Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Madho Parshad v. *Mehrban Singh* (*minor under the guardianship of Mussammat Deoka, his mother*) *from the Court of the Judicial Commissioner of Oudh, Lucknow; delivered* 25*th June* 1890.

Present:

LORD WATSON.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

In this case, which was heard *ex parte*, the Appellant did not impugn the findings of fact upon which the judgments he complains of are based; and his argument was addressed to a single question of law.

The Respondent, Plaintiff in the suit, and his paternal uncle Zalim Singh, were the members of an undivided Hindu family, and, as such, were co-sharers of land in three villages situated in the district of Unao, in Oudh. Zalim died childless in January 1885. Seven days before his death he and Mussammat Chitta, therein described as his wife, executed and delivered three deeds of sale to the Appellant of his undivided share and interest in each of these villages, at prices amounting in all to Rs. 10,000, which were duly paid by the Appellant. These sales were made by the deceased for his own personal benefit,

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without the consent of the Respondent, and without legal necessity.

The suit was brought by the Respondent in January 1886, for cancellation of these three deeds of sale, with an alternative conclusion for pre-emption in the event of their validity being sustained. The Subordinate Judge held that they were valid, upon the ground, now admitted to be untenable, that by a village custom each co-sharer was entitled to sell or mortgage his undivided interest; and, on payment by the Respondent to the Appellant of Rs. 10,000 within a time limited, he decreed pre-emption and possession, otherwise the suit to stand dismissed. On appeal, the District Judge reversed his decision and decreed cancellation of the sale deeds, holding that the alienation by Zalim was void, according to the law of the Mitakshara. The decree of the District Judge was affirmed, for the same reasons, by the Judicial Commissioner.

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. He likewise conceded that the sales by Zalim Singh, being without the consent of his co-parcener, 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 his favour for the Rs. 10,000 which were received by Zalim.

The second point ruled by a Full Bench of the High Court at Calcutta, in Sadabart Prasad Sahu *v.* Foolbash Koer (3 Bengal L. R., 31), arose in circumstances somewhat resembling those of the present case. The facts stated were, that a member of a joint family

had executed an ordinary mortgage in respect of his undivided share of a portion of the family property, in order to raise money for himself, and not for the benefit of the family; and the point submitted for decision was, whether, after the death of the mortgagor, a surviving member of the joint family could recover possession from the mortgagee without redeeming. Sir Barnes Peacock, who delivered the judgment of the Bench, after a full examination of the authorities bearing upon the question, held that, according to Mitakshara law, the mortgagor "had no authority, " without the consent of his co-sharers, to mort- " gage 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"; but that the facts were not sufficiently stated to enable the Court to say whether the mortgaged interest could be recovered without redemption.

The Appellant referred to three subsequent decisions as illustrating and supplementing the doctrine laid down by the Full Bench in Sadabart's case. In dealing with these authorities, which appear to their Lordships to be perfectly consistent with that doctrine, it is necessary to keep the following considerations in view. Any one of several members of a joint family is entitled to require partition of ancestral property, and his demand to that effect, if it be not complied with, can be enforced by legal process. So long as his interest is indefinite, he is not in a position to dispose of it at his own hand, and for his own purposes; but, as soon as partition is made, he becomes the sole owner of his share, and has the same powers of disposal as if it had been his acquired property. Actual partition is not in all cases essential. An agreement by the members of an undivided family to

hold the joint property individually in definite shares, or the attachment of a member's undivided share in execution of a decree at the instance of his creditor, will be regarded as sufficient to support the alienation of a member's interest in the estate, or a sale under the execution.

Two of the cases referred to were decided by this Board. In Deendyal Lal *v.* Jugdeep Narain Singh (4 Indian Ap., 247) a judgment debtor of the father of a joint Hindu family under an attachment of his title and share exposed the whole family property to judicial sale, at which it was knocked down to a purchaser who obtained possession and the usual certificate of title. The son of the judgment debtor then brought a suit for recovery of the estate thus sold against the purchaser, joining his father as a Defendant. Their Lordships, distinguishing between the cases of purchase by private bargain and at an execution sale, held that the son was not entitled to recover that portion of the estate which represented the undivided share of the father, and declared that the purchaser had the right to take such proceedings as he might be advised for having the judgment debtor's share and interest ascertained by actual partition. In Suraj Bunsi Koer *v.* Sheo Pershad Singh (6 Indian Ap., 88), the circumstances in so far as these related to the interest of the judgment debtor were the same, with this important exception, that the latter died before the sale of his undivided share took place. It was pleaded for his minor sons that, at the time of the sale, the interest of the deceased had passed to them by survivorship; but their Lordships affirmed the right of the purchaser on the ground that, before their father's death, the execution proceedings had gone so far as to constitute, in favour of the judgment creditor, a

valid charge upon the joint estate, to the extent of the undivided interest of the deceased, which could not be defeated by that event. At the same time, their Lordships held it to be clear upon the authorities that, if no proceedings had been taken to enforce the debt in their father's lifetime, "his interest in the property would "have survived on his death to his sons, so that "it could not afterwards be reached by the "creditor in their hands.

These two decisions lend no assistance to the argument of the Appellant. He has not taken, and cannot now take, any proceedings against Zalim Sing, whose undivided interest, according to the law expressly laid down in the second of these decisions, passed on his death to the Respondent, free from any claim at the instance of personal creditors of Zalim.

The Appellant hardly disputed that the interest of Zalim passed by survivorship to the Respondent; but he relied on the case of Mahabur Persad *v.* Ramyad Singh, decided by the High Court of Calcutta in 1873 (12 Bengal L.R., 90), as an authority for the proposition that the prices paid by him ought to form an equitable charge upon that interest, in a question with the Respondent. In that case, the father of a Hindu family, with the knowledge and acquiescence of his elder son, mortgaged the joint property, without legal necessity, and without consent of a minor son, who was the other co-parcener. The mortgagees obtained a decree on their bond, in execution of which they, notwithstanding the objections of the minor co-parcener and his brother, caused the property to be sold, and themselves became the purchasers. In a suit against them at the instance of the two sons, the Court in the interest of the minor, set aside the alienation, but directed that, on recovery of

the property, it should be held and enjoyed in defined shares, and that the shares of the father and his elder son should be jointly and severally subject to the lien thereon of the mortgagees for the sum advanced by them with interest until repayment. The reasons assigned by Phear and Ainslie, J. J., for ordering partition, and making the loan an equitable charge upon the shares other than that of the minor, were shortly these, that a decree, without such qualification, would have had the effect of restoring their property to the father and son, and leaving them at the same time in possession of the money which they had borrowed on its security, a result which the learned Judges justly considered would be contrary to equity and good conscience.

Their Lordships are unable to see that any analogy exists between that case and the present. It is unnecessary to decide whether, if Zalim Singh had been still alive, and so entitled to resume his undivided share on cancellation of the sale deeds, it would have been possible to order partition and to charge Zalim's divided share with the Rs. 10,000 paid to him by the Appellant. That course is rendered impossible by his death. It might have been quite consistent with equitable principles to refuse to Zalim restitution of the interest which he sold, except on condition of its being made at once available for repayment of the price which he received. But the Respondent is not affected by any equity of that kind. He took in his own right by survivorship, and is not liable for the personal debts and obligations of his uncle Zalim; and it appears to their Lordships, that an equity which might have been enforced against Zalim's interest whilst it existed cannot be made to affect that interest

when it has passed to a surviving co-parcener, except by repealing the rule of the Mitakshara law.

Their Lordships will therefore humbly advise Her Majesty that the Appeal ought to be dismissed.