Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Baboo Hurdey Narain Sahu v. *Baboo Rooder Perkash Misser and others, from the High Court of Judicature at Fort William, in Bengal; delivered December 5th*, 1883.

Present:

LORD FITZGERALD.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

THREE questions have been raised before their Lordships in the hearing of this Appeal. The first was disposed of in the course of the argument. It was this: that the suit was brought by the manager appointed by the Court of Wards on behalf of the infant Plaintiff; and that the manager had not authority to represent the Plaintiff in it. Without considering whether he had authority or not, their Lordships were of opinion that, if the Plaintiff had a right to sue, the objection was only a formal one, and could not be allowed to be raised in the present Appeal.

The next and the principal question in the case, was, what right or interest in the property which is the subject of the suit was acquired by the Appellant, Hurdey Narain, by his purchase at the sale in execution of a decree which he had obtained against the father of the Respondents, Shib Perkash Misser. It appears that Shib Perkash Misser was indebted to Hurdey Narain, partly on account of a mortgage, and partly for further advances; and that Hurdey Narain brought a suit against

Ra 9978. 125.—1/84. Wt. 5011. E. & S.

him in order to recover the debt, and obtained a decree on the 4th of March 1873. The decree was the ordinary one for the payment of the money; and this case is distinguishable from the cases where the father, being a member of a joint family governed by the Mitakshara law, had mortgaged the family property to secure a debt, and the decree had been obtained upon the mortgage and for a realisation of the debt by means of the sale of the mortgaged property. It is a simple money decree, which states that the claim was to recover Rs. 6,335, principal and interest, and is:—"That a decree "be passed in Plaintiff's favour for the amount "of claim and interest on the principal for "the period pending judgement of the case, "and costs with interest on the entire amount, "at the rate of eight annas per cent. per mensem "from to-day till realisation." The property was attached on the 1st of April 1873; and the attachment being by an order prohibiting the Defendant from alienating the property, it purported to be, as it must have been, an attachment of the entire eight annas; but what was attached and subsequently sold really was, the right, title, and interest of the father, against whom the decree had been obtained, in the eight annas; and it is clear from the terms of the sale certificate that this is what was sold and purchased by the Appellant. The sale certificate, which was given after some questions had been raised by the father with respect to the regularity of the sale, and the sale had been confirmed by the High Court, which questions it is not necessary to consider,—stated that an application had been made, and the sale proclamation was issued,—"and the said property was on the "5th August 1873 sold for Rs. 6,800; and "whatever rights and interests the said judge-"ment debtor had in the said property were

" purchased by Baboo Hurdey Narain, decree " holder, auction purchaser." It then went on, after speaking of the payment of the purchase money, to say:—" Therefore this sale certificate " is granted to Babu Hurdey Narain, decree " holder, auction purchaser; and it is pro- " claimed that whatever rights and interests " the said judgement debtor had in the said " property, having ceased from the date of the " auction sale, passed to the said decree holder, " auction purchaser." Therefore what was purchased on that occasion were the rights and interests of the father; and this is precisely like the case of *Deendyal Lal* v. *Jugdeep Narain Singh*, in 4th Indian Appeals, page 247, where their Lordships held that, the purchase being, as it was here, by the person who had obtained the decree, only that passed which the father, the person against whom the decree was obtained, had. The judgement in that case defines what is actually sold. At page 253, speaking of the decision of the High Court at Calcutta in the full Bench case which is so often referred to, their Lordships say :—" So long as Bhagwan lived,"—that is, the man against whom the decree was obtained,—" he " had an interest in this property which entitled " him, if he had pleased, to demand a partition, " and to have his share of the joint estate " converted into a separate estate." The bond holder had sued on his bond, obtained a decree, taken out execution against joint property, and become the purchaser of it at the execution sale. The interest which is purchased is not, as Mr. Doyne argued, the share at that time in the property, but it is the right which the father, the debtor, would have to a partition, and what would come to him upon the partition being made. That is the answer to Mr. Doyne's argument that the father was entitled to a half. What the father was en-

titled to, and what the purchaser became entitled to, was what the father would get if a partition had been made; which was only a third of the eight-annas share. According therefore to the authority of *Deendyal Lal* v. *Jugdeep Narain Singh*, the present Appellant became entitled only to the one third, treating it as if the sale was to operate as a partition at that time.

The case of *Deendyal* has been recognised in a subsequent case, in 6th Indian Appeals, page 88, of *Suraj Bunsi Koer* v. *Sheo Proshad Singh*, in which that decision was acted upon, and which case is also applicable to the present.

The other question which has been raised before their Lordships is this: The High Court, when the case came before it on appeal,—having satisfied itself that the present Appellant by his purchase took only the interest which the father had, and if a partition had been made at the time of the sale the mother would have been entitled to a third, and the son, who was then living, would have been entitled to another third,—directed that the mother should be made a party to the suit, it having been found that the rights of the parties were governed by the Mitakshara law. The mother having been made a party, the High Court then made what in effect is a partition of the property which was the subject of the suit, making a decree that the mother and the son should each recover one third, leaving the remaining third in the Appellant's possession. After that decree, and pending this Appeal, the mother died, and, a second son having been born, the two sons are now parties to this Appeal in respect of her share. The question which has been raised is whether the decree which has been made by the High Court ought to stand or not.

According to the judgement of their Lordships in *Deendyal's* case, the decree, which ought

properly to have been made would have been that the Plaintiff, the first Respondent, should recover possession of the whole of the property, with a declaration that the Appellant, as purchaser at the execution sale, had acquired the share and interest of Shib Perkash Misser, and was entitled to take proceedings to have it ascertained by partition. So that, in fact, the Appellant has got a decree more favourable to himself than he was entitled to. He retains possession of one third, instead of being turned out of the possession of the whole and left to demand a partition.

Their Lordships, therefore, think that there is no ground for altering the decree of the High Court, although it may have gone beyond what was necessary or proper. The decree is not strictly right, but the Appellant does not suffer by that. He gets all that he would be entitled to if a partition were made.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court and to dismiss the Appeal. The Appellant will pay the costs.