

1891
JAN. 28.
—
APPEL-
LATE
CIVIL.
—
15 B. 670.

[673] finding as conclusive that the 450 rupees were due to plaintiff and not to Chanappa—*Hemanta Kumari Debi v. Brojendro Kishore Roy Chowdry* (1).

Without, therefore, intending to suggest that his conclusion was wrong, or to express any opinion directly or indirectly on the merits of the case, we must, for the reasons above stated, reverse the decree of the Court below and send back the case for a fresh decision on the merits on the evidence as it stands. Costs to abide the result.

Decree reversed.

15 B. 673.

APPELLATE CIVIL.

Before Mr. Justice Bayley and Mr. Justice Telang.

RANGAYANA SHRINIVASAPPA (*Original Plaintiff*), *Appellant v.*
GANAPABHATTA (*Original Defendant*), *Respondent.**
[28th January, 1891.]

Hindu law—Alienation—Mortgage by a co-parcener—Liability of his share after his death to satisfy the mortgage.

Where a member of a joint Hindu family makes a mortgage, such mortgage, being good when made, creates a valid charge on the property to the extent of his share, which cannot be defeated by his death.

[R., 32 B. 81=9 Bom.L.R. 1366=3 M.L.T. 44.]

SECOND appeal from the decision of Gilmour McCorkell, District Judge of Kanara, in appeal No. 132 of 1889 of the District File.

Timapa, the uncle of defendant No. 1, mortgaged his share in the joint family property to the plaintiff in 1867. On this mortgage the plaintiff obtained a decree, but before it was executed Timapa died. After his death, his share in the joint family property was attached in execution of the mortgage decree.

The defendant No. 1 objected to the attachment, on the ground that Timapa's interest in the property had ceased to exist. His objection was allowed, and the attachment was raised.

[674] The plaintiff thereupon filed the present suit for a declaration that the property in dispute was liable to attachment and sale in execution of his decree against the deceased Timapa.

Both the lower Courts rejected the plaintiff's claim, holding, on the authority of *Udaram Sitaram v. Ranu Panduji* (2), that on Timapa's death the family property had passed by survivorship to his co-parcener, defendant No. 1, and was not liable in his hands to satisfy the decree obtained against Timapa.

Against this decision the plaintiff preferred a second appeal to the High Court.

Ghanasham Nilkant Nadkarni, for appellant.—It is the settled law in this presidency that a co-parcener can alienate his share in the undivided

* Second Appeal No. 234 of 1890.

(1) 17 C. 875=17 I.A. 65 (69).

(2) 11 B.H.C.R. 76.

family property for valuable consideration—*Vasudev Bhat v. Venkatesh Sanbhav* (1). Such alienation, whether by sale or mortgage, binds the family estate to the extent of his share, even after his death. The ruling in *Udaram Sitaram v. Ranu Panduji* (2) does not apply to a case like the present.

There was no appearance for the respondent.

JUDGMENT.

TELANG, J.—The District Judge does not appear to have noticed the distinction which exists between cases in which a co-parcener dies without having made a mortgage of his share and those in which he does enter into such a transaction (3). In cases of the former class no doubt, *Udaram Sitaram v. Ranu Panduji* (2), which he relies upon, is a binding authority, except in so far as it approved of *Goer Pershad v. Sheodeen* (4). To that extent, that is to say, as regards these cases where although no specific charge is created by the co-parcener himself on his share, still an attachment has been placed on that share before the co-parcener's death, it must be taken to have been modified by the Privy Council's decision in *Suraj Bunsu Koer v. Sheo Proshad Singh* (5). In cases of the latter class, however, that is, where the co-parcener himself makes a mortgage, such mortgage being good when made, creates a specific right in favour of the creditor (see *Vasudev [675] Bhat v. Venkatesh Sanbhav* (1); or, to borrow the language of the Privy Council used in reference to an attachment of a co-parcener's share it creates a valid charge on the property to the extent of the parcener's undivided share and interest therein which cannot be defeated by the death of that parcener.

We must accordingly hold that the share of the deceased Timapa in this case is, by virtue of the mortgage made by him, liable in the hands of the first defendant for the debt due on the mortgage, which is ordered to be realized by the decree in suit No. 36 of 1879. The decree of the Court below must, therefore, be reversed, and the declaration prayed for in the plaint must be made in favour of the plaintiff. Defendant must pay the plaintiff his costs throughout.

Decree reversed.

(1) 10 B. H.C.R. 139, and compare 11 B. H.C.R. 81; and 5 C. 173-4.

(2) 11 B.H.C.R. 76 (80).

(3) Comp. *Koopoo Konan v. Chinayan* quoted in *Mayne's H.L.*, pl. 306, and the observations thereon at 5 C. 168.

(4) 4 N.W.P.R. 137.

(5) 5 G. 148=6 I.A. 88.