

1878
 RAJNARAIN
 SINGH
 v.
 HERRAJAL.

The judgment of the Court, so far as is material to the present report, was delivered by—

GARTH, C. J. (McDONELL, J., concurring).—We consider that this case is governed by the Full Bench judgment in the case of *Bhimul Doss v. Choonee Lall* (1), where it was virtually decided, that in joint families governed by the Mitakshara law, the principle of survivorship obtains until partition, and that upon a partition taking place, the distribution amongst the different members of the family is to be made not according to the ordinary Hindu rule of heirship, but *per stirpes*.

Runglal having died subsequently to the institution of the suit, and also after the decision in the lower Court, the plaintiff will be entitled to a one-fourth share instead of the one-fifth share claimed by him.

Appeal allowed.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

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 May 8.

LOKI MAHTO AND OTHERS (PLAINTIFFS) v. AGHOREE AJAIL LALL AND OTHERS (DEFENDANTS).*

Practice—Appeal from Order of Remand—Civil Procedure Code (Act X of 1877), ss. 562, 588, cl. (w)—Co-sharers—Sale of Share in Execution—Title.

Upon an appeal under s. 588, cl. (w), of the Civil Procedure Code, from an order of an Appellate Court under s. 562, remanding a case which has been disposed of upon a preliminary point in the Court of first instance, the High Court may enter into the merits of the adjudication by the Court of first instance on the preliminary point, and may, if it finds the order of the lower Appellate Court defective, allow the party, who had the benefit of a decree in the first Court, to retain that benefit.

The purchaser of the rights and interests of a judgment-debtor, who is a member of a joint family, at a sale in execution of a decree, does not

(1) I. L. R., 2 Calc., 379.

* Appeal from Appellate Order, No. 108 of 1878, against the order of Baboo Matadin Roy Bahadur, Subordinate Judge of Gya, dated the 28th of March 1878, reversing the order of Baboo Sheo Saran Lall, First Sudder Munsif of that District, dated the 5th of December 1877, and remanding the case to him or retrial.

acquire any title to the rights and interests of the other members of the family, unless it is clear that the judgment-debtor was sued in a representative capacity.

Muddun Thakoor v. Kantoo Lall (1) distinguished.

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THIS was a suit for the recovery of a two-anna eight-pie share of a four-anna share in a certain mouza. It appeared, that the plaintiffs, and one of the defendants, described as the defendant No. 4, were members of a joint family. A decree had been obtained by the defendants Nos. 2 and 3, against the defendant No. 4, and in execution of this decree the whole of the four-anna share was sold, and purchased by the principal defendant, who dispossessed the plaintiffs. The Munsif made a decree in favour of the plaintiffs, without going into evidence, holding, that the shares of all the joint co-sharers could not be sold for the satisfaction of a debt due by one of the sharers, merely because the family was joint. The Subordinate Judge reversed this decision, and remanded the case for retrial under s. 562 of the Code, and the plaintiffs now appealed under s. 588, cl. (w), to the High Court, contending, that the sale in execution could not have the effect of transferring their shares to the defendant No. 1.

Mr. R. E. Twidale and Baboo Jodoo Nath Sahai for the appellants.

Baboo Mohesh Chunder Chowdhry and Baboo Amarendra Nath Chatterjee for the respondents.

The judgment of the Court was delivered by

AINSLIE, J. (BROUGHTON, J., concurring). — The first question that arises in this appeal is the nature of the order which the Appellate Court will make under cl. (w), s. 588 of the Code of Civil Procedure, by which an appeal from an order under s. 562 remanding a case, is allowed.

It is contended, that the only question which the Court has to consider is, whether the remand order is in form such as is

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provided for by s. 562, and that if it is formally correct, this Court is not, at the present stage, to enter into the merits of the adjudication on the preliminary point. But it appears to us, that there is no such limitation in the Code, and that the intention of the legislature was, that when the order remanding a case is brought in review before this Court, the Court shall consider the propriety of that order in all respects, and if it is found that the order is defective, the party who had the benefit of a decree in the first Court shall retain that benefit. By s. 629 of the Code it is provided, in cases of an order for the admission of review of judgment, that the order may be objected to on appeal, on certain limited grounds,—namely, that it was in contravention of the provisions of ss. 624 and 626 or was made after the expiration of the period of limitation prescribed therefor and without sufficient cause, but not on any other ground. The fact, that there is no such restriction in respect of the power of reviving the remand order of an Appellate Court, seems to show, that it was not intended that the Court should limit itself to consider merely the form of the order. It is also authorized to examine it on its merits.

With reference to the merits of the case, the question merely comes to this, whether a person who has purchased the rights and interests of one judgment-debtor, can be allowed to set up that the decree and sale under which he acquires title, extended to the interests of others besides the judgment-debtor named.

There are several cases decided by the Judicial Committee, which lay down a strict rule, limiting the effect of sales, where it does not appear on the face of the proceedings, that the judgment-debtor had been sued in a representative capacity; and it is only in cases where it is manifest that the judgment-debtor must have been sued as a representative, that the Court has allowed a sale, in terms of the interests of the judgment-debtor, to convey the interests of other persons. The cases referred to are: *Nugender Chunder Ghose v. S. M. Kaminee Dossee* (1), *Baijun Doobey v. Brij Bhoshun Lall Awusti* (2), *Deen Dyal Lal v. Jugdeep Narain Singh* (3).

(1) 11 Moore's I. A., 241.

(2) L. R., 2 Ind. App., 276.

(3) L. R., 4 Ind. App., 247; S. C., I. L. R., 3 Calc., 198.

The case of *Muddun Thakoor v. Kantoo Lall* (1) is governed by a distinct principle. Although the debtors in that case were not necessarily sued in a representative capacity, the sons, who were contesting the sale made under the decree, were legally bound to pay the debt covered by the decree, and the property which had been sold would have been liable in their hands to be seized and sold for it.

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The case of *Suraj Bansi Koer* (2), decided by the Judicial Committee of the Privy Council on the 1st of February of the present year, only differs from this, because it was established that the debt was one for which the sons were not properly liable, and the purchaser had taken with notice of their repudiation of it.

In the present instance, the rights and interests of the fourth defendant only were sold, and there is nothing on the face of the decree to show that the other brothers were equally liable with him for the debt, or that the proceedings were taken against him in a representative capacity. Therefore, on the authority of the cases first referred to above, we must hold that the property of the defendant No. 4 only passed by the sale, and that the Munsif was right in holding that, under these circumstances, it was not open to the defendant, who was the purchaser at that sale, to go into evidence to show that the debt was one for which a decree might have been obtained against the other brothers. Possibly it might have been so obtained, but if the judgment-creditor was content to take a decree against one brother, in such a form that it did not bind the estate, the purchaser at the sale under that decree has no right to ask for more than what was attached and sold.

We, therefore, reverse the remand order made by the lower Appellate Court, and restore and affirm the judgment of the first Court with costs.

Appeal allowed.

(1) L. R., 1 Ind. App., 333. (2) See *post*, p. 148.