

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánabhái Haridás.

BA'BA'JI AND OTHERS (ORIGINAL PLAINTIFF), APPELLANTS, v. DHURI
AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1884.

November 25.

*Hindu Law—Joint family—Decree against father alone for unsecured debts—
Purchaser at a sale in execution of such decree—Liability of family property—
Sons, how far such decree and sale binding on.*

Where a father alone is sued, not expressly in his representative capacity, and without his sons being joined as co-defendants, for unsecured debts contracted by him, whatever be the nature of such debts, the decree does not bind the interest of the sons in the family estate. Nor when the judgment-creditor proceeds to sale in execution of such decree against the family property does the sale of the father's "right, title and interest" pass any more than the father's interest to be ascertained generally by a partition with his sons.

THIS was a second appeal from the decision of C. F. H. Shaw, District Judge of Belgaum.

At an auction sale held in execution of a decree against the first defendant, the second defendant became a purchaser of the land in dispute and took possession. The plaintiffs were the sons of the first defendant and applied to the Court to set aside the sale, but their application was rejected on the 27th July 1881. They thereupon brought the presentsuit against the first and the second defendant, alleging that the land sold to the second defendant was ancestral property in which, at their birth, they took an interest; that their father (the first defendant) was separate from them, and that the land had been in their occupation; that their father's debts in respect of which the decree was passed had been incurred for improper purposes; and lastly, that the decree having ordered the sale only of their father's "right, title and interest" did not affect their shares.

The first defendant did not appear. The second defendant contended that the land belonged to the first defendant; that the plaintiffs and the first defendant were a united family; that the first defendant was manager of the family, and that the debt having been incurred for family purposes the decree in execution of which the land was sold was binding on the plaintiffs.

* Second Appeal No. 517 of 1883.

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The Subordinate Judge of Chikodi, who disposed of the suit, held that the family was united, and that the father's debt had been incurred for family necessity and he rejected the plaintiffs' claim. The plaintiffs appealed and the lower appellate Court confirmed the decree of the Court of first instance.

The plaintiffs preferred a second appeal to the High Court.

Ganesh Rāmchandra Kirloskar for the appellants:—The property sold in execution was ancestral property and was sold for debts of the father of the appellants. The appellants were not parties to the suit. What the purchaser took by his purchase was only the interest of the father, and the sale therefore did not affect the appellants' right. The burden of proof that the property was sold for proper purposes lies on the purchaser. *Nārāyanrāo Dāmodar v. Bālkrishna Māhadev*⁽¹⁾. Here the decree was a mere money decree and what was put up for sale was the right, title, and interest of the plaintiffs' father. The cases of *Trimbak Bālkrishna v. Nārāyan Dāmodar*⁽²⁾, *Bhikāji Rāmchandra v. Yashvantrāo Khopkar*,⁽³⁾ hold, on the authority of *Deen Dayal's case* as explained in *Hurdey Nārāin v. Pandit Rudra*,⁽⁴⁾ that unless the decree is a mortgage decree the sons' interest shall not be affected.

Mānekshā Jehāngirshā for the respondents:—The defence that the property was sold in execution of a mere money decree and not on a mortgage decree was not suggested in the Courts below, and cannot now be taken for the first time on second appeal. The only question before the lower Courts was whether the debts were properly incurred, and the Courts having found in the affirmative, their finding is conclusive. *Syud Emam v. Haranchunder*⁽⁵⁾. The case of *Nārāyanāchārya v. Narso Krishna*⁽⁶⁾ lays down that a sale of ancestral property for father's debts binds the interest of the sons.

WEST, J.—The case of *Deen Dayal v. Jagdip Nārāyan*, as recently explained in *Hurdey Nārāin Sahu v. Pandit Babu Rudra Prakash Missar*,⁽⁷⁾ rules that no matter for what purpose

(1) Printed Judgments for 1881, p. 293.

(2) *Ibid.*, p. 489.

(3) 14 Beng. L. Rep. 408.

(4) I. L. R. 8 Bom. 481.

(5) L. R. 11 Ind. Ap. 26.

(6) I. L. R. 1 Bom. 262.

(7) L. R. 11 Ind. Ap. 26.

an unsecured debt was contracted by a father, if he alone is sued not expressly in his representative capacity and without his sons being joined as defendants, the decree does not bind their interests in the family estate. Nor when the judgment-creditor proceeds to sale in execution against the family property does the sale of the father's "right, title, and interest" pass any more than his interest to be ascertained generally by a partition with his sons. In the present case there are four sons forming, with their father Duri, a united family. Three of them sue on account of themselves and of their infant brother which, on the decisions, they may properly do. The father having been sued on a simple debt, his interest in a piece of land was sold in execution of the decree against him, and was purchased by defendant Bábáji. Had there been other property, we should have to award to Bábáji the field he has purchased so far, but so far only as it could be equitably brought within Duri's share in a partition with his sons. But it appears that the field in question is, in fact, the whole of the family estate, and in a partition enforced by the sons Duri's share of it is one-fifth. This is what Bábáji has acquired by his purchase; the other four-fifths we award to the plaintiffs on a right separate from their father's.

The costs of this appeal are to be borne by the respondents: those of the Courts below by the parties severally as they have incurred them.

Decree reversed.

Note—The above case was followed in the case of *Gulapa* (original plaintiff No. 2) v. *Basowa* and another (original defendants) decided on 23rd February 1885. (Second appeal No. 560 of 1883).

The plaintiff and his brother sought to recover from the defendants three fields and a house situate at Nagarhalli in the Dhárwár District, together with mesne profits. They alleged that they had been driven from the village by famine and that on their return two years before the suit they found the defendants in possession of the premises, viz. the first defendant in possession of the fields and the second defendant in possession of the house.

The defendants alleged that the house and lands were sold at a Court sale on 23rd June 1877; that one Dundapa, the deceased husband of the first defendant, obtained a consent decree against the first plaintiff on 22nd January 1875, and that the property was sold in execution thereof and was bought by the said Dundapa; that the rest of the property came to Dundapa by private arrangement in settlement of debts due to him by the first plaintiff, and that the first de-

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defendant had sold the house to the second defendant for Rs. 98 under a deed of sale dated 18th July 1879.

The Subordinate Judge of Gadag found that under the Court sale only the share of plaintiff No. 1 had been sold and that the execution proceedings were of no effect against the second plaintiff, the latter not having been a party to the decree or to the execution proceedings. He awarded to plaintiff No. 2 a half share and possession of the three fields and the house.

The defendants appealed and the District Judge of Dhārwar rejected the plaintiffs' claim. Plaintiff No. 2 appealed to the High Court. The following is the judgment of the Court (*Mr. Justice Nánábhai Haridás and Sir W. Wedderburn, Justice*):

NA'NA'BHA'I HARIDA'S, J.—Having regard to the case of *Bābaji Suttu v. Duri* we think what the purchaser at the auction sale really bought was only the right, title, and interest of the appellant's father in the property in dispute, namely, his share in it. The Subordinate Judge thinks the appellant's brother Basapa's share also passed by such sale, inasmuch as Basapa was made a party to the suit and the execution proceedings after his father's death as his legal representative. It is unnecessary in this case for us to express any opinion as to whether the Subordinate Judge was right or not in that view, Basapa not having appealed against that decision. The property in dispute, it is admitted on both sides, is the only property of the joint family. The appellant's one-third share should, therefore, be separated from the rest and made over to him. This should be done in execution of our decree.

The decree of the District Judge is reversed, and that of the Subordinate Judge modified as above. The appellant to have his costs of this appeal from the respondents. The parties to pay their own costs in the Courts below.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhai Haridás.

KA'JI AHMAD AND OTHERS (ORIGINAL PLAINTIFFS), APPLICANTS, v. KA'JI MAHAMAD AND OTHERS (ORIGINAL DEFENDANTS), OPPOSENTS.*

Civil Procedure Code, Act XIV of 1882, Secs. 159 and 167—Practice—Procedure—Witnesses—Delay in serving Summonses—Adjournment.

Under section 159 of the Code of Civil Procedure (Act XIV of 1882), parties are entitled to summonses for their witnesses at any time before the final hearing, but if there has been delay and want of diligence in consequence of which, witnesses, not having been served in good time, are not present, the Court may properly refuse to adjourn the hearing.

THIS was an application, under the Court's extraordinary jurisdiction, for the reversal of the decree of Khán Bahádur M. N.

* Extraordinary Application No. 143 of 1883.