*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Simbhu Nath Pandey and others,* v. *Golab Singh and others, from the High Court of Judicature at Fort William in Bengal; delivered 26th February* 1886.

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Present:

LORD WATSON.
LORD FITZGERALD.
LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

This is one of the numerous cases relating to the amount of interest acquired by the purchaser at an execution sale where the sale relates to a joint family estate subject to the Mitakshara law, and the father of the family alone has been party to the proceedings. Like several of its predecessors it has been heard *ex parte*.

Luchmun Singh is father of the joint family. He has a wife and four sons. The family property consists of a share of mouza Kindwar amounting to 1 anna 4 pie in extent. Other shares of the mouza were, when the transactions now in question took place, vested in other branches of the family who had become divided from Luchmun. The share of Luchmun's father was four annas. The Appellants, who were Defendants in the suit, claim the whole 1 anna 4 pie. The Respondents, the wife and sons, who were Plaintiffs, claim five sixths of it

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as the shares which would come to them on partition.

On the 17th September 1865, Luchmun took a loan of 219 rupees from Bhichook, one of the Appellants, and executed a bond for payment in a month's time, with interest at 24 per cent., or, after the month, with interest at 48 per cent. In July 1869 the bondholder sued Luchmun, and an agreement was made that Luchmun should pay Rs. 590. 4, with interest at 24 per cent. in a given month, and by way of security should mortgage "his right and interest in "mouza Kindwar." This agreement is embodied in a decree of the Moonsiff of Bhagulpore, dated the 7th August 1869. The same decree goes on to direct that in the event of non-payment the mortgaged property shall be sold by auction for the realization of the decretal money. In the year 1874 a sale took place in execution proceedings under this decree.

The certificate of sale bears date the 21st December 1874, and is as follows:—

"A petition being filed for execution of the decree of the Court of the Sudder Moonsif of Bhagulpore, dated 6th August 1869, in Case No. 494 of 1869, *v.* Luchmun Singh, of mouzah Kindwar, pergunnah Bhagulpore, judgment debtor, and for holding auction sale of the under-mentioned property, an istahar was issued according to the order of this Court, and the said property, after being advertised, was sold by auction on the 7th September 1874; and accordingly the right and interest which the judgment debtor had in that property was purchased at auction for Rs. 625 by Bhichook Nath Pandey, inhabitant and proprietor of mouzah Phoolwaria, decree holder, who forthwith filed Court fee stamps of Rs. 12. 8 poundage fee, and filed a receipt for the balance Rs. 612. 8 out of his decretal money. Therefore, this certificate is granted to Bhichook Nath Pandey, decree holder, auction purchaser of the said property; and it is hereby notified, that whatever right, title, and interest the said judgment debtor had in the said property, being extinguished from the 7th September 1874, the date of the sale, is transferred to Bhichook Nath Pandey, decree holder, and that this certificate will be held a valid document with reference to the transfer of the right, title, and interest of the judgment debtor.

"*Specification of Property.*

"The right and interest of the judgment debtor in 4 annas, out of 16 annas of mehal Kindwar (main and hamlet), tuppa Chandipa, pergunnah Bhagulpore, the towzi number of the entire mehal being 82, and the sudder jumma Rs. 380. 8.

"Dated 21st December 1874."

The purchaser was put into possession on the 12th January 1875, and he appears to have remained in the possession and enjoyment of the whole 1 a. 4 p. until this suit was brought on the 18th April 1881. There is no distinct evidence as to the value of the property, but in the plaint the value is stated for Court purposes at Rs. 5,500, which the Defendant does not dispute in his written statement, though he objects to the insufficiency of the Court fee on the ground that the Plaintiffs sue to recover some kamat land worth Rs. 2,292. 2. Their Lordships conceive that the Rs. 625 paid must be much below the value of the entirety, if indeed it is not below that of the sixth share which Luchmun would take on partition.

The Subordinate Judge dismissed the suit. He held that the debt was not tainted with immorality, and that two of the sons had consented to the mortgage. But his principal ground appears to have been that he was bound by the decision in *Upooroop Tewari* v. *Lalla Bandajee*, 6 L. R., Calc. 749, to hold that a mortgage of the right and interest of Luchmun passed the entirety of the family property.

On appeal the High Court reversed the decision of the Subordinate Judge, and gave the Plaintiffs a decree declaring that they are entitled to a partition of the family estate, and to obtain their respective shares under the Mitakshara law, the Defendant No. 1 being entitled to retain only the share of Luchmun Singh the father. They referred to the vernacular expressions used by Luchmun in his petition, on which the decree

of the 7th August 1869 was founded, and which are rendered by the expression "right and "interest;" and they thought that Luchmun clearly understood that he was dealing with only his own property in the estate. Further, they relied on the fact that the sons were not made parties to the execution proceedings, and to the treatment of that fact in *Deendyal's case.*

Their Lordships cannot agree with the Subordinate Judge. Whatever part any of the sons may have taken in negotiating between Luchmun and Bhichook, there is no evidence whatever of their proposing to mortgage their own interests. The sons may have assented to what was done, but the question is, what was done? That must be answered by the documents.

Moreover if Bhichook relied on assent by the sons he should have taken care to make them parties to the execution proceedings. In *Deendyal's case*, where the expressions used by the mortgagor were much more favourable to the conveyance of the entirety than they are here, the creditor's omission of the sons from the proceedings was made a material circumstance against him. And in *Nanomi Babuasin's case*, where the decision was in favour of the purchaser, the same circumstance was recognized as being material when 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.

In the case of *Upooroop Tewary* Mr. Justice Mitter thought that the words "my pro-"prietary share" in a mouza were calculated to describe the entirety of the family property in dispute; and he distinguished them from the expression "right, title, and interest." In *Hurdey Narain's case*, 11 Ind. App., 26, there was no conveyance, but a sale on a money decree. The only description was "whatever rights and

" interests the said judgment debtor had in the " property," these were purchased by Hurdey Narain. The High Court held that nothing passed beyond the debtor's interest which gave him a right to partition, and which perhaps may for brevity be called his personal interest, and this Committee affirmed the decision. Each case must depend on its own circumstances. It appears to their Lordships that in all the cases, at least the recent cases, the inquiry 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.

Their Lordships are sorry that they cannot follow the learned Judges of the High Court into their examination of the vernacular petition. But they find quite enough ground in the decree to express a clear agreement with them. They conceive that when a man conveys his right and interest and nothing more, he does not *primâ facie* intend to convey away also rights and interests presently vested in others, even though the law may give him the power to do so. Nor do they think that a purchaser who is bargaining for the entire family estate would be satisfied with a document purporting to convey only the right and interest of the father. It is true that the language of the certificate is influenced by that of the Procedure Code. But it is the instrument which confers title on the purchaser. Its language, like that of the certificate in *Hurdey Narain's case*, is calculated to express only the personal interest of Luchmun. It exactly accords with the expressions used in the decree of August 1869, founded on Luchmun's own vernacular expressions, which the High Court construe as pointing to his personal interest alone. The other circumstances of the case aid the *primâ facie* conclusion instead of

counteracting it. For the creditor took no steps to bind the other members of the family, and the Rs. 625 which he got for his purchase appears to be nearer the value of one sixth than of the entirety.

Their Lordships will humbly advise Her Majesty that the Decree of the High Court should be affirmed and this appeal dismissed.