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January 15.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 279 of 1874.

UDARA'M SITA'RA'M..... (*Defendant*) *Appellant.*

RA'NU PA'NDUJI AND VENKU PA'NDUJI ..... } (*Plaintiffs*) *Respondents.*

Undivided Hindu family—Ancestral property—Alienation of his share by a co-parcener—Attachment of a share in ancestral property—Liability of a divided share in the hands of the heir for the debts of the deceased—Liability of the ancestral estate for the separate debt of a deceased co-parcener in an undivided Hindu family.

In the Bombay Presidency, the share of one of the co-parceners in a Hindu undivided family in the ancestral estate may, before partition, be seized and sold in execution for his separate debt in his lifetime. Such a co-parcener cannot, however, by simple voluntary gift, or by devise, alienate his share to a stranger, so as to bind his surviving co-parceners after his decease.

The purchaser, mortgagee, or other alienee, for valuable consideration, of such an unascertained share, cannot, before partition, insist upon the possession of any particular portion of the undivided family estate.

The mortgagee or purchaser of a share in the undivided ancestral estate of a Hindu family takes such share subject to the prior charges or incumbrances affecting the family estate or that particular share.

If the mortgage or sale be of a special portion of the family property and possession of such portion can, on partition, be given to the mortgagee or purchaser, without injustice to prior incumbrancers or to co-parceners, it is the duty of the Court, making the partition, to give effect to the mortgage or sale, and so to marshal the family property among the co-parceners as to allot that portion, or so much of it as may be just, to the mortgagee or purchaser.

Quære.—Whether, in the event of it being impossible, consistently with the rights of others, to give possession of the portion mortgaged or sold to the mortgagee or purchaser, he would be entitled to be recouped out of such other portion as might, on partition, be allotted to the parcener whose share in the special portion had been mortgaged or sold.

The attachment of a parcener's share in the family property under an ordinary money decree should go against the share, right, title, and interest of the judgment-debtor in such parts of the family property (naming and describing them) as the judgment-creditor can specify, and against his share, right, title, and interest in all other parts of the family property.

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The divided share of a Hindu in property which previously belonged to the united family, is, after his decease, and while yet in the hands of his heir, assets for payment of the debts of the deceased.

The whole of the family undivided estate would generally, when in the hands of the sons or grandsons, be liable for the debts of the father or grandfather, and previously to the passing of Bombay Act VII. of 1866, the sons and grandsons were personally liable for the debts of the father or grandfather whether they received assets or not. But there is no authority for the converse, viz., that the father or grandfather is responsible for the debts of his son or grandson independently of the receipt of assets, unless he promise payment.

The proposition of Hindu law that debts follow the assets into whosesoever hands they come, must, generally speaking, be confined to separate estate, and the liability of undivided ancestral estate, in the hands of sons and grandsons, to the debts of the father or grandfather is exceptional.

Undivided family property is not, in the hands of surviving co-parceners, generally speaking, liable to the *separate* debt of a deceased co-parcener.

Where, therefore, a Hindu, undivided in estate from his father, died separately indebted to the plaintiffs, who obtained a decree against the father and wife of the deceased, as his legal heirs and representatives, to recover, from the estate and effects of the deceased, the amount of their debt and costs, and sought, in satisfaction of the decree, to attach a shop, which, during the lifetime of the deceased and subsequently to his death, had been in the possession of his father, there being no proof of any separate estate of the deceased having devolved upon his father: *Held* that, though the son was, during his life, jointly interested with his father in the shop as being ancestral property, his right had come into existence at his birth and died with him, and therefore the plaintiffs could not render the shop available for their claim.

Kályánbhái v. *Motirám Jamnádás* 10 Bom. H. C. Rep. 378; *Vásudev Bhat* v. *Venkatesh Sanbháv* 10 Bom. H. C. Rep. 139; and *Fakirápá* v. *Chanápá* 10 Bom. H. C. Rep. 162; commented on and distinguished. *Goor Pershád* v. *Sheodin*, 4 N.-W. P. Rep. 137, approved.

THIS was a special appeal from the decision of A. Bosanquet, District Judge of Ahmadnagar, reversing, on appeal, the decision of the First Class Subordinate Judge of that place, who had dismissed, with costs, the plaintiffs' claim to attach a shop in the possession of the defendant in satisfaction of a decree, obtained by them against him as the heir and legal representative of his deceased son, in respect of a separate debt due by the son to the plaintiffs.

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The special appeal was argued before WESTROPP, C.J., and WEST, J.

Shántárám Náráyan for the special appellant.

Shivsankar, for the special respondents, was called on by the Court to support the decree, and cited the following authorities in support of his contention :—*Sadabart Prasád Sahu* v. *Foolbash Koer* (*a*), *Goor Surun Doss* v. *Ram Surun Bhukut* (*b*), and *Kályánbhái* v. *Motiram* (*c*).

WEST, J., referred to *Goor Pershád* v. *Sheodeen* (*d*).

The facts sufficiently appear in the following judgment delivered by

WESTROPP, C.J. :—Dhondu died indebted to the present plaintiffs, who, after his death, brought a suit (No. 1960 of 1871) against his father, Udarám, and wife, Sonkábái, in which it was decreed, on the 4th August 1871, that the plain-

(*a*) 3 Beng. L. R. 31 F. B.—The passage of this judgment, relied on by the pleader for the respondent, was a *quære* expressed by Peacock, C.J., in delivering the judgment of the Full Bench, who, after citing from the Treatise of Yájnavalkyá (Edition of Roer and Montriou), Text No. 51, that "he who takes the property of one who leaves no son shall pay the debts," remarked (p. 36) : "According to this doctrine whoever succeeds to the property is liable, to the extent of that property, to pay the debts. I express no opinion on the subject, because the case has not been argued, and does not arise in the present suit."—*Ed.*

(*b*) 5 Calc. W. R. Civ. Rul. 54.—The judgment in this case, delivered by Trevor and Glover, JJ., was relied on as declaring the true exposition of the law as it prevails under the Mitakshara system to be that "sons have from the first a vested interest in ancestral property, and such interest is saleable at any time." But in this case the son, against whose share in the ancestral property execution was sought, was still alive.—*Ed.*

(*c*) 10 Bom. H. C. Rep. 378.—The passage relied on in this case was an *obiter dictum* (p. 380) of the Court (Melvill and Pinhey, JJ.), to the effect that by the judgments in *Vásudev Bhat* v. *Venkatesh* (10 Bom. H. C. Rep. 139) and *Fakirápá* v. *Chanápá*, (*Id. Ib.* 162) it was settled law in the Bombay Presidency that the creditor of a single co-parcener might sell his debtor's share, not only in the entire family property, but in a particular portion. See *Post.* p. 80.—*Ed.*

(*d*) 4 N.-W. P. Rep. 137.

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tiffs should recover, from the property and effects of Dhondu, the sum of Rs. 445-6-0 for debt and costs.

Dhondu, up to the time of his death, was undivided in estate from his father, Udarám, who, during Dhondu's life-time and subsequently to his decease, was in possession of a shop, inherited by Udarám from his father, Sitárám. In the suit No. 1960 of 1871, the plaintiffs had attached the right, title, and interest of Dhondu in the shop, but the Subordinate Judge, on the 20th April 1872, at the instance of Udarám, raised, under Section 246 of the Civil Procedure Code, that attachment. The plaintiffs, in their plaint in the present suit, filed on the 8th of April 1873, alleged that Dhondu and his father were equal co-parceners in the ancestral shop, and that, although there had not been any partition of estate between Dhondu and his father, Udarám, Dhondu's share therein was, after his death, liable in his father's hands to the amount of the decree in the former suit, and prayed a declaration to that effect against Udarám. It should be noted that it is not stated in the plaint whether or not the shop constituted the whole of the family ancestral estate. The importance of that remark will presently appear.

The Subordinate Judge being of opinion that, by virtue of Udarám's survivorship, the whole of the shop became revested in him, and that it was not, in his hands, liable for a separate debt of Dhondu, such as the claim in this and the former suit, dismissed this suit.

The District Judge has reversed that decision, and made a decree as prayed by the plaintiffs. Udarám has filed the present special appeal against that decree.

The District Judge, after stating that Dhondu, when alive, was entitled to an undivided moiety of the shop, proceeded to say:—"The interest of a co-parcener in undivided property has, for many years, been held, in this Presidency, to be liable to be attached and sold by his judgment-creditors." That proposition, which may be more fully stated thus: the share of a co-parcener, the member of a Hindu undivided family, may, before partition, be seized

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and sold in execution, in this Presidency, for his separate debt in his lifetime, is quite correct and is in perfect accordance with the authorities recognized by this Court in *Vásudev Bhat* v. *Venkatesh Sanbháv* (*e*), which case was itself maintained by a Full Bench in *Fakirápá* v. *Chanápá* (*f*). In those cases, the previous decisions in *Dámodhar Vithal* v. *Dámodhar Hari* (*g*) and *Tukárám* v. *Rámchandra* (*h*), in which it was held that a co-parcener in a Hindu family may, for valuable consideration, alienate, in his lifetime, his share in the undivided family estate to a stranger, were fully supported. A parcener cannot, however, dispose of his share in the undivided family estate by simple voluntary gift, or by devise, so as, after his decease, to bind his surviving co-parceners: *Gangubái* v. *Rámanná* (*i*), 2 Norton L. C. 355; 3 Bom. H. C. Rep. A. C. J. 9; 10 *Ibid.* 157; 2 Stra. H. L. 434 by Mr. Colebrooke.

It should be borne in mind that the purchaser at a judicial or private sale of the undivided share of a parcener in the family estate, or the mortgagee or other alienee (for valuable consideration) of such a share is not, before partition, entitled to insist upon the possession of any particular portion of the undivided family estate as representing the share of that parcener: *Appovier* v. *Rama Subba Aiyan* (*j*). A passage at page 380 in the judgment in *Kaliánbhái* v. *Motirám Jamnádás* (*k*) has been quoted, as showing that the law in this Presidency is otherwise; but the remark relied upon for that purpose was not indispensable to the decision of that case, and would appear to have been made with an imperfect recollection of the minor details of the cases of *Vásudev Bhat* v. *Venkatesh Sanbháv* and *Fakirápá* v. *Chanápá* there mentioned. In the former of those cases, the Court upheld the attachment against three houses, but it did not say or suggest that upon a sale of Munjnáth Bhat's share in those houses taking place under that attachment, the purchaser could,

(*e*). 10 Bom. H. C. Rep. 139, 158, 159. (*f*). Ibid. 162.
(*g*). 1 Bom. H. C. Rep. 182. (*h*). 6 Bom. H. C. Rep. A. C. J. 247.
(*i*). 3 Bom. H. C. Rep. A. C. J. 66. (*j*) 11 Moo. Ind. App. 75, 85, 90.
(*k*). 10 Bom. H. C. Rep. 378, 380.

by any other means than by a partition, obtain possession of the share which he might, under such a sale, purchase. It should be further noted that there was nothing before the Court in that case to show that there was any family estate except those houses, and the argument throughout proceeded upon the broad questions whether a parcener might alienate, for valuable consideration, his share in undivided family estate, and whether such a share could be taken in execution for the separate debt of that parcener. In *Fakirápá* v. *Chanápá* the defendant was the purchaser of Baslingáppá's share in a house under a decree against the latter. It did not appear whether there was any family property beside the house, and the purchaser was not the plaintiff. The suit was brought by one of the co-parceners for a declaration of his right to the whole of the house, and he succeeded only in obtaining a declaration that he and the four other co-parceners beside Baslingáppá were entitled to five-sixths of the house, and that the purchaser, as alienee of Baslingáppá's share, was entitled to the remaining sixth. No question, therefore, arose in that case as to what would be the regular and proper manner for him to enforce his purchase. The sale (judicial or private), mortgage, or other alienation of a share in the undivided family property of a Hindu family, though in this Presidency conferring a right upon the mortgagee or purchaser, and working a severance so far as to render the mortgagee or purchaser a tenant in common with the parceners other than he whose share has been thus alienated, cannot be regularly and completely enforced by giving possession except through the medium of partition, which may be effected either amicably with the other parceners, or by a duly constituted suit for a partition of the whole of the family property, to which suit all of the co-parceners should be made parties: *Sadásew* v. *Bápuji* (*l*), *Jiwan* v. *Gunnoo* (*m*), *Nánábhái* v. *Náthábái* (*n*), *Náráyan Bábáji* v. *Náná Manohar* (*o*); Manu, Ch. IX.

(*l*). 4 Morris S. D. A Rep. 145. (*m*). 9 Harr. S. D. A. Rep. 555.
(*n*). 7 Bom. H. C. Rep. 46. (*o*). Ibid. 178.

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pl. 47; *Trimbak Dixit* v. *Náráyan Dixit* (*p*). When a share in the undivided ancestral estate of a Hindu family is mortgaged or sold, either by the parcener himself, or by way of execution, the mortgagee or purchaser takes such share subject to such *prior* charges or incumbrances as may affect the family estate, or as may affect that particular share. If the mortgage or sale be of a special portion only of the family property, it may not always be possible, consistently with prior existing rights, for the Court, making the partition, to give possession of that portion to the mortgagee or purchaser. But generally it would be possible to do so, either wholly or partially, and, therefore, if without doing injustice either to prior incumbrancers or co-parceners, such possession can, on partition, be given, it would be the duty of the Court, making the partition, to endeavour to give effect to the mortgage or sale, and so to marshal the family property amongst the co-parceners as to allot that portion of the family estate, or so much thereof as may be just to the mortgagee or purchaser. Such was the view expressed, as we think correctly, in *Pándurang Anandráv* v. *Bháskar Sádashiv* (*q*), decided 18th August 1874, and in which a review was refused on the 9th December 1874. Whether, in the event of it being impossible, consistently with justice to others, to give possession of the portion of the family property mortgaged or sold to the mortgagee or purchaser, he would be entitled to be recouped out of such other portion thereof as might, on partition, be allotted to the parcener whose share in the special portion had been mortgaged or sold, it is unnecessary now to give any opinion. The proper mode of attaching a parcener's share in the family property under an ordinary money decree would seem to be that the attachment should go against the share, right, title and interest of the judgment-debtor in such parts of the family property (naming and describing them) as the judgment-creditor can specify, and against his share, right, title, and interest in all other parts of the family property. It would be unreasonable to expect

(*p*). Supra, p. 69.

(*q*). Supra, p. 72 and *Note*, p. 75.

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the judgment-creditor to be able to specify in detail the family property, but he should do so to the extent which his information would permit. The sale should be conducted on the same principle as the attachment, unless by arrangement with the co-parceners, which would often be advantageous to everybody concerned, the sale were confined to a particular portion of the family estate.

The District Judge further said: "It is also undoubted that the divided share of a Hindu would be liable to be sold after his death in execution of a decree obtained against his heir." In that proposition we fully agree. The divided share of a Hindu in property, which had previously belonged to the united family, is separate estate, and, like any other estate held in severalty (such, for instance, as self-acquired property), is assets, while yet in the hands of the heir, for payment of the debts of the deceased proprietor. We say "while yet in the hands of the heir," because it is not so hypothecated for the debts of the deceased that the heir may not, for valuable consideration, dispose of it effectually before attachment. The purchaser in such case would be protected, but the heir would, of course, be responsible for the purchase money: *Jamiyátrám* v. *Parbhudás* (*r*); 8 Harrington's S.D.A. Rep. 232, 289; and 10 Bom. H. C. Rep. 367.

The learned District Judge continued thus: "Udarám has as his son's heir, acquired his share in the family estate, but he has acquired it subject to its liabilities," and thereupon the learned Judge, assuming that the separate debt of Dhondu was one of those liabilities, made a decree in reversal of that of the Subordinate Judge, and in favour of the plaintiffs. In that decision we are unable to concur.

Subject to certain limited exceptions (as for instance debts contracted for immoral or illegal purpose), the whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts of the father or grandfather: 1 Dig. Bk. I. Chap. V., pl. CLXVII; *Girdhari-*

(*r*). 9 Bom. H. C. Rep. 116.

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lall v. *Kantoolall* (*s*). In the last mentioned case, alienations by the father in his lifetime, made for the purpose of raising money to pay his debts, were upheld. There, Sir Barnes Peacock, after referring to a case in 6 Moore's Ind. App. 421, says :—"That is an authority to show that ancestral property, which descends to a father under the Mitakshara Law, is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son, as the son of his father, acquires an interest by birth, is liable to the father's debts. The rule is, as stated by Lord Justice Knight Bruce :—'The freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt'." In the mofussil of this Presidency, previously to Mr. White's Act (Bombay Act VII. of 1866) the sons and grandsons of a deceased Hindu were personally liable for his debts whether they received assets from him or not : Vyav. Mayukha, Chap. V., Sec. IV., pl. 11, 12, 13, and 14 ; 1 Dig. Bk. I., Ch. V., pl. CLXXXVIII. ; the responses of the Pandits 2 Borr. p. 222, 2nd Edn. ; 1 Stra H. L. 167. There is not any authority for the converse of that proposition, viz., that the father or grandfather is responsible for the debts of the son or grandson independently of the receipt of assets. Kátyáyana says :—"By the general rule of law, a father need not pay the debt of the son ; but he must pay it, if either at the time of the loan, or afterwards, he promised payment" : 1 Dig. Bk. I, Ch. V., pl. CCXV. There has not been any such promise proved here. The proposition which we find in the books of Hindu law, that debts follow the assets into whosesoever hands they come, must, generally speaking, be confined to separate estate. There is special mention made of the circumstances under which the joint family estate or the co-parceners of the debtor are responsible

(*s*) L. Rep. 1 In. App. 321.

for his debts. For instance, Manu says:—"If the debtor be dead, and if the money borrowed was expended for the use of the family, it must be paid by that family, divided or undivided, out of their own estate:" 1 Dig. Bk. I., Ch. V., pl. CLXXXVI. Vrihaspati lays it down that: "A house-keeper (*Grihasta*, householder,) shall discharge a debt contracted by his uncle, brother, son, wife, servants, pupil or dependants for the support of the family during his absence" (*Ibid.* pl. CLXXXIX). To the same effect are several other passages in Jagannátha's Digest (*Ibid.* pl. CXC. to pl. CXCIII. inclusive; pl. CXCVI. to pl. CC. inclusive). The liability of undivided ancestral estate, in the hands of the sons and grandsons, to the debts of the father or grandfather is also exceptional, and is provided for by special texts, to some of which we have already referred. That it is exceptional is clearly deducible from the following text of Nárada (1 Dig. Bk. I., Ch. V., pl. CLXIX) :—"A father being dead, his sons, whether after partition or before it, shall discharge his debt in proportion to their shares, or that son alone who has taken the burden upon himself." The words "after partition or before it," and the word "shares" here show that the author was treating of ancestral property, and that he felt it necessary expressly to declare its liability to the debts of the father, whether or not it was undivided, *i.e.*, after partition or before it. And Yájnyavalkya (*Ibid.*, pl. CCXXIX) says:—"A debt, secured merely by a written contract, shall be discharged, from a moral and religious obligation, only by three persons, the debtor, his son, and his son's son; but a pledge shall be enjoyed until actual payment of the debt by any heir in any degree." That, generally speaking, undivided family property is not, in the hands of surviving co-parceners, liable to the separate debt of a deceased co-parcener, *i.e.*, a debt not incurred on behalf of the family, was decided in *Goor Pershád* v. *Sheodin* (*t*), a much stronger case, so far as the creditor was concerned, than the present case. The parcener's share in a house, which was undivided family

(*t*) 4 N. W. Prov. Rep. 137.

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property, was attached, in his lifetime, under a decree obtained against him for his separate bond debt. He died before any sale under the attachment. The High Court of the North-Western Provinces affirmed the ruling of the Courts below, which discharged the attachment on the ground that Mahádev at his death "left no right at all in the house, and that there was nothing, therefore, in connexion with it which was liable to be sold" for the purpose of satisfying the plaintiffs' decree. To that extent we fully concur in that decision; but there were remarks made by the Court in that case as to the inalienability of a share in undivided estate, which would not be applicable in this Presidency. In the present case, neither the decree sought to be executed against the family property, nor the attachment was made in the lifetime of Dhondu. His share had ceased before either of those events. It is not proved that any separate estate of the son has devolved upon the father. The shop, upon which the plaintiffs seek to fasten their claim, has throughout been in the possession of the father; and although the son was jointly interested in it, it is not pretended that the son ever even demanded, much less obtained, a partition of it. The right of the son to a share in it, as being ancestral property, had come into existence at his birth, and it died with him. The plaintiffs, therefore, cannot render it available for their claim.

We reverse the decree of the District Judge and restore that of the Subordinate Judge. The respondents must pay the costs of the suit and of both appeals.