1913

March, 4.

Before Mr. Justice Sir George Knox and Mr. Justice Muhammad Rafiq.

JALESHAR RAI AND OTHERS (DEFENDANTS) *v.* ANRUT RAI AND OTHERS (PLAINTIFFS).*

Hindu law—Mitakshara—Joint Hindu family—Liability of sons in respect of a mortgage executed by father—Exemption of sons' interests—Subsequent suit against the sons—What plaintiffs are entitled to recover.

In 1892 a decree was passed on appeal for sale on a mortgage of joint family property against the father of the family. In 1896 the sons, who were not made parties to the original suit, obtained a decree exempting their shares in the family property. In 1897 the share of the father was sold and realized less than half the amount of the decree. In 1910 the mortgagees brought a suit against the sons to recover the balance of the mortgage debt after giving credit for the amount realized by sale in execution of the decree of 1892.

Held the suit was not barred, but that the plaintiffs could only recover the unsatisfied portion of the decree of 1892 together with future interest as allowed by that decree. They could not treat the suit as an ordinary mortgage suit, merely giving credit for the amount realized under the decree of 1892, nor could they claim interest at the contractual rate on the unpaid amount of the decree.

Lachhman Das v. *Dallu* (1) followed. *Dharam Singh* v. *Angan Lal* (2) and *Ran Singh* v. *Sobha Ram* (3) referred to.

THE facts of this case are fully stated in the judgement of the Court.

The Hon'ble Munshi *Gokul Prasad*, for the appellants.

Maulvi *Muhammad Ishaq*, for the respondents.

KNOX and MUHAMMAD RAFIQ, JJ:—It appears that one Payag Rai, father of the first five defendants appellants and grandfather of the other six, executed a deed of mortgage on the 27th of September, 1883, in favour of Anrut Rai plaintiff respondent No. 1, and the ancestors of the other plaintiffs respondents. The mortgage was given in respect of ancestral property in lieu of Rs. 999, carrying fourteen annas per cent. per mensem interest, and was redeemable on the 27th of June, 1885. In 1891 the mortgagees instituted a suit against Payag Rai only without impleading his sons, to recover, Rs. 1,567-7-4½, the amount due on foot of the mortgage of 1883 and for sale of the mortgaged property in default of payment. One of the objections to the suit was that

* Second Appeal No. 1114 of 1911 from a decree of Ram Auatar Pande, District Judge of Azamgarh, dated the 27th of May, 1911, modifying a decree of Ram Chandra Chaudhri, Subordinate Judge of Azamgarh, dated the 16th of December, 1910.

(1) Weekly Notes, 1900, p. 125. (2) (1899) I. L. R., 21 All., 301.
(3) (1907) I. L. R., 29 All., 544.

post diem interest at the stipulated rate of fourteen annas per cent. per mensem could not be claimed under the terms of the deed of the 27th of September, 1883. The court of first instance disallowed the objection and passed a decree on the 3rd of July, 1891, against Payag Rai for Rs. 1,548-11-6. On appeal the learned District Judge gave effect to the objection of Payag Rai as to interest, holding that the mortgagees were entitled to recover post diem interest by way of damages only, which he allowed at six per cent. per annum. The decree of the first court was modified and the claim of the mortgagees was decreed for Rs. 1,321-7-6 on the 11th of June, 1892.

On the 18th of August, 1896, the first five defendants appellants, the sons of Payag Rai, instituted a suit against the mortgagees for a declaration that the decree obtained by the latter against Payag Rai was not binding on them, as they were not parties to it, and that their share in the mortgaged property was not liable to sale under it. The claim of Payag Rai's sons was decreed on the 11th of November, 1896. On the 20th of February, 1897, the share of Payag Rai only in the mortgaged property was sold in execution of the decree of the 11th of June, 1892. The sale realized Rs. 725.

On the 13th of February, 1910, eighteen years after the decree obtained against Payag Rai and thirteen years after the sale of his share, the plaintiffs respondents brought the suit out of which this appeal has arisen in the court of the Subordinate Judge of Azamgarh against the sons and grandsons of Payag Rai to recover Rs. 2,093-2-6, the balance alleged to be due on the mortgage of 1883.

The suit of the plaintiffs respondents was in form an ordinary mortgage suit and they claimed Rs. 2,093-2-6 by making up the accounts from the date of the original mortgage as in an ordinary suit on a mortgage bond, crediting the amount realized by Payag Rai's share. In making up accounts, interest was charged at the stipulated rate of fourteen annas per cent. per mensem from the date of the mortgage till the date of the institution of the suit, thus ignoring the decree of 1892, under which interest after due date was allowed at six per cent per annum only.

The claim was resisted on several grounds, two of which need only be mentioned here as they alone have been pressed in the

1913

JALESHAR RAI v. ANRUT RAI.

appeal before us. It was urged in defence that as the decree of 1892 against Payag Rai had become barred and incapable of execution on the date of the institution of the present suit, the claim of the plaintiffs respondents was also barred. The principle on which accounts were made up in the plaint was also objected to. The Subordinate Judge disallowed the pleas in defence and decreed the claim for Rs. 2,093-2-6. On appeal the learned District Judge modified the decree of the first court. He held that the plaintiffs respondents should get the unsatisfied amount of the decree of 1892 together with interest at the contractual rate of fourteen annas per cent. per mensem from the 20th of February, 1897, up to date of decree.

The defendants appellants challenge the decree of the lower appellate court on the two grounds already mentioned. They contend that the original mortgage debt contracted by Payag Rai was merged in the decree of 1892. The mortgage of 1883 no more exists. The only outstanding debt against the ancestor of the appellants, for the payment of which they are liable under the Hindu law, is the unsatisfied amount of the decree. And as the decree has become barred and incapable of execution, the debt for the recovery of which the present suit is brought has also become barred and no claim in respect of it can be maintained.

The learned vakil for the appellants relies in support of his argument on the case of *Lachhman Das* v. *Dallu* (1). That case, in almost every respect, resembles the present case. In that case one Data Ram, father of a Mitakshara joint family, executed a mortgage in respect of ancestral property. The mortgagee sued Data Ram alone and obtained a decree against him. In execution of the decree the mortgaged property was sold for the amount of the decree and purchased by the mortgagee. Subsequently the sons of Data Ram sued the mortgagee and obtained a decree for recovery of possession of their share in the mortgaged property on the ground that they were not parties to the suit in which the decree for sale had been passed against their father. Then the mortgagee brought a suit against the sons, framing his suit as an ordinary mortgage suit and making up accounts from the date of the mortgage and giving credit for the money realized at the sale.

(1) Weekly Notes, 1900, p. 125.

The sons resisted the claim. They denied their liability for the mortgage debt as also the power of their father to charge their share in the ancestral property. They further disputed the manner in which the accounts had been made up in the plaint. They said, that if they were made liable for the mortgage-debt, they should pay only one-fourth of the money paid at the sale of the mortgaged property, as their share which was released from the operation of the decree against their father was one-fourth only. In disposing of his last objection HENDERSON, J., remarked as follows.—

"I have already drawn attention to the finding that previous to the suit by the respondents (*i.e.* the sons) the mortgage decree had been fully satisfied, and it is only because the plaintiff (*i.e.* the mortgagee) 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 that 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 would not be unfair to deduct one-fourth from 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 sum of Rs. 275 became an outstanding debt as from the date of the respondents' 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."

It is on the basis of these observations that the learned vakil for the appellants contends that the mortgage of 1883 merged in the decree of 1892; and as the mortgage of 1883 no more exists and the decree debt due from Payag Rai has become barred, the claim of the plaintiffs respondents is also barred. We do not think, that the contention of the appellants is sound. The plaintiffs respondents have not framed their suit on the basis of the decree of 1892. They do not seek to charge the appellants' share in the ancestral property on the strength of that decree. And indeed they could not do so in the face of the decree of 1896 in favour of the appellants declaring that the latter were not bound and that their interest in the ancestral property was not affected by the decree obtained against their father. If, according to the appellants, the mortgage

1913

JALESHAR RAI v. AUGUT RAI.

of 1883 has merged in the decree of 1892, then the unsatisfied portion of that decree can be recovered only as a simple money debt. If the contention of the appellants is correct, the present suit is not maintainable, that is, the plaintiffs respondents cannot enforce payment of the debt charged on the ancestral property by Payag Rai against the interests of his sons in that property, though the debt was not tainted with immorality or otherwise objectionable.

The plea of limitation urged on behalf of the appellants can only be given effect to if we hold that the suit of the plaintiffs respondents in its present form is not maintainable. That such a suit is maintainable is amply borne out by the case-law on the subject, vide *Dharam Singh* v. *Angan Lal* (1) and *Ran Singh* v. *Sobha Ram* (2). We, therefore, find that the claim of the plaintiffs respondents is not barred by limitation. The observations of HENDERSON, J. quoted above, upon which great stress is laid by the learned vakil for the appellants, do not apply to the nature of the remedy open to a mortgagee against the Hindu sons, but to the amount recoverable by him after he has obtained a decree against the father only and a portion of that decree remains unpaid. Those observations do, however, certainly support the second contention for the appellants, namely, that the plaintiffs respondents cannot recover more than the unsatisfied portion of the decree of 1892 with future interest allowed on that decree. The plaintiffs respondents cannot make up accounts as in an ordinary mortgage suit, and, giving credit for the money realized at the sale of Payag Rai's share, claim the balance. Nor can they claim to recover interest at the contractual rate on the unpaid amount of the decree, as has been allowed to them by the learned District Judge. We allow the second contention of the appellants. The result is that we modify the decree of the lower appellate court by decreeing the claim of the plaintiffs respondents for Rs. 529-3-0 with interest at six per cent. per annum from the 20th of February, 1897, up to the date of the decree of this Court, that is, Rs. 1,038-5-0. The appellants will pay the sum of the Rs. 1,038-5-0 within six months of the decree of this Court with future interest at six per cent. per annum. In default of payment within six

(1) (1899) I. L. R., 21 All., 301. (2) (1907) I. L. R., 29 All., 544

months the amount will be realized by sale of the share of the appellants in the property specified in the mortgage of 1883. Future interest at six per cent. per annum is allowed. Costs in all courts in proportion to success and failure.

Decree modified.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

1913
March, 11.

JAMNA PRASAD RAUT (JUDGEMENT-DEBTOR) *v.* RAGHUNATH PRASAD AND OTHERS (DECREE-HOLDERS.)*

Civil Procedure Code (1908), *section* 60 (*c*)—*Execution of decree—Attachment—Objection that attached property is the house of an agriculturist—Judgement-debtor both zamindar and agriculturist—Burden of proof.*

Where a judgement-debtor whose house was attached in execution of a decree took objection that the house was the house of an agriculturist to which section 60 (*c*) of the Code of Civil Procedure applied and was not susceptible of attachment, and it was found that the judgement-debtor was both an agriculturist and a zamindar:

Held that it lay on the judgement-debtor to prove that the house was strictly of the nature contemplated by the provisions of section 60 (*c*).

IN this case in execution of a simple money decree against one Jamna Prasad Raut a house belonging to him in a certain village was attached. The judgement-debtor took objection that the house was the house of an agriculturist within the meaning of section 60 (*c*) of the Code of Civil Procedure and could not be attached. This objection was overruled on the finding that the house was not in fact occupied by the judgement-debtor (who was both a zamindar and an agriculturist) as an agriculturist. The judgement-debtor appealed to the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru* and Munshi *Haribans Sahai*, for the appellant.

Munshi *Mangal Prasad Bhargava* (with him Babu *Jogindro Nath Chaudhri*), for the respondent.

TUDBALL and MUHAMMAD RAFIQ JJ:—The appellant is a judgement-debtor whose house in a certain village has been attached in the execution of a simple money decree. Two portions of the same house have already been attached and sold, and the remainder, which is described as a six anna share, has now been attached. The judgement-debtor came forward and objected that he was an agriculturist and therefore his house was exempt from attachment

* First Appeal No. 304 of 1912, from a decree of Harbandhan Lal, First Additional Subordinate Judge of Gorakhpur, dated the 1st of June, 1912.