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June 12.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

LACHHMAN DAS (PLAINTIFF) *v.* DALLU AND OTHERS (DEFENDANTS).*

Hindu Law—Joint Hindu family—Joint family property sold in execution of a decree on a mortgage against the father alone—Decree satisfied—Subsequent recovery by the sons of part of the mortgaged property—Remedy of mortgagee.

A mortgagee held a mortgage of joint family property given by the father alone. He sued on his mortgage without making the sons parties to the suit, and having obtained a decree, brought the whole of the joint family property to sale and purchased it himself. This purchase, together with a further cash payment of Rs. 59, satisfied the mortgage debt. After the mortgage had been thus satisfied, the sons brought a suit for recovery of their shares in the joint family property amounting to one-fourth, and obtained a decree, and got possession of the property claimed. The mortgagee then brought a suit against the sons to recover from them a share of the mortgage debt proportionate to the share in the joint family property owned by them. *Held*, that the original mortgage having become extinct the plaintiff was entitled to a decree for one-fourth of the price realized by the mortgaged property at auction sale and to recover the same by sale of the interest of the sons in the joint family property. *Bhawani Prasad* v. *Kallu* (1) referred to. *Dharam Singh* v. *Angan Lal* (2) followed.

THE facts of this case sufficiently appear from the judgment of Henderson, J.

Mr. *Sinha* and Munshi *Gobind Prasad* for the appellant.

Pandit *Baldeo Ram Dave* for the respondents.

BURKITT, J.—It is unnecessary for me to state the facts in the case. They have been fully dealt with in the judgment about to be pronounced by my brother Henderson, which I have had an opportunity of perusing. I concur in holding, as was done in the case of *Dharam Singh* v. *Angan Lal* (2), that the lien can be enforced by sale of the respondents' interest in the mortgaged property by reason of the pious duty incumbent on them of paying their father's lawful debts.

The amount for which they are liable is Rs. 275, with interest as set forth by my brother Henderson. I concur in the order proposed by him. A decree will be drawn up accordingly, giving the respondents six months from to-day, within which they can avoid sale by paying the sum now decreed against them. The appellant is entitled to proportionate costs in all Courts.

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* Second Appeal No. 864 of 1897, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 15th September 1897, reversing a decree of Rai Anant Ram, Subordinate Judge of Aligarh, dated the 31st March 1897.

(1) (1895) I. L. R., 17 All., 537. (2) (1899) I. L. R., 21 All., 301.

HENDERSON, J.—On the 5th January 1877, one Data Ram, the father of a Mitakshara joint family, executed a mortgage in respect of 114 bighas in mauza Pular, in favour of the plaintiff-appellant to secure the sum of Rs. 99-8 with interest. That sum, it was stated by the plaintiff in his plaint in the present suit, was required for the purpose of paying Government revenue, and this statement, though not admitted, was not denied in the written statements of the defendants.

On the 16th August 1887, the plaintiff, in a suit brought by him on the mortgage against Data Ram alone, obtained a decree for sale of the mortgaged property, and on the 22nd November 1888, after the death of Data Ram, the property was sold under the decree and purchased by the plaintiff himself for Rs. 1,100, and the sale was confirmed on the 8th January, 1889.

It is important to note that the decree of the 16th August 1887 was for Rs. 1,129, including costs, to which was added interest at 6 per cent. per annum on Rs. 1,000 for six months, as ordered by the decree, making a total of Rs. 1,159. It has been found in the present suit, that after giving credit for the Rs. 1,100, the price fetched by the mortgaged property when sold, the balance of Rs. 59 was actually paid off. The decree of the 16th August 1887 was therefore satisfied, as has been found by the lower appellate Court.

On the 28th July 1896, however, the defendants-respondents, who are the sons of Data Ram, brought a suit against the plaintiff-appellant, alleging that as they were not parties to the decree of the 16th August 1887, they were not bound by that decree, nor was their one-fourth share in the mortgaged property affected by the sale under that decree, and on the 15th September 1896 they obtained a decree for possession of their one-fourth share on the sole ground that they were not parties to, and therefore not bound by, the decree of the 16th August 1887.

It appears that the sale of the mortgaged property on the 22nd November 1888 was made in proceedings in execution had against the respondents, Data Ram having died in the meantime, and that in such proceedings they did not object that the mortgage debt was one for which they were not liable, or that they were not bound by the decree, but, in my opinion, an objection

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of this nature could not have been entertained by the Court executing the decree, as the duty of that Court was confined to giving effect to the decree as it stood, and did not justify it in taking into consideration the question whether it was valid or binding upon the sons of the judgment-debtor or affected their interests in the property directed to be sold.

The decree of the 15th September 1896 was one of many decrees obtained under somewhat similar circumstances in this Province on the strength, it is said, of a decision of a Full Bench of this Court in the case of *Bhawani Prasad* v. *Kallu* (1) in which it was held that a mortgage decree in a suit upon a mortgage against a mortgagor who is the father of sons in an undivided family governed by the Mitakshara, is not binding upon the sons, of whose existence and interest the plaintiff mortgagee had notice, unless joined as parties to the suit, and that the sons if not made parties may sue for a declaration that the decree-holder is not entitled to sell, in execution of his decree for sale, the interest of the sons in the property comprised in the mortgage, although the sole ground of their suit is that they were not parties to the suit by the mortgagee. The decision in that case turned mainly, if not entirely, upon the interpretation which the Full Bench put upon section 85 of the Transfer of Property Act.

As in the case of *Bhawani Prasad* v. *Kallu* (1) it was not alleged in this suit or in the suit brought by the respondents against the appellant that the debt of the father was tainted with immorality or impiety. Before the passing of the Transfer of Property Act a decree upon a mortgage against a Hindu father passed in the absence of his sons was a good and valid decree, and it was always considered, and by some of the High Courts in India it is still considered, that a sale under such decree was so far good against the sons that it could only be impeached in a suit brought by them if it could be shown that the debt did not exist or had been incurred for immoral or impious purposes. According to the decision in the case of *Bhawani Prasad* v. *Kallu* (1) the sons may sue to have it declared that their interests were not affected by the decree, and in the present case, where the property was sold and purchased by

(1) (1895) I. L. R., 17 All., 537.

the decree-holder himself, the sons have obtained a decree for possession of their shares of the mortgaged property.

The decree of the 15th September 1896 has never been impeached, and apart altogether from the fact that this Court is bound by the decision of the Full Bench so far as it goes, it must be taken to have been rightly made.

The present suit, which is a suit by the mortgagee against the sons of Data Ram, was instituted on the 24th September 1896, and, except for the fact that the plaint recites the former suits and proceedings to which I have referred, the suit in form is an ordinary mortgage suit against the sons of Data Ram upon the original mortgage. Notwithstanding the decree obtained by him upon the mortgage and the proceeding and sales had thereon, the plaintiff treats the mortgage as still subsisting and claims that there is due upon an account being taken on the mortgage in the usual way the sum of Rs. 7,777. Against that sum he gives credit for the sum of Rs. 1,100 paid by him for the property when sold under his decree, and he claims to be entitled in consequence of his having been deprived of one-fourth of the property purchased by him to a one-fourth share of the balance, or Rs. 1,669 after giving credit for Rs. 150, the amount of profits which he admits having realized while the defendant's one-fourth share was in his possession. He, however, relinquishes a small sum, and the actual amount which he now claims is Rs. 1,500, and he seeks to enforce the payment of this sum by the sale of the one-fourth share of the defendants.

I have already drawn attention to the finding that previous to the suit by the respondents, the mortgage decree had been fully satisfied, and it is only because the plaintiff has since been deprived of a one-fourth share of the mortgaged property which he himself purchased for Rs. 1,100, that he is now able to say that any portion of the debt has not been discharged. In my opinion the original mortgage no longer exists, and if there is still outstanding a portion of the debt due upon the decree against Data Ram, then the respondents as sons of Data Ram are liable to that extent for the debt of their father, as they do not allege that the debt was one from which they could claim to be relieved. It is clear, I think, that but for the whole mortgaged property, including the

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interests of the respondents, having been sold, the mortgage decree could not be taken to have been satisfied. It would not be unfair to deduct one-fourth from the Rs. 1,100 which was paid for the whole property and take the balance Rs. 825 as the amount for which credit should have been given, leaving Rs. 275 still outstanding as a debt, for which the respondents are still liable. The plaintiff is not entitled, as he has sought to do, to treat the mortgage as if it were still subsisting, and to take the account upon it from the beginning and after giving credit for the Rs. 1,100 paid by him on the 22nd November 1883, and the sum of Rs. 150, the profits alleged to have been realized by him from the share of the defendants while it was in his possession, to say that the balance found upon the account on the footing of the mortgage as if subsisting is still due.

The sum of Rs. 275 became an outstanding debt as from the date of the respondent's decree declaring them entitled to possession of their one-fourth share, and it will carry such interest, if any, as was allowed on the principal amount of the mortgage decree. For this amount the respondents are undoubtedly liable to the plaintiff. Their father had full power to charge their interest in the mortgaged property for the debt, and nothing has taken place to discharge their interest from the mortgage lien.

The only point which remains to be determined is whether in this suit the lien can be enforced, and on this point we have been referred to the case of *Dharam Singh* v. *Angan Lal* (1), where such a lien was enforced. The facts of the case are not distinguishable from those of the present case, but the point now before us did not directly arise, as no objection was raised as to the form of the decree of the lower appellate Court which directed the property of the defendants to be sold to meet the claim. This appears from the following observations in the judgment of the Court:—"The plaintiffs are therefore entitled to claim the amount "decreed to them. No objection was taken in argument to the form "of the decree in the Court below." There is nothing in the decision of the Full Bench which prevents a mortgagee who has sued a Hindu father in the absence of his sons from subsequently bringing a suit to enforce his mortgage against the interests of the

(1) (1899) I. L. R., 21 All., 301.

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sons in the ancestral property, and I am unable to see why the plaintiff here should not be entitled to enforce the lien against the respondents' interest in the mortgaged property on the ground of their pious obligation to pay their father's debts.

The decree of the lower appellate Court dismissing the plaintiff's claim ought, I think, to be set aside, and there ought to be a decree in favour of the plaintiff for Rs. 275, with such interest, if any, thereon, as may have been given by the decree of the 16th August 1887, from the 15th September 1896, and in default of the respondents paying the same by a day to be fixed, their one-fourth share in the mortgaged property should be sold in satisfaction of the claim.

Appeal decreed.

Before Mr. Justice Knox, Acting C. J., and Mr. Justice Blair.

1900
June 15.

DALEL SINGH AND OTHERS (JUDGMENT-DEBTORS) *v.* UMRAO SINGH AND OTHERS (DECREE-HOLDERS).*

Civil Procedure Code, section 294—*Application by the decree-holder for leave to bid at a sale in execution of his decree—Limitation—Act No. XV of* 1877 *(Indian Limitation Act), Sch. ii, Art* 179(4)—*Execution of decree.*

Held, that an application for leave to bid at a sale in execution under section 294 of the Code of Civil Procedure is an application to take some step in aid of the execution of the decree within the meaning of art. 179(4) of the second schedule of the Indian Limitation Act, 1877. *Bansi* v. *Sikree Mal* (1) followed. *Raghunundun Misser* v. *Kally Dut Misser* (2) dissented from.

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

Babu *Harendra Krishna* for the appellant.

Mr. *W. M. Colvin* for the respondent.

KNOX, ACTING C.J., and BLAIR, J.—The sole point with which we have to deal in this appeal is, whether the application for execution which was passed on the 19th November 1889, is or is not barred by limitation. The Court below taking in aid an application by the judgment-creditor, dated the 8th January 1896, has decided that it was not so barred. The contention

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* First Appeal No. 18 of 1900, from a decree of Mr. A. Rahman, Subordinate Judge of Meerut, dated the 6th January 1900.

(1) (1890) I. L. R., 13 All., 211. (2) (1896) I. L. R., 23 Calc., 690.