APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

1884
July 12.

BALVANT SANTA'RA'M (ORIGINAL PLAINTIFF), APPELLANT, *v.* BA'BA'JI BIN SAMBHA'PA' (ORIGINAL DEFENDANT), RESPONDENT.*

Hindu law—Joint family—Mortgage by manager of family property binding upon minor members—Civil Procedure Code (Act XIV of 1882*), Secs.* 328 *and* 331*—Decree, obstruction in execution of—Decree-holder, option of, to proceed under Section* 328 *or by a separate suit.*

Sadoba, Rághoba and Sambhápá were members of an undivided Hindu family. Sambhápá died, leaving him surviving several sons. Subsequently Sadoba, Rághoba and Rájárám, the eldest son of Sambhápá, mortgaged the family house to the plaintiff. In 1877 the plaintiff brought a suit upon the mortgage against Sadoba, Rághoba and Rájárám. The Court of first instance awarded him possession of the house until he should receive payment of the mortgage-debt. In execution of the decree the plaintiff was obstructed by the widow and sons of Sambhápá, but after inquiry the Court on 14th January, 1879, overruled the objection and directed possession of the house to be given to the plaintiff. On 28th January, 1879, the plaintiff complained that he was prevented from obtaining possession of one of the rooms in the said house; the defendant Bábáji appeared, and admitted that he had locked up the room, and he refused to give up possession, contending that he was not bound by the mortgage, that at the date of the mortgage Rájárám was not joint with him and the other sons of Sambhápá, and that the loan was not required for family necessity. The Subordinate Judge dismissed the plaintiff's application. In 1882 the plaintiff brought the present suit against the defendant in which he prayed for a decree giving him possession of the said room on the terms of the decree passed in 1877. The defendant alleged that the house in question was not the joint property of his uncles Sadoba and Rághoba, but that his father Sambhápá was the sole owner; that his uncles Sadoba and Rághoba and his brother Rájárám had no right to mortgage it, and that the money was not required for family necessity. He contended that the decree of 1877 was not binding on him, and, further, that the present suit was barred.

Held that the plaintiff was entitled to a decree against the defendant. There was nothing to show that at the date of the mortgage in 1875 the defendant was not still a member of the same joint family with Rájárám into which he had been born. In the mortgage transaction all the branches of the family were represented by their eldest members, and the mortgagee (the plaintiff) might reasonably suppose that a transaction entered into by them and apparently necessary for the common interest was really necessary.

It was contended for the defendant that the date (13th October, 1879,) at which the plaintiff's application, presented in the execution proceedings, was dismissed,

* Second Appeal, No. 266 of 1883.

being the point of time from which the period of limitation began to run, the present suit was barred.

Held that the defendant, although he was called as a witness and had set up his claim in the execution proceedings, was not made a party either in addition to Lakshman or by substitution for him, and could not be bound by those proceedings, and, consequently, could not take advantage of them to resist a claim otherwise admissible against him.

It was further contended that the previous suit on the mortgage had exhausted the plaintiff's cause of action, and that the plaintiff had no further right against the defendant.

Held that the decree in the former suit could not affect the defendant, as he was not a party to it, nor was he represented. If he had been represented, he could not have resisted the execution of the decree. Not having been represented he could, on principle, be exempted from liability in the present suit only if the cause of action was merged in the judgment against his uncles and brother. Here, however, there was no such merger. The previous decree had awarded possession of the whole house to the plaintiff. The existence of that decree could not be a reason for not awarding part of the same house when detained by the defendant. He avowed himself a stranger to the defendants against whom the previous decree was obtained, and his act might be regarded as constituting a separate cause of action.

Held, also, that section 328 of the Civil Procedure Code (XIV of 1882) does not make it obligatory on a decree-holder, who is obstructed in execution of the decree, to pursue his remedies under that section. Accordingly, the failure on the part of the plaintiff to avail himself of the remedy under that section did not prevent him from proceeding against the defendant by a regular suit.

THIS was a second appeal from the decision of A. C. Watt, Acting District Judge of Dhárwár, reversing the decree of the First Class Subordinate Judge at the same place.

Sudoba, Rághoba and Sambhápá were three brothers, members of an undivided family. Sambhápá died, leaving several sons, of whom the present defendant was the fourth.

In 1875 the two brothers Sadoba and Rághoba, and Rájárám, the eldest son of Sambhápá, mortgaged to the plaintiff's father Iswarápá a house, the subject-matter of the suit. The money borrowed under the mortgage was borrowed to pay off a previous mortgage of the same house executed in 1872 by Sadoba, Rághoba and another of the sons of Sambhápá by name Lakshman. The defendant Bábáji was not a party to either of these mortgage transactions.

1884

BALVANT SANTÁRÁM v. BA'BA'JI.

In 1877 the plaintiff brought a suit upon this mortgage in the First Class Subordinate Judge's Court at Dhárwár against Sadoba Rághoba and Rájárám, and obtained a decree awarding him possession of the house until he received payment of the mortgage-debt. The plaintiff applied for execution of the decree, but was opposed by the widow and sons of Sambhápá. An inquiry took place, and on the 14th January, 1879, the Subordinate Judge overruled the objection of the opponents, and directed that possession should be given to the plaintiff. On 28th January, 1879, the plaintiff presented an application to the Court, stating that Lakshman, the son of Sambhápá, had locked up one of the rooms in the house, and refused to give up possession. On 13th October, 1879, Lakshman appeared, and said that the defendant Bábáji had locked up the room. Bábáji, who was served a notice, appeared on 18th November, 1879 and admitted that he had locked the room, and refused to open it, contending that his eldest brother Rájárám was divided in interest from him and his other four brothers, and that he (Rájárám) had no right to mortgage the house. The plaintiff was not present on the day when Bábáji was examined, and the Subordinate Judge dismissed the plaintiff's *darkhast*. The plaintiff took no further steps in the matter for about two years and five months.

In April, 1882, the plaintiff brought a suit against the defendant in the First Class Subordinate Judge's Court at Dhárwár, praying for a decree giving him possession of the said room in the house, and authorizing him to keep possession of it under the terms of the decree passed in 1877. The plaintiff had obtained possession of the whole house with the exception of the said room.

The defendant alleged that the house was not the joint property of his uncles Sadoba and Rághoba, but that his father Sambhápá was the sole owner thereof; that his father had been in possession of it during his lifetime, and since his death the defendant, and his brothers (except Rájárám), who lived undivided with him, had been in possession of the house; that Rághoba, Sadoba and Rájárám had no right to mortgage it, as they were not managers of the family, and had never been in occupation. He contended that the mortgage-deed, on which the decree was obtained in

1877, was not binding upon him; that the mortgage money was not borrowed for family necessity; that Sadoba, Rághoba and Rájárám had fraudulently passed the mortgage-bond; and, lastly, that the suit was barred.

The Subordinate Judge held that the house had been mortgaged for family necessity by Sadoba, Rághoba and Rájárám, who lived as a joint family with the defendant; that Sadoba had acted as manager of the family, and he passed a decree for the plaintiff.

The defendant appealed to the District Judge of Dhárwár, who reversed the decree of the lower Court, holding that the debt was not incurred for family necessity so as to bind the defendant. He looked upon the delay by the plaintiff to file his suit, and his failure to take steps within thirty days, as provided under section 328 of the Civil Procedure Code, from the date of last obstruction by the defendant, and the evidence in the case on behalf of the plaintiff as suspicious, and rejected the plaintiff's claim. The plaintiff appealed to the High Court.

Shámráv Vithal for the appellant.—The family was a joint family, and the necessity for which the property was mortgaged was a family necessity, for the money borrowed on the mortgage was borrowed to pay off a pre-existing mortgage. This was such a family necessity as one defined in the case of *Bábáji Máhádáji* v. *Khrishnáji Devji*[1]. In the present case the debt was incurred by the manager of the family—*Samálbhái* v. *Someshvar*[2]. Moreover, the deed was not only signed by the manager alone, but by as many other members as were then of age. Further, Rájáráin, a brother of the defendant, who was of age, and, therefore, qualified to take part in the mortgage transaction, had also put his signature to the deed. The interest of the minors, therefore, must be held bound. It is laid down as obligatory on creditors to make inquiry where there are minor co-parceners.—West and Bühler's Hindu Law (3rd ed., p. 749). The creditors here had made proper inquiries as to the family necessity. In the case of *Gansavant* v. *Náráyan*[3] it was held that where a transaction

(1) I. L. R., 2 Bom., 666. (2) I. L. R., 5 Bom., at p. 41.
(3) I. L. R., 7 Bom., *per* West, J., at p. 471.

1884

BALVANT SANTÁRÁM v. BÁBÁJI.

was in the name of the manager alone he would be considered as acting for the family so as to represent other members, minor or otherwise, unless it was proved that he acted for himself alone. Therefore the defendant and his brothers must be held bound by the mortgage.

Mánekshá Jahángirshá for the respondent.—The suit was barred, for this was a suit practically to set aside an order of the Court made in the execution of the decree. The plaintiff did not take steps to have it set aside within thirty days, the time prescribed by the Limitation Act XV of 1877, art. 167. The procedure to be observed in such a case is that laid down in sections 328 and 331 of the Civil Procedure Code (Act XIV of 1882). Where a certain procedure is prescribed, that procedure alone should be followed.

The minors ought to have been made parties to the suit in order that they might be bound—*Kisansing* v. *Moreshwar*(1); *Pándurang Kamti* v. *Venkatesh Pai*(2). These cases go to show that where a transaction is to be held binding upon persons having interest therein, they ought to be made parties.

Shámráv Vithal in reply.—The Civil Procedure Code does not make it obligatory on a decree-holder to avail himself of the procedure laid down in sections 328, 331. He can bring a separate suit within the time prescribed for such suit. The cases cited have arisen out of execution sale. It has been held by the High Court of Madras that "section 329 of the Code does not give the Court power to determine as between a judgment-creditor and a third party obstructing the execution of the decree, important questions on the merits which are wholly unconnected with, and cannot be affected by the fact that the obstruction is made at the instigation of the defendant." See *Govinda* v. *Keshav*(3).

WEST, J.—It is contended for the respondent in this case that as Lakshman in resisting the plaintiff Balvant in taking possession of the room in question was acting for his brother Bábáji, or else the opposition by closing the apartment was solely that of Bábáji himself, the dismissal of the judgment-creditor's claim to remove

(1) I. L. R., 7 Bom., 91. (2) *Ibid.* 95.
(3) I. L. R., 3 Mad., at p. 82.

1884

BALVANT SANTÁRÁM v. BÁBAJI.

the obstruction forms a point from which limitation must be computed in the present suit against Bábáji. On such a computation the suit will be barred. But though Bábáji was called as a witness, and set up his claim in the execution proceedings, he was not made a party either in addition to Lakshman or by substitution for him. He could not be bound by those proceedings, and, consequently, he cannot take advantage of them to resist a claim otherwise admissible against him.

Again, it is said that the former suit (No. 241 of 1877) on the mortgage, which is the basis of the present suit, also exhausted the cause of action. In that earlier suit the members of the family who had executed the mortgage, and they alone, were made defendants. The present defendant was not named. The decree obtained in such a suit could not affect him, and this it was, probably, which made the judgment-creditor drop the proceedings in execution when resisted by Lakshman and Bábáji. Now, when Bábáji withholding part of the mortgaged property is sued for possession of it under the lien created by the mortgage, the question is whether the suit is barred by the previous one for possession of the whole of the property and an award of such possession, but in a suit to which Bábáji was not a party. He was not represented in that suit, for had he been represented he could not have resisted execution of the decree, and if he was not represented he can on principle be exempted from liability to the present suit only on the ground of the cause of action being merged in the judgment against his brother. In many cases the right against all defendants is merged in a judgment against one. That is when there is a joint liability or a community of liability which is a complete liability in each of several who are answerable, but at the same time not a multiple liability, so that satisfaction may be obtained over and over again. Thus in *Buckland* v *Johnson*[1] it was held that a recovery in trover against A., who was jointly liable with B., barred a suit against B. for money had and received. In Comyns's Dig. Judgment (L. K. 4, 1. 4) it is said that where damages are uncertain, a recovery, even without execution against one of two persons liable, is a bar to an action

(1) 23 L. J., C. P., 204.

1884

BALVANT SANTÁRÁM v. BÁBÁJI.

against the other. This principle has been applied in many modern cases—*Brinsmead* v. *Harrison*[1]. But, on the other hand, a judgment in trover or detinue does not change the property without satisfaction, though put in execution—see *Ex parte Drake*[2]. The judgment in such a case does not so completely absorb the right on which it is brought that, even though wholly infructuous, it deprives the party injured of all other remedy—see *Drake* v. *Mitchell*[3]. In the case of a particular article misappropriated the thing is certain, and so it is where a particular house has been sold or mortgaged. A decree and execution by which a plaintiff obtains possession of three rooms out of six awarded to him cannot have destroyed his right to the other three. As against the judgment-debtor the judgment-creditor may be tied down to a particular remedy to be obtained only in execution, but as to any stranger to the suit he must have the ordinary remedy should that stranger insist on a right vested in himself to three rooms from which he excludes the plaintiff. The rule may be quoted from Comyns's Dig. Judgment, L. 9: "Where the thing is certain, execution against one does not bar a suit against another on the same foundation." Hence a decree against Sadoba and others awarding possession of the whole house cannot be a reason for not awarding part of the same house when detained by Bábáji. He avows himself a stranger to them, and his act may be regarded as constituting a separate cause of action. It was urged that Bábáji ought to have been proceeded against, if at all, under section 331 of the Code of Civil Procedure. No doubt he might have been so proceeded against, but the language of the Code in section 328 is that the decree-holder may, not that he must, proceed in the way indicated, and the similar language of the Code (Act VIII) of 1859 having been construed by the Courts to leave an option to the judgment-creditor to proceed either summarily or by regular suit, the present Code is to be construed in the same sense, unless a different one is plainly intended—see *per* Lord Selborne, C., in *Municipal Building Society* v. *Kent*[4]. Either method having been open to the plaintiff, it is not a sound objection that he has preferred a suit as the more convenient way of pursuing his right.

(1) L. R., 6 C. P., 584.
L. R., 5 C. D., 866.

(3) 3 Ea. R., 258.

(4) L. R., 9 A. C., p. 269.

1884

BALVANT SANTÁRÁM v. BÁBÁJI.

The question, however, remains whether Bábáji is indeed liable under the mortgage sued on. At the time of its execution there is nothing to show that he was not still a member of the same joint family with Rájárám into which he has been born. But he was an infant, and where an infant's interests are concerned, great care ought to be exercised by any one dealing with the adult members of the family. On the other hand, the welfare of Hindu families would be greatly injured, the cost of necessary loans would be much increased, by making it hazardous to enter into honest and reasonable transactions with the managing members, whether one or more. The cases of *Bábáji Mahádáji* v. *Krishnáji Devji*(1) and *R. S. Joshi* v. *L. B. Joshi*(2) show that a Hindu family, including absent or infant members, is not necessarily compelled to perish through helplessness in any case of difficulty. A reasonable freedom of action must be allowed as well to the manager in an ordinary case as in the case of one managing an hereditary business. The principle in each case is the same, though the necessary latitude is greater in the case of a trading family than in that of one engaged in agriculture or a profession not involving mercantile engagements on a large scale. The credit due to an ordinary manager when he acts for himself and his younger brothers—*Tandavaraya Mudali* v. *Valli Amma*l(3) —is much increased when he is joined by the representatives of the other branches of the family in any particular transaction, whether those branches are united with, or separated from, his own. The presumption of honesty and family affection might be outweighed as to the single individual by the counter presumption of his valuing his own interest too highly, but the temptation to the representatives of other branches must be almost inappreciable. In the present case Sadoba and Rághoba executed the mortgage sued on along with Rájárám. The first two are brothers, and Rájárám is the eldest son of a third brother who died leaving several sons, of whom the defendant Bábáji is one. All the branches of the family were thus represented by their eldest members, and the mortgagee might reasonably suppose that a transaction entered into by them, and apparently necessary for the common

(1) I. L. R., 2 Bom., 666. (2) I. L. R., 2 Bom., 650.
(3) 1 Mad. H. C. Rep., 398.

1884

BALVANT SANTÁRÁM v. ÁBÁJI.

interest, was really necessary. He lent Rs. 800, and he produces a mortgage for Rs. 500 paid off by Sadoba as a proof of the good faith with which he entered into the transaction. This earlier mortgage, with interest, amounted to more than Rs. 700. It was executed by Sadoba and Rághoba with the addition of Lakshman, brother of Rájárám and Bábáji; but as Lakshman was a minor his concurrence could not add to the validity of the contract. It had to rest on the part taken in it by the elder representatives of the family, and when virtually ratified by Rájárám by his joining in the new mortgage might well be supposed by an outsider to have been executed with due regard to the family interests. The protection that the Courts afford to the interest of minors must not become an indulgence that may be perverted into an instrument of fraud, nor must those who have reaped the benefit of the transactions of managers and adult members during their early years be allowed to turn round at a later time and repudiate them without just and sufficient cause. We think the District Judge has in this case erred as to the presumptions that arise where the active members of a family unite in a transaction not obviously fraudulent, unreasonable, or unusual; and reversing the decree of the District Court we restore that of the Subordinate Judge, with costs throughout on the respondent.

Decree reversed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Nánábhái Haridás.

July 22.

NA'GO KA'NA'TURIA (ORIGINAL DEFENDANT), APPELLANT, *v.* BA'BA'JI KA'TA'RI (ORIGINAL PLAINTIFF), RESPONDENT.*

Registration—Consideration—Assignment—Mortgage—Stamp.

A. executed to B. an assignment of a mortgage. It was stamped with a stamp of Rs. 168; and recited that B. had instituted a suit against C. to recover Rs. 3,000, interest and costs, and that an agreement had been come to between B. and C., that, on C. getting A. to execute the assignment of the mortgage and on his paying Rs. 500, the suit should be dismissed and settled. It further recited that Rs. 5,000 was due to A. on the mortgage, and that A. had, at C.'s request, agreed

* Appeal, No. 22 of 1884.