

14 B. 597.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

HARI VITHAL (Original Defendant), Appellant v. JAIRAM VITHAL
AND OTHERS (Original Plaintiffs), Respondents.*
[21st April, 1890.]

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Hindu law—Manager—Decree against manager for debt due by the family—Sale in execution of such decree binds the other co-sharers though not parties to the decree.

The plaintiffs and their brother Esaji were in joint occupation of certain *thikans* in a *khoti* village. Esaji being the eldest brother was in management of the family estate. In 1877 the *khot* sued Esaji alone for arrears of assessment due on the *thikans* in question, obtained a decree, and in execution put up the *thikans* to sale. Defendants 2 to 5 became the auction-purchasers, and were put into possession by the Court. Thereupon the plaintiffs sued for a partition of their five-sixths share of the *thikans* sold, alleging that they were not bound by the Court sale, as they were not parties to the *khot's* suit against their brother, or to the execution proceedings.

Held, that the assessment for which the *khot* obtained a decree against Esaji, being due by the whole family, the sale in execution passed the shares of the plaintiffs, as well as that of their brother, to the auction-purchasers.

Daulat Ram v. Mehr Chand (1) followed, by which

Lakshman Venkatesh v. Kashinath (2) and *Maruti Narayan v. Lilachand* (3) are overruled.

[F. 20 C. 453; R., 18 B. 147; 20 B. 338; 21 B. 205 (216, 219); 23 B. 372; 29 C. 583 = 6 C.W.N. 370; 6 C.L.J. 362; 10 C.P.L.R. 67; 16 C.P.L.R. 19; 2 N.L.R. 101 (104); Doubtful, 15 Bom.L.R. 36 = 18 Ind. Cas. 385; D., 4 C.L.J. 68 = 10 C.W.N. 176; 2 S.L.R. 76.]

APPEAL from an order of remand made by R. S. Tipnis, Acting Assistant Judge of Ratnagiri, in appeal No. 231 of 1886.

[598] Esaji and his brothers were in joint occupation of certain *thikans* in the *khoti* village of Khanavali. Esaji, being the eldest member of the family, was the manager of the family estate. In the year 1877 the *khot* of the village sued Esaji for arrears of assessment due on the *thikans* in dispute. The *khot* obtained a decree, and in execution put up the *thikans* to sale. Defendants 2 to 5 became the auction-purchasers, and were put in possession by the Court.

Thereupon Esaji's brothers filed the present suit for partition of their five-sixths share of the *thikans* in question, alleging that the *thikans* belonged to them jointly with Esaji, defendant No. 1, and that as they were not made parties to the *khot's* suit against Esaji, or to the execution proceedings, they were not bound by the Court sale.

The Subordinate Judge rejected the plaintiffs' claim, holding that the entire holdings were put up to sale in execution of the *khot's* decree, and that the sale was binding on the plaintiffs.

On appeal the Assistant Judge held that as Esaji was not expressly sued as manager of the family, his rights alone could pass to the auction-purchaser at the Court sale. The decree of the Subordinate Judge was, therefore, reversed, and the case was remanded, in order that the shares

* Appeal No. 7 of 1889.

(1) 15 C. 70 = 14 I.A. 187.

(2) 11 B. 700.

(3) 6 B. 564.

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of the several co-sharers might be ascertained, and the suit disposed of on the merits.

Against this order of remand defendant No. 3 appealed to the High Court.

Daji Abaji Khare, for appellant.—The decree obtained by the *khot* against *Esaji* is binding on the whole family. It was a decree for rent due on the *thikans* in dispute. The rent was due from all the members of the family. *Esaji* was the manager, and he was sued as such, though not in express terms. The sale in execution was of the entire holdings, and not limited to the right, title and interest of *Esaji* alone. It is, therefore, binding on the plaintiffs. The Privy Council case of *Daulat Ram v. Mehr Chand* (1) is in point. This case practically upsets the rulings of this Court in *Maruti Narayan v. Lilachand* (2) and *Lakshman Venkatesh v. Kashinath* (3).

[599] *Ganesh Krishna Deshmukh*, for respondents.—In the Privy Council case just cited the mortgage related to the whole family property. The whole family took the benefit of the mortgage transaction, and acquiesced in it. Under such circumstances the Privy Council rightly held that the decree on the mortgage, though passed against one member of the family, was binding on the whole family. Will the Court extend this principle to money-decrees? A long course of decisions of this Court has finally settled the law in this presidency, that a decree against a manager other than a father will not bind his co-sharers, if they are not parties to the suit. That principle governs the present case—*Krishnaji v. Vithal* (4); *Gan Savant Bal Savant v. Narayan Dhond Savant* (5); *Padmakar Vinayak Joshi v. Mahadev Krishna Joshi* (6); Mayne's Hindu Law, s. 324 (4th ed.).

Daji Abaji Khare in reply.—*Daulat Ram's case* (1) is followed by this Court in *Vishnu Vithal v. Venkatrav Bhavanji* (7). The same principle is laid down in *Nanomi Babuasin v. Modhun Mohun* (8) and *Jeo Lal Singh v. Ganga Pershad* (9).

JUDGMENT.

BIRDWOOD, J.—The plaintiffs sued for partition of their five-sixths share of the land and other property in suit, which they claim to own as ancestral property jointly with the defendant No. 1, in execution of a decree against whom, for assessment due on the land to the *khot*, it was sold by the Civil Court and is now in the possession of the defendants Nos. 2 to 5, who are the purchasers at the Court sale or the vendees of the purchasers.

The Subordinate Judge found that the plaintiffs and defendant No. 1 had no proprietary interest in the land, and that the Court sale was binding on the plaintiffs, whose claim he therefore rejected.

His decree was, however, reversed, on appeal, by the Assistant Judge, who found that the land in suit was the ancestral property of the plaintiffs and defendant No. 1; that it was held jointly by them as occupancy tenants, and was partible. He found, further, that defendant No. 1 was the eldest member of the family and [600] occupied the land

(1) 15 C. 70=14 I.A. 187.

(4) P.J. for 1887, p. 337.

(7) P.J. for 1889, p. 248.

(2) 6 B. 564.

(5) 7 B. 467.

(8) 13 I.A. 1=13 C. 21.

(3) 11 B. 700.

(6) 10 B. 21.

(9) 10 C. 996.

as manager, but that he was not sued by the *khot* expressly in his representative character, and that, therefore, his right alone passed under the Court sale. The Assistant Judge remanded the case, in order that the several joint tenants at the time of the sale might be ascertained and the suit disposed of on the merits.

It is against this order of remand that defendant No. 3 has appealed; and his principal contention is that the Court sale was binding on the plaintiffs, inasmuch as the whole family property alleged to belong to them and defendant No. 1 was sold in satisfaction of a debt due by the family. It has also been argued that the plaintiffs and defendant No. 1 are not occupancy tenants, and that the property is not held jointly by them. But this contention has not been pressed; and there seems to be no sufficient ground for questioning the correctness of the Assistant Judge's decision as to the *status* of the family and the partibility of the estate.

The Assistant Judge's decision, that the defendant No. 1 was presumably the manager, as eldest member of the family, must also be taken as correct. It is clear that he was in possession of the land in dispute; and it must be taken that he was managing it for the family.

The question, then, is whether the sale in execution of the *khot's* decree against him passed the shares of the plaintiffs as well as his own.

In *Maruti Narayan v. Lilachand* (1) it was observed that there had never been, so far as the Judges deciding the case knew, "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." And the case of *Pandurang Kamti v. Venkatesh Pai* (2) was referred to as having been followed in several other cases. *Maruti Narayan's case* was cited in *Lakshman Venkatesh v. Kashinath* (3) as showing that, according to the course of decisions in this Court, "a sale under a decree against the manager of a Hindu [601] family only passes the right, title and interest of those who are parties to the suit," even though the debt in respect of which the decree was made may have been contracted for a family purpose.

The appellant, however, relies on the recent decision of the Privy Council in *Daulat Ram v. Mehr Chand* (4). In that case, the managing members of a joint trading family had purported to mortgage the family estate, to pay a debt due by the firm, and were sued upon the mortgage. The property was sold in execution and purchased by the mortgagee, who then sued the other members of the family to obtain a declaration that he had purchased the entire family estate. The defendants, without showing that the mortgage did not validly bind the estate, contended that as they were not parties to the former suit they were not affected by the decree. It was held, however, by their Lordships of the Privy Council that the whole estate had passed to the purchaser. In this case, it appeared, from the certificate of sale, that the whole property was sold, and that the mortgage was a valid mortgage of the entire property, including the rights of the defendants, as it was entered into in order to pay the debts of the business. In the judgment delivered by Sir Barnes Peacock it is said (p. 80): "It appears from the cases that have been cited, that notwithstanding the defendants were not made parties to the suit, still as

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(1) 6 B. 564 (566).
(3) 11 B. 700.

(2) P.J. for 1879, p. 513; 7 B. 95, note.
(4) 15 C. 70 (80) = 14 I. A. 187.

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the suit was brought on the mortgage to recover the mortgaged property, and the plaintiff in the suit obtained a decree and executed that decree by seizing the mortgaged property, the question would be whether the mortgage included the interest of all parties, or only the right, title and interest of the two parties who were made defendants." A passage is then quoted, apparently with approval, from the judgment of Mr. Justice Pontifex, in *Pursid Narain Sing v. Honooman Sahay* (1) in which, after stating that it has been decided that if the managing member of a family, of whom the other members are minors, "having authority (the touchstone of which is necessity) mortgages the whole 16 annas of the ancestral property, then, in a suit by the mortgagee, the sale under the decree would pass the [602] whole 16-annas of the mortgaged property, although the mortgagor alone was made defendant," adds as the probable reason for the decision "that the 16-annas having been validly mortgaged to the mortgagee, and his remedy being foreclosure or sale of the decree of the Court would affect what was in the parties before it, namely, the mortgagee's right, validly acquired, to have the whole 16-annas sold." It appears, therefore, as stated in the head-note, that the question whether the shares of all the members of the family were bound, depended, in *Daulat Ram's case* (2), on the authority of those who executed the mortgage to raise money to pay a debt owed by the family. Their Lordships apply also to the case the principles affirmed in *Nanooni Babuasin v. Modhun Mohun* (3) as to sales under a decree against a father, where it was said (at p. 36): "Their Lordships do not think that the authority of *Deendyal's case* bound the Court to hold that nothing but Girdhari's co-parcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale." Though in the Bombay Presidency the course of decisions as regards sales under a decree against a manager has been as stated in the case of *Lakshman Venkatesh v. Kashinath* (4), still the right of a manager to bind the estate by transactions for its benefit is well established (see the cases cited at West and Bühler, 3rd ed., pp. 609, 610, 634). That being so the decision of the Judicial Committee in *Daulat Ram's case* (2) must now be held to govern cases, such as the present, where family property has been sold in execution of a decree against a manager alone. It practically overrules the decision in *Lakshman Venkatesh v. Kashinath* (4) and the preceding decisions there referred to. And, indeed, the principles laid down in *Daulat Ram's case* (2) have already been applied by the First Division Bench of this Court to a recent Bombay case, [603] *Vishnu Vithal v. Venkatrav Bhavanji* (5). In the present case it is not contended that only the share of defendant No. 1 was sold at the Court sale. The whole property in his possession and management was sold, though he alone was sued; and the *khot*, who obtained a decree for the assessment due on the entirety, had the right to put up the entirety for sale, for the assessment was due by the whole family, not by the manager only. The decree of the Court "would affect

(1) 5 C. 845 (852).

(2) 15 C. 70 (80) = 14 I. A. 187.

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

(4) 11 B. 700.

(5) P. J. for 1899, p. 248.

what was in the parties before it," as was said in *Pursid Narain Sing's case* (1), namely the *khot's* right, as to which there is no question, to sell the whole estate. We must, therefore, hold that the plaintiffs were bound by the sale.

We reverse the Assistant Judge's order of remand; and restore the decree of the Subordinate Judge, rejecting the plaintiffs' claim with costs.

JARDINE, J.—I concur. But as the effect of our decision is opposed to that of *Lakshman Venkatesh v. Kashinath* (2) and the reasoning on which it is based, I think I ought to give my reasons separately. That case, like the present, was one in which the property was sold under a money decree. In giving the judgment of the Court Sir C. Sargent, C. J., said (at pp. 701-2): "The course of decisions in the Court shows that a sale under a decree against the manager of a Hindu family only passes the right, title and interest of those who are parties to the suit—*Maruti Narayan v. Lilachand* (3)." The case cited by the learned Chief Justice was determined, as the report shows and as is pointed out by Sir C. Sargent in *Kisansing Jivansing Pardesi v. Moreshwar Vishnu Joshi* (4), by the direct authority of *Deendyal's case* (5):

Of the earlier Bombay cases it may be said that the Court certainly had not before them the decision of the Judicial Committee of the Privy Council in *Nanomi's case* (6). It does not appear to have been referred to in *Lakshman Venkatesh v. Kashinath* (2), although it is the authority used, together with *Suraj Bansis's case* (7), by the learned Judges who decided *Krishnaji v. Vithal* (8). *Nanomi's case* (6), [604] is one where the joint family property was sold in execution of a money decree. The family to whom the estate belonged, was one governed by the Mithila law, which, as their Lordships point out, does not on the point under consideration differ from the Mitakshara law. The authority of *Nanomi's case* (6) is made more binding upon us by the reference made to it by their Lordships in a later case of a family under the Mitakshara law—*Daulat Ram v. Mehr Chand* (9), where the following passage is quoted (p. 31), as having been said after a very full consideration of the whole case:—Their Lordships do not think that the authority of *Deendyal's case* bound the Court to hold that nothing but Girdhari's co-parcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right it will avail them nothing unless they can prove that the debt was not such as to justify the sale."

I agree that the debt justified the sale, and that the plaintiffs were as much interested in the payment as the first defendant.

In *Nanomi's case* (6) their Lordships also say (at p. 36) with reference to any ambiguity which there may be in the expressions by which the estate is conveyed to the purchaser:—

(1) 5 C. 845 (852).

(3) 6 B. 564.

(5) 4 I.A. 247 = 3 C. 198.

(7) 6 I.A. 88 (106) = 5 C. 148. (8) P.J. for 1887, p. 337. (9) 15 C. 70 = 14 I. A. 187.

(2) 11 B. 700.

(4) 7 B. 91.

(6) 13 I.A. 1 = 13 C. 21.

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"If the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings." The ambiguity in the certificate of sale in the present case is precisely the same as in *Nanomi's case* (1). But the Court has to look at the substance of the transaction—*Bissessur Lal Sahoo v. Luchmessur Singh* (2), *Jeo Lal Singh v. Gunga Pershad* (3). Applying these principles to the fact that the first defendant represented the plaintiffs who were equitably liable to pay the amount of the decree, I am of opinion that the plaintiffs cannot succeed.

Order reversed.

14 B. 605.

[605] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

BALKRISHNA BAPUJI APTE AND ANOTHER (*Original Defendants*),
*Appellants v. LAKSHMAN DINKAR (Original Plaintiff), Respondent.**
[22nd April, 1890.]

Hindu law—Inheritance—Mitakshara—Mayuka—Mother's right to succeed to a childless son's property—Priority of the mother over the father—Mitakshara paramount in Ratnagiri.

In the Ratnagiri District the Mitakshara is the paramount authority on Hindu law.

Under the Mitakshara the mother of a childless separated Hindu comes in the order of succession next after his widow and before his father.

The rule of the Mayuka, that the father is to be preferred to the mother, being directly opposed to the rule of the Mitakshara, cannot prevail in the Ratnagiri District.

[R., 24 B. 367 (373) ; 11 Bom. L.R. 641.]

SECOND appeal from the decision of R. S. Tipnis, Acting Assistant Judge of Ratnagiri, in appeal No. 631 of 1888.

The plaintiff separated from his son Vasudev in 1880.

Vasudev died in 1882, leaving a childless widow. The widow died soon afterwards. The persons who survived her were Vasudev's mother Saguna and his father, the present plaintiff.

In 1883 the defendant No. 1 obtained a decree against Saguna as the heir and legal representative of Vasudev, deceased, and in execution put up to auction Vasudev's property. Defendant No. 3 became the auction-purchaser, and was put into possession by the Court.

In 1886 the plaintiff filed the present suit to set aside the decree obtained by defendant No. 1 against Saguna and the proceedings held in execution, and for recovering possession of the property in dispute. The plaintiff alleged that he became the owner, on Vasudev's death, of the property in dispute, and that the decree against Saguna was obtained by fraud and collusion.

* Second Appeal No. 631 of 1888.

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

(2) 6 I.A. 233.

(3) 10 C. 996.