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providing, as it has, that in suits for foreclosure or sale by the mortgagees, and in suits for redemption by mortgagors, the account between the parties should be taken on the abnormally favourable principles laid down in ss. 12, 13 and 14 of the Act for the guidance of the Courts of the Deccan in such cases. It must be further observed that it is manifest that, if suits for an account, and no more, can be brought against mortgagees under s. 16, decrees for payment of the money [621] due upon mortgages by instalments may be made under s. 17. This we have already, without doubt, held not to be sanctioned by the Act (1), and we have pointed out that, if it had been so sanctioned, the sale of the mortgaged lands piecemeal in order to meet the unpaid instalments would be detrimental alike to debtor and creditor. We do not perceive any sufficient ground for altering the views which we entertained in that case.

Our reply to the question "whether a mortgagor may bring a suit for an account under s. 16 of Act XVII of 1879?" is in the negative.

We leave to the Special Judge of the Deccan the disposal of the question as to the costs of this reference. In relation to that question we should mention that there was not any appearance here for the plaintiff; but Mr. Shantaram Narayan appeared and argued the case on behalf of the defendants, who have been successful.

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Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Melvill.

KASTUR BHAVANI, SON AND HEIR OF THE DECEASED BHAVANI RAMCHANDRA (*Original Defendant*), *Appellant v.* APPA AND SITARAM HARJIRAV, MINORS (*Original Plaintiffs*), *Respondents.** [10th August, 1876.]

Hindu law—Sale of ancestral property by father for debts incurred for immoral purposes—Son's interest in ancestral estate—Evidence—Stamp—Intention to defraud Government of stamp revenue—Reg. XVIII of 1827, *s.* 13—*Act XXXIV of* 1860, *s.* 13—*Act X of* 1862, *s.* 15—*Admissibility of insufficiently stamped documents—Issues.*

Where a document was admitted in evidence by the Court of first instance without any objection by the parties, but the Assistant Judge in appeal held it inadmissible, because it was insufficiently stamped, although no objection was made to it in the memorandum of appeal.

Held, that the Assistant Judge ought not to have excluded it from his consideration.

[622] On documents insufficiently stamped under Reg. XVIII of 1827, the question does not properly arise under s. 13 of that Regulation whether the intention of the parties is not sufficiently stamping them was to defraud Government of its revenue. That question was rendered important, first, by s. 13 of Act XXXVI of 1860, and subsequently, in a more explicit manner, by s. 15 of Act X of 1862.

The plaintiffs (two of whom were minors) sued to set aside the sale and recover possession of certain ancestral lands, on the ground that they had been sold by their father to pay off debts contracted for immoral purposes. The documentary evidence in the case showed that the lands had been originally mortgaged by the grandfather and father of the plaintiffs to the father of the defendant for Rs. 1,600; that they had subsequently taken from him other loans which, together with

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* Special Appeal No. 124 of 1876.

(1) *Shankarapa* v. *Danapa*, 5 B. 604.

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the mortgage-debt, amounted to Rs. 4,400-15-0; that on the 23rd May, 1858, an agreement (Ex. No. 38) was made between the plaintiffs' father and the father of the defendant, by which the former was to sell the equity of redemption in the mortgaged property to the latter in consideration of the latter releasing the former from the said debt of Rs. 4,400-15-0 and paying him the sum of Rs. 235; that, accordingly, on the 25th May, 1858, the plaintiffs' father conveyed the property to the defendant's father for Rs. 235 by a deed of sale (Ex. 17) which, however, did not refer either to the agreement (Ex. 38) or to the debts for Rs. 4,400-15-0. There was no allegation or evidence in the case showing that the plaintiffs' grandfather had contracted the debt of Rs. 4,400-15-0 for any immoral purposes, nor that their father applied the sum of Rs. 235 to the payment of debts incurred for immoral purposes, although it was in evidence that he drank to excess. The Court of first instance dismissed the suit, holding, *inter alia*, that the plaintiffs had failed to prove the property to have been sold by their father for debts incurred for excessive drinking. One of the issues raised by the Assistant Judge in appeal was whether there was any necessity for the sale of the property by the plaintiffs' father. He found this issue in the negative, and held the sale invalid, except as to the plaintiffs' father's own share. On special appeal to the High Court.

Held, that on the above facts the plaintiffs had failed to establish any case entitling them to set aside the sale of the lands by their father.

Held, also, that it ought to have been ascertained whether the minor plaintiffs were born before the date of the sale, *viz.*, 25th May, 1858, because if they had not been born before that date, their suit would have been unsustainable, as they never could have had any interest in the property.

Quære.—Even supposing that the plaintiffs' father had applied the sum of Rs. 235 to the payment of debts incurred for the immoral purpose of excessive drinking, whether that trivial amount would have justified the setting aside of the sale of the 25th May, 1858, the main consideration for which was the release of the pre-existing debts for Rs. 4,400-15-0.

[R., 5 B. 630; 4 Bom. L.R. 587 (597).]

THIS was a special appeal from the decision of E. Hosking, Acting Assistant Judge at Thana, amending the decree of the Second Class Subordinate Judge of Murbad.

[623] This suit was brought by Lakshman and his two brothers, Appa and Sitaram, alleging that certain ancestral lands had been sold by their father Harjirav to Bhavani (deceased), father of defendant No. 1 (Kastur), and that the sale was illegal and void, because it was made to pay off debts contracted for immoral purposes. They prayed that the sale should be set aside and the lands restored to them. The plaint was filed on the 4th April, 1872. Appa and Sitaram were minors, and were represented by their mother as their guardian.

Kastur (defendant No. 1) answered, *inter alia*, that the suit was barred by limitation, and that the sale was for necessary family purposes. Defendants Nos. 2 and 3 replied that they were in possession of some of the lands in dispute as purchasers under defendant No. 1.

The Subordinate Judge held that the claim of Lakshman (plaintiff No. 1) was barred by limitation, and that it was not proved that the sale was made by Harjirav for the payment of debts contracted for immoral purposes.

Two of three issues raised by the Assistant Judge in appeal were—(1) whether the plaintiff Lakshman's claim was barred by limitation, and (2) whether there was any necessity for the sale by the plaintiff's father. He found the first issue in the affirmative and the second in the negative. The following are his reasons:—

"On the 23rd May, 1843, plaintiff's grandfather Mahadevrav and their father Harjirav mortgaged certain lands to Bhavani Ramchandra,

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the father of Kastur (defendant No. 1), for Rs. 1,600. Subsequently Mahadevrav and Harjirav executed several money bonds to the said Bhavani for different amounts, and on the 23rd May, 1858, Harjirav had an agreement executed to him by Bhavani to the effect that Bhavani should release Harjirav from a debt of Rs. 4,400-15-0, owing on the said mortgage bond (Ex. 16) and on other bonds, and that Harjirav should sell the equity of redemption of the property to Bhavani for Rs. 235. Plaintiffs were served with a notice to produce the original agreement, but they failed to do so, plaintiff Lakshman merely stating that he had not got it (Ex. 155). Defendants [624] put in evidence Ex. 38 as a copy of this agreement; and I find that it is proved that an agreement, of which Ex. 38 is a copy, was executed to plaintiff's father Harji by Bhavani on a stamp of the value of one rupee. Two days after the execution of this agreement Harji executed a deed of sale (Ex. 17), setting forth that he sold 23 bighas rice land and 4 bighas warkas land in Sonawali village, and 33 bighas rice land and 26 bighas warkas land in Ekleher village to Bhavani for Rs. 235 cash. The deed of sale contains no reference to any previous mortgage or to any other consideration for the sale than this cash payment, and it is executed on a stamp paper of the value of eight annas. Within a year after this deed of sale had been executed, Bhavani sued Harjirav upon it for possession of the lands, obtained a decree, and was put in possession on the 27th March, 1860.

"For the defendants it is contended that Exs. 17 and 38 should be read together, in order to ascertain the real consideration for the land sold under Ex. 17. The lower Court read the two documents in this way, and no objection appears to have been raised on the ground that the documents are insufficiently stamped. But I consider that the documents are insufficiently stamped, and that the circumstances of the case show that there was an intention to defraud Government. Under Reg. XVIII of 1827 the stamp on the deed of sale (Ex. 17) is of the proper value for the consideration expressed in the document. It is contended that the sale was only of the right of redemption, and that for this the sole consideration was Rs. 235 cash. But in the first place, the sale does not purport to have been only of the equity of redemption, and secondly, if it be held to have been a sale of the equity of redemption, the consideration was not merely Rs. 235; for the debts relinquished under Ex. 38 were not only on account of the mortgage, but in great part were on account of the money bonds. The agreement, of which Ex. 38 is a copy, is altogether invalid. Exhibit 38 proved that it was on a stamp of the value of one rupee, while the proper stamp under the said Regulation would have been of the value of Rs. 8.

"Defendant Kastur has applied to be allowed to pay the deficient stamp duty and the penalty, but I have refused to allow him [625] to do so, as I am of opinion that there was an intent to defraud Government. The pleader for respondent relies upon the ruling of the Bombay High Court in *Antaji Nilkant* v. *Janardan Vasudev* (1). That ruling seems to me inapplicable to this case, as the circumstances of the two cases are very different. Had the actual consideration for the sale been expressed in Ex. 17, and had it then been not stamped at all, or had it been insufficiently stamped, there might have been no reason for imputing an intention to evade payment of the proper stamp duty. But in the present case the consideration was

(1) 10 B. H.C.R. 358.

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wrongly stated, and the proper stamp was used for the amount of consideration expressed in the deed of sale. What was the object of this erroneous statement of the consideration and of the omission of any reference to the mortgage and other bond debts? The use to which the deed of sale was put shortly after its execution, shows that the object in wrongly stating the consideration was not merely to evade payment of the proper stamp duty, which was, at the most, Rs. 6½ above what was paid, but that it was mainly to enable the vendee to sue upon the deed of sale for property, thus purporting to be valued at Rs. 235, while its actual value was Rs. 4,635. Consequently the vendee paid a fee of Rs. 20 on the institution of his suit instead of paying a fee of Rs. 150, as required under Reg. XVIII of 1827, and he paid other necessary fees in the suit as if the value of the subject-matter of the suit were Rs. 235 and not Rs. 4,635. The completeness of the deed of sale (Ex. 17) when read by itself and without any knowledge of the agreement (Ex. 38), and its incompleteness when read in the light of the said agreement are alone sufficient to raise strong suspicion that there was a bad motive for the erroneous statement of the consideration in the deed of sale * * * *

"For these reasons, I refuse to admit the agreement (Ex. 38) as evidence. I must, therefore, hold the consideration for the sale to have been merely for the cash payment of Rs. 235, and this being so, it is evident that there was no necessity for the sale, because, after the passing of this deed of sale, the vendor was able to borrow Rs. 428 from the vendee on a money bond (Ex. 31) executed a month after the said deed of sale * * *

[626] "Plaintiffs' father's share in the property sold under Ex. 17 was one-fourth. Therefore, excluding his share and the share of Lakshman, Lakshmibai as the guardian of her minor sons, Appa and Sitaram, is entitled to recover one-half of the property claimed, after payment of Rs. 117-8-0 as half of the consideration expressed in Ex. 17 and after paying half the debt due under the mortgage, Ex. 16, taking into account half the profits received by defendants from the mortgaged property."

Defendant No. 1 (Kastur) appealed to the High Court.

Shamrav Vithal, for the appellant.—The plaintiffs impugned the sale on the ground that it was made for immoral purposes. The Assistant Judge, therefore, was wrong in raising the issue whether there was any necessity for the sale. The proper issue was whether the plaintiffs proved that the property had been sold by their father for any immoral purposes. There is no evidence in the case to support that allegation, although it is in evidence that he drank to excess. Exhibits 16 and 38 show that the property had been originally mortgaged by the plaintiffs' grandfather and father to the appellants' father, and that they subsequently borrowed more money from him. All those debts amounted to Rs. 4,400-15-0, and the plaintiffs' father sold the property in discharge of those debts and on receipt of a further sum of Rs. 235. Under these circumstances, the Assistant Judge was wrong in holding that the sale was only for Rs. 235, and that it was not binding on the plaintiffs. They are bound by the sale according to the rule of Hindu law laid down in *Girdhari Lall* v. *Kantoo Lall* (1) and *Muddun Gopal Lall* v. *Mussamut Gowrunbutty* (2). Again, it was not competent to him to go into the question whether Exs. 17 and 38 were sufficiently stamped or not, as they were admitted by the Court of

(1) 1 I.A. 321=14 B. L. R. 187=22 W. R. C.R. 56. (2) 15 B. L. R. 264.

first instance without any objection. Besides, they were executed while Reg. XVIII of 1827 was in force.

M. C. Apte, for the respondents.

JUDGMENT.

[627] WESTROPP, C.J.—The plaintiffs in their plaint alleged that their father Harjirav sold the lands, the subject of this suit, to Bhavani Ramchandra, father of the first defendant, in order to pay debts contracted for immoral purposes, and, therefore, that the sale should be set aside, and the lands restored to the plaintiffs. The second and third defendants Hari and Ganu were made parties as having purchased some of the lands from Bhavani and the first defendant.

The sale sought to be set aside was by the agreement of the 23rd May, 1858 (Ex. 38), and the deed of the 25th May, 1858 (Ex. 17).

The copy of the agreement of the 23rd May, 1858, the Assistant Judge has, as the original appears to have been insufficiently stamped, declined to regard as evidence in the cause; but inasmuch as it had been admitted in evidence by the Subordinate Judge without objection by either party, and no objection was made in the memorandum of regular appeal to the District Court, we think that the Assistant Judge ought not to have excluded it from his consideration.

The Subordinate Judge made a decree in favour of the defendants.

The plaint was filed on the 4th April, 1872, *i.e.*, nearly fourteen years after the alleged sale, and it appearing that the elder plaintiff Lakshman was then upwards of nineteen years of age, the Assistant Judge as well as the Subordinate Judge held the suit, barred by lapse of time as brought by him, and he has not appealed against that decision.

The Assistant Judge, however, has held the second and third plaintiffs entitled to recover a moiety between them of such of the lands as were ancestral. The question is whether he was right in thus holding.

In the first place, we think that, looking at the mode in which the plaintiffs launched their case in the plaint, the second issue, as framed by the Assistant Judge, *viz.*, "was there necessity for the sales by the plaintiffs' father" was not correct.

The plaint admitted that the sale was made in order to pay debts, and sought to avoid the sale by alleging that those debts [628] were incurred for immoral purposes. The issue, then, ought to have been whether that allegation was true, *viz.*, "were those debts, in respect of which the sale was made, incurred for immoral purposes."

But, further, Ex. 38, the execution of which is not denied, shows that those debts consisted of a mortgage-debt upon the lands in dispute amounting to Rs. 1,600 incurred as well by the plaintiffs grandfather Mahadevrav as their father Harjirav; and seven money bonds executed by both of those same persons, which together with the mortgage-debt, amounted to Rs. 4,400-15-0, all being due to Bhavani, the father of the first defendant and that Harjirav was to sell the equity of redemption to Bhavani in consideration of Bhavani releasing Harjirav from the said debts amounting to Rs. 4,400-15-0, and further paying to Harjirav the sum of Rs. 235. The deed of sale of the 25th May, 1858, though not referring to the agreement (Ex. 38), nor to the debts (Rs. 4,400-15-0), but conveying to Bhavani the lands in question in consideration of Rs. 235, was manifestly executed in pursuance of the agreement contained in Ex. 38.

The first observation to be made on this state of facts, and it also applies to the plaint, is that there is neither allegation nor any evidence of

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immorality on the part of Mahadevrav, the plaintiffs' grandfather, in contracting the debts for Rs. 4,400-15-0, or that he was not bound by them; nor is there any evidence whatever that Harjirav applied the Rs. 235 to the payment of debts incurred for immoral purposes, although there is evidence that Harjirav drank to excess.

Such being the case, not only the plaintiff Lakshman, but both of the other plaintiffs have wholly failed to establish any case entitling them to set aside the sale in May, 1858.

Further, even if it should have appeared that Harjirav had applied the sum of Rs. 235 obtained from Bhavani in payment of debts incurred in procuring liquor, the amount is so trivial as compared with the amount of the pre-existing debts, the release of which constituted the main portion of the consideration for the sale in 1858, that, having regard to the case of *Girdhari* [629] *Lall* v. *Kantoo Lall* (1) and *Muddun Gopal Lall* v. *Mussamut Gowrunbutty* (2), we doubt whether, where so small a portion of the consideration was applied to debts incurred for the immoral purpose of excessive drinking, we should be justified in setting aside the sale. However it is unnecessary to decide the case on that ground.

We may further point out that the question, which the learned Assistant Judge put to himself, whether the intention of the parties to Ex. 38, in not sufficiently stamping it, was to defraud the revenue, is not a question which properly arises on documents, the stamping of which is provided for by Reg. XVIII of 1827 relating to stamps, under s. 13 of which the necessary stamp might be obtained from the Collector on payment of the penalty and duty. The language of s. 13 of Act XXXVI of 1860 first rendered that question important. Act X of 1862, s. 15, is still more explicit; but, in the present case, the Exs. 17 and 38 being both executed in 1858 before either of those enactments came into force, the question did not arise. The point has been similarly ruled in other cases in this Court.

Lastly, although in the view that we take of this case, the question is not now of importance; it ought to have been ascertained whether either the second or third plaintiff had been born before the 25th of May, 1858. If, as is extremely, probable, they were not so, this suit would have been unsustainable by them, as they never could have had a vested interest in the lands.

We reverse the decree of the Assistant Judge and restore that of the Subordinate Judge, and direct the special respondents' guardian and mother to pay to the special appellant the cost of the special appeal. She and the plaintiff Lakshman must pay to the defendants the cost of the suit and of the regular appeal.

Decree reserved.

NOTE.—See *Narayana Charya* v. *Narso Krishna*, 1 B. 262.

(1) 1 I.A. 321.

(2) 15 B.L.R. 264.