Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Girdharee Lall and another v. *Kantoo Lall and others, and Muddun Thakoor* v. *Kantoo Lall and others, from the High Court of Judicature at Fort William in Bengal; delivered Tuesday, 12th May* 1874.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THIS is a suit brought by Baboo Kantoo Lall, the son of Bhikharee Lall, and by Mussummat Doolaro Koonwaree on behalf of Mahabeer Pershad, the minor son of Lalla Bujrung Sahye, the said Kantoo Lall and Mahabeer Pershad being grandsons of Moonshee Kunhya Lall, deceased, against a number of different Defendants, who are wholly unconnected with each other, to recover possession from them of certain portions of land which belonged to the ancestral estate. The first Appeal arises out of the suit so far as it related to the first set of Defendants, Baboo Girdharee Lall and Runjeet Pandey, to recover possession of Talooka Nawalgaman and Akha Amanut Sarcar in Pergunnah Chayen, and to set aside a deed of sale which was executed by the fathers of the two Plaintiffs, dated the 28th July 1856. The fathers are both made Defendants in the suit; and it is stated by one of the wit-

nesses, and is probably the fact, that Bhikharee Lall, the father of Kantoo Lall, is in reality the person carrying on the suit. The suit was brought to set aside the deed of sale executed by the two fathers, and to recover possession of the whole property,—not the particular shares of the sons, even if the sons could be said in a case like the present to have had distinct and separate shares. The Principal Sudder Ameen dismissed the suit. The High Court set aside that decision, and awarded to the Plaintiff, Kantoo Lall, one half of his father's share,—that is, one half of an eight annas share; but as to the other Plaintiff, Mahabeer Pershad, the minor son of Bujrung Sahye, they held that he was not entitled to recover, inasmuch as he was not born at the time when the deed of sale was executed. In respect of that portion of the decision no appeal has been preferred.

The property is situated in the Mithila district, and is governed by the Mithila law, which is very similar to the law administered under the Mitakshara. With reference to the Mitakshara upon this point, it may be well to read from the 11th Moore's Privy Council Cases, p. 89, a portion of the judgment which was delivered by Lord Westbury in the case of *Appovier* v. *Rama Subba Aiyan* before the Judicial Committee. He says, " According to the true notion " of an undivided family in Hindoo law, no " individual member of that family, whilst " it remains undivided, can predicate of the " joint and undivided property that he, that " particular member, has a certain definite " share. No individual member of an un- " divided family could go to the place of the " receipt of rent, and claim to take from the " collector or receiver of the rents a certain " definite share. The proceeds of undivided pro- " perty must be brought, according to the theory

" of an undivided family, to the common chest " or purse, and then dealt with according to the " modes of enjoyment of the members of an " undivided family. But when the members " of an undivided family agree among them- " selves, with regard to a particular property, " that it shall thenceforth be the subject of " ownership in certain defined shares, then the " character of undivided property and joint " enjoyment is taken away from the subject " matter so agreed to be dealt with; and in " the estate each member has thenceforth a " definite and certain share, which he may claim " the right to receive and to enjoy in severalty, " although the property itself has not been " actually severed and divided."

It is probable that on account of this case, and on account of a decision in the High Court, 12 Weekly Reporter, Full Bench Cases, p. 5, this suit was brought by Kantoo Lall and Mahabeer Pershad not for the purpose of recovering their respective shares, because they had no distinct or definite shares to recover, but to recover the whole property upon the ground that the sale by the fathers was void, and that the whole property which the fathers had conveyed ought to be brought back again to be joint property for the benefit of the whole family. It is questionable whether a son can, under the Mitakshara law, recover an undivided share of ancestral property sold by his father (12 Weekly Reporter, Civil Rulings, 478). But it is unnecessary to determine that question in the present case, because their Lordships are of opinion that, looking to the circumstances of this case, the Plaintiff was not entitled to recover any portion of the estate as regards the first two Defendants.

It appears that the deed of sale was executed on the 28th July 1856. At that time a decree

had been obtained against Bhikaree Lall at the suit of Byjhnath Chuckerbutty, upon a bond executed by Bhikaree in his favour, and an execution had issued against him, upon which his "right and share" in the dwelling-house belonging to the family had been attached. It was therefore necessary to raise money to pay the debt of Bhirkaree Lall, the father, and to get rid of the execution whatever the effect of it might be.

The property descended from Kunhya Lall, who died in the year 1250. The eldest of the two Plaintiffs, Kantoo Lall, was not born until 1251. So that upon the death of Kunhya Lall, the property descended to Bhikharee Lall and Bujrung Sahye as his two sons, and they were the only persons interested in the property at that time. There can be no doubt that if they had contracted a debt at that time, the property which descended to them from their ancestor would have been liable to pay it. But it is said that they could not sell the property, because in 1251, before the deed of sale was executed, Kantoo Lall was born, and, by reason of his birth under the Mithila law, he had acquired an interest in this property.

Now it is important to consider what was the interest which Kantoo Lall acquired. Did he gain such an interest in this property as prevented it from being liable to pay a debt which his father had contracted? If his father had died, and had left him as his heir, and the property had come into his hands, could he have said that because this was ancestral property which descended to his father from his grandfather, it was not liable at all to pay his father's debts? In the case which has been referred to in argument of *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree* (6 Moore's Indian Appeal Cases), Lord Justice

Knight Bruce, who delivered the judgment of the Privy Council, says at page 421, "Though an "estate be ancestral, it may be charged for some "purposes against the heir for the father's debt by "the father, as indeed the case above cited from "the 6th volume of the decisions of the Sudder "Dewanny Adawlut, North-western Provinces, "incidentally shows. Unless the debt was of "such a nature that it was not the duty of the "son to pay it, the discharge of it, even though "it affected ancestral estate, would still be an act "of pious duty in the son. By the Hindoo 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 is an authority to show that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts. The rule is, as stated by Lord Justice Knight Bruce:—"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."

It is necessary therefore to see what was the nature of the debt for the payment of which it was necessary to raise money by the sale of the property in question. If the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it; and he might possibly

object to those estates which had come to the father as ancestral property being made liable to the debt. That was not the case here. It was not shown that the bond upon which the decree was obtained was given for an immoral purpose; it was a bond given apparently for an advance of money, upon which an action was brought. The bond had been substantiated in a court of justice; there was nothing to show that it was given for an immoral purpose; and the holder recovered a decree upon it. There is no suggestion either that the bond or the decree was obtained benamee for the benefit of the father, or merely for the purpose of enabling the father to sell the family property and raise money for his own purpose. There is nothing of the sort suggested, and nothing proved. On the contrary, it was proved that the purchase money for the estate was paid into the bankers of the fathers, and credit was given to them with the bankers for the amount, and that the money was applied partly to pay off the decree—partly to pay off a balance which was due from the fathers to the bankers, and partly to pay Government revenue; and then there was some small portion of which the application was not accounted for. But it is not because there was a small portion which was not accounted for, that the son, probably at the instigation of the father, has a right to turn out the *bonâ fide* purchaser who gave value for the estate, and to recover possession of it with mesne profits. This he is endeavouring to do after the purchaser has been in possession for a period of ten years; for the purchase was completed in 1856, and the suit was not brought until 1866, when the son says that the right of action accrued to him upon his attaining his majority. Even if there was no necessity to raise the whole purchase money the sale would not be wholly void.

It appears, therefore, to their Lordships, that the Plaintiffs are not entitled to set aside the deed of sale; that the judgment of the Principal Sudder Ameen with regard to it was correct, and that the High Court were mistaken in upsetting that decision, and awarding to the Plaintiff one-fourth of the estate, as being one half of the share of his father.

In addition to the case in the Privy Council, there is a case in the Sudder Court, of *Mussumat Junnuk Kishoree Koonwur* v. *Rughoonundun Sing*, reported in the Bengal Sudder decisions of 1861; in which it was held that it was necessary for the son, in order to set aside the sale of property for the purpose of paying the father's debts, to show that the debt was illegal or contracted for an immoral purpose. The passage is at page 222. It is there said, "The sales " for the reversal of which the present suit is " brought divide themselves into three classes: " first, sales made by order of court in execution " of decrees; second, sales made privately to " satisfy decrees and bonds; and third, sales " made simply in order to raise money for some " purpose or another. Freedom on the part of " the son, as far as regards ancestral property, " from the obligation to discharge the father's " debts under Hindoo law can be successfully " pleaded only by a consideration of the invalid " nature of the debts incurred. Now we are " clearly of opinion that the Plaintiff has been " unable to show that the expenses for which " those decrees were passed were, looking to the " decrees themselves (and we cannot now look " beyond these), immoral, and such as under " Hindoo law the son would not be liable " for."

It appears therefore to their Lordships that the Plaintiff certainly is not entitled to set aside this deed; and if he were so entitled, it is

very doubtful whether he has any particular share in this property of which he is entitled to recover possession. It is unnecessary, however, for their Lordships to decide anything with regard to that point, inasmuch as they hold that the Plaintiff is not entitled to set aside the deed of sale.

The second Appeal is by Muddun Mohun Thakoor. He is the fourth Defendant in the suit which was brought against him to recover possession of 5 annas share in Mouzahs Rajpore and Alinuggur, &c. It appears that Muddun Mohun Thakoor purchased at a sale under an execution of a decree against the two fathers. He found that a suit had been brought against the two fathers; that a court of justice had given a decree against them in favour of a creditor; that the court had given an order for this particular property to be put up for sale under the execution; and therefore it appears to their Lordships that he was perfectly justified, within the principle of the case which has already been referred to, in 6th Moore's Indian Appeal Cases, in purchasing the property, and paying the purcase money *bonâ fide* for the purchase of the estate. At page 423 of the report, Lord Justice Knight Bruce says:—"The power of the "manager for an infant heir to charge an "estate not his own is under the Hindoo "law a limited and qualified power. It "can only be exercised rightly in a case of "need, or for the benefit of the estate. But "where in the particular instance the charge "is one that a prudent owner would make in "order to benefit the estate, the *bonâ fide* lender "is not affected by the precedent mismanage-"ment of the estate. The actual pressure on "the estate, the danger to be averted, or the "benefit to be conferred upon it in the par-"ticular instance, is the thing to be regarded. "But, of course, if that danger arises or has

" arisen from any misconduct to which the " lender is or has been a party, he cannot take " advantage of his own wrong to support a " charge in his own favour against the heir, " grounded on a necessity which his wrong has " helped to cause." The same rule has been applied in the case of a purchaser of joint ancestral property. A purchaser under an execution is surely not bound to go back beyond the decree to ascertain whether the court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. It has already been shown that if the decree was a proper one, the interest of the sons, as well as the interest of the fathers, in the property, although it was ancestral, were liable for the payment of the father's debts. The purchaser under that execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against those two gentlemen; that the property was property liable to satisfy the decree, if the decree had been given properly against them; and having inquired into that, and having *bonâ fide* purchased the estate under the execution, and *bonâ fide* paid a valuable consideration for the property, the Plaintiffs are not entitled to come in, and to set aside all that has been done under the decree and execution, and recover back the estate from the Defendant. It appears to their Lordships, therefore, that the decision of the Principal Sudder Ameen as regards this portion of the case was also correct.

Under these circumstances their Lordships will humbly recommend Her Majesty that the judgment of the High Court, so far as it relates to the two portions of the estates purchased by the Appellants in these two Appeals, respectively be reversed, and that the decision

of the Principal Sudder Ameen with regard to them be affirmed, and that the Respondents do pay to the Appellants, respectively their costs in the High Court, and their costs of these Appeals.