.

We have succeeded in finding only one case, amongst the reports of cases in this Presidency, in which the non-alienability of a parcener's share was maintained. That is *Ballojee* v. *Venkappa* (*v*) in which, it must be observed, that both the Munsif of Poona and the Zilla Judge upheld the mortgage in dispute. Intermediately between their decrees, the Assistant Judge had, on grounds not affecting the general question of a parcener's right of alienation of his own share, made a decree unfavourable to the mortgagee. On an appeal to the Sudder Adawlut, that Court in 1839

(*v*) Select Ca. S. D. A. 243.

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reversed the Zillah Judge's decree in favour of the mortgagee, and held that the mortgagor had not power even to mortgage his own share of the family property. This ruling was arrived at upon a not very lucid opinion (as reported) of the Shástri, and, moreover, *ex parte*, inasmuch as the defendant, the mortgagee, did not appear on the special appeal, and there was not any argument addressed to the Court on his behalf. There are accordingly reasons why that case, standing as it does alone, is not entitled to much weight.

In subsequent cases, it appears that the Bombay Sudder Adawlut, although holding that the purchaser of the share of a parcener in Hindu family property cannot, before partition, sue for possession of any particular part of that property, or predicate that it belongs to him exclusively, yet was of opinion that he may maintain a suit for partition, and thus obtain the share which he has purchased: *Sadasew* v. *Bapooji* (*w*), *Jiwan* v. *Gunnoo* (*x*).

The High Court at its appellate side (Kinloch Forbes and Tucker, JJ.) held in *Gundo* v. *Rámbhat* (*y*), that a member of a Hindu undivided family may mortgage his own share of the family estate, and that, if he were acting as manager of the undivided family, he may mortgage the shares of the other members of the family on any common family necessity, or for the general benefit and use of the family. The right of one member of an undivided Hindu family to sell his own share was maintained by Kinloch Forbes and Erskine, JJ., in *Dámodhar Vithal* v. *Dámodhar Hari* (*z*).

In *Tukárám* v. *Rámchandra* (*aa*) Melvill and Warden, JJ., in 1869, held distinctly that, at this side of India, a member of an undivided Hindu family can, without the consent of his coparceners, sell his share in the undivided property. They distinguished the case of a sale, as that was, from the case of

(*w*) 4 Morris S. D. A. Rep. 145. (*x*) 9 Harr: S. D. A. Rep. 555
(*y*) 1 Bom. H. C. Rep. 39. (*z*) Ibid. p. 182.
(*aa*) 6 Bom. H. C. Rep. A. C. J. 247.

a gift, which, in *Gangubái* v. *Rámanná (b)*, it was held that a Hindu parcener could not make gift of his share in undivided property without the consent of his coparceners. The case of a gift (either testamentary or *inter vivos*) is clearly different from that of a transfer or charge made for valuable consideration; and we have already seen that Mr. Colebrooke distinguishes the former from the latter. We are not aware of any instance, at this side of India, in which, without the consent of the heirs, a testamentary gift of the share of a parcener in undivided property has been upheld.* I have frequently refused to recognize such devises, and am aware that other Judges have pursued the same course.

During the nineteen years and upwards of my acquainaance with the Island of Bombay, I can affirm that the right of a parcener to sell, mortgage or otherwise alien, for valuable consideration, his share of Hindu undivided property has uniformly been recognized in that Island, originally in the Supreme Court, and, since its abolition, in the High Court at its original jurisdiction side; and according to the tradition, which existed amongst the senior members of the Legal Profession whom I found here in 1854, that doctrine had been acted upon in this Island from a time anterior to the opening of the Supreme Court in 1824.

In accordance with that tradition was the decision in *Maccundass* v. *Gunpatrao* (*c*), where, subject to the claims which other members might have on the undivided family estate, the right of one member to mortgage his share was recognized and that of the mortgagee to maintain a suit against the other coparceners for partition.

The partition of the estate of Pránjivandás Kahándás by the Supreme Court, during the Chief Justiceship of Sir M. Sausse, afforded a strong instance of the same ruling. Pránjivandás Kahándás left a widow, Jethi Vahu, and three sons

* NOTE.—Acc. 2. Borr. R. 7, 515, Reprint of 1862-63.

(*b*) 3 Bom. H. C. Rep. A. C. J. 66. (*c*) Perry's Or. Ca. 143.

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surviving him, namely, Pránvalabhdás, Parbhudás, and Ichhálál. A fourth son, Hargovind, was born after his death. Pránjivandás Kahándás had made a will in favour of his widow and three elder sons, but it was admitted by all of the parties that the estate being ancestral, such a devise could not deprive the posthumous son, Hargovind, of his right to a fourth share. The widow, Jethi Vahu, waived such claim, if any, as she might have under the will to a share, and accepted a maintenance. On the partition, mortgages severally created by Pránvalabhdás, Parbhudás, and Ichhálál on their respective shares, some of which were in favour of strangers (Parsis) to the family and one or more in favour of the family at large, were severally enforced and carried into effect against the respective shares of the several mortgagors. It may be useful to mention that although the whole family was, for many years, undivided in estate, the three elder sons had, by means of moneys borrowed on their respective shares, traded separately. The eldest, Pránvalabhdás, became insolvent. A bill, filed by the Official Assignee to make the shares of the other co-parceners liable for the trade debts of Pránvalabhdás, was dismissed. A bill, filed by one of his creditors on behalf of himself and the other creditors of Pránvalabhdás for the same purpose, met the same fate.

We next proceed to mention the authorities here as to the right to take in execution, for his private debt, the share of a parcener in the undivided estate of a Hindu family.

The plaintiff in *Sheochund* v. *Nihalchund* (*d*), a suit brought in 1817, did not, by his plaint, venture to deny that his co-parcener's (Dhoollubh's) share was lawfully attached, but sought for exemption of his own share only from attachment.

In *Duyashunker* v. *Brijvullubh* (*e*) an attachment against a parcener's share in undivided property, was upheld. The second point there decided, namely, that a sale, made by that

(*d*) 1 Borr. 329.
(*e*) Select Ca. S. D. A. 43.

parcener subsequent to the judgment, but before the attachment, was invalid against the judgment creditor, is not now good law. If the sale were for valuable consideration, as would seem to have been the fact, and not merely colourable, although it may have been made with the intention of defeating the judgment creditor, it ought to have been upheld, inasmuch as the judgment before attachment constituted no lien on the property.

Hurreedass v. *Ghirdurdass* (*f*), is another instance of an attachment against a parcener's share in undivided property being upheld. Provision was, however, made that his share should bear a portion of his mother's funeral expenses.

In *Ram and Gunesh Sabashet* v. *Rugooveer* (*g*), the Sudder Dewanee Adawlut upheld an attachment against the share of one of three co-parceners for his private debt, and, after a reference to the Shástri, laid it down that a division of property may be enforced to satisfy a judgment creditor.

In *Sadashew* v. *Gunesh and Ram Sabashet* (*h*), the same Court permitted an attachment of the whole of the family property, but directed that, on a sale thereof, one third of the proceeds, or so much of such one third as might be necessary, should be paid to the judgment creditor of one of the parceners, and that the remaining two thirds should be paid over to the other two parceners.

The same doctrine was enforced by the same Court in *Mulhar Kundo* v. *Rowjee and Luximon* (*i*), *Devichund* v. *Yemajee* (*j*), *Jejeebhaee* v. *Jejeebhaee* (*k*), *Moteeram* v. *Shamjee* (*l*), *Bhagoo* v. *Hunmuntram* (*m*).

There is a consistency in that doctrine with the liability of the deceased father's estate in the hands of his sons or

(*f*) Select Ca. S. D. A. 46. (*g*) 1 Morris S. D. A. Rep. 9.
(*h*) 1 Morris S. D. A. Rep. 18. (*i*) 1 Morris S. D. A. Rep. 75.
(*j*) 3 Morris S. D. A. Rep. 1. (*k*) I bid. 146 (*l*) I bid. 151.
(*m*) 7 Harringtoh's S. D. A. Rep. 135.

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others to pay his creditors as laid down in the Mayukha, Chap. 5, Sec. 4, Pl. 14, 16, 17, 19, and in the passage quoted by Sir B. Peacock from the Mitákshará on the payment of debts published by Mr. Roer and Mr. Montriou, text No. 51, abovementioned. We are not, however, to be understood as saying that the liability amounts to a lien (See 9 Bombay H. C. Rep., 116).

On the principle *Stare decisis*, which induced Sir Barnes Peacock and his colleagues strictly to adhere to the anti-alienation doctrine of the Mitákshará in the provinces subject to their jurisdiction where the authority of that treatise prevails, we at this side of India find ourselves compelled to depart from that doctrine, so far as it denies the right of a Hindu parcener, for valuable consideration, to sell, incumber, or otherwise alien his share in undivided family property. The foregoing authorities lead us to the conclusion that it must be regarded as the settled law of this Presidency, not only that one of several co-parceners in a Hindu family may, before partition, and without the assent of his co-parceners, sell, mortgage, or otherwise alien, for valuable consideration, his share in the undivided family estate, moveable or immoveable, but also that such a share may be taken in execution under a judgment against him at the suit of his personal creditor.* Were we to hold otherwise, we should undermine many titles, which rest upon the course of decision, that, for a long period of time, the courts at this side of India have steadily taken. Stability of decision is, in our estimation, of far greater importance than a deviation from the special doctrine of the Mitákshará upon the right of alienation.

It remains for us to dispose of the second point, namely, whether the deed of sale (Exhibit 9) was executed by the 2nd defendant to the 1st defendant for valuable consideration. As already stated by us, we must, on the facts as found by the District Judge, hold that the sum of Rs. 3,500, the alleged

* NOTE.—The same law has been laid down as to Muhammadans —2 Morris S. D. A. Rep. 99, 276, 284; Select Cas. S. D. A. 46.

consideration, was paid voluntarily by the 1st defendant to the 2nd defendant without any previous request from the latter, and "merely to save the reputation of the family." A moral obligation is not a sufficient consideration to uphold a promise: *Eastwood* v. *Kenyon* (*n*). The question there arose upon a motion in arrest of judgment, whether the declaration showed a sufficient consideration for the promise. It stated, in effect, that the plaintiff had *voluntarily* acted as guardian and agent for the defendant's wife, while she was a minor and unmarried, and had *voluntarily* expended money for the improvement of her estate, and had obtained money for that purpose by borrowing it upon his promissory note, and that the defendant's wife had received the benefit of the expenditure, and, after she came of age, promised to pay the note. It was argued, for the plaintiff, that the declaration disclosed a sufficient moral consideration to support the promise; but the Court, in a judgment in which all the authorities on the subject were reviewed, refused to acknowledge the doctrine that a moral obligation is a sufficient consideration for a subsequent promise, and held the declaration to be bad, because it stated no consideration, but a past benefit, conferred without the request of the defendant. In commenting upon the doctrine in question, they said: "The doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it. The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied to the prejudice of real creditors." The law is now quite settled in conformity with that judgment, which is highly applicable to this case:

(*n*) 11 Ad. & E. 438.

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Beaumont v. *Reeve* (*o*). See also 3 Bos. and P. 249—note *to* *Wennall* v. *Adney*, adopted in *Eastwood* v. *Kenyon*.

On these grounds, we affirm the decree of the District Judge with costs, and with a declaration that only the right, title, and interest of the second defendant, Munjnáth Bhat, can be sold under the attachment of the three houses mentioned in the plaint.*

Decree affirmed.

June 24.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 313 *of* 1872.

FAKIRA'PA' BIN SATYA'PA' .....*Appellant.*

CHANA'PA' BIN CHANMALA'PA' .....*Respondent.*

Hindu Law—Alienation by a coparcener of his share in the undivided family property.

Held by a Full Bench, following the doctrine laid down in the preceding case, *Vasudev Bhat* v. *Venkatesh Sanbháv*, that a Hindu parcener may, without the consent of his coparceners, alienate his share in undivided family property.

Tukaram v. *Ramchandra* (6 Bom. H. C. Rep. A. C. J. 247) approved and adopted.

Bajee v. *Pandoorung* (Morris Part II. 93) disapproved.

THIS was a special appeal from the decision of Baron Larpent, District Judge of Dharwar, affirming the decree of the Principal Sudr Amin.

Chanápá brought this suit to establish his right to a house purchased by Fakirápá at an auction sale in execution of a decree against the plaintiff's son, Báslingápá. The plaintiff alleged that he had turned out Báslingápá on account of

(*o*) 8 Q. B. 483.

* See the next case.