

(1913) 08 CAL CK 0030

In the Calcutta High Court

Case No : Appeal from Original Decree No. 334 of 1909

Hitendra Singh and Others

APPELLANT

Vs

Rameshur Singh and Others

RESPONDENT

Date of Decision : 01-08-1913

Acts Referred:

Citation : (1913) 08 CAL CK 0030

Final Decision : Dismissed

Judgement

1. The Plaintiffs-Appellants sued to recover possession of 7 as. 8 $\frac{3}{4}$ gds. share of Mouzah Pandaul, on establishment of their rights thereto, under the following circumstances. The Plaintiffs and their father, Babu Durga Dutt Singh, Defendant No. 4, are a branch of the family of the Maharaja of Darbhanga. It appears that Pergana Jabdi was granted as Babuana to Kirat Singh, the father of Durga Dutt Singh. The Maharaja of Darbhanga obtained a decree for Rs. 27,186, on the 18th February 1893, against Defendant No. 4, in respect of arrears of Government revenue and cesses payable for Pergana Jabdi the Babuana property, which, it is alleged by the Raj, were payable by the holders of the property but were not paid. In execution of the decree obtained in that suit the 7 as. 8 $\frac{3}{4}$ gds. share of Mouzah Pandaul which was the joint family property of the Plaintiffs and the Defendant No. 4 was sold and purchased by the Raj on the 20th March 1895. The Plaintiffs allege that the Government revenue and cesses for Pergana Jabdi Babuana property are payable by the Raj and not by the holder of the property, that the claim in the suit in which the decree was passed, was not a just or equitable claim against Defendant No. 4, and that in any case the alleged liability for which the suit was instituted and for which the said decree was passed was not a liability of, or affecting, the joint property of the Plaintiffs and Defendant No. 4, that the decree being only a personal decree against Defendant No. 4, and the share of Mouzah Pandaul sold being the joint property of the Plaintiffs and Defendant No. 4, and in which they had an equal interest with the latter, their interest in the property sold was not liable to be sold and could not be sold under the said decree. The Plaintiffs, accordingly, prayed that a decree might be passed

awarding them possession of the property sold or, at any rate, to the extent of their interest in the same. The defence of the Maharaja of Darbhanga inter alia was that the grantee and his heirs in the male line are liable to pay the Government revenue and other public demands in respect of the said Babuana property to the Darbhanga Raj, that the decree obtained against Defendant No. 4 was a valid decree passed in respect of a just claim, that the Plaintiffs were legally bound by the said decree, that the property in suit was legally attached and sold in execution of the said decree, and the Plaintiffs are not entitled to impugn the said sale which was legally binding upon them. The Subordinate Judge of Darbhanga dismissed the suit and the Plaintiffs have appealed to this Court. Four contentions have been raised on their behalf in this appeal : --

First, that the Government revenue and cesses of the Babuana property are payable by the Raj, and not by the heirs of the grantee ; secondly, that even if the Government revenue and cesses were payable to the Raj they were not payable by the Plaintiffs, but by Defendant No. 4, the holder of the Babuana property for the time being ; thirdly, that the decree was passed against Defendant No. 4 personally and not as karta of the joint family ; and, fourthly, that the decree and the execution proceedings not being against the entire joint family, what was sold, was the mere personal interest of the Defendant No. 4 and not the interests of the Plaintiffs.

2. As regards the first contention, the Plaintiffs have examined some witnesses, who said, that the Government revenue and cesses for the Babuana property were never paid to the Darbhanga Raj and that no demand for them was ever made by the Raj. But the documentary evidence adduced by the Defendant is conclusive to show that the revenue and cesses were payable by the grantee, and had all along been realised from his heirs. The original sanad by which Pergana Jabdi was granted to Babu Kirat Singh, the ancestor of the Plaintiffs, does not appear to be in existence. But the sanad is recited in a later document dated 1807 executed by Maharaj Madho Singh, the father of Babu Kirat Singh, in favour of Maharaj Kumar Chhatar Singh, the eldest son of the former. After reciting that Pergana Jabdi had been granted to Babu Kirat Singh as Babuana maintenance property, and other Perganas to his other brothers, the deed states that the said Babu "will enjoy the Malikana Dustoors and profits of the said Perganas, and will pay to you the Government revenue, payable on account (of those Perganas), and you will pay the same to the Hakim (Government) along with the Government revenue of the Raj properties. Then it appears that in the year 1879 an application was made by the Manager of the Court of Wards of the Darbhanga Raj for the registration of the name of the minor, Maharaja Lachhmishwar Singh in respect of the Mouzahs in Pergana Jabdi. Thereupon a petition of objection was filed on behalf of Babu Durga Dutt Singh (the Defendant No. 4 in the present suit) in which he relied upon the said sanad of 1807 and distinctly stated that he and his brother Giridhari Singh had been paying the Government revenue of Pergana Jabdi through the Maharaja Bahadur. The deed of sale dated 1873 and the mortgage bond dated the 15th December 1890

executed by Babu Durga Dutt Singh show that large sums of money, which were due to the Raj for Government revenue and cesses, were paid by him. Then there are decrees for Government revenue and cesses for Pergana Jabdi passed against the Defendant No. 4 ; and even so far back as 20th October 1841 a decree was obtained by the Raj against Babu Kirat Singh himself for Government revenue of Pergana Jabdi. The above documents and the judgments and decrees conclusively establish that the holders of the Babuana property are liable to pay the Government revenue and cesses for Pergana Jabdi to the Raj. The learned Counsel for the Appellants argued that they do not establish a custom ; but it is really an incident of the grant and there can be no possible doubt that the Government revenue for the Pergana is paid by the Raj and realised from the holder of the Pergana. In the case of Babu Gunesh Dutt Singh v. Moheshur Singh 6 M. I. A. 164 (1855), the Judicial Committee of the Privy Council observed, that where an estate is granted to a younger son as a Babuana allowance, he continues to pay the rent and assessment to the Raja ; the property is never separated from the zemindary at all. The first contention, therefore, must be overruled.

3. As regards the second contention, it is argued that even if Government revenue and cesses are payable to the Raj, the Defendant No. 4, the holder of the Pergana as Babuana for the time being, was liable to pay and that the Plaintiffs who are his sons and grandsons were not liable to pay. It is contended that the petition of Durga Dutt dated the 12th March 1879 (exhibit 2) referred to above shows that so long as Babu Kirat Singh was alive, he alone was in possession of the Pergana and that on his death his sons Giridhari and Durga Dutt were in possession. The right, therefore, accrues on the death of the last male holder, which is inconsistent with the case that the sons have joint interest with the father during his lifetime and reliance has been placed upon the case of Durgadut Singh v. Rameshwer Singh I. L. R. 36 Cal. 943 : s. c. 13 C. W. N. 1013 (1909), in which it was held that Babuana property is impartible and alienable. But the question, whether the sons and grandsons have interest in the property during the lifetime of the father and the grandfather in the Babuana property does not require any discussion in the present case, as the Plaintiffs themselves state in the fourth paragraph of the plaint that Pergana Jabdi is a Babuana property of the Plaintiffs and Babu Durga Dutt Singh, Defendant No. 4. It was never suggested in the pleadings or in the arguments before the lower Court, so far as it appears from the judgment of the Court below, that the Plaintiffs had no present interest in the Babuana property. Their contention in the Court below was that the Government revenue and cesses were not payable by the holders of the Babuana property, but were payable by the Raj. It is contended, however, on behalf of the Appellants that they are not bound by an admission on a point of law, and that according to the view taken by the Privy Council, in the case cited above, the property belongs to Defendant No. 4 alone, so long as he is alive, that the debt for which he was sued (namely, the Government revenue and cesses) was his personal debt and that it was not a debt for which the joint family was

liable. It was contended on behalf of the Respondent that the decision of the Judicial Committee proceeded upon a confession made by the learned Counsel for the Appellants in the case before the Privy Council ; that the object of the Babuana grant being the maintenance of the grantee and his descendants in the male line, the property granted as Babuana becomes the joint property of the family, and that, otherwise, it would be open to the first holder of the property to alienate it altogether and thus frustrate the very object of the grant and that Babuana property cannot have the same incidents, as the Raj itself out of which it is carved. It appears, however, that the judgment of the Judicial Committee did not proceed entirely upon the admission of Counsel, and their Lordships pointed out that if the holder of the Babuana property for the time being failed to pay the stipulated Government revenue to the Maharaja, and the latter himself was obliged to discharge the claim of the Government, he might sue the former for the amount so paid and, if necessary, recover the amount decreed to him by the sale of the Babuana property, and an involuntary alienation of this kind would as effectually defeat the claim of all the members of the family, who were at the time or might thereafter become entitled to maintenance out of the property, as would any voluntary alienation of it. But although Babuana property may be alienated by the person to whom it descends, it is held or managed by him for the maintenance of the family so long as it is not alienated, and the family has the benefit of it. It appears from the evidence of Amarendra Singh (the Plaintiff No. 2) that all the members of the family appropriated the income of the Babuana property. The revenue payable for the property, but which was not paid, therefore was enjoyed by all the members and it may in that sense be considered as a joint family debt. In the view, however, we take on the fourth point, it is unnecessary to discuss the matter any further.

4. Then comes the third question, namely, whether the decree was passed against Defendant No. 4 personally or as karta of the joint family. It appears from the plaint in the suit by the Raj against Babu Durga Dutt Singh (Ex. 2) that the Raj prayed for a decree against the person and properties of the Defendant to be recovered from the person and the properties of the Defendant. The decree directed the Defendant to pay to the Plaintiffs the amount decreed. The liability in one sense was a common liability of the family, and the Defendant, no doubt, was the karta of and represented the family, but the decree was not passed against him expressly as karta. The question would have been important, had the certificate of sale and the proceedings in execution raised any ambiguity as to the property sold. Having regard to the view we take on the 4th point this question also need not be discussed further.

5. The last question is whether in execution of the decree against the father alone, the father's interest only or the entire property was sold ; and this involves the question whether the creditor in a judgment against the father in a Mitakshara joint family even though it is for a personal debt of the father is entitled to sell not only the interest of the father in the family property but the interest of the sons also in the property.

6. It has been contended on behalf of the Appellant that where the debt is a personal debt of the father and the decree is against him alone, all that can be sold in execution of such a decree is the personal interest of the father only. As a general proposition the contention on behalf of the Appellant that under a decree against one person (unless where he is sued in a representative capacity) the interests of others who are not parties to it cannot be sold is correct, but the position of a son under the Mitakshara is very peculiar. The father can sell any portion of the ancestral estate even for a personal debt, provided the debt was not contracted for illegal or immoral purposes. Now, under sec. 266 of the Code of Civil Procedure, the execution creditor can levy execution not only against property belonging to the judgment-debtor but also against property over which he has a disposing power, which he may exercise for his own benefit. So that, if the father in a Mitakshara family has the power to dispose of any property to discharge his debt, the creditor can avail himself of the right which the father himself may exercise for his own benefit. It was next contended on behalf of the Appellant that even if the creditor can realise the debt due by the father alone from the property of the entire family, he cannot do so unless the suit is so framed and the sons are made parties to the proceedings, and a large number of cases were cited as supporting the contention. The decisions, as pointed out in *Nanomi Babuasin's case* L. R. 13 I. A. 1 (1885), are not on all points in harmony either in India or in the Privy Council. We must however see whether the cases support the contention of the Appellant. The first case relied upon is that of *Deendyal Lal v. Jugdeep Narayan Singh* L. R. 4 I. A. 247 (1877). In that case their Lordships observed : --"Whatever may have been the nature of the debt, the Appellant cannot be taken to have acquired by the execution sale more than the right, title and interest of the judgment-debtor. If he had sought to go further, and to enforce his debt against the whole property, and the co-sharers therein who were not parties to the bond, he ought to have framed his suit accordingly, and have made those co-sharers parties to it. By the proceedings which he took he could not get more than what was seized and sold in execution, viz., the right, title and interest of the father. If any authority be required for this proposition, it is sufficient to refer to the cases of *Nugendra Chander Ghose v. Kaminee Dossee* 11 M. I. A. 241 (1867), and *Baijun Doobey v. Brij Bhookun Lal* L. R. 2 I. A. 275 : s. c. I. L. R. 1 Cal. 133 (1875)." But the observations in that judgment must be read with reference to the circumstances of the case and not as laying down an invariable rule that in no case will the sons' interest pass in an execution sale, unless they are joined in the suit. Such a view will be in direct contradiction of the rule laid down in *Muddun Thakoor v. Kantoo Lall* L.R. 1 I. A. 321 (1874). In the latter case where ancestral property had been sold in execution of a decree against the father alone, it was held, in a suit by the son to recover the property, that if the decree was a proper one, the interest of the sons as well as the interest of the father in the property, although it was ancestral, were liable for the payment of the father's debts and that in such a case, a purchaser under an execution is not bound to go further back than to see that there was a decree against the father and if he bona fide purchases the estate

under the execution and bona fide pays a valuable consideration for it, he is protected against the suit of the sons seeking to set aside all that has been done under the decree in execution, and recover back the estate as joint ancestral property. Sir James Colville who delivered the judgment of the Judicial Committee both in the cases of *Deendyal Lal v. Jugdeep Narayan Singh* L. R. 4 I. A. 247 (1877) and *Suraj Bansi Koer v. Sheo Prasad Singh* L. R. 6 I. A. 88 (1879) observed in the latter case as follows :-- "This case [referring to the case of *Muddun Thakoor v. Kantoo Lall* L. R. 1 I. A. 321 (1874)] then, which is a decision of this tribunal, is undoubtedly an authority for these propositions:--

First.--That where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had no ice that they were so contracted and, secondly, that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make enquiry beyond what appears on the face of the proceedings." The principles so laid down were held inapplicable to the case of *Suraj Bansi Koer v. Sheo Prasad Singh* L. R. 6 I. A. 85 (1879), as in that case the debt was found to have been incurred for immoral purposes and the purchasers were held to have purchased with knowledge of the Plaintiffs' claim which was preferred before the sale, and subject to the result of the regular suit, by which the execution Court held, they could obtain their remedy The next case relied upon was the case of *Hari Narain v. Rudar Perkash* I. L. R. 10 Cal. 626 (1883), where a money decree was made against the father of the family and the decree-holder caused the family estate to be attached, and brought to sale the father's right, title and interest therein, it was held, following *Deendyal Lalls* case L. R. 4 I. A. 247 (1877) that only the father's rights and interests passed by the sale and not the interests of the family. But the decision in that case turned upon the construction of the sale certificate and the other proceedings, and the question whether a creditor, in execution of a decree against the father alone, can sell the entire family estate was neither raised nor decided. As pointed out in *Minakshi Naidu v. Immudi Kamaka* L. R. 16 I. A. 1 : s. c. I. L. R. 12 Mad. 142 (1888), all the documents in *Hari Narain's* case I. L. R. 10 Cal. 626 (1883) showed that the Court intended to sell and that it did sell nothing but the father's share--the share and interest that he would take on partition and nothing beyond it--and the Privy Council in that case put it entirely upon the ground that everything showed that the thing sold was " whatever rights and interests the said judgment-debtor had in the property" and nothing else. The case of *Minakshi Naidu v. Immudi Kamaka* L. R. 16 I. A. 1 : s. c. I. L. R. 12 Mad. 142 (1888) is a clear authority for the proposition that in execution of a decree for money against the father alone, the debt not being contracted for immoral purposes, the property of the family can be sold and will pass to the purchaser.

In that case the decree-holders obtained a decree for money upon a note against the father and attached a zemindary in execution thereof. The son intervened and sought by petition an order that his interest in the zemindary should be excluded from the sale, and that the sale should be made subject to his right. It does not appear what order, if any, was made on that petition ; but notwithstanding that petition, the sale took place and it was held upon the documents in that case that the thing professed and intended to be sold and actually sold was not the father's share but the whole interest in the zemindary itself. The son impeached the debt as having been made for illegal and immoral purposes and that impeachment failed. Their Lordships held "that being the case there might have been a sale of this estate under this decree including the whole interest or of so much as was necessary. Upon the documents their Lordships have arrived at the conclusion that the Court intended to sell and that the Court did sell the whole estate and not any partial interest in it." It is true in that case the son does not appear to have even contended that no more than his father's interest was sold. His case was that the whole zamindary was sold out and out ; he impeached the debt which led to the sale and asserted that the decree founded on it could not bind his interests. But the judgment of the Privy Council shows that the interest of the son may pass by a sale held in execution of a decree for money against the father alone where the debt is not one for immoral purposes, although the son is not a party to the decree or the sale. It is contended that in that case, the father contracted the debt as karta of the family, but it does not appear that he either contracted the debt or was sued as karta of the family.

7. That the entire family property may pass by a sale in execution of a money decree against the father alone was also established in *Nanomi Babuasin v. Modun Mohun L. R.* 13 I. A. 1 (1885), where in execution of a decree for mesne profits, against the father alone, ancestral family property was sold, and the sons brought a suit in which they contended that nothing passed by the sale except such share as the father would have taken on partition. Their Lordships said as follows :--

There is no question that considerable difficulty has been found in giving full effect to each of two principles of the Mitakshara law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father. It is impossible to say that the decisions on this subject are on all points in harmony, either in India or here. But the discrepancies do not cover so wide a ground as was suggested during the argument in this case. It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions

have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority." Then their Lordships said that they did not think that the authority of Deendyal's case L. R. 4 I. A. 247 (1877) bound the Court to hold that nothing but Giridhari's (the father's) coparcenary interest passed by the sale. If the debt was of a nature to support a sale of the entirety, he might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale. If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's coparcenary interest alone (and in Deendyal's case L. R. 4 I. A. 247 (1877) there certainly was an ambiguity of that kind) the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which could have justified a sale if the sons had been brought in to oppose the proceedings." It is clear from the above decision that Deendyal's case L. R. 4 I. A. 247 (1877) does not lay down an invariable rule, that in no case will the sons' interests pass in an execution sale against the father, unless they are joined in the suit, and it is also clear, that if the debt is of a nature to support a sale of the entirety of the property the creditor may legally procure a sale of it by suit against the father alone. In that case, the debt was found by the High Court to be a joint family debt, because the joint family presumably benefited by the mesne profits for which a decree was made against the father. The Privy Council held that the High Court was right and observed that if it was a joint family debt, a sale to answer it, effected either by the father, or in a suit against him could not be successfully impeached, that learned Counsel for the Appellant strongly relied upon the fact that there was a joint family debt as distinguishing that case. But their Lordships did not lay down that the interests of the sons would pass by a sale against the father, only where the debt is a joint family debt, meaning thereby that the debt is one which is incurred for the benefit of the joint family. What was laid down is that if the debt is of a nature to support a sale of its entirety, the father may legally sell it without suit, or the creditor may legally procure a sale of it by suit. Now, every debt incurred by the father not for illegal or immoral purposes is of a nature to support a sale of the entirety of the family property. The debt in the present case was revenue due for Babuana property which the evidence shows was enjoyed by the whole family. The debt therefore was as much a joint family debt as the debt in Nanomi Babuasin's case L. R. 13 I. A. 1 (1885). But assuming that the debt was a personal debt of the father, there could be no doubt that the father could sell family property for discharging that debt, and if he could do so, his creditor might legally procure a sale of it by suit. Then their Lordships say--"But

if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale, if the sons had been brought in to oppose the execution proceedings." Now, apart from the question whether the purchaser bargained and paid for the entirety of the property in the present case, which we will deal with later, could it have made any difference, had the sons been brought in to oppose the execution proceedings ? All that they could show is that the debt was not such as to justify the sale, in other words that the debt was incurred for illegal or immoral purposes which in the present case it was not.

8. The next case to be considered is that of *Shimbhoo Nath Pandey v. Golap Singh* L. R. 14 I. A. 77 : s. c. I. L. R. 14 Cal. 573 (1887). There the question was whether the whole estate belonging to a joint family living under the Mitakshara, including the shares of sons, or the share of their father only passed to the purchaser at a sale in execution of a decree against the father alone upon a mortgage by him of his right, and it was held that as the mortgage and decree as well as the sale certificate expressed only the father's debt, the prima facie conclusion was that the purchaser took only the father's share, a conclusion which the circumstances--the omission on the part of the creditor to make the sons parties and the price paid--not only did not counteract but supported. But their Lordships did not in that case lay down any principle different from that laid down in *Nanomi Babuasin's* case L. R. 13 I. A. 1 (1885). Lord Hobhouse, who delivered the judgment of the Judicial Committee in both the cases, observed--"Each case must depend upon its own circumstances. It appears to their Lordships that in all the cases, at least the recent cases, the enquiry has been what the parties contracted about, if there was a conveyance, or what the purchaser had reason to think he was buying, if there was no conveyance, but only a sale in execution of a money decree."

9. The subsequent decisions of the Privy Council follow these principles. In *Bhagbut Persad v. Girija Koer* I. L. R. 15 Cal. 717 (1888), the sale in execution of a decree against the father was found to be not merely of the right, title and interest of the debtor, but a sale of the property being right, title and interest of the debtor. The sons were no parties to the suit or the proceedings in execution, and before the sale, notice was given on behalf of the sons that the property was ancestral and joint. It was held that the sons could not set up their rights against the sale in execution of the decree against the father unless they could establish that the debt had been contracted for any illegal or immoral purpose. In *Daulat Ram v. Mehr Chand* I. L. R. 15 Cal. 70 (1887), the mere fact that the other members of the family were no parties to the action, was considered not to be a ground for holding that their shares in the family property did not pass at a sale held in execution of a decree against the managing members of a joint trading family, upon mortgage executed by the managing members alone, and their Lordships quoted with approval the principles laid down in *Nanomi Babuasin's* case L. R. 13 I. A. 1 (1885).

10. In the case of Mahabir Pershad v. Moheswar Nath L. R. 17 Cal. 584 (1889), it was held, that it is only on condition of the son's showing that the father's debt has been contracted for an illegal or immoral purpose that the son, upon a decree against the father alone being executed by the attachment and sale of the family estate, can claim to have the liability limited to the father's own share under the Mitakshara. In the absence of such proof, whether the entirety of the family estate has been transferred at the sale in execution, or not, is a question of fact, in each case dependent on what was understood to be brought, and has been brought, to sale. Lord Hobhouse in delivering the judgment of the Judicial Committee observed--"There have been of late years a great number of suits of this kind, and some difficulties have been felt as to the proper mode of treating them. It is to be hoped that recent decisions by this Commutes have lessened these difficulties. At all events, their Lordships feel none in this case, treating it on the principles laid down in the cases of Nanomi Babuasin v. Modun Mohan L. R. 16 I. A. 1 : s. c. I. L. R. 12 Mad. 142 (1888) and Bhagbut Persad Singh v. Girija Koer I. L. R. 15 Cal. 717 (1888) ; and addressing themselves to the question of fact whether the thing meant to be sold and brought was the entirety of the estate or only a share in it."

11. Reliance was placed on behalf of the Appellants upon the fact that the decrees in the above case and some of the other cases cited above were based upon mortgages. But as pointed out by Sargeant, C.J., in Kagal Ganpaya v. Manjappa I. L. R. 12 Bom 691 (1888), in the case of an execution sale, the mere fact that the decree was a money decree against the father, as distinguished from one passed in a suit for the realisation of a mortgage security directing the property to be sold, is not a complete test, and we need only point out that the decrees in Minakshi v. Immudi L. R. 16 I. A. 1 : s. c. I. L. R. 12 Mad. 142 (1888) and Nanomi Babuasin v. Modun Mohun L. R. 13 I. A. 1 (1885) were money decrees. The Appellants also relied on the fact that in some of the cases where the interest of the sons also was held to have passed by the sale, the purchaser was a stranger and not the decree-holder himself as in the present case, but that fact can make any difference only where the question arises whether the purchaser had notice of the debt being immoral. No such question arises in the present case.

12. We do not think it will serve any useful purpose to discuss the decisions of the Courts in India, which were cited at the Bar. Each case turned (as it must) upon its own circumstances and the decisions are not uniform on all points, and in some cases different views are taken of the effect of some of the Privy Council decisions. Some of the cases were decided before Nanomi Babuasin's case L. R. 13 I. A. 1 (1885), and in so far as they lay down that the sons must be made parties to a suit against the father in order to bind them, they must be taken to have been overruled by the later decisions of the Privy Council.

13. The decisions of the Privy Council cited above show that the whole family property may be sold in execution of a money decree against the father alone for

a personal debt of the father, if the debt was not contracted for immoral purposes, and that it is not absolutely necessary that the son should be a party either to the suit itself or to the proceedings in execution.

14. They further show that if it appears from the form of the suit or of the execution proceedings or from the description of the property put up for sale, that only the interest of the father in the property was intended to be sold and was put up for sale, the interest of the sons would not pass by such a sale and in such a case, the absence of the sons from the suit or execution proceedings would be a material element for consideration.

15. If, on the other hand, the proceedings show that the intention was to sell the entire property and the same was sold and bargained for, then the purchaser would be entitled to the whole and the sons, though not parties to the proceedings, cannot claim their shares against the purchaser except by proving that the debt was contracted for immoral purposes.

16. And lastly the words "right, title and interest" of the judgment-debtor may either mean the share which the father might have sold to satisfy his debt or the share which he would have obtained on partition; and the question what was intended to be sold or was sold in each case will depend upon its own circumstances.

17. We are now to apply the above principles to the facts of the present case. The decree against the Defendant No. 4, Babu Durga Dutt Singh, the father of the Plaintiffs, was, as we have already stated, for the recovery of arrears of Government revenue in respect of the Babuana property which was enjoyed by the family.

18. Even if it was not a family debt, it could not possibly be attacked on the ground of immorality, and there was no allegation even of any immorality on the part of the father. That being so, the father could have sold the share which the family had in the property, to satisfy the debt and the creditor therefore, could sell the property and not merely the personal interest of the father in execution of the decree, although it was passed against the father alone. Now in the second paragraph of the plaint in the present suit the Plaintiff distinctly stated that the decree-holder caused the 7 as. 8⁷ gds. share of Mouzah Pandaul to be sold by auction declaring it to be the property of the Defendant 2nd party (the father), and in the 5th paragraph of the plaint they stated, "that the said share sold is the ancestral property of the joint family of the Plaintiffs and the Defendant 2nd party and the Plaintiffs have each of them an equal interest in it as the Defendant 2nd party has. The right and interest of the Plaintiff's in the property sold was not liable to be sold and could not be sold under the said decree and the said late Maharaja acquired no legal right or interest to or in the Plaintiffs' right and interest to the said property under the said auction sale." The fact that the 7 and odd annas share in Mouzah Pandaul, belonging to the family, was sold, is not only not denied, but is admitted by the Plaintiffs in the

plaint. All that is stated is that their interests were not liable to be sold and could not be sold. Having regard to the statements in the plaint, the question whether only the personal interest of the father or the entire interest of the family in the property was sold does not arise at all; and we are of opinion that it is not open to the Appellants, under those circumstances, to raise the question in appeal. But even assuming that it is open to them to raise the question, let us see what was intended to be sold and was sold. In the sale proclamation the property belonging to the judgment-debtor to be sold at auction was described as "7 as. 8 gds. 3 karas of Mouzah Pandaul, within Thana Barampore, the former Touzi Number whereof is 5417 and the present Touzi Number 6473 and the area of the entire mahal is 2925 acres 3 roods 1 pole and the Sudder Jama of the entire mahal is Rs. 2,554-11." The sale took place on the 20th March 1896 and the property was purchased by the decree-holder for Rs. 55,000. The judgment-debtor, the father of the Plaintiffs, applied for setting aside the sale on the ground of irregularities in conducting the sale; but the Court held that the sale was properly proclaimed, the process was actually served and that the evidence in proof of the insufficiency of price could not be deemed good and satisfactory; and the application was rejected. The sale was confirmed on the 13th July 1896. The order confirming the sale states "whereas Munshi Udit Sahay, Mukhtear for the decree-holder, purchased for Rs. 55,000 the rights and interests in the properties specified below sold by the bailiff of the Court on the 20th March 1896, in execution of the decree in Suit No. 3 of 1892 by this Court and thirty days have elapsed since then and a petition made by the judgment-debtor for setting aside the sale was rejected on the 2nd July 1895, it is ordered that the sale be and the sale is hereby confirmed." Then follows the inventory which is exactly the same as in the sale proclamation, namely, 7 as. 8 gundas 3 kouris share of Mouzah Pandaul, &c., &c. On the 7th September 1896, a certificate of sale was granted which states "This is to certify that Munshi Udit Sahay, the Mukhtear, has been declared purchaser for decree-holder for and in consideration of Rs. 55,000 in Suit No. 3 of 1892 at a sale by public auction on the 20th March 1896 of the undermentioned property, viz., 7 as. 8 gundas 3 kouris in Mouzah Pandaul (the further description being the same, as in the sale proclamation) in execution of the decree in this suit and that the sale has been duly confirmed by the Court."

19. It will appear from the sale proclamation, which is the most important document, that what was intended to be and was going to be sold was the 7 and odd annas share of Mouzah Pandaul which was the only share belonging to the family in the Mouzah. The certificate of sale which is the title-deed of the purchaser also shows the same thing. There is nothing whatever to show in either of these two documents that only the right, title and interest of the judgment-debtor was going to be sold or was sold.

20. It was contended on behalf of the Appellant that in the order confirming the sale, the words "rights and interest" in the property give rise to an ambiguity. We do not think, however, that they do. The words "rights and interests," we think,

mean the entire rights and interests in the property ; and even if these words mean the rights and interest of the judgment-debtor we think having regard to the terms of the sale proclamation and the certificate of sale, the words "rights and interests " in the order confirming the sale (which, moreover, could not override the terms of the sale proclamation) do not raise any ambiguity or induce us to hold that only the personal interest of the father was sold. The certificate of sale was followed by delivery of possession and the purchaser obtained delivery of possession of the entire 7 and odd annas share of Mouzah Pandaul belonging to the family without any objection on the part of his sons who were adults at the time, and the purchaser was in possession for ten years of the entire property when the present suit was brought in 1906.

21. It was not even suggested that the price paid was not the full value of the property purchased but only of the personal interest of the father. The only evidence we have on the record (the order refusing to set aside the sale) shows that the price was not insufficient ; and the Appellants cannot complain that the matter was not gone into in the lower Court when they admitted that the sale was of the entire property and not merely the personal interest of the father.

22. Under the circumstances, we are of opinion that the interests of the Plaintiffs in the property in suit passed by the sale and that they cannot succeed as the debt for which the property was sold was not a debt incurred for immoral purposes. We, accordingly, confirm the decree of the Court below and dismiss the Appeal with costs.