

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Shah.

1915. RAMCHANDRA NARAYAN JOSHI AND OTHERS (ORIGINAL DEFENDANTS
 October 1. Nos. 1 TO 4), APPELLANTS *v.* SHRIPATRAO BIN TUKOJIRAO DESHMUKH
 AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT No. 5), RESPONDENTS. °

Civil Procedure Code (Act XIV of 1882), sections 366 and 371—Abatement of suit—Mortgage—Joint Hindu family—Redemption suit by the mortgagor in his personal right—Second suit to redeem by co-parceners not barred by abatement.

One V, a member of an undivided Hindu family, instituted in the year 1881 a suit for redemption against the mortgagee, but pending the suit he died on the 9th July 1883. On the 15th October 1883, the Court directed that the suit should abate. Subsequently in the year 1912, T, V's son, and 3 grandsons filed a second suit for redemption of the same property alleging that the property being ancestral they had interest in it by birth. It was also alleged that an adult brother of V was interested as a co-parcener in the same property. The trial Court dismissed the suit on the strength of the order of abatement passed on the 15th October 1883. On appeal, the District Court, reversed the decree and remanded the suit for disposal.

On appeal to the High Court,

Held, that there being no indication that V's suit was brought in a representative capacity, it would certainly be defective as a redemption suit according to all canons of procedure and if the suit was defective V's personal right to sue did not embrace the rights of his co-parceners and none of them would be concluded by the application of section 371 of the Civil Procedure Code (Act XIV of 1882).

Held, also, that apart from the question raised upon section 371 there was sufficient authority for the conclusion that since the introduction of the Code of 1877 no legal proceeding by V short of actual redemption would deprive his co-parceners of their right to redeem against the mortgagee.

PER CURIAM :—The right of a mortgagee to enforce his security by sale in a suit against the person who executes with authority, express or implied, a mortgage of family property, without joining the co-parceners interested results from the authorised mortgage which carries with it the all embracing remedy. It does not follow that the defeat of one co-owner who desires to redeem will bar the exercise of the same right by another : hence arises the necessity for joining all parties interested in one suit.

° Appeal from Order No. 50 of 1914.

APPEAL against the order passed by Dr. F. X. De-Souza, District Judge, Sholapur, reversing the decree passed by G. G. Nargund, Subordinate Judge of Barsi.

Suit to redeem and recover possession.

One Vyankatrao Deshmukh mortgaged on the 21st March 1861 two lands, survey Nos. 1 and 167 in favour of two mortgagees, viz., (1) one Ramchandra Joshi, the father of defendants Nos. 1 to 4 and (2) one Bojraj.

In the year 1871 the rights of Bojraj under the mortgage were purchased by Ramchandra who thus became the sole beneficiary under the mortgage.

In 1881 Vyankatrao instituted a suit No. 399 of 1881 against Ramchandra to redeem the mortgage of 1861. After the issues were settled in that suit, Vyankatrao died on the 9th July 1883 and as his heirs were not brought on the record the Court passed an order on the 15th October 1883 directing that the suit should abate.

Subsequently in the year 1912 another suit for redemption of the said mortgage was filed by Tukoji-rao, Vyankatrao's son, and three grandsons on the ground that (1) the lands mortgaged were Vyankatrao's ancestral lands in which the plaintiffs had an interest by birth; (2) that their suit was instituted in their own right and not as legal representative of Vyankatrao; (3) that in any event the order of abatement could not bind the plaintiffs because the suit was brought by Vyankatrao in his own name without adding as parties, the co-parceners of the undivided Hindu family.

The defendants contended *inter alia* that the plaintiffs not having taken steps to have their names brought on record since suit No. 399 of 1881 abated on Vyankatrao's death, the second suit for redemption was not maintainable.

The Subordinate Judge found that Vyankatrao's suit was brought in a representative capacity and the order

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passed therein was binding on the plaintiffs. He, therefore, passed a preliminary decree holding that the plaintiffs' suit was barred under Order XXII, Rule 9 of the Civil Procedure Code, 1908.

On appeal, the District Judge, reversed the decree and remanded the suit for disposal on the merits on the following grounds:—

“As pointed out in the case of *Narayan v. Pandurang*, I. L. R. 5 Bom. 685, and *Anusayabai v. Sakharam*, I. L. R. 7 Bom. 464, under the law in force before the year 1877 the manager of an undivided Hindu family represented the common interests of the family with regard to litigation as well as other transactions. And the presumption was that a manager was acting for the family unless it was made out that he acted and professed to act for himself alone. It is true that doubts were expressed by Sargent C. J. in *Padmakar v. Mahadeo Krishna*, I. L. R. 10 Bom. page 21, as to the soundness of the rule so widely stated. Be this as it may, the consensus of authority points to the conclusion that the rule has no longer any force after the enactment of section 50 of Act X of 1877. I, therefore, hold that the present plaintiff not having been a party either actually or constructively to the suit No. 399 of 1881 is not bound by the order of abatement passed in that suit and that he is not, therefore, barred from instituting the present suit by order 22 rule 9 of the Code of Civil Procedure, Act V of 1908.”

The defendants appealed against the order of remand.

Campbell with *K. N. Koyajee*, for the appellant.—The present suit is barred under sections 366 and 371 of the Civil Procedure Code of 1882. Vyankatrao has been found to have been manager of the family and so his suit in 1881 was of a representative character. No fresh suit can, therefore, be instituted: *Vithu Dhondi v. Babaji*⁽¹⁾; *Tatyarao v. Puttappa*⁽²⁾; *Kishen Parshad v. Har Narain Singh*⁽³⁾; *Sheo Shankar Ram v. Jaddo Kunwar*⁽⁴⁾; *Hori Lal v. Munman Kunwar*⁽⁵⁾; *Madan Lal v. Kishan Singh*⁽⁶⁾; *Debi Singh v. Jia Ram*⁽⁷⁾;

(1) (1908) 32 Bom. 375.

(2) (1910) 12 Bom. L. R. 940.

(3) (1911) L. R. 38 I. A. 45.

(4) (1914) L. R. 41 I. A. 216.

(5) (1912) 34 All. 549.

(6) (1912) 34 All. 572.

(7) (1902) 25 All. 214.

Balwant Singh v. Aman Singh⁽¹⁾; *Jaddo Kunwar v. Sheo Shankar Ram*⁽²⁾; and *Sheik Ibrahim Tharagan v. Rama Aiyar*⁽³⁾. The respondent's only remedy was to have brought himself on the record of the previous suit in 1883 on the death of his father or to have got the order of abatement set aside.

Coyajee with *N. V. Gokhale*, for the respondents, not called upon.

SCOTT, C. J.—The facts found by the District Judge are that one Vyankatrao Deshmukh mortgaged on the 21st March 1861 the lands in suit in favour of two mortgagees, and subsequently the interest of the 2nd mortgagee became vested in the 1st mortgagee. In 1881 Vyankatrao instituted a suit No. 399 of 1881 against the mortgagee for redemption, but after issues were settled in that suit he died, the date of his death being 9th July 1883. On the 15th October 1883, the Court directed that the suit should abate. This suit was filed in 1912 by Tukojirao, Vyankatrao's son, and three grandsons for redemption upon the ground that the land mortgaged was ancestral property in which the plaintiffs, Vyankatrao's sons, had an interest with him at birth. It was also alleged that an adult brother of Vyankatrao was interested as a co-parcener in the same property. In the trial Court the suit was dismissed on the strength of the order of abatement passed on the 15th October 1883.

An appeal was preferred to the District Court which reversed the order and remanded the suit for disposal. From that decree this appeal is now preferred. It is contended that by reason of section 366 of the Code of 1882, the redemption suit is not maintainable by the present plaintiffs. That section must be read with section 365 which provides that "In case of the death of a sole plaintiff or sole surviving plaintiff, the legal

(1) (1910) 33 All. 7.

(2) (1910) 33 All. 71.

(3) (1911) 35 Mad. 685.

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representative of the deceased may, where the right to sue survives, apply to the Court to have his name entered on the record in place of the deceased plaintiff, and the Court shall thereupon enter his name and proceed with the suit;” and section 366 provided that “If within the time limited by law no such application be made to the Court by any person claiming to be the legal representative of the deceased plaintiff, the Court may pass an order that the suit shall abate.” Section 371 provided that “When a suit abates or is dismissed under this Chapter [XXI], no fresh suit shall be brought on the same cause of action.” Now the time limited by law for an application under section 365 was in 1883 two months. The order for abatement, therefore, was not without jurisdiction.

The contention for the appellants in this appeal is that as Vyankatrao filed the redemption suit, he represented all persons interested in the mortgaged property, and after his suit came to an end, no further suit can be instituted by any one else. In support of that contention reference was made, particularly to the judgment of the Privy Council in *Kishen Parshad v. Har Narain Singh*⁽¹⁾, and a Full Bench decision of the Allahabad High Court in *Hori Lal v. Munman Kunwar*⁽²⁾. With regard to the Privy Council case, we are of opinion that all that was decided was, as stated by Mr. Justice Chamier in his judgment in *Hori Lal v. Munman Kunwar*⁽²⁾, that managing members of a joint family entrusted with the management of a business are competent to enforce at law the ordinary business contracts which they are entitled to make or discharge in their names. We cannot regard it as an authority with regard to redemption suits.

The contemporaneous decision of the same Bench, *Madan Lal v. Kishan Singh*⁽³⁾, indicates that if a

(1) (1911) L. R. 38 I. A. 45.

(2) (1912) 34 All. 549.

(3) (1912) 34 All. 572.

manager sues on a mortgage on behalf of all his co-parceners he should at least purport to sue in a representative capacity as was suggested by West J. in *Gan Savant Bal Savant v. Narayan Dhond Savant*⁽¹⁾. There is no indication here that Vyankatrao's suit was brought in a representative capacity. If not it would certainly be defective as a redemption suit according to all canons of procedure, *e. g.*, Ch. III and V of the Code of 1882, *Gan Savant Bal Savant v. Narayan Dhond Savant*⁽¹⁾, *Padmakar Vinayak Joshi v. Mahadev Krishna Joshi*⁽²⁾ and *Bolton v. Salmon*⁽³⁾. If the suit was defective Vyankatrao's personal right to sue did not embrace the rights of his co-parceners and none of them can be concluded by the application of section 371. In coming to this conclusion we have not overlooked illustration (d) to section 361 of the Code of 1882 which treated the father's right to sue his co-parcener for partition as including the right of suit of his own sons. Whether that illustration was consistent with the principles of Hindu Law or not we need not here inquire, for Vyankatrao at the time of his death had a brother who was also interested in the equity of redemption. Apart from the question raised upon section 371, we think that the two Bombay cases above cited are sufficient authority for the conclusion that since the introduction of the Code of 1877 no legal proceeding by Vyankatrao alone short of actual redemption would deprive his co-parceners of their right to redeem against the mortgagee. The right of a mortgagee to enforce his security by sale in a suit against the person who executes with authority, express or implied, a mortgage of family property, without joining the co-parceners interested results from the authorized mortgage which carries with it the all embracing remedy: see the

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opinion of Pontifex J. quoted by the Judicial Committee in *Doulut Ram v. Mehr Chand*⁽¹⁾. It does not follow that the defeat of one co-owner who desires to redeem will bar the exercise of the same right by another: hence arises the necessity for joining all parties interested in one suit.

It must not be taken from the above remarks that we assent to the view that the provision of the Code which refers to representative suits can properly be applied to suits on behalf of a Hindu family by its manager.

We affirm the decree and dismiss the appeal with costs.

Decree confirmed.

J. G. R.

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Before Mr. Justice Batchelor and Mr. Justice Hayward.

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October 12.

THE ASSISTANT COLLECTOR OF KAIRA (ORIGINAL OPPONENT),
APPELLANT v. VITHALDAS VALLAVADAS AND OTHERS (ORIGINAL
CLAIMANTS), RESPONDENTS.*

*Land Acquisition Act (I of 1894), section 32—Bhagdari and Narvadari
Act (Bom. Act V of 1862), section 3†—Unrecognised sub-division of a
narva holding—Compulsory acquisition.*

⁽¹⁾ (1887) L. R. 14 I. A. 187 at p. 196.

* First Appeals Nos. 182, 183, 184 and 185 of 1912.

† The material portion of section 3 of the Bhagdari and Narvadari Act (Bom. Act V of 1862) runs as follows:—

It shall not be lawful to alienate, assign, mortgage or otherwise charge or incumber any portion of any bhag or share in any bhagdari or narvadari village other than a recognized sub-division of such bhag or share, or to alienate, assign, mortgage or otherwise charge or incumber any homestead, building site (gabhan) or premises appurtenant or appendant to any such bhag or share or recognised sub-division, appurtenant, or appendant thereto, apart or separately from any such bhag or share, or recognised sub-division thereof.