APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Hayward.

1918.

August 28.

BHAGIRTHIBAI KOM MAHADEV ABHYANKAR (ORIGINAL PLAINTIFF), APPELLANT *v.* ROSHANBI KOM MAHOMED HANIF AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*; AND MIRKHA WALAD IMAM-KHA (ORIGINAL DEFENDANT No. 2), APPELLANT *v.* BHAGIRTHIBAI KOM MAHADEV ABHYANKAR (ORIGINAL PLAINTIFF), RESPONDENT†.

Decree—Execution—Mahomedan family—Decree for debts of a decea sed Mahomedan against the heir in possession—Other heir not a party to the suit, whether bound by the decree—Representation.

A Mahomedan died leaving as his heirs a son M, two widows S and B and three daughters. He bequeathed all his property to M. On M's death the property was inherited by his heirs, a daughter A and his widow R, who remained in possession of the property. A money decree was obtained against the estate of M in a suit by a creditor in which the defendants were R, S and an illegitimate son of M. A was not made a party to the suit. In execution of the decree, M's right, title and interest in house No. 371 was sold, and purchased by defendant No. 4. Subsequently A having died, her interest in the property was conveyed by her heir to the plaintiff who sued to recover by partition A's share in house No. 371.

Held, that the plaintiff was entitled to succeed as A's share in the house was not bound by the creditor's decree as she was not made a defendant in the suit and her interest could not be represented by R.

Davalava v. *Bhimaji Dhondo*(1), discussed.

FIRST appeal against the decision of V. G. Kaduskar, Additional First Class Subordinate Judge of Poona, in Suit No. 344 of 1911.

Suit to recover possession of property.

The property in suit consisting of five houses Nos. 130, 371, 527, 529 and 551 belonged to one Maniaba. He died in 1889 leaving as his heirs two widows, Sakinabi and Bibiabi, a son named Mahomed Hanif and three daughters. By his will, dated the 20th November, 1875, Maniaba left the property in suit to his son Mahomed Hanif.

* First Appeal No. 43 of 1917. † First Appeal No. 113 of 1917.

(1) (1895) 20 Bom. 338.

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Mahomed Hanif remained in possession of the property till his death in 1900. His heirs were his widow Roshanbi, and a daughter Aminabi, by his predeceased wife Lalbibi. He had also a son named Abdul Rahiman who was afterwards held to be illegitimate. The possession of the property remained with Roshanbi.

In 1902, Bibiabi died and her share went to her granddaughter Aminabi. In the same year, one Hayatbi, a creditor of the deceased Mahomed Hanif, brought a suit (No. 1081 of 1902) for the recovery of Rs. 750 from the estate of Mahomed, against four persons (1) Roshanbi, (2) Sakinabi, (3) Aminabi and (4) Abdul Rahiman. In this suit the claim against Aminabi was abandoned and it was withdrawn with liberty to file a fresh suit.

In 1903, Hayatbi filed a fresh suit No. 607 of 1903 against three persons, Roshanbi, Sakinabi and Abdul Rahiman. Aminabi was not made a party to this suit. It was decreed in favour of the plaintiff for Rs. 327 to be recovered out of the estate of the deceased Mahomed Hanif. In execution of the decree, house No. 371 was purchased by defendant No. 4 at the Court sale.

In 1907, Aminabi died and her share in the property in suit was inherited by her maternal uncle Ahmed Manaji.

In 1908, the plaintiff obtained an award decree against Ahmed Manaji in execution of which the right, title and interest of Aminabi in the property which had devolved upon Ahmed, was purchased by the plaintiff. The plaintiff was obstructed in getting possession of the property by defendants Nos. 1 to 4, and hence the suit.

Defendant No. 1, Roshanbi, contended *inter alia* that Ahmed Manaji was not the heir of the deceased Aminabi; that the plaintiff's transactions with Ahmed

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were collusive, fraudulent and void; and that she was not bound by them.

Defendants Nos. 2 and 3 were the mortgagees of Sakinabi's interest in houses Nos. 529 and 527 respectively. They supported defendant No. 1.

Defendant No. 4 contended that he was the Court purchaser of house No. 371 in execution of the decree against defendant No. 1 and, as she was in possession of the entire property, the decree passed against her was binding on all the heirs of the deceased Mahomed and they were bound by the sale.

The Subordinate Judge found that the plaintiff was entitled to the share of the deceased Aminabi in the property in suit excluding her share in house No. 371 in the possession of defendant No. 4. According to him Roshanbi, being in possession of the entire estate, sufficiently represented Aminabi's interest in the property in suit No. 607 of 1903 and therefore the plaintiff was bound by the Court-sale of house No. 371 in execution of the decree in the said suit. He favoured the view expressed in Calcutta and Bombay rulings: see *Muttyjan* v. *Ahmed Ally*[1]; *Amir Dulhin* v. *Baij Nath Singh*[2]; *Davalava* v. *Bhimaji Dhondo*[3]. The order as to costs was "Plaintiff's costs are allowed. Plaintiff to pay costs of defendant No. 4."

The plaintiff preferred an appeal No. 113 of 1913 to the High Court.

Defendant No. 1 put in cross-objections and defendant No. 2 filed an appeal No. 43 of 1917 for costs.

G. S. Rao, for the appellant:—I submit that as Aminabi was not a party to the suit No. 607 of 1903 her interest did not pass to the auction purchaser. The

(1) (1882) 8 Cal. 370.
(2) (1894) 21 Cal. 311.
(3) (1895) 20 Bom. 338.

view of the lower Court that as Roshanbi was in possession of the entire estate she represented the estate and her daughter Aminabi though not a party was bound by the decree is based upon the Calcutta rulings in *Assamathem Nessa Bibee* v. *Roy Lutchmeeput Singh*[1]; *Muttyjan* v. *Ahmed Ally*[2] and the ruling of our High Court in *Davalava* v. *Bhimaji Dhondo*[3].

According to my contention the view taken in these cases is not correct. The proper view is that laid down in the Full Bench case of the Allahabad High Court in *Jafri Begam* v. *Amir Muhammad Khan*[4]. When a Mahomedan dies his estate devolves on different heirs who take it as tenants-in-common each one of whom is an independent owner of his own share. One of the heirs cannot be represented by others; thus a decree against one heir cannot bind the other heir who is not a party to the suit. The principle of representation by which a manager represents the whole joint family of Hindus cannot be made applicable to the case of Mahomedans. In *Jairam Bajabashet* v. *Joma Kondia*[5], which was a case of Hindus, the minor sons of the deceased were not allowed to dispute the sale of the family property under a decree against the elder son for a debt of the deceased; but this principle was extended in a later case of *Khurshetbibi* v. *Keso Vinayek*[6] to the heir of a deceased Mahomedan. There the daughter was held bound by a sale under a decree against the son of the deceased Mahomedan. This case, I submit, cannot be regarded as a binding authority as no reasons are given for extending the rule of the joint family of Hindus to the heirs of a deceased Mahomedan; and moreover it was not followed in a still later case of *Ambashankar* v. *Sayad Ali Rasul*[7].

(1) (1878) 4 Cal. 142.
(2) (1882) 8 Cal. 370.
(3) (1895) 20 Bom. 338.
(4) (1885) 7 All. 822.
(5) (1886) 11 Bom. 361.
(6) (1887) 12 Bom. 101.
(7) (1894) 19 Bom. 273.

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It was, however, relied on in the case of *Davalava* v. *Bhimaji*[1]. I submit that *Davalava's case*[1] was not correctly decided and is not a binding authority. There Ranade J. applied the rules of representation founded on the peculiar nature of the joint family of Hindus to the heirs of a deceased Mahomedan, and further relied on a theory of universal succession explained by Markby J. in *Assamathem Nessa Bibee* v. *Roy Lutchmeeput Singh*[2]. This theory was not accepted by the Full Bench of the Allahabad High Court in *Jafri Begam's case*[3]. Ranade J. also relied on the authority of *Khurshetbibi* v. *Keso*[4]. Jardine J. merely based his judgment on the authority of *Khurshetbibi's case*[4]. These two learned Judges were not unanimous in their reasons for the decision which circumstance greatly detracts from the case as a binding authority.

The Madras High Court following *Davalava's case*[1] decided in *Pethummabi* v. *Vittil Ummachabi*[5] that if one heir of a deceased Mahomedan be in possession of the entire estate then that heir can transfer even by a voluntary sale the shares of the other heirs to pay the debts of the deceased. This view of the Madras High Court, is not, however, followed in the later Full Bench case of that Court: see *Abdul Majeeth* v. *Krishnamachariar*[6].

According to the Calcutta High Court, in the earlier cases of *Hendry* v. *Mutty Lall Dhur*[7] and *Assamathem Nessa Bibee* v. *Roy Lutchmeeput Singh*[2] it was held that a decree against one heir would not bind the other heirs not parties to the suit. In the case of *Muttyjan* v. *Ahmed Ally*[8], Morris J. treated a creditor's suit against

(1) (1895) 20 Bom. 338.
(2) (1878) 4 Cal. 142.
(3) (1885) 7 All. 822,
(4) (1887) 12 Bom. 101,
(5) (1902) 26 Mad. 734 at p. 738.
(6) (1916) 40 Mad. 243.
(7) (1877) 2 Cal. 395.
(8) (1882) 8 Cal. 370,

the heir in possession of a deceased Mahomedan as in the nature of an administration suit and held that those heirs of the deceased who had not been made parties could not recover anything but what remained after the debts of the testator had been paid. I submit a creditor's suit is not in the nature of an administration suit, unless the suit is in form and substance an administration suit. Moreover in an administration suit all the heirs would be necessary parties: see form No. 41 in Appendix A and No. 17 (13) in Appendix D of Schedule I of the Civil Procedure Code of 1908. In the present case all the heirs were not parties to the creditor's suit nor was the suit in form an administration suit. The view as to the creditor's suit taken by the Calcutta High Court was expressly dissented from by Mahmood J. in *Jafri Begam's case*[1] though subsequently reasserted in Calcutta in *Amir Dulhin* v. *Baji Nath*[2]. I submit that the view taken by Mahmood J. is the correct one as according to him upon the death of a Mahomedan, the inheritance vests immediately in his heirs, and is not suspended by reason of debts being due from the estate of the deceased, and the personal liability of the individual heirs is something different from the liability of the estate. Hence the shares of those heirs who are not parties to a suit are not bound under a decree obtained by a creditor against one heir in possession of the estate.

J. R. Gharpure, for respondent No. 4:—I submit that Roshanbi and Sakinabi who were in possession of the estate of the deceased Mainaba were made parties to the suit No. 607 of 1903 and under the rulings of our High Court in *Khurshetbibi* v. *Keso Vinayek*[3] and *Davalava* v. *Bhimaji Dhondo*,[4] the suit brought against them was a good suit, and it precluded other heirs from

(1) (1885) 7 All. 822.
(2) (1894) 21 Cal. 311 at p. 315.
(3) (1887) 12 Bom. 101.
(4) (1895) 20 Bom. 338.

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disputing the correctness of the decree. Whether the case arises under Hindu law or Mahomedan law the moment it migrates into the sphere of the law of procedure the fine line of distinction regarding the rule of representation by a manager of a joint Hindu family, which is peculiar only to Hindus, disappears. The test is whether the interest of the heir not on record is sufficiently represented in law and if that is so he is estopped from contending that he was not bound by the decree. This was the test applied by Markby J. in *Assamathem Nessa Bibee's case*[1] and following that case it was held by Ranade J. in *Davalava's case*[2] that an heir in possession could represent the other heirs of a deceased Mahomedan in a suit by a creditor. There is no foundation for the contention that the rule of representation as laid down in that case is not applicable to Mahomedans. Under Mahomedan law the obligation to pay the debts of a deceased Mahomedan is stricter than under Hindu law and therefore a creditor can proceed against one heir in possession and a decree passed against him will bind the interests of the other heirs as well.

Secondly, I submit that the suit against Roshanbi and Sakinabi was in the nature of an administration suit or it had the same legal effect which an administration suit possesses. It was, therefore, binding on all the heirs who took shares in the estate of the deceased Mainaba and thus the interest of Aminabi passed to my client: see *Muttyjan* v. *Ahmed Ally*[3]; *Amir Dulhin* v. *Baij Nath Singh*[4]; and *Bai Meherbai* v. *Maganchand*[5]. It is true that this theory was not accepted by Mahmood J. in *Jafri Begam* v. *Amir Muhammad Khan*[6], but his judgment would not be entitled to any weight

(1) (1878) 4 Cal. 142.
(2) (1895) 20 Bom. 338.
(3) (1882) 8 Cal. 370.
(4) (1894) 21 Cal. 311.
(5) (1904) 29 Bom. 96.
(6) (1885) 7 All. 822.

as being that of a single Judge. The other Judges in that case do not share Mahmood J.'s view. Moreover our High Court was also inclined to favour the theory in *Davalava's case*[1].

Lastly, I submit that my client, as a *bona fide* purchaser at a Court-sale was not bound to inquire into the validity of the decree or into the procedure followed in effecting the sale. There were no irregularities in the proceedings and the order passed in execution not having been set aside under Article 11 of the Indian Limitation Act within one year from the date it was passed, the plaintiff's suit is barred: see *Malkarjun* v. *Narhari*[2] and *Rewa Mahton* v. *Ram Kishen Singh*[3].

Rao, in reply:—Our High Court does not lay down that there is a right of representation under the Mahomedan law: see *Isap Ahmed* v. *Abhramji Ahmadji*[4]. Ranade J.'s judgment in *Davalava's case*[1] was based on the analogy of Hindu law and upon universal succession. That analogy will not apply to Mahomedans as the constitution of a Mahomedan family is essentially different from that of a Hindu family. Ranade J. does not accept the reasoning of the Calcutta High Court that the suit of the creditor is in the nature of an administration suit.

The case of *Malkarjun* v. *Narhari*[2] is not applicable to the facts of the present case. There the decree passed was held to be a good one and execution could proceed against the judgment-debtor's estate. Here there was no decree against Aminabi as she was not a party to the suit and was not bound by any subsequent proceedings taken under the decree in that suit.

B. K. Mehendale, for respondent No. 1.

(1) (1895) 20 Bom. 338.
(2) (1900) 25 Bom. 337.
(3) (1886) 14 Cal. 18 at p. 25.
(4) (1917) 41 Bom. 588.

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B. G. Kher, for respondent No. 2 and for appellant in appeal No. 43 of 1917.

J. G. Rele, for respondent No. 3.

V. B. Patwardhan, for respondent in appeal No. 43 of 1917.

C. A. V.

HEATON, J.:—The facts which we have had to master in the consideration of these appeals are complicated, but for the purpose of Appeal No. 113 of 1917 they may be simply stated. A Mahomedan named Maniaba died possessed of five houses, leaving as his heirs a son, two widows and three daughters. The son Mahomed Hanif died afterwards, leaving as his heirs a daughter Aminabi, his widow Roshanbi and a son who was afterwards held to be illegitimate and not to be an heir. A money decree was obtained against the estate of Mahomed Hanif in a suit by a creditor in which the defendants were that deceased person's widow Roshanbi, his step-mother Sakinabi and the son Abdul. His daughter Aminabi who was really his principal heir was not made a party to the suit. Thereafter one of the five houses known as No. 371 was sold in execution of the decree and bought by defendant No. 4. What was sold was the right, title and interest of Mahomed Hanif deceased. The plaintiff has become, by processes which it is immaterial at present to set out, the owner of whatever interest Aminabi had in this house. She sued *inter alia* to recover by partition Aminabi's share and her claim in this particular was rejected. She now appeals to us.

She claims that Aminabi's interest in the house was not bound by the decree obtained by the creditor, because Aminabi was not made a defendant in the creditor's suit and that consequently her interest in the

house did not pass to the auction-purchaser, defendant No. 4. The latter contends, firstly, that Aminabi's share in the house could be sold under the decree, for the decree was against the estate of her deceased father from whom she inherited her interest in the house; and, secondly, in any event, that Aminabi's interest in the house passed at the sale; for what was sold and what was paid for was the father's interest. If the decree was such that Aminabi's interest could be sold under it, then undoubtedly that interest was sold, for it was included in the father's interest the whole of which was sold.

If her interest in the house was not bound by the decree, nevertheless, as it was in fact sold, it is contended that it would pass to the purchaser, defendant No. 4. This contention, however, we think, has nothing substantial to support it. There cannot be a valid sale under a decree unless the property sold can properly be sold under the decree.

Let us consider the real question; whether the creditor's decree would bind the interest of Aminabi who was not made a defendant. If we consider this question in a purely general way ignoring all questions of Hindu or of Mahomedan law, the answer must, I think, be that the decree would not bind Aminabi's interest. She was just as much concerned in the matter as the other defendants, in fact more so, for her share in the property was larger. She could not be bound by the decree unless she was in some way properly represented and as a fact she was not represented. She was indeed definitely and explicitly excluded. For the creditor had brought an earlier suit to which Aminabi was a defendant, but the claim as against her was dropped, though against the others and as to them only it was withdrawn with leave to bring another suit

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But even if this had not happened, the decree would not be operative against Aminabi's interest. It could not be if she was not represented; and she would not be represented in such a suit to which she was not a party, apart from the peculiarities of Hindu or Mahomedan law; except on the somewhat curious theory that a creditor's suit, such as this, is in effect an administration suit by a creditor. I do not think it is, although there are Calcutta decisions favouring this view: *Muttyjan* v. *Ahmed Ally*[1] followed in *Amir Dulhin* v. *Baij Nath Singh*[2]. It seems to me to be a mistake in terms to call a suit by a creditor to establish a single debt against the estate of a deceased person, a creditor's administration suit. Neither the proceedings nor the decree were appropriate to an administration suit. There was a difference in substance as well as in form. Chandavarkar J. saw a great difference between such suits as will appear from the observations at the end of his judgment in *Bai Meherbai* v. *Maganchand*[3].

It may at first sight appear that the law is unreasonable, if it will not allow a creditor to establish a debt against the estate of a deceased debtor without making all the heirs defendants; for some or most of the heirs may be in distant countries and it may be impossible to obtain a decree within a reasonable time if all are to be made parties. But this view of the law is, I am glad to think, fallacious. The creditor can compel one of the heirs on the spot to take out Letters of Administration or failing that can take out such Letters himself, a proceeding which can be accomplished within a reasonable time although many of the heirs may be living in distant parts of the world. But if a creditor ignores the Probate and Administration Act

(1) (1882) 8 Cal. 370. (2) (1894) 21 Cal. 311.

(3) (1904) 29 Bom. 96.

and elects to bring an ordinary suit, he must be content with the law applicable to ordinary suits. That is both just and reasonable in my opinion.

Does the fact that the deceased debtor was a Mahomedan make any difference? There cannot of course be any appeal to Hindu law in this case, for we are concerned only with the ordinary law or with the Mahomedan law. The point is fully and clearly dealt with in paragraph 161 of Sir Roland Wilson's Digest of Anglo Mahomedan Law, 3rd Edition and in paragraphs 566 and 567 of F. B. Tyabji's Principles of Mahomedan Law.

I shall unhesitatingly accept Sir Roland Wilson's conclusions and follow the Allahabad decisions if it be open to us to do. But is it open to us? Are we not bound by the Bombay decisions referred to in Sir Roland Wilson's discussion of the law?

The two Bombay cases referred to by Sir Roland Wilson are *Khurshetbibi* v. *Keso Vinayek*[1] and *Davalava* v. *Bhimaji Dhondo*[2]. The former judgment in its reasoning deals exclusively with the sale, not with the decree, it does not pronounce whether the decree would bind an heir who was not made a defendant; it finds that the auction-purchaser bought a certain interest in property and was therefore entitled to that interest. In the second case the decision was to the same effect; there had been a sale under a decree and the matter decided was rather what the auction-purchaser had bought, than what was the effect of the decree. But in any event the later case is no authority; not only because the point decided is the effect of the sale, not of the decree, but also because the reasons given by the two Judges are different. Jardine J. seems to have had

(1) (1887) 12 Bom. 101.

(2) (1895) 20 Bom. 338.

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doubts as to applying to Mahomedans a rule evolved from Hindu law and he contented himself with relying on and following the case of *Khurshetbibi* v. *Keso Vinayek*[1]. We are, therefore, thrown back on that case as the one which stands in the way of giving effect to what we believe to be the law.

Broadly speaking only the parties to a suit are bound by a decree and consequently only their property can be sold under the decree. But to this general rule there is an apparent exception in the case of Hindus. It has become by now well established that the whole of a Hindu family property is in certain circumstances liable to be sold in execution of a decree to which all the sharers are not parties. This is an exception to the general law and appears to be based on some principle of representation which is evolved from a consideration of the law applicable to joint Hindu families. This exception is neither stated nor explained in the case of *Khurshetbibi* v. *Keso Vinayek*[1], it is simply assumed; so we have to look elsewhere for the explanation. We need not go very far. In the case of *Akoba Dada* v. *Sakharam*[2] Sir Charles Sargent, the same learned Judge who gave judgment in *Khurshetbibi's case*[1] said as follows:—

"These cases doubtless establish that when the minor son is substantially before the Court, and the proceedings show a clear intention on the part of the Court making the decree to bind the entire estate which is subject to the debt, no mere technical or formal objection will be allowed to prevail against giving full effect to the decree."

Again in the case of *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh*[3], the Judges of the Privy Council observed :—

"Their Lordships have therefore come to the conclusion that although there may have been some irregularity in drawing up these decrees, they are

(1) (1887) 12 Bom. 101. (2) (1885) 9 Bom. 429 at p. 431.
(3) (1879) L. R. 6 I. A. 233 at p. 237.

substantially decrees in respect of a joint debt of the family and against the representative of the family."

Then in the case of *Ishan Chunder Mitter* v. *Buksh Ali Soudagur*[1], the earliest of all the cases, the liability of a Hindu under a decree to which he was not a party, is illustrated by the analogy of a suit against an executor. Underlying all these cases is the idea of substantial representation and the idea arises out of the peculiarities of the Hindu joint family where the property is family property, not individual property; and where the representation is to be of the family not of individuals. It is clearly essential, therefore, in these cases to ascertain first of all whether the person, whose property is sold under a decree but who was not a party to the decree, was substantially represented in the suit. In this case we know that Aminabi was not substantially represented; she was specifically excluded. That consideration alone would, in this case, demand that the appeal be allowed and that it be held that Aminabi's share in the house could not and did not pass by the sale. But many hours of our time have been spent on the question whether the exception to the general law, which we are considering, applies to Mahomedans as well as to Hindus. Why should it? No reason whatever is given in *Khurshetbibi's case*[2] and none that appeals to us in Mr. Justice Ranade's judgment in *Davalava's case*[3]. Indeed there is apparently no Bombay case in which the matter is discussed, except in *Davalava's case*[3] and in that case Jardine J. does not say a word on the point and Ranade J. gives reasons which, as I have said, do not appeal to us.

The truth seems to be that a rule derived from Hindu law was applied to Mahomedans without the reasons being stated. Quite recently a Full Bench of this

(1) (1863) 1 Mar. Rep. 614. (2) (1887)12 Bom. 101.
(3) (1895) 20 Bom. 338.

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Court sat to consider a very remarkable instance of this practice of applying Hindu law to Mahomedans. My learned brother and myself have considered the matter most carefully and have come to the conclusion that it would not be incumbent on us to follow the case of *Khurshetbibi* v. *Keso Vinayek*[1] if that case be held to affirm that the theory of substantial representation derived from the Hindu law applies to Mahomedans. For, to follow that case, if it so decides, would be to accept, without any stated reason for doing so, the application to Mahomedans of a rule evolved out of Hindu law; and to do this would, we think, be to set aside the principle underlying the decision of the Full Bench of this Court in *Isap Ahmed* v. *Abhramji Ahmadji*[2].

The plaintiff sued for mesne profits from the date of suit and should have such profits which must be determined in execution.

We have heard the cross-objections of defendant No. 1 and find there is no substance in them. We dismiss them with costs.

We allow the appeal No. 113 of 1917 with costs against defendant No. 4. The decree will have to be modified so as to allow plaintiff to obtain on partition Aminabi's share in house No. 371 and to award plaintiff mesne profits from date of suit in respect of that share from defendant No. 4.

In appeal No. 43 of 1917 the defendant No. 2 is the appellant. He has a mortgage from Sakinabi, one of the widows of Maniaba and the step-mother of Mahomed Hanif. This mortgage deed has not been put in evidence but it appears that defendant No. 2 is in possession of the ground floor of house No. 529 and he

(1) (1887) 12 Bom. 101. (2) (1917) 41 Bom. 588.

desires that directions should be given that in making the partition, the ground floor of house No. 529 should, if possible be allowed to Sakinabi's share. The desire is natural, but the request is one to be presented and considered when the partition comes to be made. Only the person, who makes the partition, knowing the value of the total estate and the value of each house separately and also knowing something of the convenience and wishes of the sharers, can make an equitable and fair partition. The matter is not one for us to pronounce on in appeal, for it has not yet been dealt with by the appropriate authority. But we think defendant No. 2 should not be made liable for plaintiff's costs; that would be most unfair. The decree of the lower Court must be modified by providing that defendant No. 2 is to pay only his own costs. We make no order as to costs in this appeal.

HAYWARD, J.:—The plaintiff sued as purchaser to recover possession by partition of Aminabi's share in house No. 371 in Poona City, being part of the estate of Aminabi's deceased father Mahomed Hanif. The defendant No. 4 resisted the suit as the purchaser of the whole house at a Court-sale of the estate of the deceased Mahomed Hanif.

It was not disputed that Aminabi was not personally represented in the litigation leading to the Court-sale, but it was contended that her share was bound, as it was in the possession of Roshanbi and was sufficiently represented in the litigation by Roshanbi, the widow of the deceased Mahomed Hanif. This contention was upheld on the strength of the decision in the case of *Davalava* v. *Bhimaji Dhondo*[1] by the trial Court. The substantial questions for determination on this first appeal are whether that decision ought to be regarded as binding and, if not, whether it was right. It seems

(1) (1895) 20 Bom. 338.

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to me that it ought not to be regarded as binding, as the two learned Judges did not agree on the *ratio decidendi*, which is alone binding according to the authorities underlying paragraph 535 of Vol. XVIII of Halsbury's Laws of England; and, with all deference, that it was wrong in that it applied without justification a rule founded on the peculiar nature of the joint family of Hindus to the heirs of a deceased Mahomedan.

It was held by Sir Barnes Peacock in the case of *Ishan Chunder Mitter* v. *Buksh Ali Soudagur*[1] that a Court-sale was binding on the minor son of a Hindu, based upon a decree obtained against the widow as representing the estate of the deceased Hindu. This was approved by the Privy Council in the case of *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh*[2] and it was said that it was necessary to look to the substance of the proceedings in Court-sales relating to the estates of deceased Hindus. This principle of representation was subsequently applied by their Lordships in the case of *Doulut Ram* v. *Mehr Chand*[3] to the transactions of the managing members of joint families of Hindus and it has been regarded ever since as a settled rule govering the joint families of Hindus, as would appear from paragraphs 320 and 333 at pages 425 and 443 of the 8th Edition of Mayne's Hindu Law. It was acted upon by Sir Charles Sargent in the case of *Jairam Bajabashet* v. *Joma Kondia*[4], where the minor sons of a deceased Hindu were not allowed to dispute the sale of the family property under a decree against the elder son for a debt of the deceased Hindu, and it was extended by the same learned Judge in the case of *Khurshetbibi* v. *Keso Vinayek*[5] to the heir of a deceased Mahomedan. There the daughter was held

(1) (1863) 1 Mar. Rep. 614.
(2) (1879) L. R. 6 I. A. 233.
(3) (1887) L. R. 14 I. A. 187.
(4) (1886) 11 Bom. 361.
(5) (1887) 12 Bom. 101.

bound by a sale under a decree against the son of the deceased Mahomedan. This could not be regarded as a binding authority, as no reasons were given for extending the rule of the joint family of Hindus to the heirs of deceased Mahomedans. No reference was made to the rules of Mahomedan law nor to the provisions of Regulation IV of 1827 requiring Mahomedan law to be applied to Mahomedans in default of Acts of the Legislature. It was moreover not applied by the same learned Judge several years later to the case of *Ambashankar Harprasad* v. *Sayad Ali Rasul*[1]. It was, however, relied on again, without reasons being stated, by Jardine J. in the case under immediate consideration, namely, *Davalava* v. *Bhimaji Dhondo*[2]. Ranade J. on the other hand dealt in detail with the matter but his reasons, though entitled to respect, could not be regarded as binding in default of the approval of the 2nd Judge. He discussed at length the rule governing the joint families of Hindus and then proceeded (p. 345) to state that there was no foundation for the contention that the rule was based on the peculiar constitution of a Hindu joint family and that the analogy did not hold good in the case of Mahomedans. His authority for this somewhat startling statement was an *obiter dictum* in the case of *Hukeem Bibee* v. *Khoja Gowhur Ali* (cited in *Assamathem Nessa Bibee* v. *Roy Lutchmeeput Singh*[3]) and the extension of the rule without express reasons in the case already mentioned of *Khurshetbibi* v. *Keso Vinayek*[4]. He stated further that the creditor could seek his relief against one of several heirs in a case where all the effects might be in the hands of that heir, as the succession was of the kind known as universal and any one of the heirs of a

(1) (1894) 19 Bom. 273.
(2) (1895) 20 Bom. 338 at p. 346.
(3) (1878) 4 Cal. 142 at p. 164.
(4) (1887) 12 Bom. 101.

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deceased person stood as litigant on behalf of all the others. He relied for this statement on the dissentient judgment of Markby J. in the Full Bench case of *Assamathem Nessa Bibee* v. *Roy Lutchmeeput Singh*[1]. Markby J. there held that the heirs in possession merely *represented* the estate, which devolved upon them with all its rights and liabilities by universal succession, and that the estate did not *vest* in all the heirs immediately as owners (pp. 157 to 159), relying on the rules of procedure contained in the Hedaya for the disposal of the estate of a deceased Madomedan. But this view was not adopted by the majority of the Judges of the Full Bench and it was expressly dissented from by Mahmood J. as being based upon mere rules of procedure superseded by the Civil Procedure Code in his exhaustive judgment in the later case of *Jafri Begam* v. *Amir Muhammad Khan*[2] before the Full Bench of the Allahabad High Court; and the results of the investigation of Mahmood J. were accepted in the case of *Amir Dulhin* v. *Baij Nath Singh*[3] by a subsequent Bench of the Calcutta High Court. There would appear, therefore, to have been but slender foundations in the authorities to support the proposition put forward by Ranade J. in the case under immediate consideration, namely, *Davalava* v. *Bhimaji Dhondo*[4], that the particular rule governing the transactions of managing members of joint families of Hindus, ought to be extended by analogy to the case of Mahomedans. It was again expressly denied that such extension was permissible in the later case of *Pathummabi* v. *Vittil Ummachabi*[5] before the Madras High Court, though it was said (p. 738) on the authority of *Davalava* v. *Bhimaji Dhondo*[4] that the creditors could seek relief

(1) (1878) 4 Cal. 142 at p. 164.
(2) (1885) 7 All. 822.
(3) (1894) 21 Cal. 311 at p. 316.
(4) (1895) 20 Bom. 338.
(5) (1902) 26 Mad. 734.

against the heirs in possession of the whole estate under the Mahomedan law. But this later dictum also was shown to be untenable in the judgment of Abdur Rahim J. in the subsequent case of *Abdul Mujeeth* v. *Krishnamachariar*[1] before the Full Bench of the Madras High Court. It seems to me, therefore, with all deference that the proposition propounded by Ranade J. extending the rule of representation governing the joint families of Hindus to the heirs of deceased Mahomedans ought, upon the authorities, to be rejected, as directly contrary to the spirit of the provisions of Regulation IV of 1827; and that the rules of the Hedaya providing for the representation by the heirs in possession of the estate of a deceased Mahomedan ought to be disregarded, as mere rules of procedure superseded by the Civil Procedure Code, as pointed out by Mahmood J., in *Jafri Begam* v. *Amir Muhammad Khan*[2] before the Full Bench of the Allahabad High Court and approved in the case of *Amir Dulhin* v. *Baij Nath Singh*[3] by the Calcutta High Court and in the judgment of Abdur Rahim J. in the case of *Abdul Majeeth* v. *Krishnamachariar*[1] before the Full Bench of the Madras High Court.

It remains only to notice an alternative theory adopted in the case of *Muttyjan* v. *Ahmed Ally*[4] by the Calcutta High Court, that creditors' suits against the heirs in possession should be regarded as administration suits binding on all the heirs of a deceased Mahomedan. It was considered and rejected by Mahmood J., in the case of *Jafri Begum* v. *Amir Muhommad Khan*[2], before the Allahabad High Court but was re-asserted in the case of *Amir Dulhin* v. *Baij Nath Singh*[3] by a subsequent Bench of the Calcutta

(1) (1916) 40 Mad. 243 at pp. 255, 257.
(2) (1885) 7 All. 822.
(3) (1894) 21 Cal. 311 at p. 316.
(4) (1882) 8 Cal. 370.

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High Court. It seems to me, with all deference, that mere creditors' suits would be altogether different as pointed out by Mahmood J. They would be solely on behalf of those particular creditors and not on behalf of all creditors as contemplated by the form of plaint No. 41 in Appendix A, and by the form of preliminary decree requiring public notice to all interested, No. 17 (13) in Appendix D, of Schedule I of the Civil Procedure Code. Nor would they result in the satisfaction of all persons interested and in the final distribution of the estates as provided in the form of final decree No. 18 in Appendix D and in Order XX, Rule 13 of the First Schedule of the Civil Procedure Code. It seems to me moreover that there would be no necessity for regarding them as any thing but what they really would be or for adopting the admittedly inexact analogy of administration suits; for there would be nothing to prevent their being brought, if desired, in the proper form and ample remedy for any practical inconvenience has already been provided in sections 23 and 69 of the Probate and Administration Act, 1881, by the Legislature. The defendant No. 4 ought not, therefore, in my opinion, to be permitted to succeed either on this ground. He would not be entitled to succeed on the special rule as to representation by managers of joint families of Hindus as already shown and, as it seems to me, further indicated by the remarks of their Lordships in the case of *Khiarajmal* v. *Daim*[1] before the Privy Council. Nor would he be entitled, as already shown, to appeal to any similar rule of representation under the Mahomedan law in order to escape the general rule there applied (p. 312) that the property of parties not properly represented on the record could not validly be sold by the Court. The discussion by their Lordships of the

[1] (1904) 32 Cal. 296 at p. 314.

supposed powers of *de facto* guardians in the most recent case of *Imambandi* v. *Mutsaddi* supports, it seems to me, the view that no such rule of representation could be pleaded under Mahomedan law in aid of an invalid sale by the Court. This case would appear not yet to have been reported. It was only decided on the 28th February, 1918, by the Privy Council(2).

This appeal ought, therefore, in my opinion, to be allowed. The cross-objections of respondent No. 1 ought to be dismissed with costs. The appeal of respondent No. 2 ought to be dismissed with costs. Possession by partition of the particular house in dispute with mesne profits and costs ought to be allowed against respondent No. 4.

Decree reversed.

J. G. R.

(2) Since reported (1918) L. R. 45 I. A. 73.

APPELLATE CIVIL.

FULL BENCH.

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

BHUTA VALAD JAYATSING (ORIGINAL PLAINTIFF-APPLICANT), APPELLANT *v.* LAKADU DHANSING AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1918. *September* 28.

Civil Procedure Code (Act V of 1908), section 98—Second Appeal from the mofussil—Difference of opinion—Procedure—Letters Patent, 1865, clause 36.

In second appeals from the mofussil on the Appellate Side of the High Court where Judges differ the procedure is governed by section 98 of the Civil Procedure Code, 1908, and not by clause 36 of the Letters Patent, 1865.

* Second Appeal No. 22 of 1917.