

## APPELLATE CIVIL.

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

LAXMAN NILKANT PUSALKAR (ORIGINAL DEFENDANT), APPELLANT v.  
VINAYAK KESHAV PUSALKAR (ORIGINAL PLAINTIFF), RESPONDENT.\*

1915.

October 18.

*Hindu Law—Decree against one co-parcener—Right to attach and sell the interest of another co-parcener in execution—Declaration, suit for.*

The plaintiff sued for a declaration that the property of the defendant was liable to attachment and sale in execution of a decree obtained by the plaintiff in another suit (to which this defendant was not a party) against the defendant's undivided brother for money borrowed on the defendant's account. The declaration having been granted, the defendant appealed:

*Held*, that where the stage of sale had not been reached there was no reason for assuming jurisdiction to dispose of property belonging to one who was no party to the suit and was not a representative of the judgment-debtor.

SECOND appeal against the decision of M. B. Tyabji, District Judge, Ratnagiri, confirming the decree passed by K. E. Kulkarni, Subordinate Judge at Devrukh.

Suit for declaration.

This action was instituted by the plaintiff for a declaration that the defendant's interest in the plaintiff's property was liable to attachment and sale in execution of the decree obtained in a Small Cause Court suit. The plaintiff contended that the property in suit was the property of his judgment-debtor; the defendant had no interest in it and that the debt for the recovery of which his decree was obtained was binding on the defendant and one for which the property in dispute was liable.

The defendant urged that his interest was not liable to attachment in execution of the decree.

The Subordinate Judge declared that the property was liable for attachment and sale in execution of the

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plaintiff's decree, the defendant having no interest in the same.

On appeal, the District Judge, confirmed the decree.

The defendant preferred a second appeal.

*G. K. Parekh*, for the appellant.

*B. V. Desai*, for the respondent.

SCOTT, C. J. :—This suit is brought by the plaintiff to establish his right to attach and sell the interest of the defendant (amounting to one-fourth of an equity of redemption) in execution of a Small Cause Court decree passed on an instrument of loan signed by the judgment-debtor alone who was a brother and co-parcener of the present defendant. The money is held to have been borrowed for the benefit of all the brothers. The present defendant was not a party to the suit in the Small Cause Court.

The question now to be decided is unembarrassed by the interest of any innocent Court-sale purchaser. It is simply whether the unincumbered interest of a Hindu can be attached and sold in execution to satisfy a money decree obtained against his brother in a suit to which the objector was no party.

It may be conceded that on the findings of the lower Court the present defendant was a principal disclosed or undisclosed of the borrower and the latter as an agent would have an agent's rights of indemnity, but that is not sufficient for the plaintiff. He desires to obtain satisfaction direct from his debtor's brother's property. A similar question was stated but not decided by the Judicial Committee in *Doorga Persad v. Kesho Persad Singh*<sup>(1)</sup>. In Bombay cases where the question has arisen the current of decision has not been uniform.

<sup>(1)</sup> (1882) L. R. 9 I. A. 27 at p. 31.

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Until *Hari Vithal v. Jairam Vithal*<sup>(1)</sup> it was uniformly held in this Court that a sale under a decree against the manager of a Hindu family when that manager was not the father of the other co-sharers only passed the right, title and interest of the party to the suit : see *Maruti Narayan v. Lilachand*<sup>(2)</sup>, *Pandurang Kamti v. Venkatesh Pai*<sup>(3)</sup>, *Lakshman Venkatesh v. Kashinath*<sup>(4)</sup>. In *Hari Vithal v. Jairam*<sup>(1)</sup> however it was stated that : " Though in the Bombay Presidency the course of decisions as regards sales under a decree against a manager has been as stated in the case of *Lakshman Venkatesh v. Kashinath*<sup>(4)</sup>, still the right of a manager to bind the estate by transactions for its benefit is well established. That being so, the decision of the Judicial Committee in *Doulut Ram's case*<sup>(5)</sup> must now be held to govern cases, such as the present, where family property has been sold in execution of a decree against a manager alone. It practically overrules the decision in *Lakshman Venkatesh v. Kashinath*<sup>(4)</sup> and the preceding decisions there referred to." *Doulut Ram's case*<sup>(5)</sup> related solely to mortgaged property and it does not appear to me to affect in any way the authority of *Lakshman Venkatesh v. Kashinath*<sup>(4)</sup> and kindred cases. In a later case however, *Sakharam v. Devji*<sup>(6)</sup>, the view taken in *Hari Vithal v. Jairam Vithal*<sup>(1)</sup> was adopted and re-enforced by a reference to *Sheo Pershad Singh v. Saheb Lal*<sup>(7)</sup>, again a case of mortgage or as it is called in the report "pledge."

*Hari Vithal v. Jairam Vithal*<sup>(1)</sup> and *Sakharam v. Devji*<sup>(6)</sup> have not been accepted without demur : see *Madhusudan v. Bhau.*<sup>(8)</sup>

(1) (1890) 14 Bom. 597.

(5) (1887) L. R. 14 J. A. 187.

(2) (1882) 6 Bom. 564.

(6) (1898) 23 Bom. 372.

(3) (1879) 7 Bom. 95, note.

(7) (1892) 20 Cal. 453.

(4) (1886) 11 Bom. 700.

(8) S. A. 443 of 1911 (Unrep).

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In *Khiarajmal v. Daim* <sup>(1)</sup> the Judicial Committee observed that the Court has no jurisdiction to sell the property of persons not parties to the proceedings or properly represented on the record although judicial sales are not disturbed on the ground that some members of the family who were minors were not parties if it appears that there was a debt justly due from a deceased member of the family and no prejudice is shown to the absent minors.

This must now be taken subject to section 53 of the Civil Procedure Code. In the present case the stage of sale has not been reached and there is no reason for assuming jurisdiction to dispose of property belonging to one who was no party to the suit and is not a representative of the judgment-debtor.

I would reverse the decree and dismiss the suit with costs throughout.

SHAH, J.:—I concur. I desire to add that I express no opinion as to the correctness of the view taken in *Hari Vithal v. Jairam Vithal* <sup>(2)</sup> that *Doubut Ram's case* <sup>(3)</sup> has the effect of overruling the earlier decisions of this Court in *Maruti Narayan v. Lilachand* <sup>(4)</sup> and *Lakshman Venkatesh v. Kashinath* <sup>(5)</sup>. The point does not arise in this case, and when it arises it will require to be carefully considered in view of the doubt expressed in *Madhusudan v. Bhau* <sup>(6)</sup>.

*Decree reversed.*

J. G. R.

<sup>(1)</sup> (1904) 32 Cal. 296 ; L. R. 32 I. A. 23.

<sup>(2)</sup> (1890) 14 Bom. 597.

<sup>(3)</sup> (1887) L. R. 14 I. A. 187.

<sup>(4)</sup> (1882) 6 Bom. 564.

<sup>(5)</sup> (1886) 11 Bom. 700.

<sup>(6)</sup> S. A. 443 of 1911 (Unrep).