

APPELLATE CIVIL.

Before Mr. Justice Farran and Mr. Justice Candy.

1894.
August 22.

JA'LBHA'I ARDESHIR SHET (ORIGINAL DEFENDANT), APPELLANT, v.
LOUIS MANOEL (ORIGINAL PLAINTIFF), RESPONDENT.*

Christian—Native Christian—Conversion from Hinduism to Christianity, effect of—Hindu convert—Sálsette, law applicable to Christian inhabitants of—Hindu law, how far applicable—Succession—Inheritance—Co-parcenary—Primogeniture—Manager of family—Mortgage by manager when binding on family property—Mortgage—Redemption—Decree against manager alone on the mortgage, how far binding on the property—Parties—Practice—Will—Joint family—Ancestral property—Right of Christian of Sálsette to deal by will with his share in ancestral property.

The law of a conquered territory continues in force until altered by the Crown or the Legislature. The island of Sálsette was conquered from the Maráthas by the British in 1774 and the law of succession for the Christian inhabitants of the island remained unaltered until the passing of the Indian Succession Act (X of 1865). Until that Act was passed, the law of primogeniture was not in force among the Christian inhabitants of Sálsette. In the absence of a widow and daughter the sons took the property of their father in equal shares.

Quære whether they did so under the Hindu law or the Portuguese law or by force of usage existing among them.

A mortgage of certain property was made in 1875 by the eldest of three brothers (Pedro, Minguel and Enos), who were Christian inhabitants of the island of Sálsette. They had inherited the property from their father, who died in 1840. The family had originally been a Hindu family, but had been converted to Christianity. Enos died in 1876, and Minguel died in 1883, bequeathing his interest in the property to his nephew the plaintiff, who was Pedro's son. In that year (1883) the mortgagee sued Pedro alone upon the mortgage and obtained a decree which he afterwards assigned to the defendant who sold the mortgaged property in execution of the decree, and at the sale purchased the property himself. The plaintiff (son of Pedro the mortgagor) now sued to redeem the property, and the questions arose (1) whether under the law applicable to the Christian inhabitants of Sálsette the eldest brother Pedro had succeeded on the father's death to the whole of the family property, and (2) if not, then to what extent the mortgage in question bound the property of the family.

Held, (1) that the law of primogeniture prior to the passing of the Indian Succession Act (X of 1865) did not exist among the Christian inhabitants of Sálsette, and that Pedro, although eldest son, had not succeeded to the whole of the family property. He and his brothers took equal shares in the property of their father.

(2) That the mortgage by Pedro had been authorised by the family and was for family purposes and was binding upon the family property. Although Pedro and his brothers could not be regarded as co-parceners under Hindu law, yet having regard to the fact that they were descendants of converts from Hinduism, among whom

Hindu usages largely prevailed, the question should be treated in much the same way as if the family was still a Hindu family, and the Court would not require the same direct proof of the manager's authority to mortgage as it would in the case of an English manager under similar circumstances.

(3) That the plaintiff was not entitled to redeem. What was intended to be sold at the sale held in execution of the decree upon the mortgage was the whole interest in the mortgaged property. The defendant purchased that interest subject to the right of the plaintiff to show that his share derived from Minguel was not bound by the mortgage, and he had failed to do so. Minguel's share as well as Pedro's had passed by the sale.

(4) A member of the Christian community of the island of Salsette is entitled to deal with his share in ancestral property by will.

THIS was a first appeal from the decision of Ráo Bahádur G. V. Limaye, First Class Subordinate Judge of Thána.

One António Louis Manoel, a Christian inhabitant of Salsette in the Thána District, died in the year 1846 leaving considerable immoveable property and three sons, *viz.* Pedro, Minguel and Enos. The family had been originally a Hindu family.

On the 9th January, 1875, the eldest son, Pedro, mortgaged the family property in dispute in the present suit to the executors of one Domingos Aga de Penha for Rs. 8,000. The mortgage-deed was attested by Enos, who died in the year 1876.

Disputes subsequently arose between Pedro and Minguel, which were referred to arbitration, and an award was made under which the family property was given to Minguel. The award was presented to the Subordinate Judge's Court at Násik, and an order that it should be filed was made by consent on 10th February, 1882, and it was duly filed under section 526 of the Civil Procedure Code (Act XIV of 1882).

Minguel died on the 27th May, 1883, having made a will by which he left the property to Pedro's son, Louis Manoel, the present plaintiff, who subsequently obtained possession of the property including the property in suit.

The mortgage-debt contracted by Pedro not having been paid, the mortgagees in April, 1883, filed a suit on the mortgage against Pedro (to which the present plaintiff was not a party) and obtained a decree on the 11th May, 1885, which he assigned to the present defendant, Jálbháí Ardeshir Shet. In execution of the

• 1894.

JÁLBHÁÍ
ARDESHIR
SHET
v.
LOUIS
MANOEL.

1894.

JALBHA I
ARDESHIR
SHEEv.
LOUIS
MANOEL.

decree the defendant sold the property now in dispute at a Court sale on the 27th September, 1886, and purchased it himself. In 1887 he sought to dispossess the plaintiff.

The plaintiff thereupon brought a suit (No. 308 of 1888) against him in the Court of the First Class Subordinate Judge of Thana to establish his right to the mortgaged property as devisee of his uncle Minguel and for an injunction restraining the defendant from interfering with his possession. In that suit the plaintiff treated the defendant as a trespasser, and did not admit his title as mortgagee. The Court found that the defendant was a mortgagee of plaintiff's father Pedro and dismissed the suit.

On appeal by the plaintiff to the High Court the decree was confirmed on the ground that defendant not having been a party to the consent order of the Nasik Court, it could not affect his right under the mortgage which was prior in date (see Printed Judgments of 1890, p. 215).

While these proceedings were going on, the defendant took possession of the property. The plaintiff now sued to recover it. He contended that the property which had been mortgaged by his father Pedro was ancestral property and that the mortgage not being for the benefit of the family, only affected Pedro's share. He prayed for possession of Minguel's moiety and for a declaration that it was not affected by the mortgage, and as heir of Pedro he prayed for redemption of Pedro's moiety on payment of what might be due. In the alternative, he prayed for redemption of the whole property in case Minguel's share should be held subject to the mortgage.

The defendant contended that English law and not Hindu law applied to the plaintiff and his family, who were Christians, and that, consequently, Pedro, as eldest son had succeeded to the whole property and was competent to mortgage it; that the award of the arbitrators and the consent order of the Nasik Court based on it were collusive and fraudulent, and being subsequent to the mortgage did not affect it; that the plaintiff's suit of 1888 having been dismissed, the question now raised was *res judicata*, and that the plaintiff being one of the sons and heirs of Pedro was

bound by the mortgage effected by his father, by the decree on the mortgage, and the subsequent execution sale.

The Subordinate Judge was of opinion that up to the date of the passing of the Indian Succession Act (X of 1865) the plaintiff's family had been subject to Hindu law; and that, consequently, Minguel had at that time a half share in the property which he retained till his death. He held, however, that the mortgage of 1875, had been effected by Pedro with Minguel's consent, and that Minguel's share was included. As to the plaintiff's claim to his father Pedro's share, the Court held that it was *res judicata* by the previous suit, and that his claim to it was now barred. The arbitration proceedings and the consent decree were found to be a sham. But as to the share of Minguel, the Court held that the plaintiff was entitled to redeem, and passed a decree in the following terms:—

"I, therefore, order that the plaintiff do redeem and recover possession after partition of half of the property in dispute from the defendant on payment to him of Rs. 6,181 with interest at 9 per cent. per annum on Rs. 4,000 out of that sum from 2nd April, 1883, to date of payment; *minus* half of the net income, if any, derived by the defendant from the said property, the amount of which will be determined in execution. In default of payment within six months from the date of determination of the income, the plaintiff's right to redemption will for ever be foreclosed. Costs of both the parties to be borne by the plaintiff."

The defendant appealed, and the plaintiff presented cross-objections under section 561 of the Civil Procedure Code (Act XIV of 1882).

Inverarity (with *Máneksháh J. Taléyáarkhán*), for the appellant (defendant):—We have bought the property at a sale in execution of a decree upon the mortgage effected by Pedro in 1875. He was the eldest son. The family was Christian, and English law applied, and on his father's death in 1840 the whole property devolved on Pedro by right of primogeniture. He, therefore, could mortgage the whole of it.

If it be held that the rule of primogeniture does not apply, then we contend that there is evidence in the case to show that the mortgage was effected for family purposes. Pedro was the manager of the family, and the proceedings instituted by the mortgagee against Pedro bound his brother, though they were

1891.

JALBHÁI
ARDESHIR
SHEE
v.
LOUIS
MANOEL.

1894.

JALBHAI
ARDESHIR
SHET
v.
LOUIS
MANOEL,

against Pedro alone—*Doulat Ram v. Mehr Chand*⁽¹⁾; *Hari Vithal v. Jayaram Vithal*⁽²⁾. Some of the property in dispute was the self-acquired property of Pedro, and, therefore, the plaintiff is not entitled to dispute the alienation of that property. He can only lay claim, if at all, to that portion of the property which is ancestral. But we dispute his right even with respect to the ancestral property.

It is not now open to the plaintiff to contend that the award and the consent order were not fraudulent and collusive. See Printed Judgments of 1890, p. 215. The consent order is a nullity.

Either the Hindu law of succession or the English law of primogeniture applies. If the former law applies, then Minguel had no right to make a will, because the property was ancestral. His share survived to Pedro. *Primâ facie* the English law applies—*Lopes v. Lopes*⁽³⁾. The plaintiff is bound by the execution sale held against his father, and is not entitled to redeem any portion of the property. Whether the Hindu law or the English law of primogeniture applies, we are entitled to retain the whole of the property.

Lang (Advocate General with *Dattatraya A. Idgunji*) for the respondent (plaintiff).—The mortgage affected Pedro's share only. Minguel and Pedro were tenants-in-common. Minguel did not join in the mortgage. There is no evidence in the case to show that he was either consulted or informed by Pedro. The mortgage was not effected for the benefit of the family. The money was borrowed by Pedro to meet losses which he had suffered in his business: therefore, the debt cannot be a charge on the whole property. Neither the English law of primogeniture nor the Hindu law of succession is applicable to the present case. The English law of primogeniture is not applicable, because the family belonged to Salsette and not to Bombay, and the Hindu law of succession is not applicable, because among the Christian inhabitants outside Bombay, prevailing customs are given the binding force of law. See Regulation IV of 1827.

⁽¹⁾ L. R., 14 I. App., 187.

⁽²⁾ I. L. R., 14 Bom., 597.

⁽³⁾ 5 Bom. H. C. R., O. C. J., 172.

The evidence in the case distinctly shows that Pedro and Minguel were tenants-in-common. Pedro was not the manager of the family, and, therefore, the mortgage is not binding either on Minguel or his devisee the plaintiff—*Ganesh Sadashiv v. Balakrishna Gopab*⁽¹⁾; *Vasudeo Balaji v. Narayan Krishna*⁽²⁾; *Venkat v. Kannan Dhora*⁽³⁾; *Bir Chunder v. Mahomed Afsarooden*⁽⁴⁾; *Dullabhdas Devchand v. Lakshmandas*⁽⁵⁾.

The High Court's judgment in Suit No. 308 of 1888 (Printed Judgments of 1890, p. 215) did not decide that the consent order of the Nasik Court was inoperative; it only decided that the mortgage charge could not be affected by that order. That consent order gave the family property to Minguel. In order that it should be inoperative, it should be in fraud of some one—*Abdool Hoosein v. Charles Agnew Turner*⁽⁶⁾; *Gunga Narain Gupta v. Tiluckram Showdhry*⁽⁷⁾. It does not affect the mortgage charge, and, therefore, it is not in fraud of the mortgagee. That order is binding as long as it is not set aside—*Motiram v. Bahiru*⁽⁸⁾. Its operation was to make Minguel the assignee of Pedro. Minguel, therefore, took the whole property, Pedro's half being mortgaged. Minguel devised the whole to the plaintiff, and he is now, therefore, entitled to redeem the half that was mortgaged by Pedro and recover possession of the other half free of any charge. Even if the consent order be left out of consideration, still he would be entitled to redeem half of the property as his father's heir, and to recover the other half free of any charge under his uncle's will. A third party cannot impeach a decree as fraudulent—*Gulibai v. Jagannath*⁽⁹⁾.

FARRAN, J.:—In this case the lower Court has passed a decree entitling the plaintiff to redeem and recover possession from the defendant of one-half of the property in dispute on payment of half the money due under a mortgage of the 9th of January, 1875, executed by Pedro de Penha in favour of the assignor of the defendant. Both sides object to that decree,—the plaintiff, on

(1) P. J., 1887, p. 28.

(2) P. J., 1882, p. 21.

(3) I. L. R., 5 Mad., 184.

(4) I. L. R., 10 Cal., 299.

(5) I. L. R., 10 Bom., 88.

(6) I. L. R., 14 I. App., 111.

(7) L. R., 15 I. App., 119.

(8) P. J., 1889, p. 68.

(9) I. L. R., 10 Bom., 659.

1894.

JALBHA'I
ARDESHIR
SHEP
v.
LOUIS
MANOEL.

1894.

JALBHAI
ARDESHIR
SHET
v.
LOUIS
MANOEL.

the ground that it gives him too little; the defendant, on the ground that it gives the plaintiff too much.

The plaintiff had, previously to the present suit, filed a suit (No. 308 of 1888) in the same Court against the defendant in substance to establish his right to the mortgaged property in priority to the mortgagee, basing his title upon a consent order of February 10, 1882, which we shall hereafter refer to. This suit was finally dismissed on the 13th August, 1890, by the High Court, principally on the ground that the order of February, 1882, was not binding on the mortgagee—*Louis Manoel Pedro Antonio de Penha v. Jalbhai Ardeshir Shet*⁽¹⁾. The dates there given are inaccurate.

The third ground of appeal, which raises the question whether the law of primogeniture prevailed amongst the Christian inhabitants of Salsette prior to the passing of the Indian Succession Act (X of 1865) cannot, we think, be supported. The defendant Jalbhai rested his case, in his written statement, mainly on the prevalence of that law, relying probably on the decision in *Lopes v. Lopes*⁽²⁾; but the judgment in that case was based upon the ground that the Portuguese law was not preserved to the Portuguese inhabitants of the town and island of Bombay, but was by implication abrogated when Bombay was ceded to the English in A.D. 1661. Salsette is in a wholly different position. From the Portuguese it passed by conquest to the Maráthas about the year A.D. 1737; and subsequently in A.D. 1774 it was conquered by the British from the Maráthas. (See a full account in Bombay Gazetteer, Vol. XIII, p. 203.) Under these circumstances the rule as laid down by the Privy Council in *The Mayor of Lyons v. The East India Company*⁽³⁾, and recognised in the judgment in *Lopes v. Lopes* (at page 181), is that the law of the conquered country continues until the Crown or the Legislature change it. So far, however, from changing the law prevailing at the time of the conquest, the Bombay Legislature by Regulation IV of 1799, when providing a code for the Courts administering the law in Salsette, (*inter alia*) enacted in section 14 that "in all cases of succession to landed property the Judge is, of whatever religion

(1) P. J. for 1890, p. 215.

(2) 5 Bom. H.C.R., O. G. J., p. 172.

(3) 1 Moo. I.A., p. 271.

the parties may be, to endeavour to ascertain also whether they have been regulated by any general usage of the district where the disputed land is situated or any particular usage of the family of the defendant, and to consider in his decision the weight due to such evidence." That Regulation was repealed, but it is not suggested that the English law of primogeniture was introduced into Salsette by any later enactment, as the *lex loci* of the island. Regulation IV of 1827 provides that "the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of the Government applicable to the case, and in the absence of such Acts and Regulations the usage of the country in which the suit arose; if none such appears, the law of the defendant, and in the absence of specific law and usage, justice, equity and good conscience alone."

We have, therefore, to ascertain how lands in Salsette in the case of its Christian inhabitants descended on an intestacy prior and subsequent to the year A.D. 1774 and down to the year 1866. A great mass of evidence has been taken in the case, which establishes that when a Christian inhabitant of Salsette died intestate previous to 1866, his property, both moveable and immoveable, devolved, not on his eldest son, but on his sons equally. That evidence is by no means consistent as to what the rights of the widow and daughters are considered to have been. As it was mainly directed to establish the non-existence of the law of primogeniture, and was not directed to the ascertainment of the rights of members of the family other than sons, it would be unsafe to draw any general conclusions from it. It is, however, clearly established that, as a fact, sons, in the absence of a widow and daughters and other persons entitled to share in it, share equally the property of their father.

It is argued for the appellant Jálbhái that the evidence proves that the Christian inhabitants of Salsette, being converts from Hinduism, must be taken to have retained the Hindu law in its entirety, and that the Court ought to administer in this case the Hindu law pure and simple to the parties. Counsel relied on the case of *Abraham v. Abraham*⁽¹⁾ in support of his argument. The Subordinate Judge seemingly adopted it. The difficulty in

1894.

JÁLBHÁI
ARDESHIR
SHET
v.
LOUIS
MANOEL.

(1) 9 Moo. I. A., p. 199.

1894.

JALBHAI
ARDESIR
SHEET
v.
LOUIS
MANOEL.

acceding to it is that it is quite different from the case made by his client in the pleadings. In the first paragraph of the written statement the defendant says that "the terms *ancestral property* and *family property* employed by the plaintiff are entirely inappropriate; the plaintiff and his family being Christians. In the year 1846 the succession to property belonging to any member of the plaintiff's family was governed by English law." The evidence undoubtedly establishes that sons take an equal share in their father's estate, as the plaintiff throughout has contended; but whether they do so in consequence of the prevalence of the Hindu law, or of the Portuguese law amongst this class, or of a usage existing amongst them from their having retained or adopted these respective laws in a modified form, it is unnecessary, and under the circumstances would be improper for us to determine.

The defendant, however, also seeks to establish the validity of the mortgage on the ground that "it was executed by Pedro with the assent of his brothers Minguel and Enos, and that the money raised upon it was spent in such a way that the mortgage would still have been good if Pedro had been, as he was not, the manager of a Hindu family at the time he made it." The issue raised on that contention has been decided by the Subordinate Judge in favour of the defendant, and we think that that finding ought to be supported. We cannot, however, find on the record before us that Mr. Kher went into this question, or how the First Class Subordinate Judge, who ultimately decided the case, considered himself precluded from entering upon it.

Although we are not prepared to hold, for the above reasons, that the property of Antonio descended upon his three sons Pedro, Minguel and Enos, as co-parceners under Hindu law, rather than as tenants-in-common as alleged by the plaintiff, yet we think that having regard to the fact that the Christian inhabitants of Salsette are for the most part descendants of converts from Hinduism (see Bombay Gazetteer, Vol. XIII, pages 202, 204) and that Hindu usages, as shown by the evidence prevail to a large extent amongst them in the mode of the management of their paternal estate, and as the plaintiff in his plaint, though alleging that the property devolved upon Pedro, Minguel and Enos as tenants-in-common, in paragraph 11 speaks of the other members

of the family being co-parceners with Pedro, and complains that the mortgage was not for the benefit of the family, we should not be justified in requiring the same direct proof of the authority of the manager of the family to mortgage the paternal estate under his management as we should require in the case of an English manager under similar circumstances, but should treat it much in the same way as if the family were still a Hindu family. The decision in *Abraham v. Abraham* is, we think, an express authority for our doing so. The case is also very similar in its circumstances to *Myna Boyee v. Ootdrám*⁽¹⁾.

In this case Minguel, who had become a priest in early life, left the management of the paternal estate (at all events after the death of the mother, in 1865 probably) in the hands of Pedro assisted by his lame and delicate brother Enos, he himself returning from time to time to the family house and staying there for short periods only. From 1863 to 1865 Pedro sold several plots of land, and subsequently purchased other plots, the conveyances of the plots sold being executed sometimes by him and his mother and brother Enos, and sometimes by himself alone. Pedro also took a liquor contract from Government, and carried it on for some years, and altogether acted as a general manager invested with the largest powers. That which, however, leads to the conclusion most strongly that the mortgage was executed by the authority of Minguel is that when in 1882 Pedro and the plaintiff agreed to sell part of the property to one Máneckji in order to pay off the debt due on the mortgage, the plaintiff, who then held a power of attorney from Minguel, offered to execute the conveyance in Minguel's name (Exhibit 144). Minguel's also lending his name to the sham proceedings in the Násik Court to protect the property for Pedro and the plaintiff, tends to the same conclusion. The mortgage was also attested by Enos, who was assisting Pedro in the management. It was, therefore, not a clandestine mortgage. The evidence also shows that the money was raised and employed for the most part at all events in connection with the liquor contract and for the rebuilding of the family house. For these reasons we hold that the mortgage was made by the authority of Minguel and Enos and for family purposes, and was

(1) 8 Moo. I. A., pp. 400 and 420.

1894.

JA'IBKA'I
ARDESHIR
SHEK.v.
LOUIS
MANOEL.

1894.

JA'LBHA'I
ARDESHIR
SHEEv.
LOUIS
MANOEL.

binding upon the whole family. The absence of Minguel and his priestly office account for his not having himself signed or attested the mortgage. The true theory perhaps is that he abandoned the property wholly to his brothers. Enos died in or about the year 1876, and his interest in the equity of redemption then devolved on his brothers Pedro and Minguel. This is common ground.

We also agree with the Subordinate Judge that the award of the 27th October, 1881, presented to the Násik Court and the consent order of February 10, 1882, that it should be filed, were collusive between Minguel represented by the plaintiff and Pedro. Two different Judges have arrived at that conclusion. The additional evidence put in in the present case places the question, we think, beyond doubt. The object of the conclusive award and order and the mode in which the object was carried out were these:—The plaintiff and his father Pedro were desirous of inducing the mortgagees to accept a small sum in payment of the mortgage-debt. They accordingly caused it to be represented in a document, which was drawn up in the shape of an award, that Pedro had wasted the estate to the extent of Rs. 10,000 and that Minguel had received nothing. The document then awarded that Pedro should give possession of the whole residue of the estate to Minguel. This document Pedro and the plaintiff caused some three persons to sign as though it were an award made by them. It was then presented to the Court at Násik as an award under section 525 of the Code of Civil Procedure, and eventually on the application of the plaintiff as the attorney of Minguel and with the consent of his father Pedro it was filed as an award under section 526.

This award and the subsequent proceedings thereon must, we consider, be discarded from consideration in this case (1) because the decision of the Appellate Court in Suit No. 308 of 1888 has decided that the plaintiff cannot base his title on the decree of the Násik Court *as a decree*, the mortgagee not having been a party to these proceedings. We do not decide that, if that decree had operated as an assignment to Minguel, the decision of the Appellate Court would have precluded the plaintiff as executor

of Minguel from suing upon it as an assignment to redeem the mortgage. It is unnecessary to express an opinion upon that point, because (2) the award is not in itself an assignment, but merely gave Minguel the right to an assignment from Pedro, and the order of the Násik Court gave it no further force beyond this, that it conferred on Minguel the right to have a decree passed according to it under section 522. No decree, which might have operated as an assignment, was ever passed. (3) The award being a sham award, and the order for its filing being a collusive order, intended to have no effect between the parties to it, but to be used as a blind to deceive the mortgagee, cannot be used against any one except possibly the parties to it and their privies—*Ahmedbhoy v. Vulleebhoy*⁽¹⁾; Evidence Act (I of 1872), section 44.

Minguel died in 1883, leaving a will, dated 5th January, 1881, by which he bequeathed his interest in the property in question to the plaintiff. The plaintiff has duly proved it. It is contended by counsel for the defendant that Minguel had no power to deal with the property by will, as he was an undivided co-parcener governed by Hindu law, but we cannot accede to that contention. It is not the case made by either party upon the pleadings, and the evidence has not been directed to meet it. Even if we assume that the Christians of Sálsette retained the Hindu law of inheritance down to 1866, it is clear that, as pointed out in *Abraham v. Abraham* (*supra* at p. 241) and *Myna Boyee v. Ootarrám* (*supra*) the holding of land in co-parcenary incapable of being dealt with by will is not a branch of the law of succession proper, and that the Hindu law of succession or inheritance can well be retained by Christian converts without their at the same time being bound by its rule of strict co-parcenership. The evidence in this case is conflicting as to the power of a Sálsette Christian to deal with his share in ancestral property by will, but read as a whole, is, we think, in favour of his being considered entitled to do so. The plaintiff in this view is, therefore, in the same position in regard to the equity of redemption in the mortgaged property as Minguel would have been had he survived.

(1) I. L. R., 6 Bom., p. 572.

1894.

JALBHAI
ARDESHIR
SHEET
v.
LOUIS
MANOEL

1894.

JALBHAI
ARDESHIR
SHET
v.
LOUIS
MANOEL.

We have next to consider the effect of the suit on the mortgage which in April, 1883, the mortgagee filed against Pedro alone in the Násik Court (subsequently transferred to Thána), and to which he did not make the plaintiff as executor of Minguel a party. In that suit a decree was on the 11th May, 1885, passed for the sale of the mortgaged property. The defendant became the assignee of that decree. The property was sold under it, and the defendant purchased on the 27th September, 1886, and in that capacity now claims to be the absolute owner of the property. We have already pointed out that it was unnecessary to make the plaintiff a party to these proceedings as pretended assignee of the equity of redemption under the consent order of the 10th February, 1882. Independently of that decree the plaintiff as executor of Minguel was the owner of half of the equity of redemption. The question whether the proceedings bound him, is one of difficulty. Section 85 of the Transfer of Property Act (IV of 1882) does not apply to the case, as it was not then in force in Thána. The reason why the plaintiff did not apply to be made a party to these proceedings, must have been that he did not at that time desire to redeem the mortgage, inasmuch as he was then preparing to assert his title to the property free from the mortgage under his fraudulent decree, a claim which he subsequently unsuccessfully asserted in Suit No. 303 of 1888 in the Thána Court and in appeal in this Court. The mortgagee did not make him a party, as Pedro was supposed to represent the family in the matter of the mortgage.

The question is, can the plaintiff now redeem on the ground that he was not made a party to those proceedings. Although the parties are not members of a joint Hindu family, yet they appear to a considerable extent to govern their dealings as though they filled that character. If they were such members, the case of *Doulat Rám v. Mehr Chand*⁽¹⁾ would be exactly in point, as well as the case of *Vishnu Vithal v. Venkatráv Bhavanji*⁽²⁾. The mortgage purported to mortgage the whole interest in the property and was made by Pedro the manager. The suit was brought against Pedro who had executed the mortgage, and asks that the debt may be satisfied out of the mortgaged property and

(1) L. B., 14 I. A., 187. (2) P. J., 1889, p. 248.

that the property may be sold. What was intended to be sold was the whole interest in the property, and that was what the defendant purchased. The above cases are not, we think, in conflict with *Shahk Abdulla v. Hâji Abdulla*⁽¹⁾, where one only of the heirs of the mortgagor was made a party to the suit on the mortgage. The Privy Council in deciding *Doulat Râm v. Mehr Chand* (*supra*) do not suggest that the plaintiffs in that case were at all events entitled to redeem the property, as they had not been made parties to the suit in which the property was sold at the instance of the mortgagee. What their Lordships appear to us to hold is that the purchaser at the Court's sale obtained a good title to the property purchased by him subject to the right of the co-parceners, who were not made parties to the suit, to dispute the sale on the ground that the original mortgage was not binding upon them. We think that the principle of these decisions governs the case before us, and that the defendant purchased the whole interest in the mortgaged property subject to the right of the plaintiff to show that his interest derived from Minguel was not bound by the mortgage. This he has failed to do. The plaintiff is not, for the reasons we have given, entitled as absolute owner to recover half the mortgaged property from the defendant who has obtained possession of it under his purchase. That portion of his claim has been correctly disallowed by the Subordinate Judge.

The Subordinate Judge has, however, allowed the plaintiff to redeem half the mortgaged property on payment of half the sum due under the mortgage. If, subject to the plaintiff's right to dispute the mortgage being binding upon his share in the mortgaged property, the decree and sale by the Thana Court affect his interest, he cannot now be entitled to redeem at all. We have held, for the reasons which we have stated, that they do. This portion of the plaintiff's claim cannot, therefore, be supported, and the suit ought to have been dismissed *in toto*. We disallow the plaintiff's cross objections and allow the defendant's appeal with costs throughout.

Suit dismissed.

(1) I. L. R., 5 Bom., 8.

1894.

JA'LBHAI
ARDESHIR
SHET
v.
LOUIS
MANOEL.