

THIS was a reference by Khan Saheb J. E. Modi, Subordinate Judge of Viramgam, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

The question referred by the Subordinate Judge for the High Court's decision was:—

Has a party any right, after issues have been fixed or hearing has commenced, to give a list of additional witnesses to be summoned by the Court?

The Subordinate Judge was of opinion that he has no such right under s. 159 of the Civil Procedure Code.

There was no appearance for either of the parties.

JUDGMENT.

SARGENT, C. J.—By the language of s. 159 of the Civil Procedure Code a party to a suit is entitled, as of right, to summonses to witnesses any time before "the day fixed for the disposal" of the suit. West, J., in *Kaji Ahmed v. Kaji Mahamad* (1) says the Court, may, under proper circumstances, "refuse to adjourn the hearing for their attendance, even though they have been summoned," and so it may equally inform the party asking for summonses during the hearing, as was the case here, that it does not intend to adjourn the hearing for their attendance, but it cannot refuse to grant the summonses if insisted on. It might happen that the hearing was not concluded as expected, and that it would be right, after all, to hear the witnesses so summoned.

15 B. 87.

[87] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

MARUTI SAKHARAM (*Original Plaintiff*), Appellant v. BABAJI, DECEASED, BY HIS SON BALA (*Original Defendant*), Respondent.*
[14th August, 1890.]

Hindu law—Money decree against father—Execution sale—Auction-purchaser at such sale—Construction—Practice.

In the absence of special circumstances showing an intention to put up the entire interest of the family in the property sold in execution of a money decree against the father, only the interest of the father passes to the auction-purchaser, regard being had to *Baboo Hurdey Narain Sahu v. Pandit Baboo Rooder Perlash Misser* (2) and *Simbhunath v. Golab Seng* (3).

[*Diss.*, 14 A. 190 (191); *F.*, 3 Bom. L. R. 97 (99); *R.*, 21 B. 616 (618); 24 B. 343 (344); 3 Bom. L.R. 322 (355).]

THIS was a second appeal from a decision of W. H. Crowe, District Judge of Satara.

The plaintiff and his father Sakharam were members of an undivided Hindu family. One of Sakharam's creditors obtained a money decree against him, and sold certain land in execution. The defendant purchased it at the execution sale, and obtained possession.

* Second Appeal, No. 293 of 1889.

(1) 9 B. 308 (310).

(2) 11 I.A. 26=10 C. 626. (3) 14 I.A. 77=14 C. 572.

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The plaintiff alleged that the land was ancestral property, and now sued the defendant to recover his half share thereof.

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The defendant pleaded that the debt, in respect of which he had obtained the decree against the plaintiff's father Sakharam, had been incurred for family purposes, and he contended that the whole of the land in question passed to him by the sale.

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The Court of first instance allowed the plaintiff's claim to the half of the property.

The defendant appealed to the District Judge, who reversed the lower Court's decree.

The plaintiff preferred a second appeal to the High Court.

Babaji Abaji Bhagvat, for the appellant :—The execution proceeding clearly shows that the right, title and interest of Sakharam alone was put up to sale, and that the defendant intended to buy that much only. It was a money decree against the father, and only the father's interest could pass by the sale—*Baboo [88] Hurdey Narain Sahu v. Pandit Baboo Rooder Perkash Misser (1), Simbhunath v. Golab Singh (2)*. The question as to what passes by such a sale is a mixed question of fact and law. The certificate of sale as well as the proclamation of it, does not show that the entirety of the property was sold or proclaimed for sale. There is, besides, an additional important circumstance, *viz.*, the price that the defendant paid. These circumstances go to prove that only a limited interest was put up to sale and purchased by the defendants. The son (plaintiff) was not a party to the original suit, or to the execution proceeding, nor was the debt found to be for family purposes.

Ganesh Ramchandra Kirloskar, for the respondent :—The lower appellate Court was right in holding that the defendant had purchased the entire interest. The plaintiff admits in his plaint that the whole survey number was sold, but at the same time he alleges that his interest was not affected by the sale. Since the decision of *Nanomi Babuasin v. Modun Mohun (3)* subsequently followed in *Mahabir Pershad v. Moheshwar Nath (4)* sales in execution of decrees against the father, unless they are for debts improperly incurred, must be held to pass the entire interest in the family property. After the purchase by the defendant the plaintiff never by his conduct suggested that only a limited interest had passed to the purchaser. He did not even come forward in the execution proceedings. That both the parties considered that the entire estate was sold, is evident from the plaintiff's conduct in taking no proceedings for ten years.

JUDGMENT.

SARGENT, C. J.—We think that in the case of a money decree against the father it must be taken as settled by the decisions of the Privy Council in *Hurdey Narain v. Pandit Rooder Perkash (1)* and *Simbhunath v. Golab Singh (2)* that, in the absence of special circumstances showing an intention to put up the entire interest of the family in the property only the interest [89] of the father passes to the auction-purchaser. The case of *Bhagbut Pershad v. Girja Koer (5)* which the District Judge considers is

(1) 11 I. A. 26=10 C. 626.

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

(5) 15 C. 717=15 I.A. 99.

(2) 14 I.A. 77=14 C. 572.

(4) 17 C. 584 (589)=17 I.A. 11.

inconsistent with the ruling in *Simbhunath v. Golab Singh*, was on a bond which made the debt a charge on the land. In *Nanomi Babuasin v. Modun Mohun*(1) and *Meenakhsi Naidu v. Immudi Kanaka*(2) and *Mahabir Pershad v. Moheshvar Nath*(3) there were other special circumstances which the Court thought conclusively pointed to all parties having considered that the entire estate was put up for sale and purchased.

In this case it is not suggested that the Court has any other materials for coming to a conclusion than such as are afforded by the contents of the execution documents which are identical with those in *Hurdey Narain's case*(4). We must, therefore, reverse the decree of the Court below, and restore that of the Subordinate Judge, with costs on the defendant here and in the Court below.

Decree reversed.

15 B. 89.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

RAMKRISHNA JAGANNATH (*Plaintiff*) v. VITHAL RAMJI AND TWO OTHERS (*Defendants*).^{*} [23rd June, 1890.]

Res judicata—Mortgage—Sale by mortgagees—Suit by purchaser against mortgagee for possession—Issue raised by mortgagor impeaching bona fides of sale—Decree for plaintiff without recording finding on issue—Subsequent suit for redemption by mortgagor against mortgagees impeaching sale as fraudulent and void.

In 1874 the plaintiff mortgaged certain property to Ramji Dadu and Ramji Lala. In 1877 the mortgagees sold it by auction to one Khandu Mahadu, who in the following year sued the mortgagors for possession. The defendants in that suit filed a written statement impeaching Khandu's title under the alleged sale, and at the hearing an issue was raised as to whether the plaintiff (Khandu) was [90] the purchaser of the premises *bona fide* and for valuable consideration. The plaintiff (Khandu) obtained a decree in that suit, but no finding on the said issue was recorded. The plaintiff in the present case was the son of the mortgagee, and he now sued to redeem the property and for a declaration that the alleged sale by the mortgagees was fraudulent and void as against him. He contended that in the former suit he did not intend to allege that the sale was not *bona fide*, but merely that it took place without due notice and was impeachable on that ground, and he relied on the fact that there had been no finding on the issue.

Held, that the present suit was barred by the issue and decree in the former suit. In that suit the plaintiff (Khandu) had given evidence that he was the *bona fide* purchaser of the property. Though no actual finding on that issue was recorded, the decree passed for the plaintiff necessarily involved the finding of the issue in the affirmative.

[R., 25 B. 115 (124); 6 Bom. L.R. 288 (290).]

THE first two defendants (Vithal Ramji and Keshav Ramji) were the sons of one Ramji Lala, who died in December 1883. The third defendant was one Ramji Dadu.

The plaintiff stated that on the 18th June 1874 his father, Jagannath Vithoba, mortgaged a certain house and premises in Bombay to the third

^{*} Suit No. 659 of 1889.

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

(3) 17 C. 584 (589)=17 I.A. 11.

(2) 16 I.A. 1=12 M. 142.

(4) 11 I.A. 26=10 C. 626.