APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Kemball.

1882
November 27.

KISANSING JIVANSING PARDESI (ORIGINAL DEFENDANT), APPELLANT, *v.* MORESHWAR VISHNU JOSHI (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Undivided Hindu family—Mortgage by manager—Attachment and sale of the interest of manager where manager is not the father of other co-sharers—Tenants-in-common—Practice—Objection taken for the first time in second appeal—Practice.

N. and H. (uncle and nephew) were members of an undivided Hindu family. On the 22nd April, 1872, N. mortgaged the land indispute (part of the family property) to J., who, on the 10th June, 1876, obtained a decree against N. on the mortgage and put up the land for sale in execution. It was purchased by the defendant on the 26th October, 1876. N. and H. had previously sold the land to the plaintiff by a registered deed dated the 30th June, 1876. On the 28th September, 1877, the plaintiff sued the defendant for possession of a half share of H. in the land. The Subordinate Judge awarded the plaintiff's claim, holding that his purchase was *bonâ fide*, and that the share of H. was not bound by the mortgage executed by N. to J. In appeal the District Judge thought it unnecessary to consider whether the plaintiff's purchase was *bonâ fide*, and whether H. was liable for the mortgage debt, inasmuch as the interest of N. alone had been sold under the mortgage decree, and the interest of H., therefore, was not affected by the sale. He affirmed the decree of the first Court, with the variation that the plaintiff and defendant were jointly entitled to the possession of the land. In second appeal it was contended for the defendant that the District Judge ought to have found whether the mortgage-debt contracted by N. was for a family necessity and therefore, binding on N., and whether the sale to the plaintiff was *bonâ fide*.

Held that the plaintiff was entitled to recover. The defendant had only purchased that which was seized and sold in execution of the decree, *viz.*, the right, title and interest of N. in the land, and H.'s share was not affected by the sale.

Held, also, following *Maruti Narayan* v. *Lilachand* (1), that it was not competent for the Court in this suit to consider the question whether the loan contracted by N. in 1872 was contracted by him as manager for a necessary family purpose so as to bind the share of H. in the property.

Held, also, that if the share of N. had already been sold to the defendant under the mortgage decree, the defendant and H. were simply tenants-in-common, and there could be no objection to H. doing what he liked with his remaining share.

THIS was a second appeal from the decision of G. Druitt, Assistant Judge at Thana, varying the decree of R. S. Tipnis, Second Class Subordinate Judge at Bhiwandi.

* Second Appeal, No. 590 of 1881.

(1) I. L. R., 6 Bom., 564.

1882

KISANSING JIVANSIN PARDESI v. MORESHWAR VISHNU JOSHI.

The facts of the case are briefly mentioned in the head-note, and will be found fully stated in the judgment of the High Court.

Manekshah Jehangirshah for the appellant cited *Vrandavandas Ramdas* v. *Yamunabai* (1).

G. N. Nadkarni for the respondent cited *Mahabalaya* v. *Timaya* (2); *Pandurang Kamti* v. *Venkatesh Pai* (3); *Maruti Narayan* v. *Lilachand* (4); *Deendyal Lal* v. *Jugdeep Narayan Singh* (5).

The arguments of the pleaders on both sides are stated in the judgment of the Court.

SARGENT, C. J.—This suit arises out of the following facts. Nan Ganaji and his nephew, Hashia Bhika, were the members of an undivied Hindu family in 1872, in which year Nan mortgaged the land in dispute (part of the family property) to one Jana Patil, who subsequently obtained a decree on 10th June, 1876, against Nan, directing the sale of the mortgaged property, which was accordingly sold by auction on 26th October, 1876, and purchased by the defendant. The plaintiff had previously (as alleged in the plaint) purchased the same property from Nan and Hashia by a registered deed dated the 30th June, 1876, and seeks by his plaint to recover possession of Hashia's half share of the land and mesne profits. The defendant pleaded that the mortgage was binding on Hashia, and that plaintiff's purchase was not *bonâ fide*, but made in collusion with Nan and Hashia in order to save the property; and, lastly, that plaintiff was estopped from disputing his title. The Subordinate Judge found that plaintiff's purchase was *bonâ fide*, and that Hashia's share was not bound by the mortgage, there being no sufficient proof that the loan was contracted by Nan for family purposes, that the plaintiff was not estopped, and he decreed possession of the field in dispute to plaintiff with mesne profits.

On appeal the District Judge held that the *bona fides* of the plaintiff's purchase was not relevant; that plaintiff was not

(1) 12 Bom. H. C. Rep., 229. (2) 12 Bom. H. C. Rep., 138.

(3) Printed Judgments for 1879, p. 513; see *infra*, p. 95.

(4) I. L. R., 6 Bom., 564. (5) I. L. R., 3 Calc., 198, 208.

estopped from disputing defendant's title, and that whether both Nan and Hashia were liable or not for the mortgage-debt, as only Nan's interest in the land was put up for sale and purchased by defendant, Hashia's interest was not affected by the sale.

It has been contended before us that the District Judge ought to have recorded a finding as to whether the loan contracted by Nan in 1872 was for a necessary family purpose, as, in that case, it was said Nan having been the manager of the family at the time, Hashia's interest in the property must be deemed to have passed under the sale of the right, title and interest of Nan. This question, however, must now be regarded as concluded by authority. Not only is the case of *Mahabalaya* v. *Timaya* (1) cited by the District Judge clear on the point, but we may also refer to the more recent decision in *Maruti Narayan* v. *Lilachand*(2). There the brother of the plaintiff executed a mortgage to defendant during plaintiff's minority. The defendant sued the brother on the mortgage and obtained a decree, in execution of which the property was sold and purchased by defendant himself. Plaintiff sued to have the sale set aside and to recover his half share. The Court, consisting of Mr. Justice Melvill and Mr. Justice Kemball, held that it was incompetent to the Court below to go into the question whether the mortgage by the brother was binding on the minor plaintiff, relying on the decision of the Privy Council in *Deendayal's Case* (3) as a direct authority that the defendant by the proceedings which he took could not get more than was seized and sold in execution, *viz.*, the right, title and interest of the plaintiff's brother. In *Deendayal's Case* the plaint was instituted by the son of one Toofani Singh against his father and the purchaser at auction-sale of the right, title and interest of the father to recover possession of the family property. In dealing with the question whether the interest of the son (the family being governed by the Mitakshara law) passed to the purchaser under the auction-sale, their Lordships accepted the finding of the Zilla Judge that the loan (in payment of which the property was sold) was contracted by the father for a legal necessity as binding on them in special appeal, but pro-

(1) 12 Bom. H. C. Rep., 138. (2) I. L. R., 6 Bom., 564.
(3) I. L. R., 3 Calc., 208.

1882

KISANSING JIVANSING PARDESI v. MORESHWAR VISHNU JOSHI.

ceeded to make the following remarks (*i. e.*, as to the purpose for which the loan was contracted) :—

"This issue, however, seems to their Lordships to be immaterial in the present suit, because, 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 case of *Nagenderchander Ghose* v. *Srimutty Ramunee Dossee* (1) ; *Baijun Doobey* v. *Brij Bhookun Lall Awusti*(2)."

The judgment in *Maruti Narayan* v. *Lilachand* concludes with these remarks : "There may be some difficulty in reconciling the view expressed (*i. e.* in *Deendayal's Case*) as to the effect of the sale of a father's right, title and interest with the decision of the Judicial Committee in *Girdharee Lall's Case*(3), but there never has been, so far as we know, any difference of opinion as to the effect of a sale under a decree obtained against the manager of a Hindu undivided family alone, when that manager is not the father of the other co-sharer or co-sharers. We may refer on this point to the decision of this Court in *Pandurang Kamti* v. *Venkatesh Pai* (4)," and the Court directed that the plaintiff should be put into possession of his half share of the property.

As to the defendant's contention that the District Judge ought to have found whether the conveyance to the plaintiff was *bonâ fide*, as otherwise it would be without consideration and therefore void—*Vrandavandas Ramdas* v. *Yamunabai* (5) ; it is to be remarked that if Nan Ganaji's share had already been sold to

(1) 11 Moore's Ind. Apps., 241.
(2) I. L. R., 1 Calc., 133 ; S. C. L. R. ; 2 Ind. Apps., 275.
(3) 1 I. L. R., 321.
(4) Printed Judgments for 1879, p. 513, and see *infra*, p. 95.
(5) 12 Bom. H. C. Rep., 229.

defendant, the latter and Hashia were simply tenants-in-common, and there could be no possible objection to Hashia's doing what he liked with his remaining share. As to the objection that plaintiff was estopped from disputing defendant's right to the land, because he had bid at the auction, it is plain that as only Nan's right, title and interest were put up for sale, he is in no way precluded from now contending that defendant bought that interest and nothing more. As to the objection that the sale to the plaintiff took place pending defendant's suit against Nan to enforce the mortgage, it is sufficient to say that it was not taken in either of the Courts below, and cannot, therefore, be taken in this Court. The decree must, therefore, be confirmed with costs.

Decree confirmed.

NOTE.—The following is the judgment in *Pandurang Kamti* v. *Venkatesh Pai* (S. A. No. 201 of 1879) above referred to and decided by MELVILL and PINHEY, JJ., on the 23rd September, 1879 :—

"It was not competent to the Courts below to go into the question whether the original debt was or was not incurred for the benefit of the family. It might have been open to the plaintiff to frame his suit so as to include all the members of the family and to obtain a decree, making them all liable in person and property ; but having failed to do this he cannot now extend the operation of his decree, or of the certificate of sale founded upon it, beyond the right actually declared and sold. In his certificate of sale he is declared to be the purchaser of the right, title and interest of defendant's Nos. 1, 4, 6, 7 and 10 only, and he cannot now be allowed to assert that he acquired under it any larger estate.

"The plaintiff alleges that he was put into possession of the whole estate by virtue of his certificate of sale. If so, the proceeding was erroneous ; for, as the property is found to have been joint family property, the plaintiff was not entitled to oust the other co-parceners, but either ought to have been placed in joint possession of the property or to have been left to a suit for partition. But, however this may be, the plaintiff has now been dispossessed ; and not having brought his suit within six months from the date of such dispossession, he is bound to establish his title. His only title is to be substituted for those of the co-parceners whose right, title and interest he has purchased ; and the most which we can do him in the present suit, which is a suit for possession, is a limited possession conjointly with the other co-parceners.

"We, accordingly, amend the decree of the District Court, and order that the plaintiff be substituted for defendants Nos. 1, 4, 6, 7 and 10 in the possession and enjoyment, jointly with the other defendants, of their undivided shares in the property in dispute."