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[718] ORIGINAL CIVIL.

Before Mr. Justice Starling.

COOVERJI HIRJI (*Plaintiff*) *v.* DEWSEY BHOJA (*Defendant*) AND NEBHA DEWSEY AND OTHERS (*Claimants*).* [29th July, 1893.]

Hindu law—Joint family—Ancestral property—Father's debt—Decree against father—Execution—Liability of family property—Purchaser—Civil Procedure Code (XIV of 1882), ss. 318, 332, 333.

In a suit for specific performance of a certain contract for the sale of land which the defendant had failed to complete, the plaintiff obtained a decree against the defendant for the repayment of the earnest money and his costs of suit. In execution of this decree the plaintiff attached the whole of the property which the defendant had agreed to sell. A warrant for sale was duly issued, and claims were advertised for. The sons of the defendant thereupon appeared before the Commissioner and claimed to be entitled to three-fourths of the property, which they alleged was ancestral. Their claim was not investigated, but to save time it was agreed that a note should be made in the proclamation of sale, that the sons claimed to be interested in the said lands and premises on the ground that they were ancestral, and that the one-fourth share of the defendant only could be sold by the attaching creditor. Under this proclamation the right, title and interest of the defendant in the property were sold. At the sale the sons gave notice of their claim. The property was duly sold and the purchaser was put into possession, the claimants being dispossessed. The claimants then took out a summons under s. 332 of the Civil Procedure Code (XIV of 1882), calling upon the purchaser to show cause why they should not be restored to possession.

Held—(1) that the judgment-debt due by the defendant was one which the plaintiff could enforce, if necessary, against ancestral property in the hands of the defendant to the extent of the whole interest therein of the defendant and his sons, as it was not an immoral or illegal debt;

(2) that, assuming that the property in question was ancestral, what the purchaser bought was the whole property and not merely the right which the defendant might have as the father of the family to a share of it on partition. The plaintiff evidently did not acknowledge any right in the claimants, but intended to sell the very largest right the defendant might have in the property, which, as the judgment-debt was one for which the family property was liable, was the whole estate of the joint family;

(3) that the purchaser, who had bought the whole of the rights of the family in the property was entitled to the possession of what he bought, and was not required to file a suit for partition, because the shares of all the co-parceners had passed to him;

(4) Assuming that the property was ancestral, the claimants were not in possession on their own account, and were, therefore, not entitled to be restored under s. 332 of the Civil Procedure Code (XIV of 1882). A member of a joint Hindu family cannot say that he is in possession of any particular portion of the joint property on his own account. His possession is the possession of the family.

[719] (5) That all the sons were entitled to, was to try the fact or nature of the debt due to the plaintiff in a suit of their own. In such suit they would have to prove that the debt was not such as to justify the sale.

[R., 25 B. 478 (492); 3 Bom. L.R. 322 (356); 11 C.L.J. 61 (64)=14 C.W.N. 298=5 Ind. Cas. 298; **Commented upon,** 18 C.L.J. 138=18 C.W.N. 695=20 Ind. Cas. 253.]

IN chambers. On the 2nd April, 1892, the plaintiff Cooverji Hirji obtained a decree against the defendant for Rs. 2,905-5-9. In execution of the decree a certain oart situate at Matunga, in Bombay, was attached. The claimants, who were the sons of the defendant, thereupon lodged a claim to the oart. They alleged that it had formerly been a part of the

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family property belonging to themselves and their father, but that a partition had been effected, and that the oart in question had been allotted to them.

On the 5th October, 1892, the Sheriff of Bombay sold by auction, in execution of the said decree, the right, title and interest of the first defendant in the said oart to one Damji Jaitha for Rs. 2,601. At the sale, the claimants (the sons) gave notice to the bidders of their claim.

On the 6th February, 1893, the sons were dispossessed by the Sheriff in execution of the decree, and possession was given to the purchaser Damji Jaitha.

The claimants (the sons) then took out a summons under s. 332 of the Civil Procedure Code (XIV of 1882), calling upon the purchaser to show cause why the property in dispute should not be re-delivered to them.

Inverarity, for the claimants, in support of the summons.

Macpherson, for the plaintiff and the purchaser, showed cause.

Reference was made to *Rai Babu Mahabir Pershad* v. *Rai Markund Nath* (1).

JUDGMENT.

STARLING, J.—In this case the defendant, a Hindu, having a family of sons, entered into a contract with the plaintiff and another, the rights under which eventually became vested in the plaintiff, to sell a certain piece of land at Matunga, and received the sum of Rs. 1,000 as earnest-money. That contract was not carried out by the defendant, and the plaintiff filed a suit against the defendant for specific performance of the contract, or else for return of the earnest-money with interest.

[720] When the case came on for hearing, Farran, J., refused to grant specific performance, but passed a decree in favour of the plaintiff for the amount of earnest-money and interest, and the costs of the suit. The result was that the defendant became indebted to the plaintiff in the sum of Rs. 2,905-5-5; and this was a debt which, in my opinion, the plaintiff could enforce, if necessary, against ancestral property in the hands of the defendant, to the extent of the whole of the interest therein of the defendant and his sons, as it was not an immoral or illegal debt.

Subsequently to the passing of this decree, the plaintiff caused the whole of the property which the defendant had agreed to sell, to be attached in execution of the decree. On that attachment being placed on the property, the present claimants did not appear and apply to have the attachment in any way restricted in its operation, as they might have done. In due course a warrant for sale was issued, and on the usual advertisement being issued for claims on the property, the claimants, who are the sons of the defendant, appeared before the Commissioner and claimed that the defendant was only entitled to one-fourth of the property, and that they were as his sons, the property being ancestral, entitled to three-fourths thereof. Whether the property is ancestral or not is open to doubt The defendant, in his written statement, says it is his self-acquired property, and the claimants now assert it to be ancestral, but I do not find any proof in their affidavits of their assertion. I, however, proceed on the assumption that it is ancestral. The claim of the claimants was not investigated and allowed by the Commissioner, but, to save time, it was agreed that a note should be made in the proclamation of sale that

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they " claim to be interested in the said lands and premises, on the ground that they are ancestral, and that the one-fourth share of the defendant only can be sold by the attaching creditor." Under this proclamation, the property was sold to one Damji Jaitha.

The sale was not made subject to the claim of the claimants, and it is evident that the plaintiff did not acknowledge any right in the claimants, but intended to sell the very largest right the defendant might have in the property, assuming him to be the [721] father of a joint Hindu family in possession of ancestral property, which, as this debt was one for which the family property was liable, was the whole estate of the joint family. Consequently, I hold that what Damji Jaitha bought was the whole property, and not merely the right which the defendant might have, as the father of the family to a share of it on partition.

Subsequently the purchaser was put in possession of the property by the Sheriff, and in carrying this out the claimants were dispossessed, and now claim under s. 332 of the Civil Procedure Code (XIV of 1882) to be restored to possession.

Now it seems to me that the auction-purchaser, who has bought the whole of the rights of the family in the property, is *prima facie* entitled to possession of what he bought. Mr. Inverarity referred me to s. 329 of Mayne's Hindu Law, as showing that the purchaser in this case ought to have filed a suit for partition, but that section only deals with cases in which the share only of the father has been sold, and not to cases, like the present, where the rights of the whole family have been sold. In the former class of cases a suit for partition is the only available remedy, as the share of the father must first be ascertained before it can be awarded to the purchaser, but in this case there is no necessity to ascertain the shares of the co-parceners, because the right of all of them has passed to the purchaser.

It was further argued that the claimants were in possession on their own account, and must, therefore, be restored to possession. I do not think they were. A member of a joint Hindu family cannot say that he is in possession of any particular portion of the joint property on his own account. His possession is the possession of the family, unless there is evidence to show that he had set up a right to a particular piece of land adversely to the family, which it has always been held must be very strictly proved. Consequently I hold that the claimants were not in possession of the land, of which they were dispossessed, on their own account within the meaning of s. 332 of the Civil Procedure Code.

The result is (in the words of the Privy Council in *Deendyal's* case(1)) that all the sons can claim is that they ought not to be [722] debarred from trying the fact or nature of the debt in a suit of their own ; and 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.

Hitherto I have discussed this case as if the defendant and his sons were members of a joint and undivided Hindu family, and this was the footing on which it was argued by Mr. Inverarity; but this was not the case made by the claimants when they obtained their summons. Then they claimed possession on the ground that there had been a partition between them and their father, and that they were in possession of a divided share of the ancestral property. They do not, however, allege that

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there were any conveyances or releases evidencing the partition, and it appears that the partition, if there ever was one, which I very much doubt, took place after the property was attached, in fact after the proclamation of sale was issued (see their letter to the Sheriff of 1st February, 1893, annexed to Nebha Dewsey's affidavit of March, 1893), in which case s. 333 of the Civil Procedure Code prevents s. 332 applying, because, if there was a partition at the time alleged, the judgment-debtor must have transferred his interest, his undivided share in the property claimed, and released his claim over the undivided shares of the claimants in such property after the institution of the suit in which the decree was made. Section 318 of the Civil Procedure Code relied on by Mr. Macpherson, for the purchaser, also provides that a purchaser shall be entitled to be put in possession of the property bought by him, if it is in the possession of a person claiming under a title created by the judgment-debtor subsequent to the attachment of the property.

Under these circumstances, the summons must be dismissed, unless the claimants file a suit within one month.

Attorneys for claimants:—Messrs. *Daphtary and Ferreira.*

Attorneys for purchaser:—Messrs. *Wadia and Ghandy.*

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[723] ORIGINAL CIVIL.

Before Mr. Justice Starling.

RAISETT CHANDMULL HAMIRMULL AND ANOTHER (*Plaintiffs*) *v.* GREAT INDIAN PENINSULA RAILWAY COMPANY (*Defendants*).*

[25th, 27th and 29th July, 1893.]

Railway company—Indian Railway Act (IV of 1879), s. 11—Loss of goods—Liability of company—Carrier—Bailment—Declaration of nature and value of goods and payment of increased charge, effect of—Contract Act (IX of 1872), s. 151—Limitation Act (XV of 1877), art. 30, sch. II.

In respect of goods for which, under s. 11 of the Indian Railway Act IV of 1879, a railway company is under no liability unless "an increased charge" is paid, the payment of an increased charge puts them under the same liability as they are under with respect to goods not specially provided for by that section, *viz.*, the liability of ordinary bailees. The payment of "an increased charge" is not equivalent to insurance.

In January, 1890, a box containing silver specie was delivered by the plaintiffs to the defendant company in Bombay to be carried to Saugor. At the time of such delivery the contents of the box were declared, and an increased charge above the charge for ordinary parcels was paid. The box was lost during its transmission to Saugor, but no evidence was called by the defendants to show what was done with the box between Itarsi and Saugor. In 1893 the plaintiffs sued the defendants to recover its value.

Held, that the defendants had not discharged the *onus* which lay upon them of showing that they had fulfilled the duties of a bailee as laid down in s. 151 of the Contract Act (IX of 1872), and that they were liable for the amount claimed.

Held, also, that the suit was not barred by limitation, and that art. 30 of sch. II of the Limitation Act (XV of 1877) did not, as was contended, apply to the case.

THE plaintiffs sued to recover from the defendants Rs. 6,000, the value of a box delivered to the defendant company at Bombay to be carried by them to Saugor, but which had been lost.

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* Suit No. 636 of 1892.