

true and to act upon such belief. It was not indeed contended in express terms that the appellant is estopped by reason of his conduct, and we cannot hold that by reason of the improvements in this case having been made within a short distance of the residence of the landlord, and on land belonging to him which he must have frequently passed, any other or further relief can be afforded to the respondents than they are entitled to under the terms of the agreement under which they held the land and by the custom of the country.

“At the same time, we cannot refrain from saying that this appears to be a very hard case, and we consider ourselves justified in the peculiar circumstances in directing that the decree do provide that the respondents be at liberty to remove within six months all the improvements made by them, for which no compensation has been allowed.”

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APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Wilkinson.

SATHUVAYYAN (DEFENDANT No. 7), APPELLANT,

v.

MUTHUSAMI (PLAINTIFF), RESPONDENT.*

1888.
August 9.
Sept. 27.

Hindu law—Personal decree against managing member of joint family not impleaded as such—Effect of sale in execution of such decree—Transfer of Property Act—Act IV of 1882, s. 99—Sale of mortgage property in execution of decree on a money bond for interest due on the mortgage.

The managing member of a joint Hindu family executed in 1878 a mortgage on certain lands, the property of the family, to secure a debt incurred by him for family purposes, and in 1881 he together with his brother executed to the mortgagee a money bond for the interest then due on the mortgage. In 1882 the mortgagee brought a suit on the money bond and having obtained a personal decree against the two brothers merely, brought to sale in execution part of the mortgaged property which was purchased by a third person :

Held, that the sale did not convey the interest of another undivided brother who was not a party to the decree :

Held, further per *Kernan, J.*, that the sale in execution was invalid under Transfer of Property Act, s. 99.

SECOND APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 814 of 1886, modifying the decree of T. Audinarayana Chetti, District Munsif of Shiyali, in original suit No. 22 of 1885.

* Second Appeal No. 1264 of 1887.

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This was a suit for the division and separate possession of a one-third share of certain land which was alleged to be the property of an undivided Hindu family of which the plaintiff and defendants Nos. 1 to 5 were members; defendant No. 6 represented the interest of the mortgagee of part of the land in question under a mortgage, dated 10th August 1878, and executed by the defendant No. 1, the plaintiff's brother, as manager of his family for family purposes. Defendant No. 7 had purchased the land in question at a sale held on 28th January 1885 in execution of a decree obtained by the mortgagee upon a money bond executed on 24th August 1881 by both of the plaintiff's brothers, viz., defendants Nos. 1 and 2, for a sum of money then due as interest on the above mortgage. The suit on the bond was original suit No. 130 of 1882, to which the plaintiff was not a party, and in which the defendants were (as was admitted in the present case) "not impleaded either as the managing members or as representatives of the family."

The District Munsif decided that the plaintiff was not entitled to any relief against defendant No. 7, but on appeal the Subordinate Judge held the sale in execution of the decree in original suit No. 130 of 1882 invalid as against plaintiff.

Defendant No. 7 preferred this second appeal.

Desikacharyar for appellant;

Ramachandra Ayyar for respondent.

The further facts of the case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from the following judgments:—

KERNAN, J.—The plaintiff claims, in this suit, to be entitled to a one-third share in all the items of property Nos. 1 to 61 mentioned in the plaint, which property, he states, is the undivided family property of himself and his brothers, defendants Nos. 1 and 2, and the defendants Nos. 3 to 5.

The following facts have been found by both the Courts, viz., first, that defendant No. 1 was manager of the undivided family, and that he, on the 10th of August 1878, executed a mortgage to Palaniappa Chetty, agent of Arunachellum, the father of defendant No. 6, for Rs. 2,500, borrowed for the payment of debts and other necessities of the family including the purchase of the plaint lands items 50 to 61; second, that interest being due on that mortgage, defendants Nos. 1 and 2 on the 24th of August

1881 executed a mere money bond to Palaniappa Chetty for SATHUVAYYAN Rs. 700, and third, that the amount of that bond was given on v. account of the said interest. MUTHUSAMI.

Original suit No. 130 of 1882 was filed by Arunachellum Chetty, father of defendant No. 6, against the defendants Nos. 1 and 2 and Palaniappa Chetty on that bond, and a decree was obtained against defendants Nos. 1 and 2 on the 21st of September 1882. Under that decree, the plaint items Nos. 1 to 31 and 34 to 48 were attached and were, on the 28th day of January 1885, sold by auction, and defendant No. 7 bought them for Rs. 135, and obtained a certificate on the 17th of June 1885, which certifies that defendant No. 7 bought the lands set up for sale and not merely the shares of the defendants in execution.

In the plaint in this suit it is stated, and the fact is, as appears on the record that the plaintiff was not made party to the suit No. 130 of 1882. Therefore, he contends, he is not bound thereby or by the sale. He alleges that there was collusion between defendant No. 6 and defendants Nos. 1 and 2, but he states that he was absent from the village when the suit was filed. The collusion has been negatived by both Courts. The District Munsif decided that the plaintiff is bound by the decree and the sale, although he was not party thereto, inasmuch as the debt, for which the decree was obtained, was incurred for family necessity and contracted by the manager of the undivided family and inasmuch as the plaintiff, who lives with defendants Nos. 1 and 2 was, as the Munsif believed, set up in this action to defraud defendant No. 6 of his interest in a portion of the lands mortgaged. The Munsif disallowed the plaintiff's claim to share in the lands purchased by defendant No. 7 and allowed plaintiff a one-fourth share in the plaint items, viz., 32, 33, 49 to 61.

On appeal the Subordinate Judge, by a decree, dated 12th August 1887, allowed the plaintiff's claim to a one-fourth share in all the plaint items, on the grounds that the plaintiff was not a party to the suit No. 130 of 1882 and is not bound thereby or by the sale, and that the decree was personal against defendants Nos. 1 and 2, the plaintiff's brothers, and all that passed under the sale was the estate and interest of defendants Nos. 1 and 2.

The plaintiff, by permission of the Subordinate Judge, argued, as a ground of appeal, not put forward in the first instance, that as the decree in suit No. 130 of 1882 was obtained by the mort-

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gaggee after the coming into force of the Transfer of Property Act, 1882, the sale was contrary to section 99 of that Act. The Subordinate Judge overruled that contention, holding that only the parties to the suit could raise it.

This last mentioned ruling was erroneous. There is no limitation contained in section 99 or elsewhere confining the application of that section to the parties to the suit. This suit is an instance where the provisions of section 99 might properly be applied as the plaintiff has an interest in the property. The plaintiff no doubt did not admit his liability as a member of the family to the payment of the mortgage of 10th August 1878, but when the Courts decided that the mortgage bound him, he was entitled to take the objection under section 99 that the sale in suit No. 130 of 1882 was invalid. The fact that the sale took place before this suit was filed cannot give validity to the sale, if it was contrary to the provisions of section 99. The plaintiff in suit No. 130 of 1882 was a mortgagee within the meaning of section 99, although the mortgage was in the name of his agent, the third defendant in that suit, who admitted the right of his principal. To treat the plaintiff in suit No. 130 of 1882 as not being the mortgagee, he being the principal, and to treat the agent, the third defendant as the mortgagee, because the mortgage was in his name, would be to evade the provisions of section 99. For then the person beneficially entitled to the amount of the mortgage and interest should be held not to be the mortgagee, but that his agent who held the mortgage only as agent was the mortgagee. The plaintiff in that suit No. 130 of 1882 was entitled to file a suit to foreclose the mortgage or sell the property, making his agent a party.

We do not agree with the judgment of the Lower Appellate Court on this point and are of opinion that the sale was invalid under the Transfer of Property Act.

The next question is whether the decree in suit No. 130 of 1882 obtained against the defendants Nos. 1 and 2 binds the plaintiff, their brother, on the ground that he was liable with them to the debt for which the suit was brought, although he was not party-defendant in that suit. That suit was on a money bond by the defendants Nos. 1 and 2; the bond did not refer to either of them as manager of the family or to the mortgage in any way. The decree was a mere money decree against the defendants. Though the plaintiff may be bound by the debt for which the

bond was given, he was not party to, or represented by either of, SATHUVAYYAN
 the defendants Nos. 1 and 2 in suit No. 130 of 1882. A sale in
 execution of that decree could be legally made of the shares of
 defendants Nos. 1 and 2, but not of the plaintiff's share. That
 share was not the property of the defendants Nos. 1 and 2 or
 either of them. No doubt, under a money decree against a father
 on foot of a debt which bound the sons, the whole interest and all
 the shares of the sons could be legally sold and conveyed, although
 the sons were not parties to the suit. The principle of such
 decision is that the father is entitled by his own act, without the
 assent of his sons, to sell the whole estate for payment of such
 debts as bind the sons. But that principle has not been extended,
 so far as I know, to the case of any manager of a family except
 a father. The course of decisions in this Presidency is that, in
 the case of adult coparcener, a brother, who is manager, but is not
 sued as such, does not represent in a suit or proceedings affecting
 the family estate the coparcener who is not made party to the suit,
 and that a decree in such suit and execution thereon would not
 bind him—*Viraragavamma v. Samudrala*(1). That was the case
 of a debt binding on both brothers, and for which a money decree
 only was had; but the manager was not sued in his character as
 manager—*Guruvappa v. Thimma*(2).

The case of *Daulat Ram v. Mehr Chand*(3) in the Privy Council
 was a case, where a managing member granted a mortgage of
 the family property, and was sued on it and there was a sale.
 Other brothers of the joint family filed a suit to set aside the sale
 on the ground that they were not parties to the suit and they
 declined to go into evidence as to the nature of the debt, or
 whether it was of a nature to bind them and it appeared that they
 got part of the produce of the purchase money of the sale. The
 Court held they were bound. But that was the case of a decree
 in a suit on foot of a mortgage, and the decree was for sale of the
 property mortgaged and the defendants refused to meet the case,
 on the ground that they had received a portion of the purchase
 money. Although the plaintiff in this case and his interest in
 the property may be bound by the mortgage created by his
 brothers and for the debt on the bond, that does not interfere with
 his right to have the sale made in suit No. 130 of 1882 set aside.

(1) I.L.R., 8 Mad., 208. (2) I.L.R., 10 Mad., 316. (3) I.L.R., 15 Cal., 70.

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WILKINSON, J.—I am of the same opinion. The only question for determination in this appeal is whether the plaintiff's share in the joint family property passed to appellant, the auction purchaser. The plaintiff's brothers, defendants Nos. 1 and 2, executed a bond to defendant No. 6 for Rs. 600. Upon that bond, defendant No. 6 brought a suit, obtained a decree, and, in execution, brought the joint family property to sale; defendant No. 7, appellant, purchased it. It has been held that a money decree against one brother, who was not impleaded as the managing coparcener or representative of the family, does not bind the other brothers and that no more than the judgment-debtor's share is liable to be attached and sold in execution—*Viraragavamma v. Samudrala*(1). This was followed in *Gururappa v. Thimma*(2).

The case relied on by appellant's pleader—*Daulat Ram v. Mehr Chand*(3) is not applicable, as that was a case of a mortgage effected by the managing members. It is admitted that, in original suit No. 130 of 1882, defendants Nos. 1 and 2 were not impleaded either as the managing members or as representatives of the family, and the decree obtained was, therefore, a personal decree and one by which the present plaintiff was in no way concluded.

The decree of the Subordinate Judge, therefore, so far as it held that the plaintiff's rights did not pass by the sale in execution, is right.

The decree of the Lower Appellate Court is confirmed and this appeal dismissed with costs.

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

(2) I.L.R., 10 Mad., 316.

(3) I.L.R., 15 Cal., 70.
