

1892

UDIR SINGH
v.
KASHI RAM.

KNOX, J.—I am of the same opinion as the learned Chief Justice both as to the answer to the reference and as to the decree which he proposes to pass in the appeal.

[The appeal was accordingly allowed and the suit dismissed with costs.]

1892.

March 24.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

MUHAMMAD HUSAIN (DEFPENDANT) v. DIP CHAND AND OTHERS (PLAIN-
TIFFS).*

Hindu Law—Joint Hindu family—Simple money decree against father how far binding upon son's interest in the joint family property—Execution of decree—Civil Procedure Codes, section 237.

With reference to the question whether the whole joint family property or only the interest of the father therein is liable under a decree obtained against a Hindu father, held that where there is nothing to show any limitation of the extent of the interest sold, whether the sale took place in execution of a decree on a mortgage or of a simple money decree, it may be presumed that the family property and not the mere undivided share of the father was sold. *Pem Singh v. Farlab Singh* (1) referred to.

The specification required by section 237 of the Civil Procedure Code, of the judgment debtor's share or interest in immovable property sought to be attached, should state distinctly whether it was the judgment-debtor's undivided share or the family property in which the judgment debtor had an undivided share, which was sought to be attached, and should also specify what that family property was. If the specification merely referred to the judgment-debtor's share and interest in what was the family property, the Court would hold, unless something to the contrary appeared, that the sale was of that share and interest only.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* for the appellant.

Mr. *A. H. S. Reid* and *Munshi Ram Prasad* for the respondent.

*Second Appeal No. 1800 of 1885 from a decree of W. R. Barry, Esq., District Judge of Aligarh, dated the 15th June 1885, reversing a decree of Maulvi Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 30th June 1883.

(1) I. *Ante*, p. 179.

1892

 MUHAMMAD
 HUSAIN
 v.
 DIP CHAND.

EDGE, C.J., and TYRRELL, J.—The appellants in this second appeal are auction-purchasers or representatives of auction-purchasers who purchased at an auction sale in 1861 held in execution of a money decree obtained against one Duli. The suit out of which this appeal has arisen was brought by one Dip Chand, a grandson of Duli, against these appellants, or those since dead whom they now represent. We shall refer to the appellants as the defendants in this suit for brevity's sake. Dip Chand was born before that sale of 1861, and was at the time of that sale a minor. Since this appeal was filed Dip Chand died and his father, Sita Ram, was brought on the record to represent the interest of Dip Chand in the appeal. The suit was to obtain possession of Dip Chand's share, namely, one-sixth, in the property which the auction-purchaser took possession of after the sale to them by auction in 1861. The question has been, what was the property sold, that is, was the property sold the whole of the undivided family property in the mauza, or was it merely Duli's undivided share in the family property, in other words, his right to partition? The lower appellate Court found that Dip Chand's share was not sold. The meaning of that finding is that the only share which was sold in execution of that money decree in 1861 was the undivided share of Duli in the family property. It has been contended by Pandit *Sundar Lal* that on the authority of *Beni Mulho v. Basdeo Patak* (1) and the recent Full Bench ruling in *Pem Singh v. Partab Singh* (2) the lower appellate Court should have found as a question of law that the whole family property, and not Duli's undivided share, was sold at the auction sale in 1861. On the other hand Mr. *Reid* for the respondent has referred to *Hardi Narain Sahu v. Ruder Perakash Misser* (2) and *Maruti Sukha Ram v. Babaji* (3), and has contended that the decree in execution of which the auction sale took place having been a money decree against Duli and not against the members of the joint Hindu family, the lower appellate Court's finding is correct in law. He has pointed out that in each of the cases cited by Pandit *Sundar Lal* the sale had either been effected or threatened

(1) I. L. R., 12 All., 99.

(2) *Ante*, p. 172.

(2) I. L. R., 15 Bom., 87.

1892

MUHAMMAD
HUSAIN
2.
DIP CHAND.

in execution of a decree obtained on a mortgage. We abide by the view expressed in effect in the recent Full Bench ruling that where there is nothing to show any limitation of the extent of the interest sold, whether the sale took place in execution of a decree on a mortgage or in execution of a simple money decree obtained against the father, a member of a joint Hindu family, it may be presumed that the family property and not the mere undivided share of the father was sold. Such a case can rarely arise where the decree is a money decree simply, because the creditor seeking execution of his money decree is bound under section 237 of the Code of Civil Procedure to set forth in his application for attachment of the property a specification of his judgment-debtor's share or interest in the property sought to be attached. Section 238 of the Code would also bear on such a case where the property was registered in the Collector's office. In our opinion such specification should state distinctly whether it was the judgment-debtor's undivided share or the family property in which the judgment-debtor had an undivided share which was sought to be attached and should also specify what that family property was. If the specification merely referred to the judgment-debtor's share and interest in what was the family property, we should be prepared to hold, unless something to the contrary appeared, that the sale was of that share and interest only and nothing else. At the time of the execution proceedings in which the sale of 1861 took place Act No. VIII of 1859 was in force, and by section 213 of that Act an application for attachment of immoveable property required a specification similar to that required under section 237 of Act No. XIV of 1882. Neither party apparently put in evidence the execution proceedings of 1861. There was however some other evidence on the record, on which the lower appellate Court found that the decree in execution of which the sale of 1861 took place was a decree against Duli and others who were strangers to the joint family and in respect of a matter in which the joint family was not interested and in which Duli had not represented the joint family. There is some evidence on the record that Duli was made liable in that matter not as a principal, but merely as a surety. It appears to us that there is

evidence, slight though it may be, to support the finding of the lower appellate Court that Dip Chand's one-sixth was not sold in 1861. Pandit *Sundar Lal* raised a further contention, namely, that this suit was barred by section 13 of the Code of Civil Procedure. It appears that Sita Ram and his brother Nathu brought a suit against the purchasers of 1861 to recover the whole of the property which they had taken possession of after the sale, their case being that Duli's liability arose out of an immoral contract from a Hindu point of view. That suit was dismissed. It appears to us that that dismissal does not operate as *res judicata* in this suit. In that suit Sita Ram and Nathu appear to have been suing on their own behalf. It does not appear that either of those plaintiffs represented Dip Chand, although Sita Ram was in fact Dip Chand's father. The accident that Sita Ram for the purpose of defending this appeal has been brought upon the record as the legal representative of Dip Chand has, so far as we can see, no bearing on this question. It was Dip Chand who obtained the decree from the lower appellate Court and Sita Ram is merely here to defend that decree, supporting the decree and the rights of the person whom he represents. There is a slight error, we are informed, in the decree below. The decree will stand for delivery of possession of one-sixth of the property of which the auction-purchasers who are now before us, or represented, got possession under the auction of 1861 and for proportionate mesne profits calculated on the basis of the profits ascertained below. To that extent the decree below will, if necessary, be varied, in other respects the appeal will be dismissed with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

JAFAR HUSAIN AND ANOTHER (DEFENDANTS) v. MASHUQ ALI (PLAINTIFF).*

Suit for recovery of possession of immoveable property—Limitation—Adverse possession—Burden of proof—Act XV of 1877 (Limitation Act), s. 23.

Where a suit for the recovery of possession of immoveable property is resisted by a plea of adverse possession for more than twelve years, the question of limitation

* First Appeal No. 40 of 1891 from an order of Babu Mirtonjoy Mukerjee, Subordinate Judge of Benares, dated the 28th March 1889.

1892

MUHAMMAD
HUSAIN
v.
DIP CHAND.

1892.

April 2.