

constitution of the joint Hindu family as defined in *Appovier v. Rama Subha Aiyan* (1). The opposite view is supported by dicta of Coblebrooke, Ellis, and Strange, and is that followed in the Madras and Bombay Presidencies, and the question was fully discussed in *Vasudev Bhat v. Venkatesh Sanbhav* (2). But the question cannot be said to be at this time an open one on this side of India. There is no doubt a current of decisions by this Court, invalidating sales by one co-parcener without the consent express or implied of his co-parcener, and I have not been able to find any case where a voluntary sale was held valid to the extent of the seller's own interest,—*Ajoolhya Pershad v. Lalta Pershad* (3); *Baboo Ram v. Gajadhar Singh* (4); *Byjnath Singh v. Rameshwar Dyal* (5); *Jeynarain Singh v. Roshun Singh* (6). The question has been decided in the same way by the Calcutta High Court in *Sudabart Prasad Sahu v. Foolbush Koer* (7). The law may be said to have been settled by a course of decisions, and it would be undesirable to disturb it.

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On this view the sale must be set aside, and the plaintiff is entitled to have possession of the property to be held as joint family property.

SPANKIE, J.—I accept the opinion of Mr. Justice Oldfield on the point referred to the Full Bench.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

SHEO PRASAD (JUDGMENT-DEBTOR) v. ANRUDH SINGH (DECREE-HOLDER).*

Execution of Decree—Act IX of 1871 (Limitation Act), sch. ii, art. 167, cl. 2.

The words “where there has been an appeal” in cl. 2, art. 167 of sch. ii of Act IX of 1871, contemplate and mean an appeal from the decree, and do not include an appeal from an order dismissing an application to set aside a decree under s. 119 of Act VIII of 1859.

(1) 11 Moore's Ind. App. 75.

(2) 10 Bom. H. C. R. 139.

(3) S. D. A., N. W. P., 1864, vol. ii, p. 315.

(4) N.-W. P. H. C. Rep., F. B. R., 1866-67, p. 86.

(5) S. D. A., N.-W. P., 1864, vol.

i, p. 299

(6) S. D. A., N.-W. P., 1860, p. 162.

(7) 2 B. L. R., F. B., 31.

* Second Appeal, No. 104 of 1878, from an order of C. W. Watts, Esq., Judge of Farukhabad, dated the 29th June, 1878, affirming an order of Maulvi Abdul Basit, Munsif of Chibramau, dated the 10th May, 1878.

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THE decree in this case was a decree for money and was made *ex parte* against the defendant on the 2nd December, 1874. The defendant applied to the Court which made the decree, under the provisions of s. 119 of Act VIII of 1859, for an order to set it aside. The Court rejected this application, and the defendant appealed against the order of rejection. The Appellate Court, on the 17th April, 1875, affirmed the order of rejection, and dismissed the appeal. On the 12th April, 1878, the plaintiff, the decree-holder, applied for the execution of the decree. The defendant, the judgment-debtor, set up as a defence to this application that the execution of the decree was barred by limitation. The Court of first instance held, with reference to the provisions of cl. 2, art. 167, sch. ii of Act IX of 1871, that the period of three years allowed for the execution of the decree began to run from the date of the order of the Appellate Court dated the 17th April, 1875, and the application for execution was consequently preferred within time. On appeal by the judgment-debtor the lower appellate Court concurred in the view taken by the Court of first instance of the question of limitation.

The judgment-debtor appealed to the High Court, contending that there had been no appeal within the meaning of cl. 2, art. 167, sch. ii of Act IX of 1871.

Munshi *Hanuman Parshad*, for the appellant.

Pandit *Ajudhia Nath* and *Lala Lalta Prasad*, for the respondent.

The judgment of the High Court was delivered by

PEARSON, J.—In our opinion the lower Courts are wrong in holding that the period of three years allowed by law for the execution of the *ex parte* decree, dated 2nd December, 1874, should be reckoned from the date of the order of the Appellate Court which upheld the first Court's order refusing the application made by the defendant for the re-hearing of the suit. The first two clauses of art. 167, sch. ii, Act IX of 1871, allow three years for the execution of a decree from the date of the decree, or (where there has been an appeal) from the date of the final decree of the Appellate Court. We think it beyond doubt that the words, "where there

has been an appeal," contemplate and mean an appeal from the decree; and no other appeal. In the present case there was no appeal from the decree now sought to be executed; nor indeed under the provisions of the old Code of Procedure was that decree appealable. The application for execution of the decree of 2nd December, 1874, presented on 12th April, 1878, was clearly beyond time, and should have been disallowed. We reverse the orders of the lower Courts and decree the appeal, with costs in all Courts.

Appeal allowed.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

RAM KISHEN (DECREE-HOLDER) v. SEDHU (JUDGMENT-DEBTOR).*

Execution of Decree—Act X of 1877 (Civil Procedure Code), s. 230.

Held that the words "the last preceding application" in the third clause of s. 230 of Act X of 1877 mean an application under that section, and not an application under Act VIII of 1859.

THE decree-holder in this case applied in February, 1878, under s. 230 of Act X of 1877, for the execution of the decree. He had previously applied under Act VIII of 1859 for the execution of the decree in July, 1877. The Court executing the decree refused to grant the application for reasons which it is not necessary for the purposes of this report to state. On appeal by the decree-holder the lower appellate Court refused to grant the application, with reference to the third clause of s. 230 of Act X of 1877, on the ground that the decree-holder had not on the application made in July, 1877, used due diligence to obtain complete satisfaction of the decree.

The decree-holder appealed to the High Court, contending that the words "the last preceding application" in the third clause of s. 230 of Act X of 1877 meant the last preceding application under that section, and not a preceding application under Act VIII of 1859.

Munshi *Hanuman Prasad*, for the appellant.

* Second Appeal, No. 93 of 1878, from an order of H. G. Keene, Esq., Judge of Agra, dated the 31st July, 1878, affirming an order of Maulvi Mubarak-ul-lah, Munsif of Muthra, dated the 15th June, 1878.

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