1895.

TRIBHOVANDA'S MANGALDA'S v. YORKE SMITH.

pleased, and that their sons could not prevent them from doing so. Under any circumstances this is a suit by Tribhovandás and Purshotamdás (and not by their sons), and in my opinion they could not maintain it. I record my findings upon the issues as follows :—[His Lordship stated his findings.]

I, therefore, dismiss this suit ; but, having regard to the complicated and difficult nature of the case, I think the most equitable course is to direct that the costs of all parties (those of the executors to be taxed as between attorney and client) should come out of the estate, that is, out of the estate which is not ancestral.

Suit dismissed.

Attorneys for the plaintiffs and minor defendants :—Messrs. *Nana and Hormasji* and Messrs. *Roughton and Byrne.*

Attorneys for the executors :—Messrs. *Little and Co.*

Attorneys for defendant No. 9 :—Messrs. *Edgelow and Gulábchand.*

Attorneys for the University of Bombay :—Messrs. *Craigie, Lynch and Owen.*

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

1895.
February 14.

DAVALAVA AND OTHERS (ORIGINAL PLAINTIFF), APPELLANTS, *v.* BHIMA'JI DHONDO AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mortgage—Mahomedan family—Mortgage by Mahomedan father—Suit by mortgagee against minor son after mortgagor's death—Decree—Possession—Minor son represented by his mother—Widow represents heirs—Decree—Daughters not parties, but bound by decree—Subsequent suit by daughters as heirs of mortgagor for redemption.

When in a mortgage suit the debt is due from the father, and after his death the property is brought to sale in execution of a decree against the widow or some of the heirs of the mortgagor, and the whole property is sold, then the heirs not brought on the record cannot be permitted to raise the objection that they are not bound by the sale simply because they are not parties to the record. This principle of law applies as much to a Hindu family governed by the Mitákshara law as to a Mahomedan family.

* Second Appeal, No. 671 of 1893.

1895.

DAVALAVA v. BHIMÁJI DHONDO.

Hari v. *Jairám*(1) and *Khurshetbibi* v. *Kesu*(2) referred to and followed.

One Nur Sáheb mortgaged his property in 1862 to Bhimáji and died in 1864, leaving a widow, a son and two daughters. In 1864 Bhimáji (the mortgagee) sued the minor son represented by his mother for possession as owner under the *gahán lahán* clause and got a decree on 30th September, 1864, and obtained possession in 1865. To this suit the daughters of Nur Sáheb were not parties. Bhimáji held the land till 1887 and then sold it to Somána (defendant No. 2). In 1890 Nur Sáheb's daughters brought this suit against Bhimáji and Somána to redeem the mortgage of 1862, contending they were not bound by Bhimáji's suit in 1864, not having been parties to it.

Held, that the plaintiffs could not redeem. They were bound by the decree obtained by the mortgagee in 1864.

SUIT for redemption. The land in question was mortgaged in 1862 by Nur Sáheb, a Mahomedan, to one Bhimáji Dhondo. The mortgage contained a *gahán lahán* clause (i.e. a provision that, in default of payment within a certain period, the land should become the property of the mortgagee).

Nur Mahomed (the mortgagor) died leaving a widow Badána, a son Husein, and two daughters Davalava and Biyáma.

In 1864 the mortgagee Bhimáji sued the minor son Husein, represented by his mother Badána, for possession of the land as owner under the *gahán lahán* clause in the mortgage-deed. He obtained a decree and got possession in 1865; and the land was then transferred to his name in the revenue books.

To this suit the daughters of Nur Sáheb (Davalava and Biyáma) were not parties.

Bhimáji held the land until 1887, in which year he sold it to Somána Fakira, whose name was then entered in the revenue books, and Somána (defendant No. 2) was in possession at the date of suit.

In 1890 the two daughters (Davalava and Biyáma) of Nur Mahomed, his son Husein and his widow Badána brought this suit against Bhimáji and Somána to redeem the mortgage of 1862.

The Subordinate Judge held that the decree of 1864 was conclusive against Husein and Badána, but was not binding against the daughters Davalava and Biyáma, as they had not been parties to that suit, and he decreed that they might redeem their shares in the land.

(1) I. L. R., 14 Bom., 597. (2) I. L. R., 12 Bom., 101.

1895.

DAVALAVA v. BHIMÁJI DHONDO.

On appeal the District Judge of Dhárwár dismissed the suit, holding that all the plaintiffs were bound by the former decree. He observed :—

"That decree was passed against plaintiff No. 4 as representing her then minor son, plaintiff No. 3. It appears to me that this decree cannot now be questioned by plaintiff No. 3 or plaintiff No. 4 who were parties to the suit, and that plaintiffs Nos. 1 and 2 are also estopped from questioning defendant No. 1's ownership and defendant No. 2's ownership derived from defendant No. 1 by *bonâ-fide* purchase for valuable consideration.

"The plaintiffs Nos. 1 and 2 were represented by their mother, plaintiff No. 4, in that litigation. They have all along stood by and acquiesced in defendant No. 1 holding as owner for twenty-two years and defendant No. 2 for three years. As against defendant No. 2, they are estopped, as they stood by and gave him no warning of their claim. Plaintiff No. 1 became major in 1874-75, and plaintiff No. 2 became major in 1880, at the latest sixteen years after her father's death. The plaintiffs Nos. 1 and 2 have not sued to set aside the decree of 1865 within three years of their having attained majority. Their claim is also time-barred."

Against this decision the plaintiffs appealed to the High Court.

Báláji Abáji Bhágvat for the plaintiffs (appellants) :—Plaintiffs Nos. 1 and 2 are the daughters of the mortgagor and are sharers by Mahomedan law. Their mother Badána did not represent them in the former suit—*Akoba* v. *Sakhárám*[1]. They were not parties to it, and their rights are, therefore, not affected by the decree, and they have a right to redeem. Their rights are several, not joint rights. A Mahomedan mother, though *de facto* manager, does not represent her minor daughters. See *Sita Rám* v. *Amir Begam*[2] and *Bába* v. *Shiváppa*[3]. The case of *Daulat Rám* v. *Meher Chand*[4] was with reference to a Hindu joint family. The rule laid down by it and other cases does not apply to Mahomedans. This suit is not barred by limitation, as sixty years is the time within which a redemption suit can be brought.

Mánekshâh Jehángirshâh for the defendant, respondent No. 2 (Somána) :—The law on this point has been considerably modified by the decision of the Privy Council in *Girdharee Lál* v. *Kantoo Lall*[5]. In the former suit and the proceedings therein the daughters and the son of Nur Mahomed (plaintiffs Nos. 1, 2 and 3)

(1) I. L. R., 9 Bom., 429.
(2) I. L. R., 8 All., 324.
(3) P. J., 1895, p. 25 ; *ante* p. 199.
(4) L. R., 14 I. A., 187.
(5) 14 B. L. R., 187.

were represented without fraud or collusion by their mother (plaintiff No. 4). Their interests, therefore, passed to the defendants. See *Hari* v. *Jairám*[1] and *Khurshetbibi* v. *Keso*[2].

Bhimáji got the property as owner by the decree of 1864, and the land was transferred to his name in the revenue register. His possession thus became adverse from 1865. Defendant No. 2 is a *bonâ-fide* purchaser for value from him who was in possession without notice. He cannot, therefore, be ousted—*Vásudeva* v. *Krishna*[3]; *Venkatesh Appa* v. *Pira Sáiba*[4].

RÁNADE, J. :—The first two appellants in this case are the daughters, the third appellant is the son, and the fourth appellant is the widow, of one Nur Sáheb who mortgaged the land in dispute with respondent No. 1 in 1862. Respondent No. 1 brought Suit No. 333 of 1864 on his mortgage-bond against the appellant No. 3, a minor represented by his guardian and mother, appellant No. 4. Appellants Nos. 1 and 2 were not parties to this suit.

The mortgage-bond contained a *gahán lahán* clause, and on the strength of this provision respondent No. 1 claimed to recover possession of the land as owner. An *ex-parte* decree was passed on 30th September, 1864, directing appellant No. 4, as representing appellant No. 3, heir of the deceased mortgagor, to make over possession of the land to respondent No. 1, and he accordingly obtained possession of it on 12th September, 1865. The kháta of the land was soon after transferred from appellant No. 3's name to that of respondent No. 1. Respondent No. 1 remained in possession of the land till 1887, in which year he sold it to respondent No. 2.

The present suit was brought in 1890 by the four appellants as heirs of the deceased Nur Sáheb to redeem the mortgage of 1862. Both the lower Courts held that the decree in Suit No. 333 of 1864 was conclusive against the claims of appellants Nos. 3 and 4, who were parties to that decree. The Court of first instance, however, held that as appellants Nos. 1 and 2 were not parties to the former suit, it was still open to them to sue for

(1) I. L. R., 14, Bom., 597.
I. L. R., 12, Bom., 101.

(3) P. J. for 1891, p. 18.

(4) P. J. for 1891, p. 103.

1895.

DAVALAVA v. BHIMÁJI DHONDO.

redemption to the extent of their $\frac{7}{16}$ths share, and partial redemption was accordingly decreed. The District Judge in appeal held that all the appellants were estopped from redeeming the land by the decision in the former suit, in which appellant No. 4 represented her minor daughters as much as her minor son, and that the claim was also time-barred, as it was not brought within three years from the time when appellants Nos. 1 and 2 attained majority.

In second appeal, it was contended before us that appellants Nos. 1 and 2, not being parties to the former suit, could not be estopped by the decision in that suit, as appellant No. 4 did not, and as mother could not, under Mahomedan law, represent appellants Nos. 1 and 2, and further the suit was not barred, as sixty years' limitation applied to the redemption suit.

As regards the first point, the Courts were no doubt at one time inclined to hold, especially in the case of a joint Hindu family governed by the Mitákshara law, that only the right, title and interest of a father or other manager passed to the purchaser at a sale in execution of a decree against him, and that the interests of his sons or co-sharers, not parties to the record, remained unaffected. In the leading case on the subject—*Deendyál* v. *Jugdeep Nárain*(1)—their Lordships of the Privy Council, following two earlier rulings—*Nugender Chunder* v. *Kaminee*(2) and *Báijun* v. *Brij Bhookun*(3)—appear to have ruled not only that the interest of a son, who was not a party to the suit against his father, did not pass to the auction-purchaser at the execution sale, but that the question of legal necessity could not be inquired into in the son's suit, and that the son was entitled to recover possession of the property, subject to the auction-purchaser's right to demand partition in a separate proceeding. This ruling in *Deendyál's* case governed the decisions in *Jatha Naik* v. *Venktapa*(4); *Máruti* v. *Lilúchand*(5); *Akoba* v. *Sakháram*(6); *Lakshman* v. *Kúshináth*(7); and was extended by these decisions to mortgage suits, which do not appear to have

(1) L. R., 4 I. A., 247.
(2) 11 Moo. I. A., 241.
(3) L. R., 2 I. A., 275.
(4) I. L. R., 5 Bom., 14.
(5) *Ibid.*, 6 Bom., 564.
(6) *Ibid.*, 9 Bom., 429.
(7) *Ibid.*, 11 Bom., 700.

been contemplated in *Deendyál's* case. In *Assamathem* v. *Roy Lutchmeeput*[1] the same principle was applied to Mahomedan claimants. A sister, who was not made a party to the record, was held not bound by a mortgage decree and an execution sale to which other heirs of her deceased father were parties. The facts of that case closely resemble those in the present dispute, and if the view therein upheld was accepted as still authoritative, the appellants Nos. 1 and 2 in the present case would be certainly entitled to succeed.

The authority of the cases noted above, however, has been considerably shaken by subsequent decisions. Their Lordships of the Privy Council had indeed in *Girdharee Lall* v. *Kantoo Lall*[2] following an earlier ruling (*Hunoomanpersaud* v. *Mussamut Babooee*[3]) held that the interest of the son, who was alive, and not a party to the suit, would pass to a purchaser in an execution sale of the right, title and interest of the father under certain circumstances where the whole property was put up to sale by order of the Court. This view was more explicitly laid down by Sir Barnes Peacock in what has been since regarded as the leading case on the subject—*Ishan Chunder* v. *Buksh Ali*[4]. Sir Barnes Peacock decided that if the debt for which the property is sold is not the widow's but her husband's debt, and the property sold also belongs to the husband, the widow, though a party to the record, must be held to have been sued in her representative character (as representing her husband's estate), and the proceedings against her as such representative would be effectual against the estate, notwithstanding that the son, who in that case brought his suit to set aside the sale, was not a party to the suit. This decision was re-affirmed in many subsequent decisions by the Calcutta High Court—*Hakeem Bebee* v. *Khajah Gowhur Ali*[5]; *Pursid Narain* v. *Honooman Sahay*[6]; *Baboojan Jha* v. *Byjnath Dutt Jha*[7]; *Sham Coomar* v. *Juttun Bibee*[8]; *Lalla Seeta Rám* v. *Rám*

(1) I. L. R., 4 Calc., 142, F. B.
(2) 14 B. L. R., 187.
(3) 6 Moo. I. A., 393.
(4) 1 Marsh., 614.
(5) 5 Wym., 27.
(6) I. L. R., 5 Calc., 845.
(7) I. L. R., 6 Calc., 474.
(8) 14 Cal. W. R., 448.

1895.

DAVALAVA v. BHIMÁJI DHONDO.

Buksh[1]; *Sotish Chunder* v. *Nil Comul*[2]; *Jotendro Mohun* v. *Jogul Kishore*[3]. In *The General Manager of the Raj Durbhunga* v. *Mahárajah Coomár Rámaput Singh*[4] their Lordships of the Privy Council affirmed the correctness of the principle laid down in *Ishan Chunder Mitter* v. *Buksh Ali Sondagar*[5]. The same point was similarly decided by their Lordships in *Bissessur Lall* v. *Mahárajah Luchmessur*[6].

In *Mussamut Nanomi* v. *Modun Mohun*[7] their Lordships of the Privy Council held that the decision in *Deendyal's* case did not bind them to hold that only the interest of the judgment-debtor, party to the record, passed by the auction sale to the purchaser. The last case on the subject is the decision of the Privy Council in *Daulat Rám* v. *Meher Chand*[8]; see also *Bhagbut* v. *Girja Koer*[9]. The decision in *Daulat Rám's* case was expressly relied upon by Sir C. Sargent, C. J., and Candy, J., in *Vishnu* v. *Venkatrao*[10] where it was held that if the entire equity of redemption was found to have been sold to the auction-purchaser, the interest of the plaintiff in that suit (one of five brothers who was not a party to the record in the execution proceeding), would pass. This same doctrine was again affirmed in *Jairám* v. *Joma*[11] and *Hari* v. *Jairám*[12]; and in this last case, their Lordships (Birdwood and Jardine, JJ.) expressly overruled the decisions in *Máruti* v. *Lilúchand*[13] and *Lakshman* v. *Káshináth*[14] noticed before. It may, therefore, be now regarded as settled law that when, in a mortgage suit, the debt is due from the father, and after his death the property is brought to sale in execution of a decree against the widow or some of the heirs of the mortgagor, and the whole property is sold, then the heirs not brought on the record cannot be permitted to raise the objection that they were not bound by the sale simply because they were not parties to the record.

(1) 24 Cal. W. R., 383.
(2) I. L. R., 11 Calc., 45.
(3) I. L. R., 7 Calc., 357.
(4) 14 Moo. I. A., 605.
(5) 1 Marsh., 614.
(6) L. R., 6 I. A., 233.
(7) *Ibid.*, 13 I. A., 1.
(8) L. R., 14 I. A., 187.
(9) I. L. R., 15 Calc., 717.
(10) P. J., 1889,-248.
(11) I. L. R., 11 Bom., 361.
(12) I. L. R., 14 Bom., 597.
(13) I. L. R., 6 Bom., 564.
(14) I. L. R., 11 Bom., 700.

It is, however, contended that this ruling is based on the peculiar constitution of a Hindu joint family, and that the analogy does not hold good in the case of Mahomedans. There is, however, no foundation for such a contention. One of the cases noted above related to Mahomedans, and the same principle was made applicable to them—*Assamathem* v. *Roy Lutchmeeput*[1], also *Hukeem Bebee* v. *Khájah Gowhur Ali*[2]. In *Assamathem* v. *Roy Lutchmeeput*[1], this point was expressly considered by the Full Bench, and both the Chief Justice and Markby, J., held that the Mahomedan law is, if possible, more strict in its recognition of the obligation to pay debts. The succession is of the kind known as universal, and any one of the heirs of a deceased person stands as litigant on behalf of all the others with respect to anything due by the estate of the deceased. The creditor can seek his relief against one of several heirs in a case when all the effects are in the hands of that heir. If, as in the present case, the property was in the hands of the widow, appellant No. 4, that heir could be sued by the creditor as representing the entire estate, and a decree obtained against her would be binding against the other heirs. This view was given effect to by this Court in *Khurshetbibi* v. *Keso*[3], where it was held that the daughter of the deceased Mahomedan was bound by the sale in execution of a decree obtained against the son whose name appeared on the record. The present case is on all fours with this case. If possible, the present respondent's claim is stronger, as the property sold was mortagaged with respondent No. 1.

On a careful consideration of all these authorities, we have come to the conclusion that the decree passed in 1864, giving effect to the *gahán lahán* clause, bound the appellants Nos. 1 and 2 equally with appellants Nos. 3 and 4. The rights of a decree-holder who obtains possession as owner are, if possible, stronger than the case of execution purchasers, for there can be no room for doubt here that the whole property passed into respondent No. 1's possession under the forfeiture clause of the bond.

(1) I. L. R., 4 Calc., 142. (2) 5 Wym., 27.
(3) I. L. R., 12 Bom., 101.

1895.

DAVALAVA v. BHIMÁJI DHONDO.

It was, indeed, urged by appellant's pleader that appellant No. 4 could not act as guardian of appellants Nos. 1 and 2, as she was their mother, and our attention was drawn to *Sita Rám* v. *Amir Begam*(1) and *Bábu* v. *Shivápp*a(2). The point thus urged does not appear to arise in the present case. The widow and the son represented the estate, and it was immaterial whether the widow could or could not act as guardian. It may also be noted that, under Mahomedan law, the sons make the daughters residuary heirs only, and it is easy to understand the reason why the minor daughters were passed over by the creditor who brought the son's name on the record. We accordingly confirm the decree of the lower Court, and reject the appeal with costs on appellants.

JARDINE, J.:—I concur. It has been admitted by the pleader for the appellants that the whole property had been mortgaged and was liable for the debt, and passed under the decree. If, then, the appellants were members of a Hindu family governed by the Mitákshara law, there would be no difficulty in upholding the decision of the District Judge on the strength of *Hari* v. *Jairám*(3) and the judgments of the Privy Council there expounded. The present case is one of a Mahomedan family, to which in *Khursheibibi* v. *Keso*(4) similar principles were applied. I follow that authority.

Decree confirmed.

(1) I. L. R., 8 All., 324.
(2) P. J., 1895, p. 25; *ante* p. 199.
(3) I. L. R., 14 Bom., 597.
(4) I. L. R., 12 Bom., 101.

APPELLATE CIVIL.

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

1895. *February* 14.

KRISHNA'JI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* MA'HESHVAR LAKSHMAN GONDHALEKAR (ORIGINAL DEFENDANT No. 1), RESPONDENT.*

Mortgage—Agreement in a subsequent deed to postpone redemption until payment of another debt—Agreement valid.

* Second Appeal, No. 277 of 1893.