[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 89 *of* 1874.

1874. Aug. 18.

PA'NDURANG A'NANDRA'V.....(*Defendant*) *Appellant.*
BHA'SKAR SHADA'SHIV .....(*Plaintiff*) *Respondent.*

Undivided Hindu family—Ancestral estate—Mortgage by some of the co-parceners of a portion of the undivided estate—Attachment and sale of the interest of one of the co-parceners in the undivided estate—Limitation—Partition.

In 1848 two members of an undivided Hindu family mortgaged some land forming a portion of the ancestral estate. The mortgagee, having obtained a decree in 1856 on his mortgage, caused 20 *guntas* of the mortgaged land to be attached and sold, on account of the right and interest of one of the mortgagors only, on 24th January 1871. In a suit brought by the purchaser against a third member of the undivided family, in whose possession the 20 *guntas* then were, to recover the same from him, as being the property of the mortgagor, whose right and interest therein had been attached and sold :

Held, 1*st.*—That the purchaser could take no more than the share of the co-parcener whose interest alone had been attached and sold, though this share might be defined as it existed at the time of the mortgage made by him in 1848.

2*nd.*—That as between the purchaser and the defendant, in determining whether the latter had been in sole and exclusive possession for a period sufficient to bar the right of the former, the rule of limitation applicable is that which would have been applied between the co-parcener whose interest had been sold and the defendant, had the former been suing for possession of the land or a portion of it.

3*rd.*—That the share of a co-parcener, being in the estate as a whole and not in any particular part of it, can be ascertained only by taking a general account of the whole estate, and making a distribution in accordance with the results of such account. In taking such account, however, and in making the consequent distribution, it would be only equitable that the share of the co-parcener who affected to deal with a portion of the land as if empowered to mortgage it should, *ceteris paribus*, if the purchaser takes his place, be so made up as to embrace wholly, or so far as possible, the land which the purchaser bought as belonging to such co-parcener.

4*th.*—That to obtain possession of the land purchased by himself, the purchaser must file against the other members of the family a partition

suit for the ascertainment of the share of the co-parcener, whose interest he has purchased, as it stood in 1848, and for the allotment to himself of that share so far as it can legally and equitably be identified with the land purchased by himself, and that, consequently, the suit in its present form will not lie.

THIS was a special appeal from the decree of W. M. Coghlan, District Judge of Tanna, reversing the decision of Mahádeo Chimnájee A'pte, Subordinate Judge at Alibág, who had rejected the plaintiff's claim with costs.

The special appeal was argued before WEST and NA'NA'BHAI HA'RIDA'S, JJ.

Dhirjálal Mathurádás, for the appellant:—The mortgage deed executed by two members only of an undivided family is not binding on the defendant who was no party to it. The execution sale was of the right, title, and interest of one of the mortgagors only. The defendant having been in exclusive possession of the land in question as the owner for 19 years, the suit is barred: *Gokalbhái* v. *Jháver* (*a*).

Vishnu Ganeshám, for the respondent:—The execution sale in 1871 was an out-and-out sale of the mortgagor's interest as it existed at the date of the mortgage in 1848.

WEST, J.:—The suit in the present case was brought by Bháskar as purchaser at an execution sale of the interest of Nilo in 20 *guntas* of land. This land had formed part of a quantity mortgaged in 1848 by Nilo and Amritráv, and was sold in execution of a decree obtained on the mortgage in a suit against Nilo and Amrit. On a sale and a certificate relating to Nilo's interest alone, Bháskar could take no more than Nilo's share, though this share might be defined as it existed at the time of the mortgage made by him in 1848. Pándurang, who was in possession of the 20 *guntas* set up an exclusive title to it, arising from sole possession, as he averred, for more than 30 years. Whether there had been this sole possession as proprietor to the exclusion of Nilo's right for such a length of time as would guard Pándurang's occupation against attack, was a question which should be determined between Bháskar and Pándurang by

(*a*) 8 Bom. H. C. Rep. 61, A. C. J.

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an application of the same rule of limitation that would have been applied between Nilo and Pándurang, had the former been seeking to obtain possession of the land in dispute, or a portion of it; but the position of Bháskar is to be identified with that of Nilo to a still further extent than this. Whether Nilo had any interest at all in the land in 1848, and if he had, what was the extent of that interest, are questions which, as there was other family property, do not admit of an answer without an inquiry into the extent and value of the joint property at large, the incumbrances resting on it, the members entitled to shares, and their respective aliquot portions. Nilo's share was not, supposing the family a united one, in any particular part of the estate, but in the estate as a whole, and could be ascertained only by taking a general account and making a distribution in accordance with its results.

In making such a distribution without advertence to the claims or interests of any third party, it might well happen that no part of the particular field now in dispute would be allotted to Nilo. But Nilo having affected to deal with this land as empowered to mortgage it, it would be only equitable that, *ceteris paribus*, his share should, if Bháskar takes his place, be so made up as to embrace wholly, or so far as possible, the 20 *guntas* which Bháskar has bought as his. It may be that his share will not be so much as 20 *guntas* or Pándurang may have a good reason to show why these 20 *guntas* are to be regarded as his own sole property, or as forming no part of the estate to a share of which Nilo was entitled in 1848; but unless some such obstacle should arise there seems no objection to Bháskar, who has bought all that Nilo is entitled to in the 20 *guntas* under the impression that the land was Nilo's only, being allowed to sue the other members of the family for an ascertainment of Nilo's share as it stood in 1848, and an allotment to him, as purchaser, of that share, so far as it can legally and equitably be identified with the 20 *guntas* put up to sale as Nilo's property.

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For this, however, another suit will be necessary. In the present suit, the plaintiff, Bhâskar, proceeded simply on the ground that Nilo had been the sole owner of the land bought by him at the execution sale. This by the very terms of the mortgage on which execution was had, Nilo was not; and no more was, or could be, sold than his rights as they appeared in the mortgage, those of a member of an undivided Hindu family.

We must, therefore, reverse the decree of the District Court with costs, but without prejudice to any suit which the plaintiff may bring in the proper form to give effect to his purchase of Nilo's interest as that of a member of an undivided Hindu family in the 20 *guntas* forming, as he avers, a part of the joint estate.

Decree reversed.

NOTE.—*Vishnu Ganesham*, for the respondent, applied, on 9th December 1874, for a review of the above judgment, on the ground that under the rulings of the High Court, the creditor of a single Hindu coparcener was allowed to attach and sell, not only his debtor's share in the entire family property, but his share in a particular portion of that property, and to have actual partition of such a portion : *Kalyanbhai* v. *Motiram* (*b*).

The Court, WEST and NA'NA'BHAI HA'RIDA'S, JJ., however, rejected the application, observing that the authority cited in support of the application was a mere *obiter dictum* and not a ruling, and that the Court's decision sought to be reviewed was supported by the rulings of the Bengal High Court in *Baboo Lall Jha* v. *Shaik Juma Buksh* (*c*) and *Kalee Pudo Banerjee* v. *Choitum Pandah* (*d*), and of the Privy Council in *Syud Tuffzul Hossein Khan* v. *Rughoonáth Pershád* (*e*).

(*b*) 10 Bom. H. C Rep. 378. (*c*) 22 Calc. W. Rep. 116.

(*d*) Idem 216. (*e*) 14 Moo. I. A. 50 ; S.C. 7 Beng. L. R. 196 P. C.