Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Balgobind Das v. *Narain Lal and others, from the High Court of Judicature for the North-Western Provinces at Allahabad, delivered 28th April* 1893.

Present:

LORD WATSON.
LORD MORRIS.
SIR RICHARD COUCH.
HON. GEORGE DENMAN.

[*Delivered by Sir Richard Couch.*]

The Respondent Narain Lal is the son of the Respondent Naunidh Lal, and they are governed by the law of the Mitakshara as administered in the North-Western Provinces. On the 27th November 1879 Narain Lal executed what is known in India as a simple mortgage, whereby, in consideration of a debt of Rs. 86,834. 12. 3 then due to Balgobind Das the Appellant, and a further advance of Rs. 6,165. 3. 9, making together Rs. 93,000, Narain Lal pledged a 4-anna share owned by him under the Hindu law out of the 8-anna share of his father Naunidh Lal in the ancestral property situate in the districts of Benares, &c., of which a detail was given at the end of the deed. And he bound himself to pay the principal sum and interest at Rs. 1. 8 per cent. per mensem within two years from the date of the bond. Neither the principal sum nor any part of the interest was paid within the two years nor subsequently,

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but the Appellant did not take any steps to enforce the bond until the 12th February 1886, when he brought a suit in the Court of the Subordinate Judge of Benares to recover the principal money and interest by enforcement of the hypothecation lien and sale of the mortgaged property. The Defendants in the suit were Narain Lal and two others, Balkishen Lal and Gopal Das, who were joined as being in possession of portions of the mortgaged property. By an order dated the 22nd June 1886 Bhola Singh was made a defendant instead of Gopal Das, and by another order dated the 22nd September 1886 Naunidh Lal was made a defendant. The real contest in the suit was between him and the Appellant. The defence set up in his written statement is that he and his son were under the law of the Mitakshara, and that the mortgage deed was invalid; that out of the properties mentioned in the plaint the properties in the first schedule to the written statement were sold to the extent of the rights and interests of Narain Lal in execution of decrees held by third parties before the date of the Plaintiff's mortgage bond sued on and were purchased by him with his own money in the name of his wife; that the rights of Narain Lal in the properties mentioned in the second schedule were purchased in good faith by him with his own money, some in his own name, some in the name of his wife, and some through his mukhtar. The whole of the purchases were made at sales by auction in execution of decrees, and it was found by the first Court that the Defendants were *bonâ fide* purchasers who had no notice or knowledge of the mortgage to the Plaintiff. It was admitted by the learned Counsel for the Appellant that there was no fact in dispute in this appeal. There is no question

as to the properties in the first schedule. They are clearly not affected by the mortgage deed. As to the properties in the second schedule the purchasers, according to the judgment of this board in *Deendyal Lal* v. *Jugdeep Narain Singh* (L. R. 4 I. A. 247), acquired the right of compelling the partition which the debtor might have compelled had he been so minded before the alienation by the sale of his share took place. The main question in the case is whether the mortgage is valid, and creates a charge which is to have priority over purchases at execution sales made *bonâ fide*, and without notice of it.

The Subordinate Judge held that Narain Lal was not competent to mortgage his undivided share in the joint estate without the consent of his father for a debt incurred for his own individual benefit, and made a decree that the Plaintiff should recover Rs. 1,26,480 out of the amount claimed from Narain Lal personally, dismissing the rest of the suit. The High Court, on appeal, affirmed this decree with a variation of the interest.

As to the defence that the mortgage deed is invalid, the leading case upon the Mitakshara law as administered in Bengal and the North-Western Provinces is *Sadabart Prasad Sahu* v. *Foolbash Koer* (3 Bengal L. R. 31). In that case two questions had been referred to a Full Bench, the second being "Bhagwan "Lal (a member of a Hindu family governed "by the Mitakshara law) in his life-time, ex-"ecuted an ordinary zur-peshgi mortgage in "respect of 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. Can the nephew of "Bhagwan Lal (who had died) recover from "the mortgagee, without redeeming the same,

" possession of the mortgaged share, or any por-
" tion of it ?" Sir Barnes Peacock in delivering the judgment of the Full Bench (the other Judges concurring) upon this question observed that there were conflicting decisions on the subject, cases in the reports of the High Courts of Bombay and Madras being in the affirmative, and a case in the High Court at Calcutta in the negative, and said that the decision of the Calcutta High Court was founded upon a current of authorities supported by the Vyavashtas of Pandits which it was too late for the Courts to overrule even if they were disinclined to agree in the principle established by them. Then, after referring to reported decisions of the Sudder Courts, the earliest of which in Bengal was in 1822, and in the North-Western Provinces (formerly part of Bengal) was in 1860, and to the parts of the Mitakshara bearing upon the question, he concluded by saying, " 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 overruling that 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. I am of opinion that upon the
" simple fact stated in the second question,
" Bhagwan Lal 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 judgment in *Deendyal's* case the distinction between a voluntary alienation and a sale in execution is referred to thus, " Their

"Lordships finding that the question of the "rights of an execution creditor, and of a "purchaser at an execution sale, was expressly "left open by the decision in *Sadabart's* case, "and has not since been concluded by any "subsequent decision which is satisfactory to "their minds, have come to the conclusion "that the law, in respect at least of those "rights, should be declared to be the same in "Bengal as that which exists in Madras. They "do not think it necessary or right in this case "to express any dissent from the ruling of the "High Court in *Sadabart's* case as to voluntary "alienations. But however nice the distinction "between the rights of a purchaser under a "voluntary conveyance and those of a purchaser "under an execution sale may be, it is clear that "a distinction may, and in some cases does, "exist between them." It appears to have been sometimes suggested that the law in Madras and Bombay is a logical consequence of the decision in *Deendyal's* case, and some argument of this kind seems to have been urged in the present case before the Subordinate Judge. Upon this there is an important passage in the judgment of this Committee in *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (L. R. 7 I. A. 181), where the question related to an alienation by will upon which the authorities in Bombay and Madras were then in conflict. At page 193 their Lordships say, "The argument (that the will "should be treated as a disposition by the co-sharer "in his lifetime of the undivided share) is founded "upon the comparatively modern decisions of "the Courts of Madras and Bombay which have "been recognized by this Committee as esta-"blishing that one of several coparceners has, to "some extent, a power of disposing of his un-"divided share without the consent of his "co-sharers," and at p. 195, "Their Lordships

" are not disposed to extend the doctrine of the " alienability by a coparcener of his undivided " share without the consent of his co-sharers " beyond the decided cases. In the case of " *Suraj Bunsi Koer* above referred to they " observed:—'There can be little doubt that " 'all such alienations, whether voluntary or " 'compulsory, are inconsistent with the strict " 'theory of a joint and undivided family " '(governed by the Mitakshara law); and the " 'law as established in Madras and Bombay has " 'been one of gradual growth founded upon " 'the equity which a purchaser for value has " 'to be allowed to stand in his vendor's shoes, " 'and to work out his rights by means of a " 'partition.' The question therefore, is not so " much whether an admitted principle of Hindu " law shall be carried out to its apparently " logical consequences, as what are limits of an " exceptional doctrine established by modern " jurisprudence."

The reported decisions as to the law in the North-Western Provinces do not go so far back as those in Bengal, but in *Chamaili Kuar* v. *Ram Prasad* (I. L. R. 2 All. 267), Mr. Justice Oldfield says:—" The question cannot be said " to be at this time an open one on this side " of India. There is no doubt a current of " decisions by this Court, invalidating sales by " one coparcener without the consent express " or implied of his coparcener, and I have not " been able to find any case where a voluntary " sale was held valid to the extent of the seller's " own interest. . . . . The law may be " said to have been settled by a course of de- " cisions and it would be undesirable to disturb " it."

The reason which has led to the recognition by this Committee of the law in Madras and Bombay applies as strongly to the recognition

of the settled law of Bengal and the North-Western Provinces and the judgment in the 7th Indian Appeals appears to their Lordships to be a recognition of that law. This is confirmed by the judgment of this Committee in *Madho Parshad* v. *Mehrban Singh* (L. R. 17 I. A. 194). There a Hindu, without the consent of his coparcener, had sold his undivided share in the family estate for his own benefit, and received the purchase money to his own use; on his death the surviving coparcener sued to recover the share. In the judgment delivered by Lord Watson it is said that the Counsel for the Appellant conceded in argument that the rules of the Mitakshara law, which prevail in the Courts of Bengal are applicable in Oudh to the alienation of interests in a joint family estate; and that he likewise conceded that the sales being without the consent of the coparcener, and not justified by legal necessity, were, according to that law, invalid; but he maintained that the transactions being real, and the prices actually paid, the Respondent could only recover the shares sold subject to an equitable charge in the Appellant's favour for the purchase monies. It was held that it might have been quite consistent with equitable principles to refuse to the seller restitution of the interest which he sold, except on condition of its being made at once available for the repayment of the price which he received, but that the Respondent who took by survivorship was not affected by any equity of that kind, and that an equity which might have been enforced against the seller's interest whilst it existed could not be made to affect that interest when it has passed to a surviving coparcener except by repealing the rule of the Mitakshara law. In the present case the interest has passed to Naunidh, not by survivorship but by purchases at sales in execution of decrees. Although it is not the

same interest as he would acquire by survivorship, it is sufficient to entitle him to set up the invalidity of the mortgage deed. If any portion of Narain Lal's share is still unsold, the Appellant may attach and sell it in execution of the decree against Narain Lal personally, but not by virtue of the mortgage. The decision in this suit is not intended to prejudice that right. But for the above reasons their Lordships hold that the suit against the other Defendants was rightly dismissed. The High Court altered the decree of the Subordinate Judge by giving to the Appellant interest on the Rs. 93,000 at 5 per cent. per annum, from the 27th November 1881 to the 13th February 1889, the date of its decree. In the mortgage deed it is covenanted that even if a suit is instituted, interest shall be paid on the whole or part of the principal amount at the rate of Re. 1. 8 per cent. per mensem (18 per cent. per annum), and the decree should be varied by giving interest at that rate instead of 5 per cent. to the 12th February 1886 the date of the institution of the suit.

Their Lordships will humbly advise Her Majesty accordingly. The Appellant having substantially failed will pay to the Respondent Naunidh Lal his costs of this appeal.