APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1887. March 17. April 19.

GURUVAPPA (PLAINTIFF), APPELLANT,

and

THIMMA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindú Law—Decree against an undivided brother—Mortgage of joint property.

A, an undivided member of a Hindú family, mortgaged part of the family property by way of conditional sale to B, to secure a loan. B having sued A personally for the amount due, A admitted the mortgage and said he would surrender the property in discharge of the debt, and a decree was passed accordingly. A's undivided brothers intervened in execution:

Held, that the decree not being passed against the joint family or its representative, and not describing the property, which it directed to be delivered to the plaintiff by way of absolute sale to be family property, could not be executed against the family property.

SECOND appeal against the decree of W. F. Grahame, Officiating District Judge of Cuddapah, in Appeal Suit No. 3 of 1886, confirming the decree of S. Subba Ráu, District Múnsif of Proddatúr, in Original Suit No. 282 of 1885.

Kondadu, the brother of the defendants, mortgaged certain family property to the plaintiff by way of conditional sale, to secure a debt. The plaintiff sued the mortgagor to recover principal and interest in Original Suit No. 152 of 1885. The mortgage was admitted, and the mortgagor said he was willing to surrender the property; the present defendants, however, intervened under s. 332 of the Code of Civil Procedure and claimed two-thirds of the property as their share, and their claim was allowed. The plaintiff filed this suit to declare his title to the property; the declaration was refused by both the lower Courts.

The plaintiff preferred this second appeal.

Mr. *Párthásaradhi Ayyangár* for appellant argued that the present suit was maintainable and the plaintiff's claim should be allowed if he proved that the mortgage of conditional sale executed

* Second Appeal No. 574 of 1886.

by Kondadu, the brother of the defendants, was executed for the benefit of the family of which the said Kondadu was the managing member; and pointed out that the decree originally obtained by the present plaintiff was not a simple money decree, but one enforcing the sale.

Mr. *Rámasámi Ráju* for respondents.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J.)

JUDGMENT.—The respondents had a brother named Kondadu, and in Original Suit No. 152 of 1885, the appellant obtained a decree against him. That decree, however, was not passed against him as the managing member or representative of the joint family. It was founded upon an instrument of mortgage which had been executed by Kondadu; and, although Original Suit No. 152 of 1885 was brought only to recover the mortgage debt, the decree directed, apparently by consent of the parties, that the mortgaged property be given up by way of absolute sale in satisfaction of the debt. On the appellant proceeding to take possession in execution of the decree, the respondents objected on the ground that they were not bound by a decree passed against Kondadu in respect of the property of their joint family. Their objection was allowed, and the appellant brought this suit to establish his right to the possession of the entire property mentioned in the decree inclusive of the respondents' shares. Relying on the decisions reported in *Virarágavamma* v. *Samudrala*(1) and *Umamahéswara* v. *Singaperumál*(2), the District Judge dismissed the suit with costs. In the last-mentioned case, the decree was against a Hindú father, and it is not precisely in point. The first case, however, was one between brothers, and as such, it is similar to the one before us. There it was held that a money decree against one brother who was not impleaded as the managing coparcener or representative of the family did not bind his other brothers, and that no more than the judgment-debtor's share was liable to be attached and sold in execution. It was also held that the question, whether or not the original debt was a family debt, could not be gone into in that suit. It is conceded that if that decision governed the case before us, the second appeal cannot be supported, but it is contended that the

(1) I.L.R., 8 Mad., 208. (2) I.L.R., 8 Mad., 376.

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decree in that case was a mere money decree, whereas the decree in the present suit executes a pre-existing mortgage. Reliance is also placed on the decisions in *Rámákrishna* v. *Namasivaya*(1) and *Narsanna* v. *Gurappa*(2).

The decree in Original Suit No. 152 of 1885 was admittedly not one passed against the joint family or its representative. Nor does it describe the property it directs to be delivered to the plaintiff by way of absolute sale to be family property. The principle laid down by the Privy Council in *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh*(3) does not therefore apply to this suit. Nor is the decision in *Rámákrishna* v. *Namasivaya*(1) applicable; for in that case the decree in the first suit was against the father, and the Court held that the execution creditor was at liberty to show in the second suit that the character of the debt was such as to bind the son's interest, because it was not brought on the cause of action litigated in the previous suit. Nor are we prepared to hold that the decision in *Narsanna* v. *Gurappa*(2) is exactly in point. That was also the case of a decree against the father and of the liability of the son's interest in ancestral property to be sold in execution. This Court followed in that case the ruling of the Privy Council in *Mussamut Nanomi Babuasin* v. *Modun Mohun*(4). The ruling was, if in execution of a decree against a father, the purchaser bargains and pays for the entire ancestral property, the whole property would pass by the Court sale, provided that the decree debt was neither vicious nor immoral, because the purchaser might clearly defend his title by showing that the nature of the debt justified the sale in case the sons impugned it in a regular suit. The *ratio decidendi* was that the character of the debt, if it was neither vicious nor immoral, was a valid ground of defence in a fresh suit, and the Judicial Committee observed further in their judgment that the rule derived from the son's pious obligation to pay the father's debt was destructive of the son's independent coparcenary rights. But in *Virarágavámma* v. *Samudrala*(5) it was observed as follows:—"It is true that the liability is shown by the decree to have its origin in the father's debt, but there is nothing on the face of the decree to show that the claim was made or relief granted against the then

(1) I.L.R., 7 Mad., 295. (2) I.L.R., 9 Mad., 424.
(3) L.R., 6 I.A., 233. (4) L.R., 13 I.A., 1.
(5) I.L.R., 8 Mad., 208.

defendant either in his representative character or as manager of the family, and that if we had felt ourselves at liberty to go beyond the decree, we should have acceded to the contention that the debt was a family debt and binding on the respondents." The possibility of a second suit was not contemplated, because there was no fresh cause of action as in the case of father and son. Again, the decree in Original Suit No. 152 of 1885 does not strictly execute the prior mortgage, but it is a decree by the consent of one coparcener that the mortgage be treated as if it were an absolute sale.

We are of opinion that this second appeal must fail, and we dismiss it with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

MAHOMED SAIB (PLAINTIFF)

and

AGGAS (DEFENDANT).*

1887. April 1, 14.

Civil Procedure Code, s. 468—Army Act of 1881, 44 & 45 Vic. c. 58, ss. 144, 151—Jurisdiction of Small Cause Courts over soldiers.

A sued a soldier to recover a debt not amounting to £30:

Held, that the suit was cognizable by a Court of Small Causes.

Semble.—The Commanding Officer of the defendant is bound to cause the summons of the Small Cause Court to be served on him.

CASE stated under s. 617 of the Code of Civil Procedure, by B. Ramasami Nayudu, District Múnsif of Bellary, in Small Cause Suit No. 667 of 1886.

The case was stated as follows:—

"In Small Cause No. 667 of 1886, the plaintiff, baker Mahomed Saib, brought a suit against Sergeant Aggas of the Ordnance Department for the recovery of a sum of Rs. 6-13-0 for bread supplied to the defendant. The defendant's summons was forwarded to the Commissary of Ordnance, Bellary, along with two other summonses; but they were returned unserved twice by that officer, stating that soldiers are under section 144 of the Army Act

* Referred Case No. 3 of 1887.