

1876. WESTROPP, C.J., on 11th August 1876, in disposing of the petition, said :—The defendant is right. There is no appeal from that order, but we do not in the least degree sympathize with him in his struggle to deprive his attorney of his costs. I may also add that we are of opinion that Mr. Justice Bayley's order was perfectly right.

ABBA' HA'JI
ISHMA'IL
v.
ABBA' THARA.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 91 of 1876.

July 27.

NARAYANA CHARYA (DEFENDANT, APPELLANT) v. NARSO KRISHNA
AND ANOTHER (PLAINTIFFS, RESPONDENTS).

Hindu Law—Sale of ancestral property by Court—Son's interest in ancestral estate.

Under the Mitákshara and Mayukha, the son takes a vested interest in ancestral estate at his birth. But that interest is subject to the liability of that estate for the debts of his father and grandfather.

The ancestral property of a Hindu father may be sold either by himself or by a Civil Court having jurisdiction, in satisfaction of his debts, not contracted for illegal or immoral purposes, and such sale will bind sons *in esse* at the time of the sale.

Girdháree Lall v. Kantoo Lall and Muddun Thakoor v. Kantoo Lall (L. R. 1 Ind. Ap. 321 ; S. C. 14 Beng. L. R. 187 ; 22 Calc. W. R. 56 Civ. Rul.) followed.

THIS was a special appeal from the decision of W. Sandwith, District Judge of Dharwar, affirming the decree of A. M. Cantem, Subordinate Judge at the same place.

This action was brought by Narso and his brother Svájiráv against Náráyanácharya for the purpose of establishing their right to and recovering possession of two-third parts in the half share of a house. The plaintiffs alleged that the house was the ancestral property of their father Krishnápá and his brother Sinápá, and that it had been sold to the defendant in execution of two decrees, the one obtained against Sinápá alone, and the other against Sinápá and Krishnápá jointly, and that as the

plaintiffs were each entitled to a third share in the half of the said house as sons of Krishnápá, they sought to recover the same from the defendant. The defendant, among other objections, pleaded (1) that the house descended to Krishnápá and Sinápá, not from their father Subápá, but from their uncle Venkápá, and was not, therefore, their ancestral property; and (2) that the debt for which the house was sold had been contracted for necessary purposes, and the sale was valid. Both the Lower Courts decreed in favour of the plaintiffs, on the ground that the house was ancestral property, and that, therefore, they had in it their vested shares, which could not be sold for their father's debts.

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

Máneksháh Jehángirsháh for the special appellant.—The Lower Courts were wrong in holding the house to be ancestral property in the hands of the plaintiffs' father Krishnápá. Krishnápá and Sinápá got it from their uncle Venkápá, and not from their father Subápá. Under the Mitákshara Law a son cannot prevent his father from alienating property which the latter has inherited collaterally, as in the present case, and the restriction upon the father's power of alienation applies only to his lineal ancestor's property: *Baboo Nund Coomar Lall v. Mouleji Razecooddeen Hoosein*⁽¹⁾. Even supposing it to be ancestral property, it was liable to be sold, under the Hindu Law, for the debts of Krishnápá and Sinápá, and Krishnápá's sons, the plaintiffs, cannot complain of such sale: *Girdháree Lall v. Kantoo Lall*⁽²⁾, *Udaram v. Ranu*⁽³⁾. The debt, having been contracted by Krishnápá as manager of the family, must be presumed to have been for their benefit, unless the contrary be shown, which the plaintiffs have failed to do.

Ghanashám Nilkhantha for the special respondents.—A son under the Hindu Law has, from the moment of his birth, an equal right with his father in ancestral property; Mit., Chapter I., Section 5, pl. 3, 5, 8, 9 and 10⁽⁴⁾; *Baboo Beer Kishore Suhye Sing v. Baboo Hur Bullub Narain Sing*⁽⁵⁾, *Sudanand Mohapattur v. Soorjo*

(1) 10 Beng. L. R. 183; S. C. 18 Calc. W. R. 477 Civ. Rul.

(2) L. R. 1 Ind. Ap. 321; S. C. 14 Beng. L. R. 187; 22 Calc. W. R. 56 Civ. Rul.

(3) 11 Bom. H. C. Rep. 76.

(4) Stokes H. L. Bks. pp. 391–393.

(5) 7 Calc. W. R. 502 Civ. Rul.

1876. *Monee Debee*⁽¹⁾; *Raja Ram Tewary v. Luchmun Pershad*⁽²⁾; *Sudanund Mohapattur v. Soorjoo Monee Dayee*⁽³⁾; *J. Rayacharu v. J. V. Venkatara Maniah*⁽⁴⁾. The father under that law cannot alienate immoveable property, whether ancestral or acquired by himself, without the consent of his sons: Mit., Chapter I., Section 1, pl. 27⁽⁵⁾; 1 Norton's Leading Cases, p. 214. Hence it is that a son can set aside an alienation made by his father of ancestral property without any family necessity: *Hoonoman Dutt Roy v. Bhag But Kishen*⁽⁶⁾; *Jugdeep Narain Sing v. Deendial*⁽⁷⁾. A father and son, by the Hindu Law, are coparceners of a joint family, and, therefore, subject to the same rules. Each has a distinct interest in the family property, though that interest is undivided. The father has no more control over the son's interest in the ancestral property than the managing coparcener has. The son's interest in the ancestral property being distinct, is not liable for any debts contracted by the father, unless they are incurred for a family necessity. Moreover, what was sold to the defendant at the Court's sale was the right, title, and interest of Krishnápá in the house. The sale, therefore, did not affect the rights of the plaintiffs.

The learned pleader also referred to Bombay Act VII. of 1866, and *Máhabeer Persad v. Ramyad Singh*⁽⁸⁾.

Máneeksháh Jehángirsháh, in reply, referred to *Muddun Gopal Lall v. Mussamut Gowrunbutty*⁽⁹⁾, and said that Mr. Justice Phear in that case, following the ruling of the Privy Council in *Girdháree Lall v. Kantoo Lall*⁽¹⁰⁾, would appear to have changed his mind since his decision in *Jugdeep Narain Singh v. Deendial*⁽¹¹⁾.

The judgment of the Court was delivered by

WESTROPP, C. J.—Subápá had two sons, Krishnápá and Sinápá, (alias Shrinivás), who, it is alleged by the plaintiffs, inherited the

(1) 8 Calc. W. R. 455 Civ. Rul.

(2) 8 Calc. W. R. 15 Civ. Rul.

(3) 11 Calc. W. R. 436 Civ. Rul.

(4) 4 Mad. H. C. Rep. 60.

(5) Stokes H. L. Bks. 375.

(6) 15 Calc. W. R. 6 F. B.

(7) 12 Beng. L. R. 100; S. C. 20 Calc. W. R. 174 Civ. Rul.

(8) 12 Beng. L. R. 90; S. C. 20 Calc. W. R. 192 Civ. Rul.

(9) 15 Beng. L. R. 264; S. C. 23 Calc. W. R. 365 Civ. Rul.

(10) 14 Beng. L. R. 187; S. C. 22 Calc. W. R. 56 Civ. Rul.

(11) 12 Beng. L. R. 100; S. C. 20 Calc. W. R. 174 Civ. Rul.

house, the subject of this suit, from their father Subápá. While Krishnápá and Sinápá were undivided in estate, one undivided moiety of the house was, by public auction, sold by a Civil Court in execution of a decree obtained against Sinápá, and the other undivided moiety was also by public auction sold by the same Court to the defendant Náráyanácharya in execution of a decree obtained against Sinápá and Krishnápá. Narso and Svájiráv, the sons of Krishnápá, have brought their suit against Náráyanácharya to recover two-thirds of a moiety of the house on the ground that at the time of the sale to Náráyanácharya they had a vested interest to that extent in their father's undivided moiety of the house.

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On behalf of the defendant it has been questioned whether the house was ancestral property of Krishnápá and Sinápá, and alleged that they acquired it from their uncle Venkápá, brother of their father Subápá; and *Baboo Nund Coomar v. Moulvi Razeooodeen Hoosein*⁽¹⁾ has been cited to show that the house, having been thus acquired from a collateral kinsman, and not from a lineal ancestor, cannot be regarded as ancestral. But it is unnecessary for us to consider either the law or the fact as to the mode in which Krishnápá and Sinápá succeeded to the house, for, even assuming that the contention of the plaintiffs is correct, viz., that the house was ancestral property in the hands of Krishnápá and Sinápá, we think that the plaintiffs must fail in their suit, and that the sale to the defendant was binding upon them. The sale was unquestionably made by the Court in or towards satisfaction of a debt of Krishnápá as well as of his brother Sinápá; and there is not any allegation that such debt was contracted for purposes either illegal or immoral. That being so, it is settled by the highest authority that even the ancestral property of the father may be sold either by himself or by a Civil Court having jurisdiction in satisfaction of such debt, and that such sale will bind sons *in esse* at the time of the sale; *Girdháree Lall v. Kantoo Lall* and *Muddun Thakoor v. Kantoo Lall*⁽²⁾, *Hunooman Persaud Panday v. Mussamut Babooce Munraj Koonweree*⁽³⁾, in which last case it was said by Knight Bruce, L. J., (at page 421) in giving judg-

(1) 10 Beng. L. R. 183; S. C. 18 Calc. W. R. 477 Civ. Rul.

(2) 14 Beng. L. R. 187; S. C. L. R. 1 Ind. App. 321; 22 Calc. W. R. 56 Civ. Rul.

(3) 6 Moore Ind. App. 393.

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ment, that, "by the Hindu law, 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." That was a case decided in accordance with the Mitákshara. The liability of ancestral estate in the hands of sons or grandsons to the debts of the father or grandfather is provided for by special texts, *ex. gr.* Nárada⁽¹⁾ :—"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 on himself;" and Vrihasputi⁽²⁾ says that "the father's debt must be first paid, and next a debt contracted by the man himself; but the debt of the paternal grandfather must even be paid before either of those;" 2, "The sons must pay the debt of their father, when proved, as if it were their own, or *with interest*; the son's son must pay the debt of his grandfather *but* without interest; and his son or the great-grandson shall not be compelled to discharge it *unless he be heir and have assets*," and see I. Dig. Bk. I., ch. V., pl. CLXX, CLXXVII, CLXXVIII, CXCVI, CXCVII, *et seq.* And nowhere was the responsibility of the sons and grandsons of a Hindu for their father's and grandfather's debts more stringent than in the Mofussil of this Presidency. Until the Bombay Legislature, at the suggestion of Mr. White, intervened in their favour by passing Bombay Act VII. of 1866, they were personally liable for the debts of those ancestors, whether or not they received assets from them. It is true that under the Mitákshara and Mayukha the son takes a vested interest in ancestral estate at his birth, but that interest is subject to the liability of that estate for the debts of his father and grandfather.

An attempt was made to distinguish a sale by private transfer from an execution sale, by which latter, it is said, only the *right*, title, and interest of the judgment debtor is sold. But it is, as we have seen, the *right* of that debtor to appropriate even ancestral estate in payment of his debts, and such an appropriation has been upheld by the Privy Council in the two appeals in 14 Beng. L. R., first above-mentioned by us, in one of which the sale was by private transfer and in the other by judicial order. It may be said that the latter sale was under Act IV. of 1846, the 10th

(1) 1 Dig. Bk. I., ch. V., pl. CLXIX.

(2) 1 Dig. Bk. I. ch. V., pl. CLXVII.

Section of which puts judicial sale on the same basis as private transfers, and not under the Civil Procedure Code. But Sir B. Peacock, in giving the judgment of the Privy Council, did not take any distinction between a judicial sale under that Act and a judicial sale under the Civil Procedure Code. The plaintiffs have relied on the decision of Phear, J., in *Jugdeep Narain Singh v. Deendial* ⁽¹⁾, but that decision was made previously to the Privy Council decisions in *Girdháree Lall v. Kantoo Lall* ⁽²⁾.

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We reverse the decrees of the Courts below, and make a decree for the defendant Náráyanácharya, and we direct the plaintiffs to pay to him the costs of the suit, but order that the parties respectively shall bear their own costs of both appeals.

[APPELLATE CIVIL JURISDICTION.]

Miscellaneous Special Appeal No. 9 of 1876.

GOP'AL NA'RA'YAN (ORIGINAL PLAINTIFF, APPELLANT) v. TRIMBAK SA'DA'SHIV AND ANOTHER (ORIGINAL DEFENDANTS, RESPONDENTS).

August 8.

Registration Act VIII. of 1871, Section 17—Assignment of a decree for sale of mortgaged property.

Where a mortgagee obtained a decree against his mortgagors for the payment of the mortgage moneys, and in default for the sale of the mortgaged property, and his heir afterwards executed an assignment of the decree, for valuable consideration, to the plaintiff, who proceeded to execute the decree by sale of the mortgaged property,

Held that the assignment was a document of which the registration was compulsory.

THIS was a miscellaneous special appeal from the order of R. F. Mactier, District Judge at Satara, affirming the order of Krishnaráv Vithal Vinchurkar, 1st Class Subordinate Judge at the same place.

One Náro Bápuji obtained a decree on a mortgage deed against two brothers Trimbak and Ganesh, in the Court of the

(1) 12 Beng. L. R. 100; S. C. 20 Calc. W. R. 174 Civ. Rul.

(2) L. R. 1 Ind. App. 321; S. C. 14 Beng. L. R. 187; 22 Calc. W. R. 56 Civ. Rul.