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lants the charge under the bond. The Courts below have decreed the claim. The third plea in the memorandum of appeal in respect of the enforcement of the charge against the house has been withdrawn; but the first plea in respect of its enforcement against the trees in Alopi's former holding is in our opinion valid. Looking to the tenure of a right-of-occupancy tenant, Alopi could only make a valid hypothecation of the trees on the land he held for the term of his tenancy. With his ejection from the land and cessation of his tenancy, the hypothecation ceased to be enforceable. We modify the decree of the lower Courts, and decree the claim against Alopi and for enforcement of the charge against the house. Each party will pay their own costs.

*Decree modified.*

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 March 18.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.*

RAGHU NATH DAS AND ANOTHER (DEFENDANTS) v. KAKKAN MAL AND ANOTHER (PLAINTIFFS).\*

*Suit for money secured by the mortgage of immoveable property situate partly in the Family Domains of the Maharaja of Benares—Act VIII of 1859 (Civil Procedure Code), s. 13—Sale in execution—Fraudulent representation by decree-holder—Suit to set aside sale—Sale of decree enforcing hypothecation of immoveable property.*

A suit was instituted in the Court of the Subordinate Judge of Benares for money secured by the mortgage of immoveable property situate within the limits of the District of Benares and of immoveable property situate within the limits of the Family Domains of the Maharaja of Benares. The Subordinate Judge had not jurisdiction to proceed with this suit in so far as it related to the latter property; and he was authorized to proceed with it, under the provisions of s. 13 of Act VIII of 1859, by the High Court in concurrence with the Board of Revenue. He accordingly proceeded with the suit and on the 18th November, 1874, gave the plaintiffs a decree for the recovery of the money claimed by the sale of the mortgaged property. With a view to bring the mortgaged property situate within the limits of the Family Domains of the Maharaja of Benares to sale, this decree was sent for execution to the Subordinate Judge at Kondh, within whose jurisdiction such property was situate; and such property was sold in the execution of this decree on the 29th August and the 4th September, 1877. Subsequently the defendants in the present suit, who held decrees for money against H, one of the plaintiffs in the suit above-mentioned, applied to the Subordinate Judge of Benares for the attachment and sale of H's interest in the decree above-mentioned, falsely representing that the sales in execution of that decree of the 29th August and 4th September, 1877, had been set aside. Such interest was accordingly put up for sale on the 29th

\* First Appeal, No. 35 of 1880, from a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Benares, dated the 6th December, 1879.

May, 1878, at Benares, by the Subordinate Judge of Benares, and was purchased by the plaintiffs in the present suit, who were induced to purchase by such false representation. The plaintiffs in the present suit claimed the avoidance of the sale of the 29th May, 1878, and the refund of the purchase money on the ground that they were induced to purchase by such false representation, and on the ground that the sale of the interest of *H* in the decree of the 18th November, 1874, being of the nature of immoveable property situate within the limits of the Family Domains of the Maharaja of Benares, could not legally be sold at Benares by the Benares Court. *Held* that such false representation must be held to constitute in law such fraud as vitiated the sale of the 29th May, 1878. Also that the Benares Court acted *ultra vires* in selling at Benares an interest in immoveable property situate within the Family Domains of the Maharaja of Benares. Also that [following S. A. No. 969 of 1877, decided the 14th December, 1877 (1)] the provisions of s. 13 of Act VIII of 1859 were not applicable in a case in which a portion of the immoveable property was situate within the limits of the Family Domains of the Maharaja of Benares, those Domains not constituting a district within the meaning of that section.

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THE plaintiffs in this suit, the purchasers at an execution-sale, claimed the cancelment thereof, and a refund of the purchase-money. It appeared that on the 29th November, 1873, one Harish Chandar and his brother Gokal Chandar sued a certain person in the Court of the Subordinate Judge of Benares upon a bond in which, among others property, certain property situate in the Family Domains of the Maharaja of Benares was hypothecated. The Subordinate Judge was not competent to entertain this suit, so far as it related to such property; but he was authorized to proceed with it, under the provisions of s. 13 of Act VIII of 1859, by the High Court in concurrence with the Board of Revenue, under whose chief control the Family Domains of the Maharaja of Benares are. On the 18th November, 1874, the Subordinate Judge gave Harish Chandar and Gokal Chandar a decree for the amount of the bond-debt which directed the sale of such property in satisfaction thereof. The decree-holders procured a certificate under the provisions of s. 285 of Act VIII of 1859, with the view of bringing such property to sale by the Court within whose jurisdiction it was situated. Such property was eventually put up for sale on the 29th August and the 4th September, 1877. In the meantime the defendants in the present suit, who in 1875 had obtained in the Court of the Subordinate Judge of Benares decrees for money against Harish Chandar, caused his interest in the decree of the 18th Nov-

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ember, 1874, to be attached and advertized for sale. The sale did not take place, as Harish Chandar objected that the decree was in the nature of immoveable property, and his interest therein could only be sold by the Court within whose jurisdiction the property thereby directed to be sold was situate; but Gokal Chandar was appointed manager of such property for the realization of the amount of the decree which, as stated above, had been put in execution by the Court within whose jurisdiction such property was situate. On the 22nd March, 1878, the defendants in the present suit preferred applications to the Subordinate Judge of Benares in which they represented that the sales of the 29th August and the 4th-September, 1877, had been set aside, and prayed that Harish Chandar's interest in the decree of the 18th November, 1874, might be again notified for sale in execution of their decrees. Such interest was accordingly put up for sale in the Subordinate Judge's Court on the 29th May, 1878, and was purchased by the plaintiffs for Rs. 8,000. When the plaintiffs became aware that the sales in execution of that decree of the 29th August and the 4th September, 1877, had not been set aside, they endeavoured to obtain the cancellation of the sale of the 29th May, 1878. Failing in this endeavour, they brought the present suit against the defendants for the cancellation of that sale, and a refund of the purchase-money, on the ground that the defendants had induced them to purchase by falsely representing that the previous sales had been set aside; and on the ground that the decree of the 18th November, 1874, should have been put up for sale by the Court within whose jurisdiction the property thereby directed to be sold was situate, and such property being situated in the Family Domains of the Maharaja of Benares, the Subordinate Judge of Benares had not jurisdiction to bring Harish Chandar's interest in such decree to sale. The defendants contended, *inter alia*, that the misrepresentations which they had made concerning the sales of the 29th August and the 4th September, 1877, had not been made knowingly, and could not have the effect of avoiding the sale which the plaintiffs sought to cancel; and that there was no irregularity in such sale. The Court of first instance held that, although such misrepresentations might not have been made knowingly, yet they were not made in good faith, *i.e.*, with due care and attention, and they therefore were fraudulent, and

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had the effect of vitiating the sale; and that, inasmuch as the decree of the 18th November, 1874, was of the nature of immovable property situate in the Family Domains of the Maharaja of Benares, the Subordinate Judge of Benares was not competent to bring it to sale, and the sale thereof was void; and it gave the plaintiffs a decree. Two of the defendants appealed to the High Court.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellants.

The *Junior Government Pleader* (Babu *Dwarkanath Banarji*), Pandit *Ajudhia Nath*, and *Munshis Sukh Ram* and *Kashi Prasad*, for the respondents.

The judgment of the Court (STUART, C. J., and PEARSON, J.,) was delivered by

PEARSON, J.—In a suit instituted by Harish Chandar and his brother Gokal Chandar in the Court of the Subordinate Judge of Benares, on the basis of a deed of mortgage, a decree was passed in their favour on the 18th November, 1874, for the recovery of Rs. 41,932-10-0 from the mortgagor, Phuljhari Kuar, and from the mortgaged property, consisting of the muafi mahal of taluqa Karona and its appurtenances which is situated in Gangapur within the domains of the Maharaja of Benares and a garden situated in the district of Benares. In execution thereof the decree-holders first caused the latter piece of property to be sold by the Court which passed the decree; and then procured a certificate under the provisions of the 285th and following sections of Act VIII of 1859, with the view of bringing to sale the property situated within the Maharaja's domains by the Court of the Subordinate Judge at Kondh within whose jurisdiction it is situated. After some delay it was sold on the 29th August and 4th September, 1877, and the sale was confirmed on the 3rd October, 1877; and was not set aside on appeal. Meanwhile four of the five defendants in the present suit, who held decrees against Harish Chandar given to them by the Court at Benares, applied to that Court to sell in execution thereof their judgment-debtor's interest in the decree of 18th November, 1874. The application was not

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allowed, but Gokal Chandar was on the 26th July, 1875, appointed under s. 243 of Act VIII of 1859, to be manager of the mortgaged property in the Maharaja's domains for the realization of the decree of 1874 which was put in execution in the Court at Kondh. Again in 1877 application was made to the Court at Benares by the first four defendants, for the sale of their judgment-debtor's interest in the decree of 1874, and they alleged that the sales of the 29th August and 4th September, 1877, had been set aside. It was accordingly sold by auction on the 29th May, 1878, and purchased by the plaintiffs for Rs. 8,000. The present suit is brought by them for the avoidance of the sale on two grounds: first that they were induced to make the purchase by the false representation that the former auction-sales of 29th August and 4th September, 1877, had been set aside, and secondly that the sale of Harish Chandar's interest in the decree of 18th November, 1874, being of the nature of immoveable property situate within the Maharaja's domains, could not legally be sold at Benares by the Benares Court. The lower Court has allowed both grounds and decreed the plaintiffs' claim to recover the purchase-money from the defendants decree-holders in the proportions in which it was paid to them respectively. The conclusion at which it has arrived is amply warranted by the circumstances of the case.

That the plaintiffs would have purchased a lien on property which had already been sold in satisfaction thereof, if they had not been deceived and misled by the false representation made of the former sales having been set aside, is wholly incredible, and the false representation must be held to constitute in law such fraud as vitiates the sale. Nor can there be any doubt that the Benares Court acted *ultra vires* in selling at Benares an interest in immoveable property situated within the Maharaja's domains. The sale is indeed liable to another objection which touches the validity of the decree of 18th November, 1874. It seems that the Subordinate Judge had not jurisdiction to entertain the suit instituted in his Court by Harish Chandar and Gokal Chandar, in so far as it related to property which was situated not within his jurisdiction but in the Maharaja's Domains. It seems that he was authorized to proceed with the suit under the provisions of s. 13 of

Act VIII. of 1859, by the High Court in concurrence with the Sudder Board of Revenue, and that in authorizing the trial of the suit the High Court inadvertently followed a practice which had been introduced in 1864, but discontinued as being of doubtful legality in 1867. The later opinion has more recently been embodied in a judicial ruling in S. A. No. 969 of 1877, decided the 14th December, 1877 (1). We are disposed to concur in that ruling, and to consider that the provisions of s. 13 of Act VIII of 1859 were not applicable in a case in which a portion of the immoveable property in suit is situate within the domains of the Maharaja of Benares. Those domains do not constitute a district within the meaning of the section. We agree with the lower Court in holding that the suit is not precluded by reason of the rejection of the application made under s. 313 of Act X of 1877, and is not bad for misjoinder. It is unnecessary to discuss the second ground of appeal and the fourth was abandoned. The appeal is dismissed with costs.

*Appeal dismissed.*

## FULL BENCH.

*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.*

EMPRESS OF INDIA v. CHIDDA KHAN.

*Witness—Judge or Magistrate—Act I of 1872 (Evidence Act), s. 121—Power of Sessions Judge to compel Magistrate to give evidence.*

A Sessions Judge, finding in the course of a trial, as regards the examination of the accused person taken by the committing Subordinate Magistrate, that the provisions of s. 346 of Act X of 1872 had not been fully complied with, summoned the committing Magistrate and took his evidence that the accused person duly made the statement recorded. The Magistrate of the District objected to this proceeding of the Sessions Judge, contending that it was "contrary to law." The Sessions Judge referred the question whether or not his proceeding was contrary to law to the High Court.

*Per STUART, C. J., PEARSON J., OLDFIELD, J., and STRAIGHT, J.*—That the privilege given by s. 121 of Act I of 1872 is the privilege of the witness, *i. e.*, of the Judge or Magistrate of whom the question is asked: if he waives such privilege or does not object to answer such question, it does not lie in the mouth of any other person to assert the privilege: the reference, the objection not

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