

The decision in *In re Manohar G. Tambekar* (1) on the analogous question raised by art. 5 of sch. I proceeds on the same view of the Act.

We must, therefore, discharge the order of the Subordinate Judge; and as counsel for the defendant admits that he has no objection to urge, on the merits, to the execution of the decree, order that the documents lodged in Court be delivered to the plaintiff, and that possession be given to him of the house mentioned in the *darkhast*.

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[101] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and
Mr. Justice Nanabhai Haridas.

KHURSHETBIBI AND OTHERS (*Original Defendants*), Appellants
v. KESO VINAYEK (*Original Plaintiff*), Respondent.*

[1st August, 1887.]

Decree—Execution—Sale in execution of a decree against a deceased person represented by a minor son—How far such sale affects interest of an heir not party to decree or execution proceedings.

K., a Mahomedan woman who was a co-sharer in a certain *khoti vatan*, died indebted, and was sued after her death as "represented by her minor son represented by his guardian." A decree having been obtained against K. thus represented, her share in the *khoti* was put up for sale in execution, and was purchased by the plaintiff, who obtained a sale certificate reciting that the right, title, and interest of K. in the said *khoti* had been purchased by him. He now sued the defendants, who were K.'s co-sharers in the *khoti*, to recover the profits of K.'s share which they had received.

K., besides her minor son, had left her surviving a daughter who had not been made a party to the suit or to the execution proceedings, and the defendants contended that her share in her mother's estate had not passed to the plaintiff.

Held, that the plaintiff was entitled to the whole of K.'s share. The debt due by K. was one for which the daughter was equally responsible; and having regard to the form of the suit and the execution proceedings, the plaintiff was justified in assuming that he was bidding for the entirety of K.'s share, and would acquire a title unimpeachable by the daughter.

[F., 20 B. 938 (345); R., 24 B. 135 (144)=1 Bom. L.R. 627 (634); 26 M. 794 (738); D., 2 Ind. Cas. 922=12 O.C. 146 (148); 2 S L.R. 76 (78).]

THIS was a reference by H. Batty, Acting District Judge of Thana, under s. 617 of the Civil Procedure Code (Act XIV) of 1882.

One Khatiza was a co-owner with the defendants of a certain *khoti vatan*. After K.'s death a creditor of hers sued upon a bond executed by her, and obtained a decree against "Khatiza, deceased, represented by her minor son represented by his guardian."

In execution of this decree, Khatiza's share in the *khoti* was put up for sale and purchased by the plaintiff, who obtained a sale certificate purporting to convey to him the right, title, and interest of Khatiza in the *khoti*.

The plaintiff sued the defendants, (the co-sharers of the *khoti*), to recover Khatiza's share of the profits which had been collected by them.

* Civil Reference, No. 23 of 1887.

(1) 4 B. 26.

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[102] Khatiza had left a daughter, who had not been made a party to the suit, or to the subsequent execution proceedings, and the defendants contended that the plaintiff's purchase did not affect her share.

The District Judge referred the following question to the High Court:—

“Whether defendants are entitled to withhold the daughter's share, on the ground that it has not passed to plaintiff under the certificate, the defendants not representing the daughter and having no title to her share which they have collected.”

Daji Abaji Khare, for the defendants.—By his purchase the plaintiff got only the minor son's interest in the property. The whole estate could not be represented by the son, the other heirs being left out—*Hendry v. Mutty Lall Dhur* (1); *Assamathem Nessa Bibee v. Roy LutchmEEPut Singh* (2). The heirs of the judgment-debtor are Mahomedans, and each one of them is in his own right, and one person alone is incapable of representing the others.

Rao Saheb *Vasudev Jaggannath Kirtikar*, for the plaintiff.—The certificate of sale clearly recited that Khatiza's entire share was sold, and the purchaser must be deemed to have bidden for and purchased that, and acquired an unimpeachable title: see *Ishan Chander Mitter v. Buksh Ali Soudagur* (3), which has been followed in *Jairam Bajabashet v. Joma Kondia* (4). The debt was a good debt, and the daughter was bound to pay it. Moreover, the defendants, who are strangers, cannot plead this defence.

JUDGMENT.

SARGENT, C.J.—The plaintiff was the purchaser at auction sale in execution of a decree on a bond against “Khatiza, deceased, represented by her minor son represented by his guardian.” The certificate of sale purports to convey to the plaintiff, in execution of the above decree, the thereunder written property in possession of Sharifabibi, grandmother and guardian of the minor—the property being subsequently described as the right, title, and interest of Khatizabibi, described as the deceased defendant, in the 3 annas 6 pies' share in the *khoti*. As no part of the produce [103] of the *khoti* was in actual possession of either of the heirs of the deceased Khatizabibi, the latter part of the description of the property may, we think, having regard to the form of the suit, be disregarded as *falsa demonstratio*, and not as intended to restrict the property sold to the minor's share. The purchaser would, therefore, be justified in assuming that he was bidding for the entirety of Khatizabibi's share in the *khoti*, and (on the principle established by the case of *Ishan Chander Mitter v. Buksh Ali Soudagur* (3), which was acted upon by this Court in *Jairam Bajabashet v. Joma Kondia* (4),) would acquire a title unimpeachable by the daughter, who was equally responsible for the debt; on any other ground than that the debt was not due. As there was no suggestion that this was the case, we think the defendants could not justify their refusal to pay the whole 3 annas 6 pies' share in the produce of the *khoti*, on the mere technical ground that the daughter had not been made a party to the original suit.

(1) 2 C. 395.
(3) Marsh. Rep. 614.

(2) 4 C. 142.
(4) 11 B. 361.