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Ichharam, as it had passed by survivorship to another person long before the Act came into operation.

[624] As regards the ornaments included in list E, the evidence relied on by the defendant is vague, and we think that the Subordinate Judge rightly allowed the plaintiffs' claim to recover them.

As regards, however, the property included in list H, worth Rs. 6,329, we cannot uphold the Subordinate Judge's decision. Bai Harkor has adduced evidence (her own and that of witnesses Nos. 101, 111, 112, 176), which is not met by any evidence on the other side. She has all along consistently claimed these ornaments as having been given to her by her husband on their betrothal. The evidence relied on by her sufficiently supports her claim, which is consistent with Hindu custom on such an occasion. We, therefore, disallow the plaintiffs' claim to recover those ornaments.

The effect of this decision will be to vary the decree of the lower Court by striking out of it the paragraph relating to the ornaments in list H.

Before, however, we can make a final decree in this appeal, it will be necessary to ascertain the amount of money to be paid as an alternative if delivery of the moveable property decreed to the plaintiffs cannot be had. Section 208 of the Code of Civil Procedure, the provisions of which have been overlooked by the Subordinate Judge, requires that the decree should state this amount. The Subordinate Judge should certify a finding on this point within two months, after taking such evidence as the parties may offer.

Decree varied.

12 B. 625.

[625] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

KRISHNAJI LAKSHMAN AND OTHERS (*Original Defendants*), Appellants
v. VITHAL RAVJI RENGE (*Original Plaintiff*), Respondent.*
[6th December, 1887.]

Hindu law—Ancestral property—Joint family—Alienations by father—Son's liability for father's debts—Execution—Purchaser—Notice—Limitation Act (XV of 1877), s. 14—Exclusion of time taken up in prosecuting a former suit which was eventually withdrawn.

Where a Hindu governed by the Mitakshara law seeks to set aside his father's alienations of ancestral property, if the alienees are purchasers at court-sales held in execution of decrees against the father, it is not enough for him to show that the debts, for which the decrees were passed, were contracted by the father for immoral purposes; it must also be shown that the auction-purchasers had notice that the debts were so contracted. The points to be determined in such cases are:—

- (1) What was the interest that was bargained for and paid for by the purchaser? Was it the father's interest only, or was it the interest of the entire family?
- (2) Were the debts, for which the decrees were obtained under which the property was sold, contracted for immoral purposes? and
- (3) Had the purchaser notice that the debts were so contracted?

* First Appeals, No. 98 and 107 of 1884 and Nos. 9 and 20 of 1885.

Suraj Bunsji Koer v. Sheo Proshad Singh (1) and *Nanomi Babuasin v. Modun Mohun* (2) followed.

The plaintiff sued in 1883 for partition of ancestral property, consisting (*inter alia*) of certain *thikans* which had been sold in execution of decrees passed against his father. The plaintiff, though an adult at the time, was not a party to the suits in which the decrees were passed against the father, nor to the execution proceedings. In the certificates of sales granted to the different purchasers, the property sold was described as being a four-annas' share, which would be equal to the shares of the father and the son together, but this description was qualified by the statement that "the right, title and interest in the above-mentioned property of the said Ravji (*i.e.*, the father) was sold." There was nothing to show that the purchasers bargained for and paid for the entire family estate. Moreover, the plaintiff's possession and enjoyment of the *thikans* in question was never disturbed, though the sharers had each a separate possession of distinct portions of the ancestral property.

Held, that under the circumstances the father's interest alone passed to the auction-purchasers.

[626] *Held*, further, that the plaintiff's claim with regard to eight other *thikans* in dispute was time-barred. On the sale of those *thikans* in execution of decrees against his father, the plaintiff intervened, and obstructed the auction-purchasers in obtaining possession. His obstruction was, however, removed by an order of the Court, dated 23rd October, 1873. The present suit, which was filed in 1883, not having been brought within one year from the date of that order, as required by the law then in force, the claim was clearly time-barred. The plaintiff was not entitled to a deduction of the time taken up in prosecuting a former suit, which was filed up in 1872 and disposed of in 1883; as that suit did not fail for want of jurisdiction or any defect of a like nature such as is contemplated by s. 14 of the Limitation Act XV of 1877, but was withdrawn by the plaintiff himself for want of parties, with liberty to bring a fresh suit. Section 374 of the Code of Civil Procedure (Act XIV of 1889), therefore, applied to the present case.

[F., 29 B. 219=7 Bom. L.B. 90 (92); R., 19 M. 90 (94).]

APPEALS from the decision of L. G. Fernandez, First Class Subordinate Judge of Ratnagiri, in suit No. 32 of 1883.

This was a suit for partition of ancestral property. The plaintiff alleged that the property in suit was joint family property, that his *bhaubands* or co-sharers were in possession and enjoyment of unequal portions of the family estate, that he demanded partition, but defendants Nos. 1 to 6 objected to it.

The plaintiff further alleged that his father was possessed of considerable ancestral property which he alienated for debts contracted for immoral purposes, that his father's alienations were, therefore, not binding on him, and could not affect his two-annas' share of the entire family property.

Defendant Nos. 1 to 18 were the *bhauband* co-sharers. Defendant No. 19 was a mortgagee under defendants Nos. 14 to 18. Defendants Nos. 20 to 32 and Nos. 37 to 43 were the alienees of the plaintiff's father Ravji.

The plaintiff first filed his suit on the 8th July, 1873, in the Malvan Court. That suit was afterwards transferred to the Vengurla Court. The Vengurla Court returned the plaint for want of jurisdiction, and it was filed in the First Class Subordinate Judge's Court at Ratnagiri in 1880. The case was fully heard there, and when judgment was about to be delivered, the plaintiff asked for leave to withdraw from the suit, as it was defective for want of parties, with liberty to file a fresh suit [627] in respect of the same cause of action. This permission was granted, and the present suit was filed in 1883.

The defendants Nos. 1 to 6 contended (*inter alia*) that four *thikans* out of the joint property had been already assigned by the *bhaubands* to

(1) 6 I.A. 88; 5 C. 148.

(2) 13 I.A. 1=13 C. 21.

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defendant No. 1 as *jeshthbhad* (or share of the eldest son), and that the said *thikans* were, therefore, not liable to partition.

Defendant No. 25 pleaded that his father purchased 34 *thikans* at an auction-sale in execution of a decree against the plaintiff's father, the deceased Ravji Raghu; that the plaintiff and his father were joint, and the latter was the managing member—hence the sale included the plaintiff's right also; that when the defendant took possession of the *thikans*, the plaintiff obstructed him, but his obstruction was removed by the Court on the 23rd October, 1872; that the plaintiff not having brought the present suit within one year from that date, his claim was barred by the law of limitation; and the plaintiff's father was not a man of vicious habits.

Defendants Nos. 26 and 27 pleaded that the plaintiff's father had mortgaged his one-fourth share in certain *thikans* to one Apa Sabshet Thanavde; that the mortgagee obtained a decree against the plaintiff's father, and in execution thereof put up to sale and himself purchased three of the mortgaged *thikans* in 1871; that Apa then sold his rights therein to the defendants in 1882; that the plaintiff's father had contracted debts for family purposes, and that, therefore, the mortgage of the aforesaid *thikans*, the decree, and the sale affected the plaintiff's share also in the family property.

Defendant No. 31 was a purchaser of certain other *thikans* at an auction-sale in execution of a decree against the plaintiff's father. He also pleaded that the debts contracted by the father and the sales in execution of decrees against him were binding on the son.

Defendant No. 23, another auction-purchaser, set up a substantially similar defence.

Defendant No. 37 pleaded that the plaintiff's father, Ravji, [628] had mortgaged to his father his one-fourth share in 81 *thikans* in 1868 for Rs. 3,575, and had passed two other bonds in 1869 for Rs. 649; that the plaintiff was bound to pay these sums; that Ravji's one-fourth share in 18 of the mortgaged *thikans* had been sold by auction in execution of decrees against him; that in respect of these *thikans* and the rest of Ravji's properties a suit was then pending in the Vengurla Court, and that the plaintiff ought to sue to redeem.

The certificates of sales granted to the different auction-purchasers described the property sold as being a four-annas' share, which would include the shares of the father and the son together; but this description was qualified by the statement that "the right, title, and interest in the above-mentioned property of the said Ravji was sold."

The Subordinate Judge found that the plaintiff's father had incurred debt for immoral purposes; that when his creditors sued him, the plaintiff was an adult member of his family; and that as the plaintiff was not made a party to the suits filed against his father, he was not bound by the decrees or by the sales which followed thereon. As to the *thikans* claimed by defendant No. 25, the Subordinate Judge was of opinion, that though the sales of those *thikans* were not binding on the plaintiff, still he had lost his right to eight of them under the Court's order of 23rd October, 1872, when his obstruction to the defendant's possession was removed.

With respect to the four *thikans* claimed by defendants 1 to 6 for *jeshthbhad*, the Subordinate Judge was of opinion that those *thikans* were liable to partition, as held by the High Court in Special Appeal No. 526 of 1865. The agreement of the *bhaubands*, upon which the defendants relied in support of their contention, was found to have been fraudulently got

up to defeat a creditor's claim against the family property; and though the plaintiff's father was a party to the agreement, the Subordinate Judge held that it was not binding on the plaintiff.

The Subordinate Judge, therefore, passed a decree in the plaintiff's favour, awarding him one-eighth of all the properties described in the plaint, with the exception of the eight *thikans* [629] in the possession of defendant No. 25, as to which the claim was thrown out as time-barred.

Against this decision the defendants Nos. 1 to 6, Nos. 23, 25, 26, 27, 31 and 37 filed appeals to the High Court.

Mahadev Chimmaji Apte, for the appellants (defendants 1 to 6).

Vasudev Gopal Bhandarkar, for the appellants (defendants Nos. 26 and 27).—The appellants are purchasers at court-sales held in execution of decrees against the plaintiff's father. Those sales are binding on the plaintiff. The certificates of sale show that a four-annas' share of the family property was sold. That includes both the father's and the son's shares. It is now settled law that the father's alienations are binding on the sons, unless they are shown to have been made for immoral purposes. The burden of proving this lies on the sons who challenge the alienations. This burden the plaintiff has not discharged in the present case. The evidence he has produced to prove his father's immorality is too vague to be acted upon. Refers to *Kastur Bhavani v. Appa*(1) and *Sadashiv Dinkar Joshi v. Dinkar Narayan Joshi* (2).

Manekshah Jehangirshah, for the appellants (defendants Nos. 23, 25, 31 and 37).—The material question in the present case is, what was put up to sale in execution of decrees against the plaintiff's father? Was it the father's interest only, or the entire family estate? This depends upon the nature of the father's debts. If the debts, for which the decrees were passed, were not contracted for immoral purposes, the son's interest also passes at the sale. Refers to *Nanomi Babuasin v. Modun Mohun*(3). In the sale-certificates the property sold is described as a four-annas' share, which includes the father's as well as the son's interest. A purchaser is not bound to go back behind the decree. All that he has to see is that there was a decree properly obtained against the father, and that the property put up to sale is liable to be sold in execution of the decree—*Girdharee Lall v. Kantoo Lall*(4). We are *bona fide* purchasers. We had no notice, that the plaintiff's father contracted debts for immoral purposes. We [630] are, therefore, entitled to protection—*Suraj Bunsu Koer v. Sheo Proshad Singh* (5). The plaintiff was not a minor at the time of the sale. He lay by for merely eleven years. He must, therefore, be taken to have acquiesced in the alienations. It is too late for him to dispute them.

Ghanasham Nilkanth, for the plaintiff (respondent).—It is found by the Court below—and that finding is supported by abundant evidence—that the plaintiff's father contracted debts for immoral purposes. The son is not under a pious obligation to pay such debts—*West and Bühler*, (3rd ed.), p. 746; *Colebrooke's Digest*, p. 213; *Bhekharain Singh v. Januk Singh* (6); *Suraj Bunsu's Case* (5). The father's power of disposal over ancestral property is not larger than that of any other co-parcener. The *onus* of showing that the father contracted debts for family purposes lies

(1) 5 B. 621.

(2) 6 B. 520.

(3) 13 I.A. 1=13 C. 21.

(4) 14 B.L.R. P.C. 187.

(5) 6 I.A. 88=5 C. 148

(6) 2 C. 436 (443).

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on the creditor—West and Bühler (3rd ed.), 166; *Kameshwar Pershad v. Run Bahadur Singh* (1). The auction-purchaser at a court-sale does not acquire more than the father's share, especially where the son is not a party to the suit or to the execution proceedings. The purchaser is bound to make reasonable inquiry and satisfy himself that the decree is passed against the father as representing the family. He is, moreover, bound to show that he bargained for and paid for the entire estate. The quantum of interest that passed at a court-sale to a purchaser is also determined by the nature of the debt for which the sale is made. If the debt is immoral, the son's interest does not pass. Refers to *Girdharee Lall v. Kantoo Lall* (2); *Suraj Bunsî Koer v. Sheo Proshad Singh* (3); *Baboo Hurdey Narain Sahu v. Pundit Baboo Rooder Perakash* (4); *Nanomi v. Modun* (5); *Simbhunath v. Golab* (6); *Jagabhai Lalubhai v. Bhukandas Jagjivandas* (7).

As to that part of the claim which the lower Court has held to be time-barred, the plaintiff is entitled to a deduction of the time taken up in a former suit brought upon the same cause of [631] action in 1873, which eventually failed for want of parties in 1883. Section 14 of Act XV of 1877 applies to this case. Refers to *Bai Jamna v. Bai Ichha* (8).

JUDGMENT.

PARSONS, J.—We see no reason to dissent from the Subordinate Judge's finding that the mortgages of the plaintiff's share of certain *thikans* by his father cannot be upheld. The plaintiff has proved that the debts were contracted for immoral purposes within the knowledge of the lenders. The alienations, therefore, cannot be held good as against the plaintiff's two-annas' share in those *thikans*, in respect of which only he seeks to set them aside. The case, however, of those appellant-defendants who purchased at auction-sales stands on a different footing. The Subordinate Judge has disallowed their claims as against the plaintiff's share in the lands sold merely on the ground that the sales were made in execution of decrees for debts contracted by his father for immoral purposes. But, in dealing with this part of the case, the Subordinate Judge has not considered the question whether the purchasers had notice that the debts were so contracted. We think that, as regards such purchasers, the two propositions laid down in *Suraj Bunsî's Case* (3), are still in force unqualified by any later decision, and that having regard to that decision and the ruling in *Nanomi's Case* (5) the points to be determined in any such case as the present are:—

(1) What was the interest that was bargained for and paid for by the purchaser? Was it the father's interest only or was it the interest of the entire family?

(2) Where the debts for which the decrees were obtained under which the property was sold, contracted for immoral purposes? and

(3) Had the purchasers notice that the debts were so contracted?

The first of these points was the material point in the cases of *Baboo Hurdey Narain v. Pundit Baboo Rooder* (4), *Nanomi Babuasin v. Modun Mohun* (5), *Simbhunath v. Golab* (6), *Pettachi v. [632] Sangili* (9), and the

(1) 6 C. 843=8 I.A. 8.

(4) 11 I.A. 26.

(7) 11 B. 37.

(2) 14 B.L.R. 187.

(5) 13 I.A. 1=13 C. 21.

(8) 10 B. 604.

(3) 6 I.A. 88=5 C. 148.

(6) 14 I.A. 77.

(9) 14 I.A. 84.

determination of it was sufficient for the decision of those cases. It is for this reason, apparently, that the second proposition in *Suraj Bunsji's Case* is not again laid down in the subsequent cases. Considering, then, the first question which arises with reference to the sales of certain *thikans* in execution of decrees against the plaintiff's father, in the light of the cases just cited, we are of opinion that the father's interest alone is what was sold in the present case. It is nowhere stated in any of the certificates of sale that the share of the son (*i. e.* of the plaintiff) is sold. It is true that the property is described in the certificates as being a four-annas' share, which would be equal to the shares of the father and the son together but this description is qualified by the statement that "the right, title and interest in the above-mentioned property of the said Ravji" (*i. e.*, the father) is sold. The case is thus very similar to *Simbhunath's Case*, where the interest of the father alone was held to have passed. It is remarked in *Nanomi's Case* that, if the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's co-parcenary interest only, the absence of the sons from the proceedings may be a material consideration. In the present case, the plaintiff, though an adult at the time, was not a party to the suit or to the execution proceedings. Again, another very material circumstance is not established in the present case, namely, that the purchasers bargained for and paid for the entirety. Further, it is abundantly clear, from the evidence, that, as regards his possession and enjoyment of the *thikans* in question, the plaintiff was never disturbed, and that, too, although by private agreement the sharers had each separate possession of distinct portions of the ancestral property. For this reason, then, that the interest of the father alone was sold, and not on the ground relied on by the Subordinate Judge, which, standing alone, is insufficient to justify his finding, we confirm that finding as to the sales in question, so far as they affect the plaintiff's share, which is alone claimed by him.

We think that the Subordinate Judge has rightly disallowed the plaintiff's claim to a share in the eight *thikans* mentioned in [633] Ex. A. In the proceedings consequent on the sale of these fields the plaintiff intervened. He was given an opportunity of showing either that his share was not sold or that it was improperly sold and that the sale was not binding on him, and he failed to prove either point; and the obstruction that he made to the purchasers obtaining possession was removed. This was in 1872. Under the law then in force, he was bound to sue within a year to establish the right that he claimed—the right that is to remain in possession of his share unaffected by the auction-sale under a decree obtained against his father. In the present suit, which was not filed till 1883, he seeks to obtain a declaration of the very same right, and asks that the time taken up in prosecuting a former suit which was filed in 1872 and disposed of in 1883 may be excluded. But that suit did not fail for want of jurisdiction or any defect of a like nature, such as is contemplated by s. 14 of Act XV of 1877 (see *Bai Jamna v. Bai Ichha* (1)). It was withdrawn by the plaintiff himself, as it was defective for want of parties, and he was allowed to bring a fresh suit. It appears, therefore, that s. 374 of the Civil Procedure Code applies to the case. Inasmuch, moreover, as neither the decrees in execution of which the sales were held nor the bonds on which the decrees were obtained are filed in the present case and no evidence is adduced as to the exact character of the debts in

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(1) 10 B. 604.

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respect of which the bonds were passed, it would not be possible for us to hold that these specific debts were contracted for immoral purposes.

The only other objection to the decree is that of the defendants Nos. 1 to 5. It refers to their claim to a *jeshtbhag* or larger share on partition. The Subordinate Judge has disallowed this claim, on the ground that the sum awarded by the agreement of A. D. 1842 to Ramchandra on account of *jeshtbhag* was provided for by the High Court's decree in a previous suit. The Subordinate Judge, however, here proceeds on a misconception both of the agreement and of the decree of the High Court. The agreement of 1842 (Ex. No. 163) provided that "fields yielding a net profit of Rs. 30 a year (after deducting the assessment) [634] should be assigned to R. B. Renge for *jeshtbhag* at the time of making the partition." The decree of the High Court (Ex. 188) in the previous suit (Sp. A. 526 of 1865) also provided that the four fields claimed should be divided after an assignment had been made of an extra share for *jeshtbhag*, as stipulated in para. 2 of the agreement, Ex 12, (Ex. 163 in the present case). It is, therefore, clear that the defendants are entitled to have an assignment of land from those four fields, yielding a net profit of Rs. 30 a year as *jeshtbhag*. We cannot, however, hold that they are entitled to more than that. The claim to hold the whole of these lands as *jeshtbhag* cannot be sustained. Exhibit 160, under which the claim is made, has been superseded by the decree, which alone now determines the rights of the parties *inter se* (Cf. *Ramchandra v. Abaji* (1)).

We, therefore, modify the decree of the lower Court by declaring that, before making the partition, land yielding a net profit of Rs. 30 a year, out of the *thikans* Holiche Kate, Wada Maine, Dagad Kate, Khalil Khajan and Parchbhai Khajan Katuban, be divided off and assigned to the defendants Nos. 1 to 6 if no such assignment has already been made by virtue of the decrees obtained by defendants Nos. 14 to 18 for partition. In all other respects we confirm the decree.

We order that each party bear its own costs in the appeals in this Court.

Decree varied.

12 B. 634.

APPELLATE CIVIL.

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

SAYAD JAFIR SAHEB (*Original Plaintiff*), Appellant *v.* SAYAD
KADIR RAHIMAN AND ANOTHER (*Original Defendants*),
*Respondents.** [30th August, 1888.]

Municipal (Bombay) Act VI of 1873, s. 36, orders under—Privy, power of Municipality to order to be built by owner of a house—Such order not imperative, but permissive—Construction.

The terms of s. 36 of Bombay Act VI of 1873 are not imperative in requiring a Municipality to call on the owner of a house to build a privy, but are

* Second Appeal No. 415 of 1886.

(1) Printed Judgments for 1886, p. 15.