

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

1910.

January 24.

RAMKRISHNA NARAYAN SINDE (ORIGINAL DEFENDANT), APPELLANT,
v. VINAYAK NARAYAN SASWADKAR (ORIGINAL PLAINTIFF),
RESPONDENT.*

Transfer of Property Act (IV of 1882), section 85—Suit upon mortgage—Mortgage executed by adult members of the family—Suit brought against all members excepting a minor—Decree—Sale of mortgaged property in execution—Minor seeking to exempt his share from sale—Representation of the minor by the adult members.

A Hindu family living jointly consisted of S., his son M., and his two grandsons S¹. and R. (minors) by a predeceased son. S. mortgaged a house for purposes allowed by Hindu law. The deed of mortgage was signed by S., M. and S¹. represented by his mother. The mortgagees sued on the mortgage and joined S., M. and S¹. as party defendants. The suit passed into a decree, in execution of which the house was sold at a Court auction and purchased by the plaintiff. In a suit by the plaintiff against M., S¹. and R. (S. having died) for possession of the house, R. claimed to exempt from the sale his share in the house which was one-fourth, on the ground that as he was not a party to the suit, he was not bound by the decree.

Held, that though R. was omitted from the suit he was represented by the adult members, who were the managing members of the family.

Held, also, that the debt was contracted by S., the grandfather of R., and R. was bound by it unless it had been contracted for illegal or immoral purposes.

SECOND appeal from the decision of R. D. Nagarkar, First Class Subordinate Judge, A. P., at Poona, varying the decree passed by D. G. Medhekar, Joint Subordinate Judge at Poona.

One Santaji had a son Maruti and two grandsons by a predeceased son : Shivram and Ramkrishna (minors).

In 1893, Santaji mortgaged a house belonging to the family for family purposes. The deed of mortgage was executed by Santaji, Maruti, and Shivram represented by his mother Gojrabai.

* Second Appeal No. 383 of 1908.

In 1901, the mortgagee sued Maruti and Shivram (Santaji having died) upon the mortgage: and obtained a decree against them. In execution of this decree the house mortgaged was sold at a Court-sale and purchased by the plaintiff.

The plaintiff then sued Maruti, Shivram and Ramkrishna to recover possession of the house. Ramkrishna contended that at least his share in the house (which was one-fourth) was not included in the sale, inasmuch as he not having been a party to the mortgage suit was not bound by the decree passed therein.

The Court of first instance agreed with the contention and passed a decree awarding the plaintiff possession of the house with the exception of Ramkrishna's share. The reasons were as follows:—

The presumption of Hindu law is in favour of joint family and joint property. Plaintiff's case is not that the first defendant had no interest in the property but that whatever interest he had has been sold under the decree, exhibit No. 69 the debt for which the decree was obtained being a joint family debt. But a reference to the mortgage-bond, exhibit No. 49, shows that it contains no recital of the purpose for which the debt was contracted. It is true that the defendant No. 1's mother represented the defendant No. 2 as his guardian *ad litem* in the suit based on the mortgage, but the first defendant was not so represented. The defendant No. 2 was also a party to the mortgage bond, exhibit 49, but not the defendant No. 1. It might be urged that the fact that the defendant No. 2, brother of the defendant No. 1, was a party to the mortgage-bond is sufficient to justify the presumption that the debt was contracted for the benefit of all including the defendant No. 1. But in the absence of any proof of a specific nature, such a presumption would not be justifiable in my opinion. There is nothing to show that there was before the creditor a sufficient material to create on his part a *bona fide* belief that the debt was necessary for any joint family purpose. I am therefore unable to say that the plaintiff purchased the right, title and interest of the defendant No. 1 in the property. Nor is there anything to show that the right of the defendant No. 1 in the property has in any way been extinguished.

On appeal the lower appellate Court came to a different conclusion. It held that Ramkrishna's share also passed by the sale. The following were the grounds:—

The next question is whether the Court-sale is binding upon the defendant No. 1. To prove that it is binding on him, one of the grounds alleged on behalf of the plaintiff is that the loan in the mortgage-bond, exhibit 49, was taken for the benefit of the joint family. The only evidence on the point to

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which attention is drawn is the fact that Maruti, the son of Santaji, and Shivram's mother Gajarabai, the widow of another son (Narayan) of Santaji, on behalf of her minor son joined Santaji in the execution of the mortgage-deed. But this is insufficient to prove that the creditor *bona fide* believed that the loan was taken for the benefit of the family in the absence of evidence showing that the creditor made enquiries and had reason to be satisfied as to the necessity for the loan. In the absence of such evidence the debt would not be binding on Shivram himself on the ground mentioned. But in Suit No. 299 of 1901 Shivram agreed to pay the debt under a consent decree and therefore his share in the suit house properly passed under the Court-sale.

Another ground on which the share of the defendant No. 1 in the suit house is sought to be found is that the loan taken under the bond, exhibit 49, having been taken by a grandfather, the defendant No. 1 as grandson was under the Hindu Law bound to pay the debt of his grandfather irrespective of its benefit to himself unless it was tainted with immorality or was otherwise repugnant to Hindu law. Reference is made to the following authorities *Narasimharav v. Antaji* (2 Bom. H. C. R. 64); *Lachman Das v. Khamnoolal* (I. L. R. 19 All. 26); *Narayan v. Venkatacharya* (6 Bom. L. R. 434); Mayne's Hindu Law, sections 302 to 304; Mayne's Hindu Law, pages 376 to 380, 6th edition; *Sadashiv v. Dinkar* (I. L. R. 6 Bom. 520). I think this contention must prevail in the absence of a suggestion and of evidence to prove that the debt was one which the defendant No. 1 as grandson was not bound to pay under the rules of Hindu law. The Allahabad ruling quoted is an authority for holding that the debt being secured by a mortgage, the defendant No. 1 was bound to pay it with interest. In this view of the matter it is necessary to go into the question whether the defendant No. 1 was benefited by the debt contracted by his grandfather. The plaintiff as auction purchaser, therefore, acquired title to the one-fourth share of the defendant No. 1 in the suit house.

The defendant appealed to the High Court.

P. P. Khare, for the appellant.

G. S. Rao, for the respondent.

CHANDAVARKAR, J.—It is true that section 85 of the Transfer of Property Act requires that all persons, having an interest in property comprised in a mortgage, must be joined as parties to any suit under Chapter IV of the Act, relating to such mortgage, provided that the plaintiff has notice of the interest. But the section has been construed by the Calcutta and the Madras High Court as not interfering with the rule of Hindu law, that it is open to a father in a Hindu family to represent, subject to certain conditions, his sons or other members in a suit brought

upon a mortgage against him. For instance in *Ramasamayyan v. Virasami Ayyar*⁽¹⁾, the mortgage had been executed by a Hindu father. The suit was brought against him and two of his three sons and there was a decree. A suit having been brought by the third son, it was contended by him that as he had not been made a party to the previous suit upon the mortgage, the decree passed in it, and the sale consequent upon it, did not bind him, and he relied upon section 85. It was held there that the father represented the sons in the absence of proof that the mortgage had been effected for a debt of the father contracted for an illegal or immoral purpose. So also in *Lala Surja Prosad v. Golab Chand*⁽²⁾, the mortgage was by a Hindu father, who, with his son, constituted a joint Mitakshara family. It was held that the father incurred the debt in his representative capacity and as managing member of the family. And the ruling of the Court was that it was open to the son by a suit to question the decree and the sale consequent upon it, but that the son, in order to succeed and entitle him to redeem his share of the property, must show not merely that he had not been made a party to the suit brought against the father, but also that the debt of the mortgage was not binding upon him, having been incurred for an illegal or immoral purpose by the father. The principle seems to be sound and in accordance with the observations of their Lordships of the Privy Council in *Khierajmal v. Daim*⁽³⁾.

In the present case the mortgage was by Santaji, grandfather of the present appellant, by his uncle Maruti, and by his brother Shivram, a minor, who was represented by his mother, Gojrabai. To the suit which was brought subsequently on the mortgage, the persons brought on the record as defendants were the present appellant's undivided uncles, Maruti and Parshram, and his undivided brother Shivram who had at that time arrived at the age of majority. The present appellant was, no doubt, omitted from the suit, but the adult members of the family represented him. They were the managing members

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(1) (1898) 21 Mad. 222.

(2) (1900) 27 Cal. 724.

(3) (1904) L. R. 32 I. A. 23 at p. 35.

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of the family. Therefore, according to Hindu law, we must hold, in the absence of any other circumstance, that the present appellant had been substantially represented upon the record, and was virtually a party to the suit. Further, even if Shivram, the brother of the appellant, had not been brought upon the record, there was Maruti, the eldest managing member of the family. The debt again was one contracted by Santaji, the grandfather of the appellant, and the latter is bound by it unless it had been contracted by Santaji for illegal or immoral purposes. It has been found that the debt had been contracted by the managing members of the family for its benefit and necessities.

On these grounds the decree must be confirmed with costs.

Decree confirmed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

1908.

UMABAI, PLAINTIFF, v. BHAU BALWANT AND OTHERS, DEFENDANTS.*

March 3.

*Civil Procedure Code (Act V of 1908) Order I Rule 3, Order II Rule 3—
Grades of several defendants in one suit—"Same act or transaction"—
"Series of acts or transactions"—Practice.*

In reading order I, Rule 3, of the Civil Procedure Code (Act V of 1908) it seems quite obvious that the word "same" which precedes the words "acts or transaction" governs also the words "series of acts or transactions" and must be read before those words also. The first condition to be fulfilled before joining several persons as co-defendants in the same suit is that the right to relief sought in the suit must arise against all the defendants from the *same* act or transaction or from the *same* series of acts or transactions. The second condition to be fulfilled under the rule is that some common question either of fact or law should arise against the defendants if separate suits were brought against such persons. Before a plaintiff can join several defendants in the same suit *both* the conditions laid down in the rule must be fulfilled, first, the relief sought against the defendants whether jointly, severally or in the alternative,

* Suit No. 651 of 1907,