

(1948) 09 CAL CK 0003

In the Calcutta High Court

Case No : A.F.A.D. No's. 1261 and 1511 of 1943

Mt. Muneswari and Others

APPELLANT

Vs

Sm. Jugal Mohini Dasi

RESPONDENT

Date of Decision : 02-09-1948

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 25, Order 41 Rule 27
Evidence Act, 1872 — Section 43

Citation : AIR 1952 Cal 368

Hon'ble Judges : Harries, C.J.;Chakravartti, J

Bench : Division Bench

Advocate : Apurbadhan Mukherji and Chandra Narain Laik, in 1261 and Purusottam Chatterjee, in 1511, for the Appellant; Apurbadhan Mukherji and Chandra Narain Laik for in 1511 and Purusottam Chatterjee in 1261, for the Respondent

Judgement

Chakravartti, J.—These are two appeals, arising out of the same suit; & the same judgment, S. A. No. 1261 of 1943 being an appeal by the plff. & S. A. No. 1511 of 1943 an appeal by the daft. The matter came up to this Court, once before & having been remanded, has come up a second time after a second decision by the lower appellate Court.

2. The subject-matter in dispute is a house, situated in the town of Asansol, which, admittedly, was acquired by & belonged to one Hanuman Singh. Hanuman was governed by the Mitak-ahara School of Hindu law & his descendants will appear from the following genealogical table.

HANUMAN	_____		_____			Ram
Nehera	Ram	Janam		_____		_____
						Deoman
Ramkripal	Ram	Sagar	Baranasia		_____	
						Ramdas
Shyamdas		_____		_____		

			Hari	Narain	Baramdeo	
Jadunathan Shewpujan						

3. As far as it appears from the record, all the persons shown in the above table, except Hanuman & Deoman, were alive at all material times, & are still alive. It will be seen that Hanuman left two sons, named Ram Nehera & Ram Janam. Ram Nehera had four sons, named Deoman, Ram Kripal, Ram Sagar & Baramasia & of them, Baramasia has two sons, named Ramdas & Shyamdas, Ram Janam, the other Son of Hanuman, has two sons, named Harinarain & Baramdeo & the former of them has two sons, named Jadunandan & Shewpujan. Deoman died in the year 1938. When Hanuman died does not appear, but it is clear that he died before any of the transactions with which the present suit is concerned took place.

4. Hanuman Singh was a resident of the district of Sahabad & he acquired the house at Asansol when he was employed there in a Colliery. His elder son, Ram Nehera, worked & lived elsewhere but the younger son, Ram Janam, appears generally to have lived with him. After his death, Ram Janam introduced into the house the deft. Jugal Mohini who was his mistress. The two were living together when on 18-8-1929, one Mr. Agabeg obtained a decree against Ram Janam for a refund of Rs. 500 which was the price paid for another house which Ram Janam had sold to Mr. Agabeg & in which Ram Janam was found to have no title. In execution of that decree, Agabeg brought the present house to sale & it was purchased by one Kedar Bhandary on 13-3-1930. On the 27th July following, Kedar sold the house to Jugal Mohini & the result of that transaction was that Ram Janam continued to live in the house. By 1936, however, the relations between him & Jugal Mohini ceased to be cordial & in that year she brought a suit against him for recovery of possession of the house on the allegation that she had been wrongfully & forcibly expelled. On 8-1-1936, the suit was decreed. Shortly thereafter, on 18-9-1936, the plffs. purchased a 13 annas 4 pies share in the house from the sons & grandsons of Ram Janam & all the surviving members of Ram Nehera's branch, except Baramasia.

5. In 1937, Jugal Mohini attempted to take possession of the house in execution of her decree against Ram Janam, but met with opposition from the plffs. Thereupon, she commenced a proceeding under Order 21, Rule 97, Civil P. C. in which the plffs. set up their purchase. The Court ruled that it could not go into complicated questions of title in that summary proceeding & made an order for possession in the defendants' favour on the finding that the vendors of the plffs. had never been in possession of the house. The order was made on 19-3-1938.

6. On 22-3-1938, the plffs. brought the present suit under Order 21, Rule 103, Civil P. C. for a declaration of their "title to & possession over a 13 as. 4 pies share" of the property & a further declaration that the deft. Jugal Mohini had "no connection therewith". No other person was impleaded in the suit. Briefly stated, the plfl. case was that the house was joint family property belonging to the

coparcenary constituted of the sons, grandsons & great grandsons of Hanuman Singh, that they, the plffs. had validly acquired a 18 annas 4 pies share thereof & were in possession, that the so-called purchase by the deft, was a collusive & benami transaction in the interest of Ram Janam & that the debt for which, the house had been sold was an immoral debt.

7. The defence, in substance, was that the house did not belong to any joint family, but had become the exclusive property of Ram Janam on a partition, as was shown by the entry in his sole name in the record of rights; that the debt for which the house had been sold was not an immoral debt; that it had been lawfully sold in execution & validly purchased by the deft, from the auction-purchaser; that her title to it had been established in the suit against Ram Janam; & that the plffs. or their vendors had never been in possession.

8. As has been seen, the suit was brought within three days of the order for possession made in the deft.'s favour in the proceeding under Order 21, Rule 97. It appears that the plff. applied for a temporary injunction restraining the deft from taking possession of the house & an ad interim injunction was first granted. At the final hearing of the application for injunction, however, the Court held that no case for granting an injunction had been made out but it directed the deft, to furnish security for mesne profits. She failed to comply with that direction with the result that the interim order was ultimately made absolute & she has been unable to take possession of the house.

9. At the hearing of the suit, the trial Court held in favour of the plffs. on all the issues raised. It held that the alleged partition had not been proved & the house belonged to Ram Nehera & Ram Janam, together with their sons & grandsons, in co paroenary right as they were still members of a Mitakshara joint family. It was held further that the debt to Mr. Agabeg for which the house had been sold was an avyavahariha debt & accordingly what had passed by the sale was only the 2 annas 8 pies share of Ram Janam himself. Id was next held that the sale to the plffs. having been a sale by Ram Nehera as the Karta of the family, it was a good sale by which the shares purported to be transferred had passed. It was lastly held that the plffs. & not the deft. were in possession. On those findings the plffs. were given a decree for joint possession with the deft, in respect of their share of 13 annas & 4 pies.

10. On appeal, the decision of the trial Court was reversed & the plffs." suit dismissed, but as the appellate judgment was, in its turn, set aside by this Court it is not necessary to refer to it in detail. The second appeal to this Court was heard by Roxburgh J sitting singly, who held that the lower appellate Court had not applied its mind to the real questions in issue & its judgment was A. I. R. not even intelligible. Accordingly, he remanded the case for a re hearing of the appeal & indicated three points which would have to be specially considered. Those were (1) whether that there had been merely a severance of the joint statue of the family or an actual division of the estate by partition so that the house at Asansol had fallen exclusively to Ram Janam's branch ; (2) whether the

purchase by the deft."s vendor was in any way affected by the character of the debt; & (3) whether the plff."s vendors had power to transfer their undivided shares in the joint coparcenary property so as to be able to pass a valid. title to the plffs.

11. The lower appellate Court has now found that there was neither a division of the estate,"nor a severance of the joint status & that at the time of the sales, the house continued to belong to a co. parcenary constituted of the two brothers, Ram Nehera & Ram Janam & their respective branches. It has next held that the debt incurred by Ram Janam to Mr. Agabeg was not an avgavaharika debt & his sons & grandsons were liable; therefore. The last finding is that the sale to the plffs. "was not a sale for family necessity, nor a, sale by Ram Nehera as the Karta of the family, but a sale by the executants of the Bale-deed of their individual undivided shares for their own benefit. The deed did not include the interests of Baramasia, nor of Deoman who according to the learned Judge, died after the deed & accordingly it could only pass a 11/30th share of the property.

12. The conclusion of the lower appellate-Court on these findings is that the deft, acquired a valid title to the share of Ram Janam"s branch? but she, being neither a co-parcener, nor a subsequent transferee of the entire interest, could) not question the sale to the plffs. which though a sale by some members of a Mitaksbara joint family of their undivided shares was not void but only voidable. Accordingly, the plffs. have-been given a decree for possession to the extent; of a 11/80th share jointly with the deft.

13. As already stated, against that decision the plffs. & the deft have both appealed. The appeals came up for hearing in the first instance-before my Lord the Chief Justice who referred them to a Division Bench in view of the importance of some of the questions involved.

14. Taking the plffs". appeal first, the grounds, urged in that appeal are (i) that the learned Judge below was wrong in re-hearing the appeal on the evidence already on record & ought to have taken further evidence; (ii) that he was wrong in holding that Ram Janam"s debt to Mr. Agabeg was not an avyavaharika debt, & (iii) that he has made a mistake in calculating the-share which passed to the plffs. under" their Kobala.

15. The first ground is entirely without substance. This Ct. in directing a re-hearing of the appeal, did not direct it to be reheard on the evidence already on record & such further evidence as the parties might adduce. It simply directed the appeal to be re heard in the light of the observations contained in the judgment. That direction meant that the same appeal that had been beard once, was to be heard again & not a different kind of appeal with its scope enlarged by the introduction of further evidence. The lower appellate Ct. would, therefore, have been wrong if it allowed further evidence to be given, simply because the appeal had been remanded for a rehearing. It might have to consider an application for leave to give fresh evidence under Order 41, Rule 27 of the Code,

if any such application was made, though the chances of such an application succeeding at the second hearing of an appeal were practically nil. But it does not appear from the order, sheet of the appeal that any such application was ever made. The complaint that the lower appellate Court did not take fresh evidence is thus wholly devoid of substance.

16. Nor, I think are the plffs." right in contending that Ram Janam's debt to Mr. Agabeg was an avyavaharika debt, as the term is understood in Hindu Law. The point in that contention is that if the debt was such that the sons & grandsons of Ram Janam would not be liable for it, their interest in the house did not pass by the execution sale & accordingly it passed to the plffs. under the Kobala subsequently executed in their favour by, among others, the sons & grandsons of Ram Janam. It is not contended that the debt was contracted for immoral purposes. What is contended is that the money was obtained from Mr. Agabeg in a way which amounted to cheating & since the liability was thus a criminal or at least a quasi-criminal liability, the sons & grandsons of Ram Janam would be under no duty to discharge it. In the first place, this contention is not based on any legal evidence. It is founded solely on certain observations contained in the judgment in the suit between Agabeg & Ram Janam & it is not easy to see how the judgment is admissible in evidence on a question between the plffs. & the deft. It was contended that the deft, claimed through Ram Janam. Granting she does, the plffs. do not claim through Agabeg & the judgment being thus one not inter partes, it is, if admissible at all in the present suit admissible only as showing that certain observations were made or certain facts found in a certain judgment, but not admissible as evidence of the truth of the facts found or observations made. Proof of the fact that certain observations were made in a certain judgment is of no use whatever. In the second place, assuming that the observations relied on can be treated as evidence of their subject-matter, it is to be noticed that they are merely observations, in no way relevant to the real issue in the suit. The plff. in that suit, Mr. Agabeg, had asked for a declaration of his title to the property he had purchased from deft. 2, Ram Janam, & for recovery of possession from deft, 1, Ram Raj Sukul, who was claiming it as his own. In the alternative, he asked for a refund of the purchase money, if it was found that his vendor had no title to the property. The only issue, therefore, was whether Ram Janam had title to the property he had purported to convey & in deciding it, it was in no way necessary to decide whether Ram Janam had made a fraudulent representation to Agabeg in order to obtain money from him by such representation. Again the observation relied on by the plffs."does not go as far as imputing deliberate fraud to Ram Janam. But assuming it does & even assuming that the parties to the present suit are representatives of the parties to the previous suit, it is impossible to see how an observation on a matter not directly & substantially in issue can be binding, in the subsequent suit. It is to be observed that the plff"s. have given no other evidence & want to establish the avyavaharika character of the debt by this observation alone. It is clear that they cannot possibly succeed. Lastly, it appears from the facts as stated in the

previous judgment that there is no foundation for branding Ram Janam's liability to Agabeg as a original liability. He claimed to have acquired the property under a registered Patta granted to him by a certain person, while deft. 2, Ram Raj Sukul, claimed to have acquired the same property under a settlement from another person. The question was to which of the Pattas the land appertained & which of the two grantors had the superior title. It appears that Ram Janam asked for a local investigation in the suit, but his prayer was refused as it was made too late. The best evidence on the matter was thus not available to the Court. It appears further that in the conveyance to Agabeg, Ram Janam included an indemnity clause to the effect that if it subsequently transpired" that he had no title to the-property, he would be bound to return the consideration money with interest. On these facts, it is difficult to find the faintest trace of criminality in the intentions of Ram Janam, not to speak of his having induced Agabeg to part with money on a false & fraudulent representation. On the other hand, what he appears to have done was to make an attempt to augment the estate by first acquiring the property & then, as some question was raised as to title, by converting it into money on a true re^ presentation of facts. I am therefore of opinion that Ram Janam's debt was not an avyavaharika debt & the sale held for satisfying it passed the interest of his sons & grandsons.

17. The third ground urged on behalf of the appellant appears to be correct. The learned Judge calculated the share transferred by the Kobala on the footing that Deoman had died in 1940. Apparently, he made a confusion between 1340 B. S. the actual year of Deoman's death, & 1940. The Kobala was executed in 1936 & since Deoman died in 1340 B. S. corresponding to 1933 it is not disputed that his share, as such, was not in existence at the date of the Kobala & has passed to the surviving co-parceners. If the transfer was valid, it is not disputed that what passed under it was roughly a 11/24th share.

18. The above disposes of the appeal by the plffs. The appeal by the deft, raises a difficult question which, though settled now in the United Provinces & Behar, does not appear to have been considered or decided in any reported case in Bengal.

19. What is contended by the deft, is that even if the family remained joint in status & estate, as now found, the sale at which her vendor purchased having been an execution sale, it validly passed the undivided share of Ram Janam & his sons & grandsons. But the sale to the plffs, having been a voluntary sale & a sale by certain members of a Mistakshara co-parcenary of their undivided shares, it was altogether void & passed nothing. The plffs. could not therefore be entitled to the possession of any part or share of the house as against the deft. The reply of the plffs. is that the execution sale, if it was valid, must be taken to have caused a severance of status & thereafter there was no joint-family estate but only an estate held by the several co-sharers as tenants-inoommon. Secondly, that even if the joint family estate continued, the sale by the plff's. vendors of their undivided shares was not void, but only voidable at the instance of one of

the other co-parceners or a subsequent transferee of the entire coparcenary interest. The debt, being neither, she was not entitled to question the validity of the sale to the plffs.

20. The first question is whether the execution sale operated to effect a severance of the joint family status. Whether or not a voluntary alienation by a member of a Mistakshara joint family of his undivided share in The family estate for purposes of his own benefit is void or only voidable in Bengal & the United Provinces, it is well settled now that it may be successfully challenged as invalid. But it is equally well settled that the undivided share of a Mistakshara coparcener is seizable in execution for the realisation of a personal debt & if sold, it passes to the purchaser so as to enable him to demand a partition on the basis of it. The Full Bench decision of this Court, in *Sudaburt Pershad v. Foolbash* 12 W. R. I. (F. B.), which is the root authority in this Province on this subject, itself recognises this distinction & it has since been affirmed in a series of decisions of the Privy Council, too numerous to mention. But if an alienation by deed is invalid for the reason that so long as the estate remains joint, no co-parcener can be said to have any particular share & accordingly there is nothing which he can transfer as his property, it is pertinent to enquire on what basis alienation under process of execution has been held to be valid. The indefinability & consequently the virtual non-existence of any such share as purported to be sold would appear to be an equally valid objection to the effectiveness of execution sales as well. In some of the decisions of the Judicial Committee, a somewhat general answer to this question has been given. Quite early in the career of this question through Courts of law, this Court, in a case which has since been repeatedly cited, set aside a sale upon a mortgage, executed by two members of a joint family but gave relief to the mortgagee, auction purchaser by imposing a partition on the estate by way of, as it said, adjusting the equities between the parties, *Mahabeer Persad v. Ramyad Singh* 12 A.P.L. R. 90. Later in *Deendyal Lal v. Jugdeep Narain* 4 I. A. 247, the Privy Council approved of the exception made in favour of execution sales & again made a reference to equity, but observed further that since the co-parcener whose interest was sold could enforce a partition at any time so long as he lived, it would not be unduly interfering with the peculiar status of Mitakahara coparceners if an execution sale of the undivided share of a coparcener was held to be valid, but the right of the purchaser was limited to that of compelling the partition which the debtor might have compelled. A division of status was thus hinted at, but the principle was not fully worked out. It is clear that although, under this explanation, the purchaser would only acquire a right to , partition, a division is implied, since the right to partition would have to be exercised on the basis of a certain share & that share could only be the share purchased at the execution sale, already demarcated & defined. It could not be a share of the nature of an undivided share of a member of a joint family, inchoate & undefined, since the execution-purchaser could not become a member of the co-parcenary by his purchase. In the next case decided by the Privy Council, *Suraj Bansi v. Sheo Prasad* 6 I. A. 88 there was again a reference to equity. Their

Lordships observed that all alienations of undivided shares, whether voluntary or compulsory, were inconsistent with the strict theory of a joint family governed by the Mitakshara law & the rule favouring exceptions to the strict law had been one of gradual growth, founded upon the equity, which a purchaser for value had, to be allowed to stand in his vendor's shoes & to work out his rights by means of a partition. To similar effect was the observation made in a much later case, *Sahu Ram Chandra v. Bhup Singh* 44 I. A. 126 which was to the effect that much, if not all of the law upon this subject, had arisen from the necessity of protecting the rights of third persons, "say, the purchasers of the property who have taken their title for onerous consideration & in good faith." The observation, it is true, was made with immediate reference to another exception, viz. sale by a father for an antecedent debt, but it applies to all modern exceptions to the old law. The ground of an equitable adjustment is not, however, a very convincing ground, at least so far as the law, as applied in Bengal & the United Provinces, is concerned; for, if the object is to protect a person who has advanced money in good faith, there is little reason to distinguish between a mortgagee or a purchaser under a voluntary sale & an execution purchaser. This was perhaps realised in *Suraj Bansi Koer's* case referred to above, & a distinction was there made between the execution creditor & a third party purchaser. But the distinction can hardly be said to be based on any good reason except where special circumstances exist, for a third party has no better reason to purchase an undivided share of a Mitakshara coparcener at an execution sale than a creditor has to advance money on the security thereof. The only case where a distinction can justly be made is when the decree is such that, *prima facie*, it makes the whole joint estate liable & in such a case it can be said that a third party purchaser was not bound to look beyond the decree. The distinction has not always been observed, as for example in *Deendyal's* case (*ante*) where the execution purchaser was the creditor himself, although it must be observed, he obtained a money decree in spite of being a mortgagee & brought to sale other properties of the judgment debtor.

21. To my mind, the real explanation of the exception in favour of execution sales is that suggested in *Deendyal's* "case which was stated more clearly in two subsequent decisions of the Privy Council. In *Madho Parshad v. Mehrban Singh* 17 I. A. 194 Lord Watson stated both the general law & the exception in the following words:

"Any "one of several members of a joint family is entitled to require partition of ancestral property, & 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, & for his own purposes but, as soon as a partition is made, he becomes the sole owner of his share, & 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 & 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 the member's interest in the estate, or a sale under the execution."

22. It is clear from this passage that an agreement between the members to hold the joint property in defined shares & an attachment of the undivided share of a member in execution are alternatives to, & may be substitutes for, an actual partition. An attachment of an undivided share thus effects a division of the joint status & it is on that basis, as the passage proceeds to say, that a sale of that share in execution can be supported. The matter is made even clearer in an earlier decision of the Privy Council. In *Hurday Narain v. Rooder Parkash* 11 I. A. 26 where the holder of a money decree against the father in a Mitakshara joint family attached & purchased his right, title & interest in the family estate in execution, Sir Richard Couch observed that the purchaser became entitled to the father's share, "treating it as if the sale was to operate as a partition at the time." The occurrence of an immediate division of interest was emphasised by a further finding. The family consisted of the father, the mother & a son & the suit was by the son to recover possession of the property from the purchaser who had taken possession of the whole of it. The High Court, in the view that the purchaser took only what the father would take on a partition & that if a partition had been made at the time of the sale, the mother would have taken a third share, directed her to be made a party & passed a decree, directing that the mother & the son would each recover a third share, leaving the remaining third in the purchaser's possession. The Privy Council did not approve of the form of the decree, for a reason that I shall have to notice in another connection, & held that it was more favourable to the purchaser than it ought to have been. But since the appeal was by him, their Lordships did not see any reason to interfere with the decree & observed : "He gets all that he would be entitled to if a partition were made." The purchaser had been given a one-third share on the footing that such would be his debtor's share if a partition had been made at the time of the sale & their Lordships, besides re-stating the principle in terms, approved of the actual determination of the share as made by the H. C. on that basis.

23. In my opinion, it is clear from the decisions of the Judicial Committee referred to above that an attachment of the undivided share of a member of a Mitakshara joint family during his lifetime operates as a division . of interest causes a severance of status. If the interest which passes to the purchaser is the share which the J. D. would get if a partition was made at the time of the sale, it follows that the interest would neither be diminished by an increase, nor increased by a diminution in the number of co-sharers, as has been held by a Full Bench of the Madras H. C. in the case of voluntary alienations of undivided shares which, in the Madras Presidency, are valid: *Chinnu v. Kalimuthu* 35 Mad. 47.

24. The execution sale caused by Mr. Agabeg would therefore cause a severance of the joint family estate, but one further circumstance special to this case must

be considered. Did it make any difference that what was purported to be sold was not the undivided share of Ram Janam, not even the totality of the shares of his branch, but the whole house ? In my opinion, the purported sale of the whole house does not exclude the application of the principle stated. If a creditor attaches an entire property as belonging to his debtor whereas the latter has only a share in it or attaches a larger share than the debtor has, the attachment will be effective only to the extent of the share actually owned by the debtor, but it will nevertheless be effective. There is thus no reason why the purported attachment of a larger share will not have the effect of causing a partition, if it is otherwise effective as an attachment of the real "share & if it carries with it all the incidents of a valid attachment to that extent. In the case of *Suraj Bansi v. Sheo Proshad* 6 I. A. 88, the father had mortgaged the entire 8as. share in the ancestral estate which he owned along with his two sons & the entire share was sold in execution. Yet the Judicial Committee held that the purchaser had acquired only "an undivided third share in the eight annas share" with the right of ascertaining the extent of such third part or share by means of a partition. If the principle of partition applied there, it clearly applies in the present case.

25. The plffs. are therefore right in contending that the execution sale of the house operated to effect a severance of the joint status. The deft, does not dispute this proposition, as generally stated. But when the plffa. proceed to contend that in consequence of the severance of status, there was no longer any joint family estate at all & therefore there could be no question of their vendors having transferred their undivided shares in a co-parcenary property, the deft, replies that the effect of the partition caused by the execution sale was not to sever all the members from one another but only to cause a severance between Ram Nehera's branch & the branch of Ram Janam. According to her, Ram Nehera remained joint with his sons & grandsons in spite of the execution sale, as did Ram Janam with his own sons & grandsons ; & since only some of the members of Ram Nehera's branch transferred their shares to the plffs., the transfer was void.

26. Now, it is true that while, the general principle is that when one co parcener separates from the others, there is no presumption that the latter remain united, there is a rider to the effect that when there has been separation between the members of a joint family, there is no presumption that there was a separation between one of the members & his descendants : *Hari Baksh v. Babu Lal* 51 I. A. 163. The case decided by the. Judicial Committee was a case of separation between two brothers & on the authority of that decision it is contended that all that was necessary to work out the rights of the execution purchaser in the present case was to separate the share of Ram Janam's branch from that of Ram Nehera's & it was not further necessary that the shares of the members of either branch should be separated. I am not too clear in my mind that the principle laid down in the cases cited would apply to involuntary partitions at the instance of a stranger-purchaser of a share, but it is not necessary to decide that question finally in this case. On the facts of the present case, the principle might perhaps

apply/since the whole share of Ram Janam's branch passed by the sale. But if the debt was such that the shares of the sons & the grandsons would not be affected, there would have to be a partition at least as between Ram Janam & his sons & grandsons & endless complications might arise if the partition were to stop there. However, even assuming that the debt, is wrong in contending that the members of Ram Nehera's branch remained joint in spite of the execution sale & that the Court did in law separate them, it cannot be doubted that they were entitled in law to re-unite. The Kobala under which the plaintiffs' claim itself states in the clearest terms that Ram Nehera is the Earta of a joint family constituted of himself & his sons & grandsons & it states at another place that the executants of the Kobala hold & possess the property in an undivided state along with Ram Janam. Assuming that Ram Janam & his branch had been separated off by the execution sale & Ram Nehera & his sons & grandsons had also been similarly separated, there can be no doubt that by the date of the Kobala, the latter had again formed themselves into a joint family. The sale, so far as it was a sale by members of Ram Nehera's branch, was therefore a sale by some of the members of a joint family, inasmuch as Baramasia did not join in the sale.

27. This leads me to the main question argued in the appeal which is whether the sale to the plaintiffs was void or only voidable & if voidable, whether it was so at the instance of a person who was neither one of the other co-parceners, nor a subsequent transferee of the entire interest in the estate. But before dealing with it, I might dispose of a question faintly raised during the argument as to the extent of the share acquired by the debt. To my mind, the present case is clear. This is not a case where a member of a joint family mortgaged his undivided share in the joint family estate & the mortgagee, purchased the share in execution of the mortgage decree. Nor is this a case where a Earta transferred or mortgaged the property & the mortgagee, having brought a suit upon the mortgage the question is if or to what extent the other co-parceners are liable. Cases such as the above have been dealt with in numerous decisions of the Judicial Committee & a close student of the decisions might still be seeking an answer to certain obstinate questions. Why it might be asked, if a mortgage by a member of his undivided share for his personal benefit or by a Earta of the joint property without any justifying necessity be invalid, *Chet Ram v. Ram Singh* 49 I. A. 228, *Narain Parshad v. Sarnam Singh* 44 I. A. 163, a sale in execution of a decree upon a mortgage, executed by a father if already held, should be upheld to the extent of the interest of the mortgagor? *Suraj Bansi v. Sheo Prasad* 6 I. A. 88. The head note of the case in the report in the Indian Appeals, stating that the decree was a decree for money is wrong, & it will appear from the judgment that the decree was a mortgage decree & the sale was a mortgage sale. But such questions do not arise in the present case. Here there was a debt of the father which was not; an immoral debt & about the antecedence of which there could be no question. It was not a debt on amount of a loan obtained by simultaneously mortgaging the whole or a portion of the family estate. According

to all authorities, the debt was binding on the sons & grandsons & the execution sale passed their interest as well, thus conveying to the purchaser a half share of the property.

28. To return now to the main question, the nature of the transfer in favour of the plffs may first be indicated. It is a transfer by Ram Nehera, acting for self & as the guardian of his two minor sons, Ram Kripal & Ram Sagar, as also of the minor grandsons Ramdas & Shyamdas. Other transferors are Baramdeo & Harinarain, the latter acting for self & as the guardian of his minor sons, Jadunandan & Shewpujan. Ram Janam is not a party to the transfer, nor is Barasnia. The transfer is of a 13 annas 4 pies share which was apparently arrived at by leaving out the share of Ram Janam. But even of the members of Ram Nehera's branch all are not represented. Desman was dead but Baramasia, who was living, is left out. The sale, as respects the shares of Ram Nehera's branch, was not by him as the Karta of his joint family, seeing that he sold the shares of his sons & grandsons as their guardian. So far as Ram Nehera's branch was concerned, the sale was thus a sale by some of the members of a Mitakshara joint family of their undivided shares. There is no suggestion that the consent of Baramasia was obtained, nor was there any family necessity to be met or an antecedent debt to be paid.

29. Now, while an alienation for value made by a member of a Mitakshara joint family of his undivided share without the consent of his other co parceners is valid in other Provinces, it is not valid in the U. P. or in Bengal. The difference, as explained by the Judicial Committee in the case of *Balgobind Das v. Narain Lal* 20 I. A. 116, has arisen by reason of the Courts of the other Provinces having relaxed the rigidity of the Mitakshara law & the Courts in Bengal & the United Provinces having applied the law in its full rigour, save in the case of execution sales. The process of relaxation has now been arrested, for in *Balgobind's* case, the Judicial Committee declared generally what they had stated with reference to a particular type of case in *Lakshman v. Ram Chandra* 7 I. A. 181 viz., that no further extension of the doctrine of alienability would be recognized. But since then a new doctrine has been developed in Bihar & the United Provinces as to the extent of the invalidity of an alienation of an undivided share. According to the High Courts of Allahabad & Patna, such an alienation is not void but only voidable. The former has added a further doctrine that it is voidable only at the instance of one of the other co parceners or a subsequent transferee of the interest of the entire joint family in the property alienated. There is no reported case of the Calcutta High Court where the question was considered or decided.

30. In my opinion, the question is concluded by a series of pronouncements of the Judicial Committee which leave no room for doctrines such as those developed at Allahabad & Patna. In the passage already quoted from the judgment in *Madho Parshad v. Mehrban Singh* 17 I. A. 194, a case from Oudh, the language used by Lord Watson is that before partition & so long as his interest is indefinite, a member of a Mitakshara joint family is not in a position to

dispose of it at his own hand & for his own purposes". If he is not in a position to transfer, which means that he has no Capacity to do so, it is difficult to see how a transfer made by him own be anything but utterly void. The actual decision was that upon the death of the transferor, his share had gone to the surviving co-parceners who were entitled to recover it from the purchaser & it seems to me that this could be possible only if the transfer had passed nothing. The principle was re-affirmed in *Balgobind Das v. Narain Lal* 20 I. A. 116, a case from Allahabad, as "settled law". In *Sahu Ram Chandra v. Bhup Singh* 44 I. A. 126, also a case from Allahabad, an even dearer statement was made by Lord Shaw of Underline (as he then was). His language is as follows :

"Under the Mitakshara Law, the joint family property owned, as stated, by all the members of the family as co-parceners, cannot be the subject of a gift, sale or mortgage, by one co-parcener except with the consent, express or implied, of all the other coparceners. Any deed of gift, sale or mortgage, granted by one co-parcener on his own account of or over the joint family property is invalid; the estate is wholly unaffected by it, & it entirely stands free" of it."

31. If the joint family estate, is "wholly unaffected by an alienation & stands "entirely free" of it, it cannot be burdened with the alienation in any circumstances & the alienation must) be wholly & absolutely void. In the next case, *Narain Prasad v. Sarnam Singh* 44 I. A. 168, a third case from Allahabad, where there was a mortgage, by three separated brothers of their respective zemindary rights in certain villages, the suit was against one of the mortgagors, who was the only survivor of the three, his son & grandson, sons & grandsons of the other two mortgagors, & a brother. No necessity or antecedent debt having been proved, the question was whether the mortgage, was at least binding on the interests of the surviving mortgagor, Sarnam Singh, as the Karta of his family. Discount Aldine, who delivered the judgment of the Board, recalled the observations of Lord Watson in *Madho Pur shad's* case (ante) & observed that the principles there laid down governed all such cases & according to those principles the mortgage was "void". It did not give to the mortgagee any rights against even the Karta's interest in the joint family property, in the absence of any special circumstances. Shortly thereafter, in *Jogi Das v. Ganga Ram* 21 C. W. N. 957, a fourth case from Allahabad, Viscount Haldane re-affirmed the decision in *Sahu Ram Chandra's* case. Next, in *Manna Lal v. Karu Singh* 39 C. L. J. 256, a case from Calcutta, Lord Phillimore referred to the law as "finally established" by the decision of the Board in *Narain Prasad's* case where it had been held that a mortgage of the joint family property of a Mitakshara family by its Karta, unless necessity or antecedent debt was proved, was "void" & did not effect even the Karta's interest. It is true that some of these cases were concerned with alienations by the Karta, but it is clear that in the absence of family necessity or an antecedent debt, such alienations were treated as in no way different from alienations by any other member. Lastly, in the case of *Chet Ram v. Ram Singh* 49 I. A. 228, a fifth case from Allahabad, Lord Shaw recalled & re-affirmed the proposition laid down by himself in *Sahu Ram Chandra's*, case which has already

been quoted.

32. In the face of these repeated expressions opinion by the Judicial Committee, there is no room for the view that an alienation by a member of a Mitakshara joint family of his undivided share without the consent of his other coparceers is only voidable. An alienation which, is declared by the highest tribunal to be "void", by which the joint family estate is "wholly unaffected" & of which the estate stands "entirely free", cannot be regarded as valid until challenged. It is noticeable that in *Narain Parshad v. Sarnam Singh* 44 I. A. 163, the alienation was not held to be binding even on the alienor, for, one of the mortgagors, Satnam Singh, was alive & a deft, in the suit & a special contention that there should be a decree at least as against him & as respects his interest was not accepted. If an alienation was only voidable & voidable at the instance of another co-parcener of a subsequent transferee, there was no reason why in cases where the question arose in the lifetime of the alienor, a decree was not made against him so far as his interest was concerned on the principle, as applied in the case of execution sales, that he was entitled to enforce a partition & the same right should be given to his alienee. The fact that this principle has not been extended to voluntary alienations is another indication that, in the view of the Judicial Committee, such alienations are wholly void. Only one possible exception, that in a case of representation by the alienor, such as was made this Court in the old case of *Mahabir Prosad v. Ramyad Singh* 12 A P L. R. 90, has not yet been finally disapproved by the Judicial Committee. In the case of *Narain Prasad v. Sarnam Singh* 44 I. A. 163, Discount Haldane made no secret of his disapproval of that decision, but neither in that case, nor in any one of the three other cases where it was considered, was it expressly overruled.

33. It remains to consider briefly the reasoning on which the Patna & the Allahabad view is founded. It will be sufficient to take one case decided by each H. C. In *Kharag Narain v. Janki Rai* 16 Pat. 230, two learned Judges of the Patna H. C. took it upon themselves to say that where the Judicial Committee had said that the alienations were void, they must be understood to have meant that they were voidable & the learned Judges proceeded to point out the confusion that was apt to be caused by declarations that particular alienations were void, made after persons, at whose instance they were voidable, had proved them to be so. It is true that they do not name the Judicial Committee, but since they base their decision on the decision of the Allahabad EL C. in *Madan Lal v. Chiddu* 53 ALL. 210 & the decision deals with the pronouncements of the Judicial Committee where the alienations were declared to be void, there can be no mistake as to whom, the learned Judges had in mind. It appears to me that comment on this view of the Patna High Court is needless, except that to impute such inexactitude of language as a confusion between "void" & "voidable" to Judges like Viscount Hal Dane & Lord Phillimore does not appear to me to be permissible. The learned Judges of the Patna High Court do not give any other reason of their own, nor do they refer to the,, reasoned pronouncements of Lord Watson & Lord Shaw but content themselves with repeating what the Allahabad High Court had said. The

case decided by the Allahabad High Court shows a better appreciation of the real position & is, for that reason, a singularly weak defence of the rule, already laid down in earlier cases of that Court. The learned Judges admit that the Privy Council cases "which lead to the contrary result, if not positively against that view", were not brought to the notice of the Court, when the earlier cases were decided, but they prefer to follow those cases on the somewhat extraordinary ground that the decision of the Privy Council in the cases concerned would have been the same, even if the alienations were held to be merely voidable. Again, I shall content myself with saying that the learned Judges might have taken into consideration the fact that the learned Full Bench decision of their own High Court in the case of Chandradeo Singh v. Mata Parsad 31 ALL. 176 where it was held that such alienation passed no title had been repeatedly approved by the Privy Council. Nor were they justified in disregarding the view clearly expressed by the Privy Council on the ground that even on the contrary view, the actual decision would have been the same.

34. There is, in my view, nothing in the Patna & the Allahabad decisions which makes out any reason or possibility for holding that alienations of the kind under discussion are not void, but only voidable.

35. The transfer in favour of the plffs. must accordingly be held to be void. In view of that finding, it is not necessary for me to consider whether if the transfer was only voidable, it could be questioned by a person in the position of the deft. I may observe, however, that as at present advised, I cannot see any reason why, even if such an alienation be only voidable, it is voidable only at the instance of one of the other co-parceners or a subsequent transferee of the entire interest in the property. A person who has acquired a share in the property, on the basis of which he can enforce a partition, is equally affected by impositions of the rest.

36. If it could be held that the transfer in favour of the plffs. were valid, it would have to be considered whether the deft, would be entitled to joint possession with them. As pointed out by the Judicial Committee in *Deendayal v. Jug Deep Narain* 4 I. A. 247, *Suraj Bansi Koer v. Sheo Prosad Singh* 6 I. A. 88, *Hardey Narain v. Rooder Parkash* 11 I. A. 26 and other cases, an execution-purchaser of the undivided share of a co-parcener in the joint family estate is not entitled to joint possession with the remaining co-parceners, but only entitled to a declaration of the share he had purchased & of his right to have it ascertained by means of a partition, I doubt whether that principle would apply to a case like the present where the parties questioning the execution-purchaser's right to possession are not any co-parceners, but some stranger purchasers to whom the shares of some of the coparceners had passed. However, as, in my view, the plffs. acquired no title to the share they purported to purchase, the question of their right to possession to the exclusion of or jointly with the deft, does not arise.

37. A further point was urged in support of the deft.'s appeal to which it is

hardly necessary to refer. It was urged that the finding that the original family had continued joint in status & estate up to the date of the execution sale & that Ram Janam had not previously got the house allotted to his exclusive share on a partition was erroneous. There is no substance whatever in that contention.

38. In the result, S. A. No. 1261 of 1943 is dismissed & S. A. No. 1511 of 1943 is allowed in part. The judgment of the trial Ct., the decrees of both the Cts, below & the judgment of the lower appellate Court, except so far as the same is upheld by this judgment;, are set aside & the plffs." suit is dismissed; The appellant, in s. A. No. 1511 of" 1943 will be entitled to her costs of the appeal-from the resps. therein, but there will be no order for costs in S. A. No. 1261 of 1943.

39. After judgment had been reserved & this judgment prepared but before it was delivered, Mr. Mukherjee who appeared for the plffs. mentioned the case before us & stated that his clients wished to make an application for admission of additional evidence. The evidence intended to be adduced was stated to be a document, executed" by Baramasia during the pendency of the second appeals in this Court, in which he had admitted that though he was not a party to the transfer in favour of the plffs., the transfer had been made with his consent. We took the view that it was quite impossible to entertain any application, for admission of additional evidence at the present stage. One of the matters which the lower appellate Ct. was specially directed by the order of remand to consider was the effect of the absence-of baramasia from the deed of transfer & that matter was the subject of elaborate consideration. by the lower appellate Court. If the transfer was really with the consent of Baramasia, there was no reason why, before the lower appellate Court, no attempt should have been made to prove such consent. In fact, no evidence of such consent existed at that time & the document was admits tedly brought into existence during the pendency of the second appeals in this Court. A document which came into existence in such circumstances is liable to be viewed with the deepest suspicion, but, in any event, there could be no question of admitting it as additional evidence after arguments in tie appeals had been concluded & judgment reserved. If, as has so often been said, Order 41, Rule 27 was not intended to enable a party to patch up the weak parts of his case as it proceeded from Court to Court, the less was it intended to enable a party to create & put in further evidence as & when occasion arose & the necessity of such evidence transpired.

Harries, C.J.

40. I entirely agree. When sitting in Patna, I followed the case of Kharag Narayan v. Janki Rai 16 Pat. 230 which was then binding on me. This case approved of the Allahabad decisions which had been referred to by my learned brother. I am no longer bound by authorities of the Patna High Court & therefore I feel that the opinions which I expressed in Shyam Behari Singh v. Rameshwar Prasad 20 Pat. 904 no longer bind me. In this Court, the matter is-entirely at large & I find myself in entire agreement with the judgment delivered by my learned brother.