

We may refer also to a passage in West and Buhler, Part II, ii, and the rules under which partition which operates in respect of the undivided family takes place, show that an undivided family is constituted in the sense indicated.

The gift to the plaintiff is therefore not invalid on the ground held by the Judge. (The Court then went on to remand the case for the trial of the other issues raised by the defence.)

1877

BALLABH DAS
v.
SUNIER DAS.

APPELLATE CIVIL.

1877
May 28.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

GIRDHARI AND OTHERS (PLAINTIFFS) v. SHEORAJ AND OTHERS (DEFENDANTS).*

Act VIII of 1859, ss. 5, 13—Account of sums realized on collective mortgage of lands in separate districts—Decree for redemption of lands within jurisdiction not barred by Regulation VII of 1825, because based on such account.

In a suit for redemption of lands lying within the district of Mirzapur, but included in the same mortgage with other lands lying within the domains of the Maharaja of Benares, the Subordinate Judge of Mirzapur took an account of the sums realized by the mortgagee from all the lands mortgaged, and finding that these sums were sufficient to discharge the entire mortgage-debt, gave the plaintiff the decree sought; the lower appellate Court dismissed the suit on the ground that such account could not be taken without deciding questions lying *ultra vires* of the Mirzapur Court. *Held* that the Mirzapur Court might take such account for the purpose of deciding whether the entire mortgage-debt had been satisfied, and might give the plaintiff a decree for the redemption of the property lying within the local limits of its jurisdiction, notwithstanding that in doing so it would have incidentally to determine questions relating to lands lying within the domains of the Maharaja.

The facts of the case and the manner in which it was dealt with by the lower Courts are sufficiently stated in the judgment.

Munshi Hanuman Prasad and Pandit Ajudhia Nath, for appellant.

The Senior Government Pleader (Lala Juala Prasad) and Lala Lalta Prasad, for respondents.

JUDGMENT.—The subject of the mortgage to which this suit refers is land situated in the district of Mirzapur, and land in par-

* Special Appeal, No. 1342 of 1876, from a decree of J. W. Sherer, Esq., C.S.I., Judge of Mirzapur, dated the 24th August, 1876, reversing a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Mirzapur, dated the 5th May, 1876.

1877

GURDHARI
v.
SHEORAJ.

gana Bhadoli, in the family domains of the Maharaja of Benares, and Regulation VII of 1825 has provided a special jurisdiction for the trial of suits for land in these domains.

This suit was brought in the Court of the Subordinate Judge of Mirzapur, by all the mortgagors, or rather the parties who now represent the original mortgagors, for redemption of the entire property mortgaged, and authority was asked, under s. 13, of Act VIII of 1859, to try the suit in the civil Court of Mirzapur in respect of the property situated in the family domains, but this was refused as the High Court found that such authority could not be given in the existing state of the law.

Two of the plaintiffs who were only interested in the mortgage to the extent of the property in the family domains, then withdrew from the suit, and the others proceeded with their claim to redeem the portion of the mortgaged property situated in Mirzapur, and they have obtained a decree from the Subordinate Judge for possession of the mortgaged property in Mirzapur on the basis of the satisfaction of the entire debt charged on the two properties.

The Judge, in appeal, has reversed the decree and dismissed the suit, holding that the trial will raise questions affecting property in the family domains in respect of which he has no jurisdiction, instancing in this view, and in the way of objection, the question whether the mortgagees were in possession of certain lands in Katehri (in the domains), and without which the accounts cannot be made up.

We do not consider that this objection to the trial of the suit is valid.

The plaintiffs were at liberty to forego, as they have done, suing for possession of the property situated in the family domains, and the suit as now brought is only for immoveable property in the district of Mirzapur, the suit does not seek to recover land in the domains, nor is there any claim raised in this suit of a nature exclusively cognizable by Courts established under Regulation VII of 1825. S. 5 of Act VIII of 1859 gives the Mirzapur Court jurisdiction to entertain the suit in respect of the immoveable property in Mirzapur, and that jurisdiction could not be ousted be-

cause, in the course of the trial of the suit, it may be necessary incidentally to decide, for the purposes of the suit, questions relating to mortgaged property held by the defendants in the family domains, the extent of it in their possession, and its profits, in order to make up the accounts of the entire mortgage so as to ascertain if the entire mortgage-debt has been satisfied, and if, therefore, the plaintiff has a right to recover the mortgaged property situated in Mirzapur.

We reverse the decree of the lower appellate Court and remand the case, under s. 351, Act VIII of 1859, for trial on the merits.

Decree reversed and cause remanded.

APPELLATE CIVIL.

1877
January 12.

(Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie).

BALWANT SINGH (DEFENDANT) v. GOKARAN PRASAD (PLAINTIFF).*

Charge against Immoveable property — Auction-purchaser's rights subject to Lease.

An obligee under a bond giving him a charge upon land who sues for and obtains only a money-decree, under which he himself purchases the land, the sale-proceeds being sufficient to discharge the debt, cannot fall back on the collateral security for a debt which no longer exists. *Seemle* that even if the sale-proceeds were not sufficient to discharge the debt, the obligee could not according to the principle laid down in *Khub Chand v. Kalian Das* (1) avail himself of his collateral security to avoid a lease granted by the obligor after the date of the bond.

THE plaintiff sued in 1873 to recover the amount due under a bond dated the 26th June, 1872, by which immoveable property was hypothecated to him, but did not seek to enforce his charge upon the land. In execution of the money-decree thus obtained the plaintiff attached, brought to sale, and became the auction-purchaser of the said property. Between the date of the bond hypothecating the property and the institution of the suit thereon in 1873, the obligor gave a lease of a portion of the said property for a term of years to a third person. The lessee opposed the plaintiff's possessin, and the plaintiff accordingly in 1875 brought the present suit against him and others.

* Regular Appeal, No. 83 of 1876, from a decree of Rai Bhagwan Prasad, Subordinate Judge of Mainpuri, dated the 20th May, 1875.

(1) I. L. R 1 All. 246.