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of any description whatsoever shall be issued on a judgment in any suit for any of the causes of action mentioned in ss. 27, 28, 29 or 30 of this Act, after the lapse of three years from the date of such judgment." It was contended before us that s. 58, Bengal Act VIII of 1869, only applies to suits instituted under Act VIII of 1869. The language of the section does not support this contention. The section says it shall apply to any "judgment in any suit *for any of the causes of action mentioned* in ss. 27, 28, 29 and 30 of the Act." That is not tantamount to saying that the suit itself must be under Act VIII of 1869. If it is a suit on any of the causes of action mentioned in the sections of the Act enumerated, it would come within the purview of s. 58; and there is no doubt that the present suit comes within the causes of action enumerated in the section. The judgment of the lower Court is therefore correct.

We dismiss this appeal with costs and assess the hearing fee at Rs. 32.

J. V. W. *Appeal dismissed.*

PRIVY COUNCIL.

P. C.*
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February 11 *and* 26.

SIMBHUNATH PANDE AND OTHERS (DEFENDANTS) *v.* GOLAP SINGH AND OTHERS (PLAINTIFFS).

[On appeal from the High Court at Calcutta.]

Sale in execution of decree—Judgment-debtor's share in joint ancestral estate—Mitakshara law—Execution of decree by sale of such share—Rights of co-sharers not being parties to the decree or execution proceedings—Sale certificate.

The question was whether the whole estate belonging to a joint family, living under the Mitakshara, including the shares of sons or the share of their father alone, passed to the purchaser at a sale in execution of a decree against the father alone upon a mortgage by him of his right.

Held that, as the mortgage and decree, as well as the sale certificate, expressed only the father's right, the *primâ facie* conclusion was that the purchaser took only the father's share, a conclusion which other circumstances—the omission on the part of the creditor to make the sons parties and the price paid—not only did not counteract but supported.

* *Present:* LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE, SIR B. PEACOCK and SIR R. COUCH.

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The enquiry in recent cases regarding the liability of the estate of co-sharers in respect of transfers made by, or execution against, the head of the family has been this, *viz.*, what, if there was a conveyance, the parties contracted about, or what, if there was only a sale in execution, the purchaser had reason to think he was buying. Each case must depend on its own circumstances—*Upooroop Tewary* v. *Lalla Bandhjee Suhay* (1) distinguished.

APPEAL, by special leave, from a decree (27th June, 1883) of a Divisional Bench of the High Court reversing a decree (5th December, 1881) of the Subordinate Judge of Bhagulpore.

The object of this suit was to establish the plaintiffs' claim to have their share in ancestral estate excluded from the effect of a sale made in execution of a decree against their father alone for a debt due by him. And the question now raised was whether the entire estate of the family—a one anna four pie share of mouzah Kindwar, in pergunnah and district Bhagulpore—passed to the purchaser at the sale, the principal defendant in this suit, or only the share of the father. The latter share would on partition be only two pie two krants of the whole sixteen annas of the village.

Their grandfather's *biswa* was four annas, or one-fourth of mouzah Kindwar. He had three sons, one of them being Luchmun Singh, the father of the plaintiffs. Inheriting one-third the latter took, as a family, a one anna four pie share of the village, each being entitled on partition (the sons being four in number) to one-sixth, including the father and mother. The plaint claimed restoration of five-sixths with mesne profits and a declaration of the sons' right to *kamat* land held by them in proportion to their share in the village.

The defendants' answer relied upon the sale, and the possession that they had obtained under the order for delivery of possession, which gave them, as they contended, rightly, the whole one anna four pie share.

At the hearing before the Subordinate Judge of Bhagulpore it appeared that, on the 12th September, 1865, Luchmun Singh, having borrowed money of Bichuknath Pandé, executed to him a money bond of that date, mortgaging also his right and

(1) I. L. R., 6 Calc., 749.

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interest in mouzah Kindwar; whereupon afterwards the decree (6th August, 1869) now in execution was made by consent. Execution proceedings resulted in the now disputed sale on 7th September, 1871, at which the right, title and interest of Luchmun Singh in mouzah Kindwar were purchased by Bichuknath Pandé, one of the defendants.

The Subordinate Judge held that the entire estate of the family passed by the sale. His reason mainly was that the father bound the sons when he incurred a debt that was in no way attributable to his misconduct. There being no immorality in the nature of the debt the decree might have been against the whole family; and the family property having been sold on this account the sons had no power to interfere with the auction sale. He accordingly dismissed the suit.

On appeal a Divisional Bench of the High Court (PRINSEP and O'KINEALY, JJ.) gave judgment as follows:—

"It appears to us from the facts of this case that it does not come within any of the judgments of this Court which have been quoted in the course of argument, and that it is a case purely within the judgment delivered by the Privy Council in the *case of Dindyal* (1). From the terms of the bond (which is a simple money bond) it is clear that the obligation was simply on the part of the father.

"The obligee sued to recover money due on this bond, and the father put in a petition confessing judgment, in which, after admitting the debt, he states: 'I have mortgaged my right and interest in mouzah Kindwar,' the words in the vernacular being 'Hakiyat O milkiyat apna.' We think from the terms of this petition that it was clearly understood by the father that he was dealing with only his own property in the estate. That this was the interpretation accepted by the decree-holder appears from the terms of the decree, which states that the debtor, after confessing judgment, has mortgaged his right and interest in mouzah Kindwar, and that a decree is accordingly passed. The terms of the sale certificate granted to the decree-holder, purchaser, are to the same effect. In the 'specification of property' the words are: 'The right and interest of the judgment-debtor

(1) L. R., 4 I. A., 147; I. L. R., 3 Calc., 198.

4 annas' (that is to say, the estate held by him and his sons) 'out of 16 annas mouzah Kindwar.' And the terms of the body of the sale certificate declare that the right and interest which the judgment-debtor had in that property was purchased at auction for Rs. 625 by the decree-holder in the case, and that it is hereby notified that whatever right, title and interest the judgment-debtor had in that property was extinguished from that date. We cannot agree with the argument that under such circumstances the judgment-debtor, father, should be regarded as being proceeded against by the obligee as representing the family estate.

"Under such circumstances we think, as we have already laid down in another case, that, under the terms of the judgment in the *case of Dindyal*, as the creditor has chosen to proceed against the father alone and to sell only the father's whole estate, he has by his own act given up whatever rights he might have had against the entire family property.

"The order of the lower Court will accordingly be set aside and a decree given to the plaintiffs declaring that they are entitled to a partition of the family estate and to obtain their respective shares under the Mitakshara law, the defendant No. 1 being entitled to retain only the share of Luchmun Singh, the father.

"The appellants will receive their costs here and also in the lower Court."

The defendants' appeal against the above decree was specially admitted by an order of Her Majesty in Council of 30th December, 1884.

For the appellants Mr. *R. V. Doyne* argued that the Subordinate Judge had rightly held that the entire interest of the family in mouzah Kindwar, the one anna two pie share, had passed by the sale in execution. What was sold was the interest that was liable to attachment and sale in execution of a decree against the father in respect of a debt incurred by him, not for any immoral purpose. What was sold was the entire interest of the family for another reason, *viz.*, that the eldest son, being of full age, was himself a party to the taking of the loan by Luchmun Singh; and he, as well as other sons on their attaining full age, assented to the mortgage on which the decree

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was based, as the evidence referred to in the judgment of the Subordinate Judge showed. *Dindyal* v. *Jugdip Narain* (1), relied upon in the judgment of the High Court, was distinguishable, as in that case the creditor had done nothing to show an intention on his part to regard any one as liable, save the father alone. The principles on which this decision should be placed were those explained in *Girdhari Lal* v. *Kantoo Lal* (2) and *Suraj Bansi Koer* v. *Sheo Pershad Singh* (3).

Reference was also made to the *Collector of Monghyr* v. *Hurdainarain Shahai* (4) and *Nanomi Babuasin* v. *Muddun Mohun* (5).

The respondents did not appear.

Their Lordships' judgment was delivered by

LORD HOBHOUSE.—This is one of the numerous cases relating to the amount of interest acquired by the purchaser at an execution sale where the sale relates to a joint family estate subject to the Mitakshara law, and the father of the family alone has been party to the proceedings. Like several of its predecessors it has been heard *ex parte*.

Luchmun Singh is father of the joint family. He has a wife and four sons. The family property consists of a share of mouzah Kindwar, amounting to 1 anna 4 pie in extent. Other shares of the mouzah were, when the transactions now in question took place, vested in other branches of the family who had become divided from Luchmun. The share of Luchmun's father was four annas. The appellants, who were defendants in the suit, claim the whole 1 anna 4 pie. The respondents, the wife and sons, who were plaintiffs, claim five-sixths of it as the shares which would come to them on partition.

On the 17th September, 1865, Luchmun took a loan of Rs. 219 from Bhichuk, one of the appellants, and executed a bond for payment in a month's time with interest at 24 per cent., or after the month, with interest at 48 per cent. In July, 1869, the

(1) L. R., 4 I. A., 147 ; I. L. R., 3 Calc., 198.
(2) L. R., 1 I. A., 321 ; 14 B. L. R., 187.
(3) L. R., 6 I. A., 88 ; I. L. R., 5 Calc., 148.
(4) I. L. R., 5 Calc., 425 ; L. R., 2 I. A., 26.
(5) L. R., 13 I. A., 1. ; I. L. R., 13 Calc., 21.

bond-holder sued Luchmun, and an agreement was made that Luchmun should pay Rs. 590-4, with interest at 24 per cent., in a given month, and by way of security should mortgage "his right and interest in mouzah Kindwar." This agreement is embodied in a decree of the Munsiff of Bhagulpore, dated the 7th August, 1869. The same decree goes on to direct that in the event of non-payment the mortgaged property shall be sold by auction for the realisation of the decretal money. In the year 1874 a sale took place in execution proceedings under this decree.

The certificate of sale bears date the 21st December, 1874, and is as follows:—

"A petition being filed for execution of the decree of the Court of the Sudder Munsiff of Bhagulpore, dated 6th August, 1869, in Case No. 494 of 1869 *v.* Luchmun Singh of mouzah Kindwar, pergunnah Bhagulpore, judgment-debtor, and for holding auction sale of the under-mentioned property, an *istahar* was issued according to the order of this Court, and the said property after being advertised was sold by auction on the 7th September, 1874; and accordingly the right and interest which the judgment-debtor had in that property was purchased at auction for Rs. 625 by Bhichuknath Pandé, inhabitant and proprietor of mouzah Phoolwaria, decree-holder, who forthwith filed Court fee stamps of Rs. 12-8 poundage fee and filed a receipt for the balance Rs. 612-8 out of his decretal money. Therefore this certificate is granted to Bhichuknath Pandé, decree-holder, auction-purchaser of the said property; and it is hereby notified that whatever right, title and interest the said judgment-debtor had in the said property, being extinguished from the 7th September, 1874, the date of the sale, is transferred to Bhichuknath Pandé, decree-holder, and that this certificate will be held a valid document with reference to the transfer of the right, title and interest of the judgment-debtor.

"*Specification of property.*

"The right and interest of the judgment-debtor in 4 annas out of 16 annas of mehal Kindwar (main and hamlet), tuppa Chandipa, pergunnah Bhagulpore, the towzi number of the entire mehal being 82, and the sudder jumma Rs. 380-8.

"Dated 21 December, 1874."

The purchaser was put into possession on the 12th January, 1875, and he appears to have remained in the possession and enjoyment of the whole 1 anna 4 pie until this suit was brought on the 18th April, 1881. There is no distinct evidence as to the value of the property, but in the plaint the value is stated for

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Court purposes at Rs. 5,500, which the defendant does not dispute in his written statement, though he objects to the insufficiency of the Court fee on the ground that the plaintiffs sue to recover some *kamat* land worth Rs. 2,292-2. Their Lordships conceive that the Rs. 625 paid must be much below the value of the entirety, if indeed it is not below that of the sixth share which Luchmun would take on partition.

The Subordinate Judge dismissed the suit. He held that the debt was not tainted with immorality and that two of the sons had consented to the mortgage. But his principal ground appears to have been that he was bound by the decision in *Upooroop Tewary* v. *Lalla Bandhjee Suhay* (1) to hold that a mortgage of the right and interest of Luchmun passed the entirety of the family property.

On appeal the High Court reversed the decision of the Subordinate Judge, and gave the plaintiffs a decree declaring that they are entitled to a partition of the family estate and to obtain their respective shares under the Mitakshara law, the defendant No. 1 being entitled to retain only the share of Luchmun Singh, the father. They referred to the vernacular expressions used by Luchmun in his petition, on which the decree of the 7th August, 1869, was founded, and which are rendered by the expression "right and interest"; and they thought that Luchmun clearly understood that he was dealing with only his own property in the estate. Further they relied on the fact that the sons were not made parties to the execution proceedings, and to the treatment of that fact in *Dindyal's case* (2).

Their Lordships cannot agree with the Subordinate Judge. Whatever part any of the sons may have taken in negotiating between Luchmun and Bichuk, there is no evidence whatever of their proposing to mortgage their own interests. The sons may have assented to what was done, but the question is, what was done? That must be answered by the documents.

Moreover, if Bichuk relied on assent by the sons, he should have taken care to make them parties to the execution proceedings. In *Dindyal's case*, where the expressions used by the

(1) I. L. R., 6 Calc., 749.

(2) L. R., 4 I. A., 147; I. L. R., 3 Calc., 198.

mortgagor were much more favorable to the conveyance of the entirety than they are here, the creditor's omission of the sons from the proceedings was made a material circumstance against him. And in *Nanomi Bubuasin's case*, where the decision was in favor of the purchaser, the same circumstance was recognised as being material when the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's coparcenary interest alone.

In the *case of Upooroop Tewary* (1) Mr. Justice Mitter thought that the words "my proprietary share" in a mouzah were calculated to describe the entirety of the family property in dispute; and he distinguished them from the expression "right, title and interest." In *Hurdai Narain's case* (2) there was no conveyance, but a sale on a money decree. The only description was "whatever rights and interests the said judgment-debtor had in the property" these were purchased by Hurdai Narain. The High Court held that nothing passed beyond the debtor's interest which gave him a right to partition, and which perhaps may for brevity be called his personal interest, and this Committee affirmed the decision. Each case must depend on its own circumstances. It appears to their Lordships that in all the cases, at least the recent cases, the enquiry has been what the parties contracted about, if there was a conveyance, or what the purchaser had reason to think he was buying if there was no conveyance but only a sale in execution of a money decree.

Their Lordships are sorry that they cannot follow the learned Judges of the High Court into their examination of the vernacular petition. But they find quite enough ground in the decree to express a clear agreement with them. They conceive that, when a man conveys his right and interest and nothing more, he does not *primâ facie* intend to convey away also rights and interests presently vested in others, even though the law may give him the power to do so. Nor do they think that a purchaser who is bargaining for the entire family estate would be satisfied with a document purporting to convey only the right and interest of the father. It is true that the language of the certificate is

(1) I. L. R., 6 Calc., 749.

(2) I. L. R., 5 Calc., 425; L. R., 2 I. A., 26.

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influenced by that of the Procedure Code. But it is the instrument which confers title on the purchaser. Its language, like that of the certificate in *Hurdai Narain's case*, is calculated to express only the personal interest of Luchmun. It exactly accords with the expressions used in the decree of August, 1869, founded on Luchmun's own vernacular expressions, which the High Court construe as pointing to his personal interest alone. The other circumstances of the case aid the *primâ facie* conclusion instead of counteracting it, for the creditor took no steps to bind the other members of the family, and the Rs. 625 which he got for his purchase appears to be nearer the value of one-sixth than of the entirety.

Their Lordships will humbly advise Her Majesty that the decree of the High Court should be affirmed and this appeal dismissed.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Miller, Smith & Bell.*

MATRIMONIAL JURISDICTION.

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May 3 *and July* 21.

Before Mr. Justice Trevelyan.

THOMSON *v.* THOMSON AND ANOTHER.*

Costs of Suit by husband against wife for divorce—Deposit of costs—Stay of proceedings until costs paid—Poverty of husband.

In a suit brought for dissolution of a marriage solemnised in 1859 (the parties to such marriage being of Anglo-Indian domicile) the respondent, being possessed of no separate property of her own, applied to the Court for an order directing her husband to deposit in Court a sum sufficient to cover her probable costs of suit.

The Court made an order directing the Registrar to estimate and certify the wife's probable costs of suit, and directed the husband to pay the sum so certified into Court. The husband being a man of next to no means failed to pay into Court the sum certified by the Registrar. *Held*, on an application by the wife to stay proceedings until such costs were paid, that it would be unreasonable to stay proceedings on account of the husband being unable to pay into Court that which he did not possess; but that, inasmuch as the affidavits filed by the parties were contradictory as to the means of the husband, the matter should be referred (if the parties so desired it) for an enquiry by an officer of the Court into the question of means.

* Suit No. 2 of 1887.